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A Right to Post?

Structural Human Rights Law and Social Media

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A large part of public and private discourse in the modern world takes place on social media platforms. Most participants in public life, from individuals to political parties to companies, feel that a presence on these platforms is necessary to properly disseminate their messaging. Considering their market share, it is generally agreed that these platforms wield a large influence on public discourse. Relatedly, recent years have seen a debate on whether civil and human rights law is sufficiently cognizant of market power, with some arguing for a more structural conception of international human rights law that takes into account the power wielded by private actors.

Using these two themes, the present article investigates whether the European Convention on Human Rights, as interpreted by the European Court of Human Rights, either *requires* states to restrict the content moderation of social media platforms or *permits* states to do so, and whether European human rights law can be said to be sufficiently cognizant of market power in this regard. It concludes that while the European Convention does not require states to restrict content moderation except in cases that are almost purely theoretical, it does permit states to introduce such restrictions. While not taking a stand on the desirability of regulation in this area, it is argued that this 'permissive structuralism' is sufficient and preferable to micro-management of content moderation via the application of states' positive obligations.

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1. Introduction

In the days following January 6th, 2021 – where supporters of the incumbent U.S. president Donald Trump had attempted to storm the U.S. Capitol to prevent the confirmation of his election loss – many social media platforms permanently banned Trump from using their services, citing threats to public safety.[1] While it was not in itself unusual that a social media platform removed content for inciting violence,[2] the removal of an incumbent world leader from the platforms which had arguably been his main mode of communication and the source of his rise to power showed the influence which these platforms wield in the modern information ecosystem.

A little more than a year later, the United States District Court of the Northern District of California ruled on a motion to dismiss a lawsuit brought by Trump against Twitter for banning his account.[3] Unsurprisingly to anyone with knowledge of U.S. constitutional law, the District Court rejected Trump's claim that the ban violated his freedom of expression under the U.S. Constitution, as there was no evidence of state involvement in the decision.[4]

Without commenting on the moral merits of the judgment, the judgment of the District Court is a poignant illustration of a central issue regarding human rights on the internet, namely that most civil and human rights regimes only recognize states as duty bearers, not private actors.[5] In response to this perceived indifference to market power, found both in constitutional and international

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[1] Sara Fischer and Ashley Gold, 'All the Platforms that have Banned or Restricted Trump So Far' (*Axios*, 11 January 2021) <https://www.axios.com/2021/01/09/platforms-social-media-ban-restrict-trump> last checked 24 May 2022.

[2] For a general overview of content moderation procedures and philosophies, see the seminal article by Kate Klonick, 'The New Governors: The People, Rules and Processes Governing Online Speech' (2018) 131 Harv L Rev 1598.

[3] *Trump v Twitter Inc*, No 21-cv-08378-JD, 2022 WL 1443233 (ND Cal, 6 May 2022).

[4] ibid *2 ff.

[5] The question of the human rights obligations of corporations has generally remained in the area of soft law. See UNHRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31.

law,[6] some have argued that the present form of international human rights law (IHRL) is insufficient and needs to be reshaped to, e.g., recognize corporations as duty bearers or at least to be more permissive of state intervention.[7]

The present article aims to investigate the merits of this proposed reorientation IHRL by analyzing the issue of freedom of forum vis-à-vis social media under the European Convention on Human Rights[8] (ECHR), in essence asking *whether the jurisprudence of the European Court of Human Rights (ECtHR) provides an effective legal basis for the protection of freedom of expression* – as a free-standing value – *in the area of social media content moderation.* I aim to answer this research question through an analysis of the ECtHR's case law, followed by a normative[9] discussion about whether the proposed reorientation of IHRL is necessary, at least concerning the ECHR regime. The choice of the ECtHR as the object of study is motivated by the fact that the ECtHR is the court which most often deals with issues of fine-tuning democracy,[10] under which the somewhat boutique issue of posting to social media certainly fits.

The article begins with a note on methodology when doing doctrinal analysis of ECtHR case law (2), followed by a brief description of the trends towards a

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[6] In a US constitutional context, see generally Jedediah Britton-Purdy and others, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' (2020) 129 Yale LJ 1784, 1806–13 (arguing that US constitutional law is blind to or even conducive to expansive market power). In an international law context, see, eg, Amy Kapczynski, 'The Right to Medicines in an Age of Neoliberalism' (2019) 10 Humanity 79 (summarizing both existing critiques and illustrating the issue vis-à-vis access to medicines).

[7] Barrie Sander, 'Democratic Disruption in the Age of Social Media: Between Marketized and Structural Conceptions of Human Rights Law' (2021) 32 EJIL 159, 162; Dafna Dror-Shpoliansky and Yuval Shany, 'It's the End of the (Offline) World as We Know It: From Human Rights to Digital Human Rights – A Proposed Typology' (2021) 32 EJIL 1249, 1269–70.

[8] European Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR).

[9] Normative in the sense of expressing a value judgment, not in the sense of expressing a legal rule.

