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Sümeyye Elif Biber[1] & Nedim Hogic[2]

ABSTRACT: The growing public role of social platforms as private entities with emerging public power has created a legal crisis regarding their activities pertinent to content moderation. In this chapter, we deal with the relationship between this legal crisis and the inter-legality approach to the legal issues arising out of it. Firstly, we explain the development of the platforms in the domain of content moderation. Resembling legal or governance systems, these private self-regulating entities have had a profound normative impact on the freedom of speech, privacy, data protection and economic development which is why we believe the term "online states" to be appropriate in describing them. Secondly, we describe the first phase of their evolution, the phase of light regulation when the platforms were operating largely without infringement from the national or international regulators. That evaluation is followed by the description of regulatory developments and cases that have led the platforms to creations of their own internal regulatory standards, case law and judicial organizations that governed the policies concerning the freedom of expression for the users of the platforms**.** Thirdly, we see this interwovenness between the national, international and the "legal orders" created by the platforms as an interactional legal order that should not only be explained by inter-legality but for which inter-legality is a useful tool concerning the disputes that consider the different normativities stemming out of the three legal orders. Therefore, we developed a three-step analysis consisting of, (i) taking the vantage point of the affair – the case at hand - under scrutiny, (ii) understanding the relevant normativities controlling the case, (iii) looking at the demands of justice stemming from the case, in order to apply this concept. In this context, we examine the decisions of the Facebook Oversight Board, finding that although the attention was paid to the international law, this was at the expense of national legislation and other relevant legalities. We conclude that inter-legality offers us, in this debate, a clear judicial path in resolving the issues at hand providing more just solutions based on inclusive reasoning and not the exclusion of the legal orders.

KEY WORDS: Inter-legality, social platforms, online states, digital rights

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1. Introduction

In the wake of the widespread unrest following the announcement of the US 2020 Presidential election results and the storming of the US Congress by a mob of supporters of Mr. Trump, the defeated Presidential candidate, had his account on the social platform Twitter suspended.[3] Explaining this decision, Twitter cited the high risk of incitement to violence. This, however, was just a continuation of the clash between Trump and the platform. The clash first erupted when Mr. Trump was sued for blocking other Twitter users from accessing his account upon receiving unfavorable reactions to his posts from them. The US District Court in New York found in this case that the comments made to Mr. Trump's Twitter account represent political and, therefore, protected speech.[4] Moreover, the Court found that the limitation of access of the plaintiffs not just to tweets but also to the "interactive space" provided in the replies and retweets, which constitute a Twitter thread, is an infringement of their First Amendment rights.[5] Thus, in January 2021, when Twitter decided that President Trump's tweet is an incitement to violence, it did not only shut down a communication channel for the US President, but it also shut down a designated public forum for exchange of views and opinions that it operated.

This episode represents what has so far been the highest point of a global legal and political crisis surrounding the private social media platforms, such as Twitter, Facebook and YouTube. That crisis began in 2016, following the political outcomes such as the Brexit referendum in the UK and the US presidential elections that were to a certain extent shaped by an organized campaign of public disinformation that took place on the platforms.[6] In this chapter, we deal with the relationship between this legal crisis and the inter-legality approach to the legal issues arising out of it.

Firstly, we explain the development of the social platforms in the domain of content moderation observing the two different phases in their development: the first from the end of the 20th century up to 2016 which was the period of light regulation and the post-2016 period of heavy regulation. It was in this second period, we argue, that the content moderation of the

[3] Schultz J. (2021). Twitter Puts an End to Trump's Rhetorical Presidency, available at https://www.lawfareblog.com/twitter-puts-end-trumps-rhetorical-presidency

[4] United States District Court Memorandum and Order, *Knight First Amendment Institute v. Trump*, (2017). No. 1:17-cv-05205 (S.D.N.Y.)

[5] Id.

[6] Generally, see Gorodnichenko, Y., Pham, T. and Talavera, O., (2018). Social Media, Sentiment and Public Opinions: Evidence from #Brexit and #US Election (No. w24631). National Bureau of Economic Research. (explaining the effects that the social media platforms had in shaping the public opinion).

platforms evaluated into a separate legal order with its own standards of freedom of speech and the bodies that were to revise them. Resembling legal or governance systems[7], these private self-regulating entities have had a profound normative impact on the freedom of speech, privacy, data protection and economic development which is why we believe the term "online states" to be appropriate in describing them.

