Facebook and the Rule of Law

Stephan Koloßa[*]

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Abstract

Law as a tool for balancing the relevant interests in a particular case is a means to an end. It is a robust instrument that ideally serves the community. This tool may however equally be used to harm the community. Therefore, it must be made sure it is handled in the most purposeful way, especially if substantial interests of a community are at stake. During the past decades, civil rights and freedoms have been developed on various levels, domestically as well as internationally through publicly available laws and through traceable interpretations by courts and their case law. Against such backdrop, the current normative development in the case of Facebook and its global community standards including its rigorous enforcement mechanism seems troubling particularly in terms of transparency and clarity. Facebook has become more than a globally important social media platform. Important questions therefore arise as to whether and how the rule of law prevails in such online scenarios, and most importantly in civil rights sensitive areas. This article will critically analyse the basic set of *lex Facebook* in the light of the rule of law. The classical procedural rule of law principles will

[*] Research Associate and Ph.D. Candidate at the Institute for International Law of Peace and Armed Conflict (IFHV) at the Ruhr University Bochum and Member of the Transdisciplinary Research Group "SecHuman" focused on security for people on the internet.

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serve as a manual and guideline. It will assess the current normative situation and point out the existing shortcomings.

I. Introduction

The Internet has massively permeated everybody's lives. Most of the people are constantly online, accessing information, generating and processing data. Through various applications people communicate with others, receive news and send greetings, pictures and videos around the world within a split second. Even when they are not actually using their mobile phones, these devices stay connected to the Internet and continue forming a part of the so-called "cyberspace". Regular actions have become digital as most of them involve using the Internet infrastructure. Apart from our daily errands online, also major civil decisions are directly influenced by the Internet such as governmental elections. We form our political will through online news which we often receive through a single platform. Although a small number of online platforms dominate the field, one of them is of major importance in this regard – Facebook. The importance of this social media platform for our social lives is hard to deny. Almost three billion users are active on Facebook and including its related platforms (Instagram, WhatsApp), and almost two billion use the services every single day.[1] Moreover, Facebook is not only providing a system for communicating with family and friends, but it has also become an important source for a variety of information. According to a research project, the majority of younger to middle-aged United States (US) Americans receive their daily political news via the platform.[2] Altogether, Facebook can claim to be only single global and greatest forum for political speech in the history of the world. Several instances have declared it the primary medium of speech and important for the democratic discourse.[3] Accordingly, banning access to social media altogether is to prevent the user from engaging in the legitimate exercise of i.a. the freedom of speech.[4] Yet, as it is a global company with only little legal regulation the question arises whether Facebook acts apart from the law without an actual coherent set of restrictions and which role

1 See statistics, e.g. on <https://zephoria.com> (last accessed 13.3.2020).

2 *A. Mitchell/J. Gottfried/K. E. Matsa*, Millennials and Political News: Social Media – The Local TV for the Next Generation?, Pew Research Centre, 2015.

3 See, e.g. *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017); *Douez v. Facebook* Inc., 2017 SCC 33; see more generally *K. Klonick*, The New Governers, The People, Rules, and Processes Governing Online Speech, Harv. L. Rev. 131 (2017-18), 1598.

4 *Packingham v. North Carolina* (note 3), 1737.

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the rule of law plays in cyberspace. This question is intrinsically linked with another issue. Cyberspace challenges law since its beginning, especially international law. While law is based on the principle of territoriality the cyberspace is not. But does that mean that the rule of law is meaningless in digital times? This article will analyse the case of Facebook under the rule of law with a particular emphasis on the aspect of hate speech. While in general one may find several calls for more transparency, this article will scrutinise some of the latest developments of public and private regulation of Facebook and point out the current shortcomings in terms of the classical rule of law.

II. The Importance and Development of the Rule of Law

1. The Classical Rule of Law

The principle of the rule of law has been an old maxim. Its main purpose is that authorities and people in positions of power exercise their potential within a framework of well-established norms and not in an arbitrary manner or in a discretionary way according to their own standards or preferences.[5] Besides state entities, the rule of law equally obliges private people and institutions to adhere to existing laws and rules even if they do not agree with them.[6] As *Tom Bingham* explained:

> "All persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."[7]

For that both the public and the private side can actually follow the rule of law it also requires several formal aspects. So far, the rule of law has been regarded as an essential basis for states particularly with regard to their domestic legal and governmental system and in international affairs equally.[8] The crucial importance results from the rule of law as a means for promoting peace and security as well as human rights.[9] According to the 2005

[5] *J. Waldron*, The Rule of Law, in: E. N. Zalta (ed.), Stanford Encyclopedia of Philosophy (Fall 2016 edition).

[6] *J. Waldron* (note 5).

[7] *T. Bingham*, The Rule of Law, 2010, 8.

[8] E.g. Millenium Declaration, UNGA Resolution 55/2, 8.9.2000, 9; UNGA Resolution 60/1, 16, 21, 119; see also *B. Fassbender*, What's In a Name? The International Rule of Law and the United Nations Charter, Chinese Journal of International Law 17 (2018), 761.

[9] Millenium Declaration (note 8), 9, 24.

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World Summit Outcome, the protection and the promotion of human rights and the rule of law belong to the universal and indivisible core values and principles of the United Nations.[10] Yet, another question is the concrete application of the rule of law concepts in the international legal context and the municipal one.

The exact details of the rule of law, be it in a material dimension, be it in a formal one, are not always clear. One reason is that this principle is not exclusively a legal concept, but also a political one.[11] Another reason is that – given the predominantly domestic legal origin – different states, regions, cultures, legal systems prefer different notions over others, turning the rule of law into an essentially contested concept.[12] It is no surprise that on one side, legal philosophers stress the importance of legal norms being laid down in advance, being made public, and being based on clear and determinate language avoiding overreaching vagueness. In contrast, the population may oftentimes interpret the rule of law rather as the absence of corruption, the independence of the judiciary, etc. Another difference stems from the two different concepts of law, the common law and the continental law.