Secondly, we describe the first phase of their evolution, the phase of light regulation when the platforms were operating largely without infringement from the national or international regulators. That evaluation is followed by the description of regulatory developments and cases that have led the platforms to creations of their own internal regulatory standards, case law and judicial organizations that governed the policies concerning the freedom of expression for the users of the platforms. We proceed to examine the regulatory backlash that came from the national state regulators post-2016 events seeing it as an attempt to limit the power of the platforms to manage the user created content but also to make them more accountable.

Thirdly, we see this interwovenness between the national, international and the "legal orders" created by the social platforms as an interactional legal order that should not only be explained by inter-legality[8] but for which inter-legality is a useful tool concerning the disputes that consider the different normativities stemming out of the three legal orders. Therefore, we developed a three-step analysis consisting of, i) taking the vantage point of the affair – the case at hand - under scrutiny, (ii) understanding the relevant normativities controlling the case, (iii) looking at the demands of justice stemming from the case in order to apply this concept.[9] Following Palombella and Klabbers we argue that taking the vantage point of the case[10] is crucial for resolution of such disputes.[11] In this context, we examine the decisions of the Oversight Board and found that although the attention was paid to the international law, this was at the expense of national legislation and other relevant legalities. Instead, inter-legality

[7] Klonick K. (2017). The New Governors: The People, Rules, and Processes Governing Online Speech, 131 Harvard Law Review, 1599-1603 (arguing that these platforms operating as the new governors of online speech, and are part of a new triadic model of speech that is between the state and speakers and publishers).
[8] In this sense following Taekema S. (2019). Between and Beyond Legal Orders Questioning the Concept of Legal Orders, in Palombella G., Klabbers J. (eds.) (2019). The Challenge of Inter-Legality, Cambridge University Press, 74.
[9] See the chapter "Inter-Legality and Surveillance Technologies" by Sümeyye Elif Biber in this volume.
[10] Palombella G., Klabbers J. (2019). Introduction, in Palombella G. and Klabers J. (eds.) (2019). The Challenge of Inter-Legality, Cambridge University Press, 1-16.
[11] Ibid.

offers us a clear judicial path in resolving the issues at hand providing more just solutions based on inclusive reasoning and not the exclusion of the legal orders.

2. Public Role of the Social Platforms

The rise of the Internet in the late 1990s provided its users with great autonomy in reaching more speech and people and accessing more information than ever before in human history. In that period, we witnessed the change "from atoms to bits" happening[12] as most information previously available in the form of books, magazines, newspapers, and videocassettes became universally accessible in the form of inexpensive electronic data.[13] This change in analog to digital technologies also shifted the basis of the society from an industrial to an informational one,[14] as the increase in digitalization created new market opportunities and new jobs for individuals. The online platforms, acting as disruptive forces,[15] dramatically accelerated these developments by providing billions of users with unprecedented access to different types of content and innovation opportunities in the digital market. Much of this was possible because, during this period, the states took a general orientation to "ignore online activities or to regulate them very lightly."[16]

This meant a liberal constitutional approach towards the regulation of the freedom of speech standards on the platforms.[17] The EU and the US have both provided liability exceptions for platforms considering them as "online intermediaries."[18] In practice, this meant that the platforms were not treated as public forums but merely as content providers that enable access

[12] Pollicino, O. (2019). Judicial Protection of Fundamental Rights in the Transition from the World of Atoms to the Word of Bits: The Case of Freedom of Speech, European Law Journal, 25(2), 155-168.
[13] Ibid.
[14] Benkler Y. (2006). The Wealth of Networks, Yale University Press.
[15] According to European documents on online platforms, social networks provide a "hosting service" meaning that "an information society service consisting of the storage of information provided by a recipient of the service." Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').
[16] Palfrey, J. G. (2010). Four Phases of Internet Regulation. Social Research, Vol. 77, No. 3, Fall 2010 , Berkman Center Research Publication No. 2010-9, Harvard Public Law Working Paper No. 10-42, Available at SSRN: https://ssrn.com/abstract=1658191 (referring to this era as an era of the "open internet").
[17] Gregorio G. D. (2019). From Constitutional Freedoms to Power of the Platforms: Protecting Fundamental Rights Online in the Algorithmic Society, 11(2) European Journal of Legal Studies, 65-103.
[18]According to the Council of Europe, the term internet intermediaries "commonly refers to a wide, diverse and rapidly evolving range of service providers that facilitate interactions on the internet between natural and legal persons. Some connect users to the internet, enable processing of data and host web-based services, including for user-generated comments. Others gather information, assist searches, facilitate the sale of goods and services, or enable other commercial transactions. Internet intermediaries also moderate and rank content, mainly through algorithmic processing, and they may perform other functions that resemble those of publishers." See Council of Europe, Internet Intermediaries at https://www.coe.int/en/web/freedom-expression/internet-intermediaries .