Nowadays the demand for the rule of law is bigger than ever regarding issues in cyberspace. Given the lack of coherent governance in cyberspace, decisive standards can be easily set by private entities that follow predominantly financial and economic interests while eclipsing societal values. The interesting questions arise as to the currently existing rule of law in cyberspace and its evaluation. The example of Facebook shows the enormous power a sole entity may exercise over its users, i.a. in the area of freedom of speech. By now, Facebook is the largest group of people in the world except for Christianity and Islam.[13] As soon as a network becomes this huge, the so-called network effects are undeniable. The value of such a social media platform increases dramatically the more users it has. It uses the peoples will to connect and stay connected to their friends and family. Now, the question is not whether or not Facebook has to be held responsible for its own success, the matter is rather that the imposed limitations by Facebook tackle constitutional rights. This has also been found by the highest courts,

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[10] UNGA Resolution 60/1 (note 8), 119.

[11] See *M. Canevaro*, The Rule of Law as the Measure of Political Legitimacy in the Greek City States, Hague Journal on the Rule of Law 9 (2017), 22, 211 et seq.

[12] See only *G. Lautenbach*, The Concept of the Rule of Law and the European Court of Human Rights, 2013, 25 et seq.

[13] *J. Smith*, Facebook is Not Here to Protect Your Freedom of Speech, Business Insider, 9.6.2016, <https://www.businessinsider.com> (last accessed 13.3.2020).

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e.g. in the US and Canada.[14] Having become a cornerstone of human rights, the rule of law should apply equally to Facebook as it does to states.

2. A Concept of the International Rule of Law

While the rule of law has been awarded significance in various inter- and transnational situations, one has to carve out its elements. Just as *Rosalyn Higgins'* pointed remark shows,

> "[t]he rule of law has become a catchphrase in efforts to address all kinds of global problems from health pandemics to armed conflicts to poverty to terrorism".[15]

As will be laid out hereafter, the focal point remains on the procedural aspects as most respectful towards the currently developing mesh network of public and private regulation in social media matters.

Overall, one central idea of the rule of law principle is to create a robust system of order and to organise power ideally by establishing a mechanism of checks and balances.[16] This includes that (evolving) norms are not sufficient to comply with the rule of law principle just because they are regarded as norms. They have limits themselves and have to be measured against predominant basic foundations namely human rights standards. Not necessarily does that include the identity of new norms with existing human rights in a substantive matter. But it must be ensured that fundamental rights and freedoms can actually be exercised in an extensive way. This goes hand in hand with another characteristic, namely the idea that law is supposed to serve the public good; law is made of and for the community.[17] This final purpose of serving the public good is yet not without objection in history. Originally, law consisted of the rules given, by nature, God, or the sovereign ruler. Slowly the perspective shifted. Referring back to *Thomas Aquinas*, he famously asserted that a law that is unjust seems not to be law.[18] However, the question immediately arises as to the limits of the limits of law. Which are the criteria for asserting a law fair and just? *Joseph Raz* explained that

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[14] For a Canadian example, see only *Douez v. Facebook* (note 3), 751.

[15] *R. Higgins*, The Rule of Law: Some Sceptical Thoughts, in: R. Higgins (ed.), Themes and Theories: Selected Essays, Speeches, and Writings in International Law, 2009, 1331, 1334.

[16] See *B. Z. Tamanaha*, Law as a Means to an End, 2006, 215.

[17] *G. Lautenbach* (note 12).

[18] *T. Aquinas*, Summa Theologiae, R. J. Henle (transl.), 1993, 96.4, sec. 4.

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"a non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and racial persecution, may, in principle, conform to the requirements of the rule of law".[19]

Therefore, it must be ensured that a system of norms is yet able to actually include human rights frameworks. Another purpose of the rule of law is ensuring individual freedom.[20] Every person is entitled to his or her own freedom within the boundaries of the laws. Fixed and well set out rules allow for foreseeability. An individual may well foresee the consequences of their actions. This purpose is also fulfilled if there is a dispute as to the exact details of a particular norm.

The ideal of the rule of law has furthermore played an important role in society already for millennia. In the antiquity, *Aristotle* emphasised the importance of laws as a means for good government.[21] Answering the question about whether best men or laws constitute the best government, *Aristotle* noted that it depended on the law. Yet he stressed that

"laws are made after long consideration, whereas decisions in the courts are given at short notice, which makes it hard for those who try the case to satisfy the claims of justice".[22]

Acknowledging that laws alone were not sufficient to solve all cases due to a certain level of complexity, he added that those cases decided on the basis of equity (or more precisely "*epieikeia*") by judges should be kept to a minimum.[23] Thus, the rules fixed prior to a problematic case being the result of a public debate should be the basis for good governance.

Taking up on the aspect of fixed rules, in the Medieval times *John Locke* emphasised the crucial role of laws as a safeguard from arbitrariness.[24] Laws must be established and standing, promulgated and known to the people. He recognised

"he being in a much worse condition, who is exposed to the arbitrary power of one man, who has the command of 100,000, then he that is exposed to the arbitrary power of 100,000 single men".[25]

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[19] *J. Raz*, The Rule of Law and Its Virtue, in: J. Raz (ed.), The Authority of Law: Essays on Law and Morality, 1979, 225.

[20] *J. A. Bruegger*, Freedom, Legality, and the Rule of Law, Washington University Jurisprudence Review 9 (2016).

[21] *Aristotle*, The Politics (c. 350 BC), Stephen Everson (transl.), 1988, 1282b.

[22] *Aristotle*, The Rhetoric (c. 350 BC), Rhys Roberts (transl.), 2010, 1354b.

[23] See *J. Waldron* (note 5).

[24] *J. Locke*, Two Treatises of Government, P. Laslett (ed.), 1988, 135 et seq.

[25] *J. Locke*, Second Treatise of Government, C. B. Macpherson (ed.), 1980, 72.

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For *Locke*, arbitrariness in this sense meant unpredictability, being solely dependent on the free discretion of another person or entity.[26] The aspect of calculability according to predetermined rules as a way to get away from natural law and closer towards a situation of positive law.