to content produced by users. This limited their responsibility before the law to actively moderate the content that the user shares. Left to self-regulation, content moderation on the platform was greatly influenced by the tradition of US lawyers in the interpretation of regulation of speech set forth by the First Amendment to the US constitution.[19]

In the US, the Communication Decency Act § 230 (CDA) shielded platforms with broad immunity from liability for user-generated content.[20] The first relevant case in which the interpretation of the immunity granted under § 230 (also considered the most important case of Internet Law to this date[21]) was the case of *Zeran v. America Online.*[22] Plaintiff Zeran claimed that the American Online Inc. (AOL) is liable for defamatory messages posted by an unidentified third party. He argued that AOL had a duty to remove the defamatory post, notify its users of the post's incorrectness, and screen future defamatory material.[23] However, the Court found that AOL was not liable under § 230, as the latter provided federal immunity to AOL.[24] According to the Court, purposive reading of the provision has demonstrated that "the imposition of tort liability on service providers for the communication of other represented, for Congress, is simply another form of intrusive government regulation of speech. Section 230, was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."[25] Thus, according to the Court, the "specter of tort liability" is precluded to avoid chilling effect.[26] Furthermore, the holding encouraged "service providers to self-regulate the dissemination of offensive material over their services."[27]

[19] Klonick, K. (2017). supra note 8, 1598.
[20] Communication Decency Act [1996] 47 U.S.C. § 230 (c) (1) states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."
[21] Goldman E. and Kosseff J. (2020). Commemorating the 20th Anniversary of Internet Law's Most Important Judicial Decision, in Goldman, E. and Kosseff, J. (eds.) (2020). Zeran v. America Online E-book at https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3286&context=historical p.6.
[22] United States Court of Appeals, Fourth Circuit, *Zeran v. America Online Inc*. 129 F.3d 327, 1997.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid. The judgment also held that internet service providers were not liable even when receiving notice of potential defamatory post.
[27] Id. The conceptualization of online platforms within the First Amendment was another critical issue for the courts in the US. The reasonings analyzed analogies to state, company towns, broadcasters and editors. See this debate in Klonick supra 5.

Similarly, the EU law in its E-Commerce Directive provided online intermediaries with responsibility exceptions for the illegal content shared by the users.[28] The two main reasons for this special regime were the lack of effective control and knowledge over the content generated by users and the desire of EU institutions to enhance the digital economy. Therefore, the mechanism of "notice and takedown" was considered an effective solution for illicit content due to the lack of awareness of the activities of users on social networks. As such, the platforms were free to remove or block illicit content when they were aware of its presence. They were granted a sort of "private" discretion on the fundamental rights of users, particularly the freedom of expression and the right to respect for private life. This delegation of public power by public actors ensured the effective implementation of public policies online.[29] The documents of the European institutions have also confirmed this public role of online platforms by clearly setting rules, guidelines, and principles to fight against illegal and harmful content, and ensuring their responsibility.[30]

The case law of the European courts has also demonstrated this quasi-public "private" discretion. In 2000, the *Tribunal de Grande Instance* in Paris ordered Yahoo! to take all the measures to prevent access in France to an auction site selling Nazi objects, in accordance with French Law that prohibits such kind of sales.[31] On the one hand, the case clearly demonstrates the inadequacy of the state to monitor each criminal act occurring online,[32] while on the other, it illustrated the power of private internet intermediaries in enforcing fundamental rights.[33] The issue at stake was the balance between the freedom of speech of the company and the other rights of claimants. Owing to the limited power of the state over the Internet, the private company was held responsible by the Court for user-generated content on their website. The case was the first sign of opening a door to the "privatization of right enforcement," thus adding