In the second half of the 19th century, *Albert Venn Dicey* pronounced another important aspect of the rule of law. Against the backdrop of a decline of the importance of laws in England, he emphasised that equality is of utmost importance.[27] Every person regardless of his or her rank, position or status is subject to the ordinary law and amenable to the jurisdiction of the ordinary tribunals.[28] Albeit his underlying idea is certainly praiseworthy, officials in practice had to have certain extra powers that correspond with certain extra restrictions. For the case of Facebook, equal use of the internal rules may play a vital role not regarding state entities but amongst different private ones. The principle of equality – as sound as it appears – at the same time causes difficulties for the rule of law when transferring it to the international plane. While in domestic law normally only one legal regime applies, a company such as Facebook being placed in a transnational context may be required to differentiate because it acts in different legal systems enforcing different rules.

In the 20th century *Friedrich August von Hayek* pushed again towards the importance of a common law model and against a too strict set of predefined rules and norms.[29] After his first publications[30] focusing partly on wartime governance, *von Hayek* rethought his positions on the implications of the rule of law for individual liberty.[31] He started questioning the meaning of general legislation as an appropriate framework for freedom. He favoured a common law model of predictability that provide guidance and solutions from judicial decisions in a somewhat evolutionary way.[32] For him a set of formulated legal rules is often a

> "very imperfect formulation of principles which people can better honour in action than express in words".[33]

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26 See *J. Waldron* (note 5).

27 *A. V. Dicey*, Introduction to the Study of the Law of the Constitution, 1915, 110.

28 *A. V. Dicey* (note 27), 114.

29 See *J. Waldron* (note 5).

30 *F. A. von Hayek*, The Road to Serfdom, 1944; *F. A. von Hayek*, The Constitution of Liberty, 1960.

31 See *J. Waldron* (note 5).

32 See *F. A. von Hayek*, Rules and Order, Volume 1 of Law, Legislation and Liberty, 1973.

33 *F. A. von Hayek* (note 32), 118.

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He saw the what we call continental approach as too much of a management system leaving people not enough room for freedom and self-determination. In times of peace, people do not need a management government.

In addition, the rule of law supports economic development. The 2017 World Development Report says:

> "It has long been established that the rule of law – which at its core requires that government officials and citizens be bound by and act consistently with the law – is the very basis of the good governance needed to realize full social and economic potential. Empirical studies have revealed the importance of law and legal institutions to improving the functioning of specific institutions, enhancing growth, promoting secure property rights, improving access to credit, and delivering justice in society."[34]

This brief overview over some aspects and developments of the rule of law show some of the problems of defining aspects of this maxim. As mentioned earlier, a significant issue concerns the projection of the domestic rule of law principle onto the international plane. One reason might lie in the different purposes the principle serves in both scenarios. On the national level, the individual is supposed to be protected by the rule of law against a powerful governing authority.[35] Second, the details of the rule of law usually differ from state to state due to different legal cultures and historical developments.[36]

The principle of the rule of law has been legally acknowledged as fundamental and democratic pillar most prominently by European States and according to the Statute of the Council of Europe in its Art. 3. The Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 similarly notes that the signatory governments "have a common heritage of political traditions, ideals, freedoms and the rule of law".[37] The importance of the rule of law internationally is not restricted to European states. For example, the United Nations General Assembly (UNGA) resolution 67/1 of 2012 stresses the global adherence to the rule of law and connects it with peace and security, human rights, as well as development. The United Nations (UN) Secretary-General further elaborates on this linkage in the addendum to the 2014 Report of the Secre-

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34 International Bank for Reconstruction and Development, World Development Report, Governance and the Law, 2017, 83.

35 *A. Watts*, The International Rule of Law, GYIL 36 (1993), 16.

36 Oppenheim's International Law, R. Jennings/A. Watts (eds.), 2008, 83.

37 Preamble to the ECHR.

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tary-General on strengthening and coordinating United Nations rule of law activities.[38]

Taking up on the exact requirements for the rule of law pointed out above the most nuanced formal and procedural aspects are the ones by *Lon Fuller* that can be regarded as crucial for closing the gap between the request for (positive) law, morality and justice.[39] He stipulates mainly eight core aspects: (i) laws must apply equally to everyone across the area of jurisdiction; (ii) laws must be made public; (iii) laws must not be applied retroactively; (iv) laws must be clear enough to be followed; (v) laws must not be contradictory; (vi) laws must be possible to obey; (vii) laws must maintain some consistency over some time; (viii) there must be congruence between an official action and the stated law.[40] *Fuller* generally assumes that written legal rules are formulated on justice maintaining that "even in the most perverted regimes there is a certain hesitancy about writing cruelties, intolerances, and inhumanities into law".[41] Against this backdrop, he developed core principles which, if followed, serve the aim of good governance and promote – in more legal terms – human rights, security and development. Those principles stipulate that laws must be general, public, prospective, intelligible, consistent, practicable, stable, and congruent.[42] Three of these principles that appear to be the most striking ones will serve as basis for scrutinising some aspects of right to reputation and freedom of expression in the case of Facebook and its handling of hate speech cases. The analysis further below will refer to these aspects that may also reflect a common denominator as to the various legal jurisdictions and may certainly be the most critical ones in the case of Facebook.

3. The Rule of Law in Cyberspace

Due to the complex infrastructure of the Internet as well as the lack of consensus on the side of the states, cyberspace is not governed by a comprehensive set of rules. Instead, the Internet is regulated by a tightly woven net of (fragmented) international treaty law, domestic law, and informal rules. As will be seen, informal rules are the most frequent ones in cyber-

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38 Addendum to the 2014 Report of the Secretary-General on Strengthening and Coordinating United Nations Rule of Law Activities, A/68/213/Add.1, 11.07.2014.

39 See *J. Waldron* (note 5).

40 *L. Fuller*, The Morality of Law, 1969, 46 et seq.

41 *L. Fuller*, Positivism and Fidelity to Law: A Reply to Hart, Harv. L. Rev. 71 (1958), 630, 636 et seq.

42 *L. Fuller* (note 40).

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space, yet also the most problematic ones. At this point and for the purpose of this article, it should be noted that the rule of law is not be understood as requiring only "hard" law. Also, other forms of regulation such as soft law and terms and conditions may serve the rule of law and should not be ignored in this context.[43]

With the emergence of the digitalisation, the question has arisen – and is yet not fully answered – which rules are actually applicable in cyberspace, and more importantly, how and to what extent they apply. Closely linked to the question of Internet governance, is the one on the characterisation of cyberspace. One view sees the Internet as a world apart.[44] As already became apparent in *Barlow's* Declaration of Independence of Cyberspace[45], the digital realm was supposed to be a world, independent and distant from the "real world". Others characterised cyberspace as an integral part of our society and not different in no way.[46] Communications through an instant message would happen as they did amongst two people standing next to one another. That this is not the case either becomes already obvious with regard to the deletion of data and the various possibilities to intercept communications. The more convincing characterisation describes cyberspace as "embodied spatiality".[47] It is necessary to take into consideration the different layers of the Internet – the physical/technical, informational, and social layer. Thus, it is possible to connect with someone who is geographically far away and yet virtually close due to, e.g. a video chat. At the same time, one cannot avoid becoming part of the digital, informational exchange that happens online. The user is not only part of one world but many worlds at the same time. This view at the same time resembles *Foucault's* theory of heterotopia.[48]

As the cyberspace forms nevertheless a certain part of the analogue world, it was only more than plausible that the existing laws have been simply applied to cyberspace. As *Frank Easterbrook* put it, the Internet is just another horse.

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43 See in general: *A. Peters*, Soft Law as a New Mode of Governance, in: The Dynamics of Change in EU Governance, U. Diedrichs/W. Reiners/W. Wessels (eds.), 2011, 21 et seq.

44 See *M. Hildebrandt*, Extraterritorial Jurisdiction to Enforce in Cyberspace? Bodin, Schmitt, Grotius in Cyberspace, U. Toronto L. J. 63 (2013), 201; *D. R. Johnson/D. B. Post*, Law and Borders: The Rise of Law in Cyberspace, Stanford L. Rev. 48 (1996), 1367.

45 *J. P. Barlow*, A Declaration of the Independence of Cyberspace, 8.2.1996.

46 See *F. H. Easterbrook*, Cyberspace and the Law of the Horse, University of Chicago Legal Forum, 1996, 207; *R. A. Epstein*, Intellectual Property: Old Boundaries and New Frontiers, Ind. L. J. 76 (2001), 818; *M. Wu*, Cyberspace Sovereignty? – The Internet and the International System, Harvard Journal of Law & Technology 10 (1997), 662.

47 See only *J. E. Cohen*, Cyberspace As/And Space, Colum. L. Rev. 107 (2008), 213.

48 *M. Foucault*, Of Other Spaces: Utopias and Heterotopias.

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> "[T]he best way to learn the law applicable to specialized endeavors is to study general rules. Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course on 'The Law of the Horse' is doomed to be shallow and to miss unifying principles."[49]

Easterbrook was challenged by *Lessing* arguing that cyberspace is not merely "another horse", but that the actual law is formed by code. Thereby, *Lessing* argued that whoever controls the technology that underlies the Internet, also sets the standards and the rules. This view indeed is to a certain extent mirroring the current global companies. *Jack Goldsmith* in addition wrote that

> "the skeptics underestimate the potential of traditional legal tools and technology to resolve the multijurisdictional regulatory problems implicated by cyberspace".[50]

On the international legal plane, however, the first step was to acknowledge that the existing laws simply apply to and within cyberspace. Most prominently the UN General Assembly Resolution "The right to privacy in the digital age" proclaimed:

> "[…] 3. Affirms that the same rights that people have offline must also be protected online, including the right to privacy; […]"[51]

Yet, as international lawyers early recognised, this general applicability of analogue law to the digital world does not answer the question as to the exact way in which the laws ought to be applied, and whether they are actually sufficient. A prominent example of the discussions around the scope of existing laws is demonstrated by the Tallinn Manual Projects.[52] Besides still ongoing projects, other endeavours in this regard have been cancelled when the last meeting of the United Nations Group of Governmental Experts (UN GGE) could not result in any agreement.[53] Taking a look at specific covenants, one of the only international treaties that have been specifically designed for the application online is the Convention on Cybercrime (also

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[49] *F. H. Easterbrook* (note 46).

[50] *J. L. Goldsmith*, Against Cyberanarchy, U. Chi. L. Rev. 65 (1998), 1199 et seq.

[51] UNGA Resolution 68/167, 21.1.2014, 3.

[52] See only *M. N. Schmitt*, Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations, 2017.

[53] See *E. Korzak*, UN GGE on Cybersecurity: The End of an Era?, in: The Diplomat, 31.7.2017, <https://thediplomat.com> (last accessed 13.3.2020).

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known as Budapest Convention).[54] And yet, it only sets out rules for a small area of the Internet. Moreover, it merely obliges the state parties to criminalise certain behaviour within their national laws. After all, domestic laws that also (partly) govern private companies such as Facebook have only a limited reach. It is noteworthy though that efforts have been made to give regional and domestic laws more effect. One example for regional efforts may be the ruling of the European Court of Justice in the case of *Google v. Spain*.[55] The Court had to decide whether to give Directive 95/46 extraterritorial effect which would mean that the right to be forgotten is not only a matter for Google Spain, but for Google Inc. The Court indeed obliged the global Google consortium to comply with the right to be forgotten for there is no possibility to hide away behind formalities and company structures. The main problem is directly visible: law is a territorial concept; the Internet is a global one. Facebook acting globally is, thus, not easy to "govern".