[28] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJL 178/1 of 17.7.2000.
[29] See the debate in Gregorio supra note 18.
[30] There are at least four leading documents to see the approach of the EU to online platforms: European Commission, COM (2016) 288 final, Online Platforms and the Digital Single Market Opportunities and Challenges for Europe; European Commission, COM (2017) 555 final, Tackling Illegal Content Online Towards an Enhanced Responsibility of Online Platforms; European Commission, C(2018) 1177 final, On Measures to Effectively Tackle Illegal Content Online; Council of the European Union, 2019, 12522/19, Progress on Combatting Hate Speech Online through the EU Code of Conduct 2016-2019 (all these documents have encouraged online platforms to take self-regulatory measures, and supported the special liability regime provided by the E-Commerce Directive).
[31] TGI Paris (22 May 2000) Licra et UEJF v. Yahoo! Inc. and Yahoo! France; U.S. District Court for the Northern District of California (2001) Yahoo!, Inc. v. La Ligue Contre Le Racisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).
[32] Reidenberg Joel R, 2004. States and Internet Enforcement, University of Ottawa Law & Technology Journal
[33] Bassini M. (2019). Fundamental Rights and Private Enforcement in the Digital Age, European Law Journal, Vol. 25, Issue 2, 188-197.

power to private entities in enforcing rights.[34] This "privatization" trend was also named as "the invisible handshake," marking the peculiar nature of collaboration between the private actors and the public functions.[35]

Therefore, the platforms regulated content access but carried out this *sui generis* activity mainly based on their definition of freedom of speech standards.[36] In the early phase of platform operation, this responsibility meant that the users participated in content moderation by flagging offensive and undesirable content. However, the weaknesses of such an approach materialized as the number of users grew and as the reports for content takedown intensified. To this, the platforms responded with creation of their own elaborate content rules, such as Facebook's "Community Standards" [37] to govern content that are divided into six sections, namely, violence and criminal behavior, safety, objectionable content, integrity and authenticity, respecting intellectual property, and content-related requests.[38]

With such a prominent role of the platforms in shaping the speech, free speech transformed from a relationship between the citizens and the state into a triangle composed of speakers, governments, and private governance actors namely the platforms.[39] In this phase lasting approximately up to 2016, the platforms played a role in expanding the borders of free speech also recognized by the US Supreme Court, which praised the "vast democratic forums of the Internet."[40]

Still, the overwhelming amount of criticism and content takedown led Facebook to announce the creation of an independent and global body to make decisions about user-generated content. [41] Called the Oversight Board, a body composed of many prominent legal experts and former judges was established in 2020. Its function, defined in the Oversight Board Bylaws, is to "protect freedom of expression by making principled, independent decisions about important pieces of content and by issuing policy advisory opinions on Facebook's content

[34] Ibid. (discussing the enforcement of the right to be forgotten recognized by the CJEU in the Case 131/12 Google Spain v. AEPD EU:C:2014:317, in the context of "privatization").
[35] Birnhack, M. and Elkin-Koren, N. (2003). The Invisible Handshake: The Reemergence of the State in the Digital Environment. Available at https://ssrn.com/abstract=381020.
[36] Rahman, K. S. (2016). Democracy Against Domination, Oxford University Press.
[37] See the Facebook Community Standards at https://www.facebook.com/communitystandards/
[38] Article 19, June 2018. Facebook Community Standards Legal Analysis, p. 2-26. See the report on https://www.article19.org/wp-content/uploads/2018/07/Facebook-Community-Standards-August-2018-1-1.pdf
[39] Balkin, J. M. (2018). Free Speech is a Triangle, Columbia Law Review, 118(7), 2011-2056.
[40] 137 S. Ct. 1730, 1735 (2017)
[41] Kate Klonick and Thomas Kadri, How to Make Facebook's 'Supreme Court' Work, The New York Times, 17 November 2018, available at https://www.nytimes.com/2018/11/17/opinion/facebook-supreme-court-speech.html

policies."[42] In October 2020, the Board started hearing cases, limited to "highly emblematic cases" as Facebook itself would referred to them releasing its first decisions in January 2021.[43]

In this way, online platforms have become first the legislators by drafting their rules; then "courts" by deciding on these rules, and finally the "executives", by enforcing the decisions they made. This perspective on the Internet threatens the separation of powers, according to which the authority of the state is divided into three branches, a legislator, an executive, and a judiciary, which mutually check and balance each other.[44] This concentration of the powers in the hands of private entities[45] led some authors to compare the regulation of speech at the platforms to a new form of *feudalism.*[46]

These trends have demonstrated that the platforms cannot be considered solely in the context of the private realm. Indeed, the Supreme Court of the United States also acknowledged in 2017 in the case of *Packingham v. North Carolina*, viewing social platforms as "modern public square", they are "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[47] Silhouetting the online form of a state, social platforms have posed us a question whether they would be considered as a legal order in the ecosystem of inter-legality. As the inter-legal approach " does not itself decide what counts as a legal order,[48]" we use the approach to explain the legal relations between the platforms, national regulators and international law as well as to demonstrate the usefulness of the approach in (quasi-) judicial decision-making.

3. Social Platforms in the Ecosystem of Inter-legality

As we have noted, social content moderation has long been a privilege of the platforms. However, two major political events occurred in 2016— the launching of the Brexit process and the US elections—have led to a reconsideration of their role in both the US and the world.

[42] Facebook Oversight Board Bylaws January 2020, available at https://about.fb.com/news/2020/05/welcoming-the-oversight-board/
[43] Brent Harris, Oversight Board to Start Hearing Cases, 22 October 2020, available at https://about.fb.com/news/2020/10/oversight-board-to-start-hearing-cases/
[44] Belli, L. & Venturini, J. (2016). Private ordering and the rise of terms of service as cyber-regulation. Internet Policy Review, 5(4).
[45] Ibid.
[46] Schneier B. (2013). "Power in the Age of the Feudal Internet", in MIND, Collaboratory discussion paper #6 Internet & Security, 2013; Belli, L. (2016). Collaborative Policymaking: from Technical to Legal Interoperability. Presented at the XIX International Congress of Constitutional Law. Brasilia. Panel 7. Available at https://www.youtube.com/watch?v=KyQ5f--Yw44&t=236s
[47] *Packingham v. North Carolina* (2017), 137 S. Ct. 1730.
[48] Palombella G., Klabbers J. supra note 10, 10.

Targeted ads spreading fake news used to target voters in the UK and the US raised concerns over the standard of moderation and regulatory control over platforms. Mass spread of hate speech and disinformation led the platforms to begin policing their content more and more, and regulatory pressures exercised by various states contributed to this. In 2017, Germany passed the Network Enforcement Act (Netz DG), a piece of legislation targeting social networks with more than two million registered users in Germany—namely Facebook, Twitter, and YouTube. This law did not introduce new criminal acts but seeks to enforce the existing criminal legislation for specific criminal acts.[49]

In the meantime, the platforms began to engage in a cartel-like behavior, which meant that the removal of one piece of content by one platform would soon trigger such a removal in other platforms.[50] This effect was beneficial for the suppression of terrorist recruitment and promotion, as it led to the creation of the Global Internet Forum for Countering Terrorism—a forum for the exchange of information on terrorist practices in social networks. With the start of the COVID-19 pandemic, platforms moved aggressively to take down many of the disinformation and conspiracy theories related to the pandemic. In this same period, Twitter flagged posts by the US President as factually untrue, also limiting the ability to distribute his tweets thereby beginning to act as an editor going beyond its obligations under Section 230 of the CDA.[51] This prompted fears of censorship and, as a political response, calls for amendments of Section 230 of the US CDA and calls for a regulatory approach that would use competition law to limit the power of the big companies.[52]

These challenges to the content moderation policy from both US and non-US regulators have marked an end of the era in which the internal legal standards of the platforms were grounded in the permissive liberal tradition.[53] The platforms' internal deliberation on the content began to include the elements of an approach typical of judicial deliberation before the

[49] Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz - NetzDG) (2017). Available at https://www.gesetze-im-internet.de/netzdg/BJNR335210017.html For the platforms, it establishes the obligation to remove content that features use of symbols of unconstitutional organizations, forming terrorist organizations, incitement of masses, including denial of the Holocaust, child pornography, insult, malicious gossip, defamation, violation of intimate privacy by taking photographs or other images, and threatening commission of serious criminal offence. See Zurth P (2021). The German NetzDG as Role Model Or Cautionary Tale? – Implications for the Debate on Social Media Liability, Fordham Intellectual Property, Media and Entertainment Law Journal.