With regard to the actual practice, the question arises whether some aspects of the rule of law still dominate in cyberspace. The following analysis will focus on the case of Facebook as it is a global company with an enormous factual influence on communication, information gathering and the democratic formation of the political will of the people and especially its community standards. The large criticism Facebook has received from various sides will be addressed as well.[56] Facebook as a global platform for communication and exchange of information has an important social value as well as economic impetus. At the same time, it is generally open to everyone regardless of the person. Against this backdrop, Facebook generally has to abide by the rule of law.

III. Case Study: Facebook and the Rule of Law

Facebook, like many other globally acting Internet for a, is not without own rules. In contrast, it has, e.g. rather strict rules when it comes to nudity, finally leading to a banning of the relevant picture in case of a violation of

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[54] Budapest Convention on Cybercrime, ETS No. 185.

[55] *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, ECJ Case C-131/12, (2014).

[56] See, e.g. *A. Mitchell/J. Gottfried/K. E. Matsa* (note 2); *R. Safian,* Mark Zuckerberg On Fake News, Free Speech, And What Drives Facebook, Fast Company, 4.11.2017, <https://www.fastcompany.com> (last accessed 13.3.2020); *J. Taranto*, Facebook and Free Speech, The Wall Street Journal, 24.10.2016, <https://www.wsj.com> (last accessed 13.3.2020).

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that rule.[57] These rules, however, are not "laws" in the classical sense but rather policies and terms and conditions of use. They are binding by the form of a contract between Facebook and every single one of its users. It is publicly laid out in the so-called community standards. In addition, an enforcement mechanism is in place, carried out by the control of Facebook over the platform. Facebook can – and does – effectively delete images, ban comments and posts, and even delete profiles.

The enforcement mechanism appears to be relatively innocuous. One could say that banning a post that is insulting or deleting a picture that shows sexual content is legitimate. However, it is not the extreme cases that pose a threat to the individual guarantees and freedoms as, e.g. enshrined in international treaties such as the International Covenant on Civil and Political Rights (ICCPR) and customs. The more crucial questions arise how far exactly goes the right to free speech? Is the use of Nazi vocabulary covered by the right to free speech and expression? Many people claim that especially with regard to the right to freedom of expression, Facebook is too lackadaisical. However, looking at this matter from a more abstract point of view, it is a matter of applicable law. On the basis of domestic law, the right to freedom of expression particularly with regard to Nazi symbolism is interpreted much stricter in Germany than in the US. But it does not answer the question whether Facebooks rules do not comply at all with the rule of law principle.

1. Regulation Via National Constitutional Law

Under international law, Facebook is still not bound by human rights law. Yet, under several national jurisdictions, states tend more and more to bind private actors with great social importance such as Facebook to constitutional law. One example is a rather recent judgment in Germany that shows a trend demonstrating how flexible constitutional law can be.[58] The case concerned a complaining soccer fan that has been banned from a future visit to the stadium in order to watch his team play. The organiser denied him the entry because he had become well-known for his violent behaviour and attacks during a match. He filed a lawsuit against the organiser and the case went up to the German Federal Constitutional Court. The Court then had to decide upon a breach of constitutional rights, namely the basic right

[57] Facebook Community Standards, <https://de-de.facebook.com> (last accessed 13.3.2020).

[58] German Federal Constitutional Court, Order of 11.4.2018, 1 BvR 3080/09.

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to non-discrimination. And indeed, the Court has ruled that the right to non-discrimination governs the relation between private individuals, a phenomenon that is known as horizontal effect in German scholarship. This application in a horizontal direction requires that a private actor must open an event or a service to the broad public without general restriction as to the concrete individuals or a group of individuals, and the exclusion of the participation may have a noticeable negative social impact. In other words, the participation must be regarded as an integral part of social life. Although the Court did not find a violation of the right to non-discrimination in the case at hand, it is nevertheless remarkable how broadly it has interpreted the horizontal effect of basic rights. This decision did not directly concern Facebook. Nevertheless, it is not difficult to adapt it to Facebook and it has already been done in academic debates.[59] The platform is generally open to the general public. The more people are connected, the better it is according to the commercials.

Germany is not the only country that has come to dealing with this kind of question and generally going in this direction. The United States Supreme Court in 2017 decided upon a case of a former sex offender who used the platform Facebook although North Carolina social media laws prohibiting registered sex offenders from accessing social media web sites.[60] The applicant was arrested for violating the law. The Court ruled in favour of the applicant. The US Supreme Court regarded cyberspace and social media platforms comparable to public places and streets being essential for public speech.[61]

> "A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. […] By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."[62]

Given the size, societal influence and factual power, it is possible to measure Facebook against the rule of law principle. This is even more the

[59] See, e.g. *Q. Weinzierl*, Warum das Bundesverfassungsgericht Fußballstadion sagt und Soziale Plattformen trifft, Juwiss-Blog, 24.5.2018, <https://www.juwiss.de> (last accessed 13.3.2020).

[60] *L. G. Packingham*, *Petitioner v. North Carolina*, 582 U.S. 137 S. Ct. 1730; 198 L. Ed. 2d 273.

[61] *Petitioner v. North Carolina* (note 60), 235 et seq.

[62] *Petitioner v. North Carolina* (note 60).

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case as the platform itself has joined the Global Network Initiative.[63] It can be argued that it indirectly admits it has a responsibility to safeguard human rights for the more than billion people who use it. Moreover, Facebook itself uses vocabulary and terms for describing its values such as "free expression" and admits that its participation in the Global Network Initiative has the aim to seek guidance from generally recognised human rights existing in treaties and custom.[64] Therefore one working hypothesis may be that states tend to regulate online platforms through constitutional law considerations. This may already be desirable as most states already possess a wide acquis of values and decisions that serve solving the current problems as well.

2. Regulation Through a Shift of Responsibility

Another possible solution may be found in some domestic legal initiatives such as the German law on social media platforms or, e.g. the discussed law on online harms in the United Kingdom.[65] Since 2017, the German legislator has adopted a bill called Network Enforcement Act[66] ("Netzwerkdurchsetzungsgesetz" or "NetzDG") which entails that all social media platforms (but especially Facebook) are obliged to take down posts comprising hate speech (briefly mentioned above).[67] The NetzDG was passed to combat terrorist and extremist content online. Facebook is by virtue of the NetzDG given the responsibility to balance privacy with freedom of expression on its own behalf. The social media platform has to provide a complaint mechanism that is capable of deleting hate speech comments within a timeframe of 24 hours.[68] The platform is held to apply the same standards and balancing requirements of the interests at stake as a state court would do. Yet unfortunately, the sanction mechanism may cause a problem for an impartial and non-arbitrary balancing act.[69] In trying to avoid any kind of

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63 Human Rights Watch, United States: Facebook Makes Human Rights Commitment, <https://www.hrw.org> (last accessed 13.3.2020).

64 See *R. Allan*, Hard Questions: Where Do We Draw the Line on Free Expression, 9.8.2018, <https://about.fb.com> (last accessed 13.3.2020).

65 UK Online Harms White Paper, 12.2.2020, <https://www.gov.uk> (last accessed 13.3.2020).

66 German Network Enforcement Act (NetzDG), <https://www.gesetze-im-internet.de> (last accessed 13.3.2020).

67 See Sec. 3 NetzDG.

68 Sec. 3 § 2 NetzDG.

69 See *D. Lee*, Germany's NetzDG and the Threat to Online Free Speech, Yale Media Freedom & Access Clinic; *H. Wieduwilt*, Frankfurter Allgemeine Zeitung, Facebook löscht Meinungen nach eigenen Regeln, 27.7.2020, <https://www.faz.net> (last accessed 13.3.2020).

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fines, Facebook may be more willing to actually delete also pseudo hateful comments even though there might not be an actual infringement of the right to personality and moral integrity, simply for economic purposes in order to minimise the risk to be subject to a fine. Thus, the German law itself does not necessarily serve the rule of law. Particularly, the exact procedures are not fully transparent but rather opaque. At this point, one might ask whether the German state has delegated its obligation to ensure freedom of expression and protect the right to personality onto Facebook in the sense, that Facebook now takes over the very same constitutional responsibilities. This, however, does not solve the problem, that its methods remain highly opaque and cannot be measured against any gathered legal acquis.

By an intermediary analysis of the complaints Facebook received and the follow-up protest, some scholars come to the conclusion that the NetzDG works well in practice.[70] The numbers (usually 30 % deletion rate)[71] taken from the transparency report Facebook is obliged to issue every six months does not enhance transparency in the sense of the rule of law as only the overall numbers are to be published. When analysing the meaning of these figures one must take into account, e.g. how the complaint mechanism actually works. Unlike other platforms (such as Twitter) the complaint is not extremely intuitively useable by the members.

The two ways of regulating social media platforms call for the crucial question to the role of the state in having the final saying in the disputes at hand. The horizontal amplification of the application of basic rights still allows the state courts to adjudicate the balance between, e.g. the right to reputation and the right to freedom of expression and to set the standard for society. Developments show an ambivalent will in domestic laws to have a bigger say in Facebooks decisions on actual human rights issues. Having earned some fame beyond the borders of German jurisdiction, the Network Enforcement Act of 2017 allows for the platform to establish its own mechanism to solve complaints in matters of hate speech and reputation. Facebook is thereby awarded some form of competence to shape both freedoms that is usually reserved for the state powers. This delegation of power bears the question whether the classical rule of law is still upheld or a new form of rule of law comes into place.

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[70] See *L. I. Löber/A. Roßnagel*, Das Netzwerkdurchsetzungsgesetz in der Umsetzung, MMR 22 (2019), 71 et seq.

[71] Facebook NetzDG Transparency Report July 2018, <https://fbnewsroomus.files.wordpress.com> (last accessed 13.3.2020).

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3. Currently Developing *lex Facebook*

Despite some potential approaches to bind Facebook's actions to already existing legal acquis and domestic constitutional norms, the actual development of Facebook's internal rules according to which it reacts to hate speech largely builds up on the large discretion that is given to the platform by states. According to a recent study[72] that was able to analyse Facebook's internal organisation process of norm creation and enforcement, the platform does not attempt to formally establish direct legal ties with existing legal rules.[73] While the platform's team working on the creation of new detailed rules is certainly aware of the existing human rights legal frameworks, Facebook's normative guidelines are mostly autonomous.[74] They are based on the complex situation where Facebook ought to coin clear, transparent rules, that may be globally applied and sufficiently clear that everyone may follow them.

4. Facebook's Compliance with the Rule of Law

The principles of equality, publicity and clarity all have to be interpreted against the backdrop of avoiding arbitrariness and the need to be able to foresee what is expected of the users so that they can adapt their behaviour accordingly. Facebook through time has begun to adopt specific legal rules as maxim for their own community standards. For instance, taking a look at many of the rules that the platform has been applying over the time on freedom of expression and comparing them to the relevant Anglo-American rules, one can find a lot of similarities. Facebook originally stems from the US. Hence it generally respects the wide freedom of expression protected by the US Constitution's First Amendment equally in its own rules.[75] Again, Facebook is not *per se* bound to constitutional or basic rights. However, Facebook is *prima facie* continuously adopting them to its own rules and principles and at the same time variating them. This is not a problem by itself. What does pose a problem, however, is that Facebook refers to legal principles without details and further elaboration as to the interpretation while collecting its rules from various jurisdictions and legal systems.

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[72] *M. C. Kettemann/W. Schulz*, Setting Rules for 2.7 Billion, 2020, <https://www.hans-bredow-institut.de> (last accessed 13.3.2020).

[73] *M. C. Kettemann/W. Schulz* (note 72), 28 et seq.

[74] *M. C. Kettemann/W. Schulz* (note 72), 30.

[75] See *Matal v. Tam*, 137 S. Ct. 1744 (2017).

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On the website, Facebook sparsely tries to elaborate on how its terms are to be interpreted.