[50] Douek E. (2020). "The Rise of Content Cartels" Knight First Amendment Institute at Columbia.

[51] Trump's social media bans are raising new questions on tech regulation CNBC Jan 11, 2021. https://www.cnbc.com/2021/01/11/facebook-twitter-trump-ban-raises-questions-in-uk-and-europe.html

[52] Brown, I. (2020). Interoperability as a tool for competition regulation. Open Forum Academy. (explaining the different regulatory approaches that could limit the power of the platforms).

[53] Joseph T. (2020). "Facebook's Speech Code and Policies: How They Suppress Speech and Distort Democratic Deliberation", 69 Am U L Rev 1641

international human rights tribunals including the invocations of the International Covenant on Civil and Political Rights.[54]

Once the social platforms began placing greater weight on balancing between their tradition of content moderation which was traditionally liberal and the pressure from national regulators, they found themselves in the ecosystem of inter-legality. Rules of the three different legal orders applied here: international law, national regulation, and private moderation standards that the platforms developed. Surely, the rules of international law enshrined primarily in Articles 19 and 20 of the International Covenant on Civil and Political Rights were relevant, even when the platforms had just begun operating. However, it was only in 2018 that the UN Special Rapporteur highlighted the international law as a source of normativity that should govern content moderation.[55] While academics have made calls for its application,[56] a specific reference to this body of law was made only in January 2021 with the first decisions of the Facebook Oversight Board.

The second legality comes from the national regulators, which, as said above, have been increasingly interested in the regulation of platforms through legislation. The tools allowing the regulators to challenge the platforms are now not only legal but also technological. These include the ability of the national regulator to not only administer fines but also order a decrease in bandwidth or a complete block of the traffic from a particular site.[57] Further, both German law and other recently proposed legislation aim to apply extraterritorially by limiting access to content that originated outside of these jurisdictions.[58] The recent decision of the EU Court of Justice of the EU in an Austrian defamation case went in the same direction: if the court in one member state orders a takedown of the social media content, then the social platform is obliged to carry out the takedown by effectively banning it in all EU member states, regardless of whether the content was used for purposes other than defamation.[59] Thus, these laws and decisions limit the right to receive foreign speech as an integral part of freedom of expression.[60]

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[54] The first few decisions of the Facebook Oversight Board issued in January 2021 with their invocation of the Article 19 and 20 of the ICCPR as well as the United Nations' Human Rights Committee are instructive in this sense. See Case Decision 2020-003-FB-UA at https://oversightboard.com/decision/FB-QBJDASCV/.

[55] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression No. A/HRC/38/35 (Jun.2018)

[56] Benesch, Susan. "But Facebook's Not a Country: How to Interpret Human Rights Law for Social Media Companies." (2020).

[57] For example, the Turkish legislator has considered such a solution. See a recent discussion in "Turkish law tightening rules on social media comes into effect" , 1.10.2020, available at https://www.euronews.com/2020/10/01/turkish-law-tightening-rules-on-social-media-comes-into-effect

[58] See Zurth, supra note 49 n. 257.

[59] *Glawischnig-Piesczek v. Facebook Ireland* (C-18/18).

[60] See excellent discussion in Thai J. (2018). "The Right to Receive Foreign Speech", 71 Okla L Rev 269.

Surely, the current state of technology enables the use of the so-called Virtual Private Networks (VPNs), software that in some situations may enable the users from one jurisdiction to access Internet content banned in that jurisdiction making the reach of the aforementioned solutions imperfect.[61] However, this software is not accessible or affordable to many, and it is impossible to predict what the future holds considering its future access or development. The other alternative, migrating users to other platforms that are more supportive of the kind of speech and content moderation they prefer, would also not solve many of the problems. Suggested as the "market response" to the issue of platforms as early as 1995,[62] this method would have a fragmenting effect on the speech forums across political and cultural lines and would just increase the number of platforms being targeted by the legislators.

The content moderation standards remain the third normativity governing the situation concerning platforms as mediators in the free speech triangle. The pressure that we described herein has revealed access to justice as the main problem of this normativity. It was only in October 2020 that Facebook allowed a clear complaint procedure for the removed content or for requests that a content be removed. Even so, the lengthy period between the complaint and the decision does not ensure a speedy resolution or protection of the rights of speakers. Thus, this third normativity remains essential for the users and their protection of the right to freedom of speech. However, this normativity is not only balancing the demands of national regulators and (to a much lesser extent) international law, but it is also balancing proportionality—enshrined in the decisions of content moderators—with probability—enshrined in the automatic takedowns of content performed by the AI.[63] Thus, within this normativity, both inter-legal and intra-legal balancing[64] occurs: inter-legal, when the platforms decide whether to follow their own guidelines or the freedom of speech standards existing within jurisdiction; and intra-legal, when they run proportionality tests between different principles and values on which their governance rules are based.