> "While there is no universally accepted definition of hate speech, as a platform we define the term to mean direct and serious attacks on any protected category of people based on their race, ethnicity, national origin, religion, sex, gender, sexual orientation, disability or disease. We work hard to remove hate speech quickly, however there are instances of offensive content, including distasteful humor, that are not hate speech according to our definition. In these cases, we work to apply fair, thoughtful, and scalable policies. This approach allows us to continue defending the principles of freedom of self-expression on which Facebook is founded."[76]

This statement is rich and for a lot of cases it may offer a suitable guidance. Yet it is in need of further interpretation. In terms of clarity, the definition speaks of "hate speech" as an attack against at least one of the enumerated categories. Already a referring to the rich jurisprudence of the European Court of Human Rights[77] alone shows that the balancing of the right to privacy in terms of a personality right and the freedom of expression on the other side is far from being an easy task but requires taking into account various details of the case at hand. The mere enumeration of some unspecified legal terms that do not stem from a single legal historical and societal development is no sufficient foundation to comply with the notions of clarity and publicity.

What is supposed to be of further guidance, Facebook explains few of the cases it had decided carving out some crucial aspects for the given circumstances.[78] But even Facebook's *Richard Allen* himself acknowledges the main problem:

> "What does the statement 'burn flags not fags' mean? While this is clearly a provocative statement on its face, should it be considered hate speech? For example, is it an attack on gay people, or an attempt to 'reclaim' the slur? Is it an incitement of political protest through flag burning? Or, if the speaker or audience is British, is it an effort to discourage people from smoking cigarettes (fag being a common British term for cigarette)? To know whether it's a hate speech violation, more context is needed."[79]

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[76] Facebook Community Standards (note 57).

[77] CoE, Freedom of Expression in Europe, Case-law concerning Article 10 of the European Convention of Human Rights, 2007.

[78] *R. Allan* (note 64); *R. Allan*, Hard Questions: Who Should Decide What Is Hate Speech in an Online Global Community?, 11.11.2017, <https://about.fb.com>> (last accessed 13.3.2020).

[79] *R. Allen*, Who Should Decide … (note 78).

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> "In Russia and Ukraine, we faced a similar issue around the use of slang words the two groups have long used to describe each other. Ukrainians call Russians 'moskal', literally 'Muscovites', and Russians call Ukrainians 'khokhol', literally 'topknot'. After conflict started in the region in 2014, people in both countries started to report the words used by the other side as hate speech. We did an internal review and concluded that they were right. We began taking both terms down, a decision that was initially unpopular on both sides because it seemed restrictive, but in the context of the conflict felt important to us."[80]

Furthermore, unlike in domestic law as well as regional situations, there is no Facebook "court" (yet)[81] that might help to further develop clear principles and establish precedents. It can neither be referred to a certain acquis of cases decided by Facebook as their internal review and decision processes are kept confidential. The actual evaluation mechanism is partly automatic, partly with people having to decide upon banning pictures in a few seconds. Especially the software is kept highly confidential.

Given that the need for developing cases is fundamental for the rule of law, a member cannot access any caseload to find out the exact details. It is equally not possible to, e.g. simply refer to the United States' Supreme Court caseload as the law does not (fully) reflect United States' law. Neither does it for any other court. Besides, there is, again, no indication as to the exact and precise enforcement mechanism. Therefore, it is yet no help that Facebook declared to cooperate with various interest groups such as the Anti-Defamation League.[82] Details continue to remain lacking.[83] Despite the community standards setting out some general guidance, they do not display any details on specific cases.[84]

5. Evolving Development of the Classical Rule of Law

Facebook has undergone significant political pressure for various incidents in order to deploy more public and coherent rules. Facebook recently

80 Facebook Community Standards (note 57).

81 See plans for a Supreme Court of Facebook, <https://www.theverge.com> (last accessed 13.3.2020).

82 See *T. Collins*, Cnet, Anti-Defamation League, Tech Firms Team to Fight Online Hate, 10.10.2017, <https://www.cnet.com> (last accessed 13.3.2020).

83 See also Art. 19, Facebook Community Standards: Analysis against International Standards on Freedom of Expression, <https://www.article19.org> (last accessed 13.3.2020).

84 Facebook, Community Standards (note 57).

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admitted that it was meaningfully involved in the last US election process.[85] It has acknowledged that Russia-lead operations purchased USD 100,000 in ads and set up fake accounts with the purpose to divide the US population.[86] It is certainly not possible to estimate the concrete effect of the operations. Nevertheless, experts are convinced that Russia did have a significant impact on the elections. Although the start did not make Facebook but in this case Russia, fingers were pointed a lot at Facebook. The pressure did not only come from the outside but even the inside when shareholders demanded for a report on the threat of fake news and democracy.

This pressure has indeed showed some effect. During the most recent French election, approximately 30,000 fake accounts have been fully removed; the same happened during the last German elections when Facebook claims to have deleted thousands of fake news accounts.[87]

Facebook even tries to establish a new system that automatically detects and removes false information also known as "fake news" and fake accounts.[88] Their plan is to rely on third party announcements like newspapers or journalists to reveal and report fake news.[89] Although the theoretical effort is laudable, the actual effect is more than to be doubted. The problem is unfortunately that the system remains opaque. No details are available as to the actual adjudicating mechanism and enforcement action. The actual details are relevant as it is not just any removal that counts, but a removal must be the result of a careful weighing process in order to protect legitimate self-expression. Comparing it to the state court decision, it is not only the final decision that counts, but even more the reasoning, on whose basis you may appeal an illegitimate judgement. In the end, Facebook reacts irresponsible as it delegates responsibility rather than investing in internal resources.

The core problem with regard to the classical rule of law is most crucially that the rules as well as the enforcement mechanism remain a black box. It is not possible to realistically foresee Facebooks reaction. It is (so far successfully) trying to push away any responsibility and try to create a scene of

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85 *C. Cadwalladr/E. Graham-Harrison*, Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica In Major Data Breach, The Guardian, 17.3.2018, <https://www.theguardian.com> (last accessed 13.3.2020).

86 Russia "Meddled In All Big Social Media" Around US Election, BBC, 17.12.2018, <https://www.bbc.com> (last accessed 13.3.2020).

87 See *J. Wattles*, Facebook Will Work With Germany to Combat Election Interference, Sheryl Sandberg Says, CNN, 20.1.2019, <https://edition.cnn.com> (last accessed 13.3.2020).

88 See *E. Dreyfuss/I. Lapowski*, Facebook Is Changing News Feed (Again) to Stop Fake News, Wired, 4.10.2019, <https://www.wired.com> (last accessed 13.3.2020).

89 *M. C. Kettemann/W. Schulz* (note 72), 26.

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state legality without publicity and accessibility behind it. Given the factual power Facebook exercises, the current situation is concerning not necessarily because of the lack of state enforcement power but because of clarity, transparency and foreseeability.

The actual threat for the rule of law does not stem from the fact that the platform rather creates new, general rules instead of relying to an existing framework. It remains a global network while a detailed and concise legal framework does not exist. Concerning is the actual shift created, e.g. by the NetzDG that simply awards Facebook more responsibility in deciding fundamental rights sensitive cases without any distinction and relationship to the given framework. One could argue that the classical rule of law is simply changed into a new more private rule of law. This, however, would require a quasi-judicial oversight mechanism that is lacking at least up to this point or some form of state influence. Correspondingly, Facebook has already declared to establish what it calls a "Supreme Court of Facebook".[90] In contrast, States have to bethink themselves of their own role and positive dimension of protecting human rights and the rule of law. Allowing for more official discretion for Facebook gives it even more legal power – an aspect on which states have to refocus. Then, a type of oversight could be put in place; be it by the public, be it through a domestic law that at least checks the procedural compliance, but which does not amount to a Supreme Court of Facebook.[91] It would be procedurally rather simple to come back to the rule of law if only the platform would receive more state influence in the decision making-process and if procedures would become more ordinarily documented instead of referring to a black-box algorithm.

Issues remain also regards the latest plans on Facebook's announced oversight mechanism.[92] Already a step forward would be the establishment of an oversight body. But some aspects remain a challenge for the rule of law. While the oversight mechanism is capable of reviewing automatically reviewed decisions, it will not be able to address and change the structural shortcoming within the automation software. It is even more problematic as to the actual mandate of the oversight body. As outlined in the oversight board's charter, the aim is to protect the freedom of expression.[93] In fact,

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[90] *Q. Wong*, Here's What Mark Zuckerberg Has to Say About Facebook's "Supreme Court", CNet.

[91] See Art. 19, Facebook Oversight Board: Recommendations for Human Rights-Focused Oversight, <https://www.article19.org>.

[92] See *Q. Weinzierl*, Difficult Times Ahead for the Facebook "Supreme Court", Verfassungsblog, 21.9.2020, <https://verfassungsblog.de> (last accessed 13.3.2020).

[93] Oversight Board Charter, <https://fbnewsroomus.files.wordpress.com> (last accessed 13.3.2020).

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while making decision about down-ratings and banning specific posts, it equally decides upon corresponding rights, namely privacy or dignity and aspects such as safety and authenticity. Finally, the most concerning issue will remain as to the relationship with the interpretation by regular courts on the domestic and international level.

Interestingly, the platform itself does not seem completely reluctant to more external influence. *Mark Zuckerberg* has acknowledged that it is not the question whether, but rather how Facebook should be regulated.[94] Moreover, he particularly claims to wish for guidance from governments on defining what or whom the platform should ban.[95] Other proposals for an amelioration of the current situation are not hard to find calling for the above-mentioned transparency.[96] In the end, the latest developments evidence that the purposes of the classical rule of law – involving public debate (*Aristotle*), establishing equality (*Dicey*), precise rules (*Hayek*) and avoid too wide margin of discretion (*Locke*) – are not fully upheld. The current situation allows for a too broad competence for one company only. Proper safeguards such as effective oversight mechanisms are not in place. Therefore, it is difficult to approve of a new or adapted form of the rule of law.

IV. Conclusion

The development of the global digital world has allowed for Facebook to gain the power it currently possesses. The platform was able to grow as big as to be able to create new rules as a new form of transnational legal order. Yet, given the dominance of *de facto* rules without publicity or coherence, the current state of rules does not fully comply with the classical rule of law. Instead they are *de facto* results imposed by one private entity rather than the result of a democratic legal procedure. It is not possible to fully access and understand the regulations from the outside. Main aspects such as publicity and clarity are currently not sufficiently provided for. Members of Facebook sometimes seem to be rendered seemingly arbitrary decisions, the result the rule of law aims to avoid. Therefore, states should engage more in order to foster the influence of the classical rule of law, not merely for the

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[94] See, e.g. Art. 19, Regulating Social Media: We Need a New Model that Protects Free Expression, <https://www.article19.org>.

[95] *H. Solomon*, Zuckerberg Calls for Guidance from Governments on Defining What Social Media Should Ban.

[96] Art. 19, Facebook Community Standards (note 83); Art. 19, Regulating Social Media (note 94).

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sake of the individuals' rights and the states positive obligation under human rights law, but also for the sake of society. With regard to all proposals, it must not be forgotten, that striving for a more rule-of-law-compliant structure, a democratic and human-rights-centred approach is of utmost importance. The primary bearers of human rights obligations are the states and their governments. Awarding Facebook with a widest discretion as to its human rights sensitive decisions by transferring authoritarian power to the platform, states deprive themselves from their legal obligation under the human rights regime.

> "Without law, each differentiated institutional complex in a modern society could not operate, nor could relations among institutional subsystems proceed smoothly. In the absence of law, then, a large and differentiated social structure is not viable; and if a specific legal system proves incapable of managing internal actions and relations within an institutional subsystem, as well as external relations among institutional subsystems, social structures and the cultural codes that guide them begin to disintegrate."[97]

[97] *J. H. Turner*, Human Institutions: A Theory of Societal Evolution, 2003, 243.

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