[61] Sardá, T., Natale, S., Sotirakopoulos, N. and Monaghan, M. (2019). Understanding Online Anonymity. Media, Culture & Society, 41(4), 559.
[62] Post, David G. (1995). Anarchy State and the Internet, Journal of Online Law, Article 3, Available at SSRN: https://ssrn.com/abstract=943456
[63] See Douek supra note 50, 52.
[64] See the chapter by Gabriel Encinas in this volume.

4. The Virtuality of the Vantage Point and A Three-Step Analysis

It is in this clash between the three legal orders (the national, the international and the platform) that the content moderation and consequentially the limits to the freedom of speech are shaped. Taking an approach of inter-legality here we analyze this dilemma through a three-step analysis: (i) taking the vantage point of the affair—the case at hand—seriously, (ii) understanding the relevant normativities controlling the case, and (iii) looking at the demands of justice stemming from the case.[65]

Regarding the first step, the angle of the case is fundamental to an inter-legality approach. As Palombella and Klabbers claim, "One does not need the ascent to a juridical heaven for ready-made and principled justice—a deracinated, universalist point—to realize that different legal orders may overlap normatively and reach beyond their own limits. On the contrary, an inter-legality perspective simply happens to be taken as soon as the vantage point of the concrete affair under scrutiny—the case at hand—is taken seriously."[66] In other words, an inter-legal approach does not search for a universalist point to determine the overlap between legal orders. Instead, the approach primarily focuses on the "angle of the case" at hand and considers it as a "master" which guides the decision maker to see the relevant normativities controlling the case.

Second, based on the case at stake, the second step suggests the legal decision-maker should "account for as many normativities as those involved in the case" by considering the "multi-faced nature of the text of law," meaning that the text of law is composed of more than one system-sourced positive law and is not limited to political, legal, and cognitive borders of a single self-contained system.[67] In this way, it suggests that legalities controlling the case are already unavoidably interconnected.[68] Indeed, for this reason, none of the legalities or regimes work effectively on their own. Therefore, considering relevant normativities to a particular legality is the only way to strengthen the effectiveness of that legality or regime.

[65] Palombella and Klabbers, supra note 10, 1-16.
[66] Ibid, 2.
[67] Ibid, 1.
[68] Ibid., 366.

Finally, the third step recommends a rational questioning of this interplay to draw the "just" solution from a composite "perspective that is not merely one-sided."[69]Considering the different normativities helps the decision maker to avoid injustice.[70]

In the context of online platforms, the determination of a proper "vantage point" is crucial. Such a situation is a result of the cross-border nature of the Internet which represents a key feature of its architecture. Operating from one location, being incorporated in another and producing its effects on users in many different jurisdictions, the very nature of the social network's architecture is transnational. This starting point lends itself naturally to the application of international law as the attempt to ignore it would be to disregard the global and transnational nature of the Internet.

In this context, any solution for the regulatory challenges that online platforms pose could not disregard the global and borderless nature of the internet. The activities of such services occur globally and independently from national borders. Therefore, considering only American free speech norms as the companies are based in the US or the standards developed by those companies or the other domestic solutions cannot be effective. From the perspective of inter-legality, the just and coherent solution on the internet could be primarily to consider international law norms controlling the case due to the virtual and global nature of such systems.

However, it should be noted that, from an inter-legal point view, this does not mean that international law norms would be the only solution in this debate. Indeed, the approach of inter-legality takes a stand against the domination of one particular legality that could create legal hegemony or monopoly over other legalities. In other words, the concept is fundamentally in search of equilibrium between legalities instead of creating domination or contradiction. However, online platforms, due to their global architecture, have posed a different "vantage point" – that is virtual and borderless - with its capacity to govern more human communication than any government does. For this very reason, norms of international law have become prominent in this debate.

The five decisions that the Facebook Oversight Board has issued in January 2021 seem to go into this direction. Covering diverse jurisdictions (Brazil, Armenia, France, United States) the decisions rely on interpretations of Article 19 and 20 of the ICCPR including the general comments on these two articles developed by the UN Human Rights Committee over the course

[69] Ibid, 3.
[70] Ibid, 383.

of its work as well as other UN human rights instruments such as the Convention of the Rights of the Child.[71] As such the decisions seem to affirm the commitment to a global free speech standard finding that in four out of five cases, Facebook acted against both the global free speech norms and its own standards.

However, while considering the international law, the decisions of the Oversight Board exclude another normativity, that of the national legislation and its norms. This will not represent a problem when the content originating by the users from a national jurisdiction with a wide interpretation of freedom of speech (such as the US) or with strong guarantees of implementation of national regulation (such the German Netz DG). It will also not represent a problem where the national regulatory standards are absent or openly ignored such as the case of Myanmar in 2018, where the Facebook posts facilitated the spread of hatred that culminated in genocide against the Rohingya Muslims minority.[72] But, where the national regulation emulates the strictness of the German Netz DG combining it with a political intention to limit the freedom of speech, the current approach by the Oversight Board might prove itself to be insufficient ultimately weakening the global freedom of speech norm.[73]

The Board does seem to be aware of the need to contextualize its decisions; for example, in the Brazilian nudity case it has contextualized the takedown of material as counterproductive to the awareness raising goals of a cancer prevention campaign.[74] Therefore, taking the next step which is to consider the norms stemming from the Brazilian legislation would be a logical step in the direction of a more balanced and just solution. This does not mean that the national regulation would take precedence over international law but that it matters from an inter-legal point of view, as we stated already above even if the inclusion would mean that the Board would have reached the same decision.

From a policy angle, the decision to exclude it from the analysis (just as the norms of national jurisdictions in the other four cases were excluded) allows Facebook to escape the criticism of attempting to impose its standards onto countries. But, to do as the Oversight Board currently does which is to openly ignore them, also ignores the legal reality which is the

[71] The five decisions are currently available only online at https://oversightboard.com/?page=decision
[72] Mozur P. (2018). A Genocide Incited on Facebook, With Posts From Myanmar's Military, NY Times Oct. 15, 2018 at https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html
[73] We cannot be sure that Facebook is not dealing with the requests stemming from national legislation. Indeed, the decisions publicly made available are presented with a caveat that they "provide an overview of the case and do not have precedential value."
[74] See Case decision 2020-004-IG-UA, para 8.3. in at https://oversightboard.com/decision/IG-7THR3SI1/

triangulation of the speech[75] and the overlap of the legal orders. The pressure from those pushing for the complaints to be reviewed by the Oversight Board will undoubtedly lead Facebook into considering them and the sooner this is acknowledged the more convincing the decisions of the Oversight Board will be. Therefore, consideration of the domestic legal norms in this process would be a step necessary in the interest of justice. It would achieve more in promoting the debate about the global regulatory free speech standards and prevention of the compartmentalization of free speech standards along national lines.

5. Conclusion

Silhouetting the form of a state online, platforms have posed us a question whether the concept of inter-legality would be a technique to solve the challenges posed by the platforms. As the inter-legal approach "does not itself decide what counts as a legal order", considering the increasing power of platforms in the global governance of freedom of speech standards, we demonstrated that they are already a part of the ecosystem. Moreover, inter-legality allows us to bypass much of the current ongoing discussions regarding the regulatory approaches to technology.[76]

In the light of premises of inter-legality, the examinations of the decisions of the Oversight Board demonstrate that although the attention was paid to the international law as the legal order that was historically excluded from these decisions, this was at the expense of national legislation and other relevant legalities. Instead, inter-legality offers us a clear judicial path in resolving the issues at hand providing more just solutions based on inclusive reasoning and not the exclusion of the legal orders. This may achieve two important goals: first, to counter the fragmentation of the global space for freedom of expression that will result from the inevitable further regulatory pressures of the state and second, to strengthen the quality of decision making and accountability within the platforms.

[75] Cf. Balkin, supra note 39.
[76] Brownsword D., Scotford E., Yeung K. (2017). Law, Regulation and Technology: The Field, Frame and Focal Questions in David Brownsword, Eloise Scotford and Karen Yeung (eds) The Oxford Handbook of Law, Regulation and Technology.