[10] Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (2009) 9 HRL Rev 397, 407.

structural orientation of IHRL, or introduction of new duty bearers, in the literature (3). The article then describes the issue of content moderation and 'must carry'-obligations (4). It then addresses the issue of whether the ECHR mandates the introduction of 'must carry'-obligations for social media companies (5.1) or at least permits the introduction of such obligations by the national legislator (5.2) Based on the results of this analysis, the article discusses whether the proposed structural reorientation or introduction of new duty bearers in IHRL is necessary, at least in this particular area (6). The article then concludes.

2. A Note on Methodology

Doctrinal legal analysis is in essence a claim about what the state of the law is at any given time. This claim is usually based on what has been done in the past, assuming legal actors will do something similar in the future. However, when studying the jurisprudence of the ECtHR, one needs to be cognizant of the fact that the Court is not a static actor. It has stated that it will overturn its own case law if societal conditions change,[11] and both inside and outside observers often describe case law in terms of distinct periods of change, sometimes based on outside influence.[12] Thus, any proper doctrinal analysis of ECHR law must to some extent take account of the fact that the Court is a social actor, and that change might come from outside the sources of law, strictly defined.[13] The following will thus make claims about current law based not only on traditional legal sources such as judgments, but also broader institutional trends.

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[11] *Tyrer v UK* (1978) Series A no 26, para 31; *Christine Goodwin v UK* ECHR 2002-VI 1, para 74.

[12] Robert Spano, 'Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity' (2014) 14 HRL Rev 487; Mikael Rask Madsen, 'Rebalancing Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (2018) 9 JIDS 199; Peter Cumber and Tom Lewis, 'Blanket Bans, Subsidiarity, and the Procedural Turn of the European Court of Human Rights' (2019) 68 ICLQ 611.

[13] Jakob v H Holtermann and Mikael Rask Madsen, 'European New Legal Realism and International Law: How to Make International Law Intelligible' (2015) 28 LJIL 211, 228–29.

3. Background: Marketized IHRL, Content Moderation, and the Proposed Turn to Structural IHRL

Unlike the national jurisdictions which either recognize some form of horizontal application of civil and human rights provisions (*drittwirkung*)[14] or IHRL instruments which explicitly provide duties for persons or groups,[15] normally, the duty bearers of IHRL are states.[16] Thus, by definition, private actors cannot violate these IHRL treaties,[17] and complaints against private actors at their associated tribunals will be dismissed because of a lack of jurisdiction *ratione personae*.

The classic *negative* conception of human rights, whereby the only obligation of states is to not interfere with (or 'respect' to use modern parlance) the human rights of rights bearers,[18] does not leave a role for human rights in circumscribing private behavior, as it – by definition – is not relevant to a state's obligations. In fact, this historical conception might be seen as extremely *conducive* to private power, as most restrictions on private behavior will be considered restrictions of this negative right.

IHRL frameworks generally don't subscribe to this conception of human rights, as even negatively formulated human rights are seen to contain positive obligations, such as protecting against violations of the substance of those rights

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[14] See the sources cited in Olha Cherednychenko, 'Towards the Control of Private Acts by the European Court of Human Rights?' (2006) 13 MJ 195, 196, fns 3–4.

[15] African Charter of Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, arts 27–29.

[16] Eg, ECHR, arts 1, 33–34; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 2(1); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 2(1).

[17] It must be acknowledged that this is an oversimplification. Corporations can be held liable for violations of the *substance* of IHRL treaties through, eg, tort law, special compliance mechanisms or national codifications of soft law instruments like the UN Guiding Principles (n 5) into law.

[18] Whether this conception ever existed in its pure form can be disputed, Patrick Macklem, 'Human Rights in International Law: Three Generations or One?' (2015) 3 Lond Rev Int Law 61, 69, but is used here for the sake of simplicity.

by private actors or balancing conflicting rights against each other.[19] Despite this, the critique that IHRL is insufficiently responsive to market power because of a 'marketized' view of state intervention as suspect, remains.[20] In the area of content moderation on social media, this market power expresses itself through the market share of social media companies and the perceived need by actors in the information ecosystem to have a presence on their platforms.

On a more general level, the perception of IHRL as marketized has led some commentators to argue that IHRL needs to be reoriented toward a more 'structural' approach. That is, acknowledging non-state power imbalances as suspect and in turn approving of state intervention to remedy these.[21] For instance, Kapczynski argues that an individual-focused right to medicine that does not address the economic power held by pharmaceutical companies risks undermining health care planning.[22] Davidson argues that the movement to recognize domestic violence as torture is part of a reorientation of IHRL which 'draws on a structural understanding of power relations to provide a basis for legal intervention'.[23]

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[19] Cherednychenko (n 14) 201–02; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 73–76.

[20] Kapczynski (n 6); Sander, 'Democratic Disruption in the Age of Social Media' (n 7). Sander positions this conception explicitly in the area of social media: 'Marketized conceptions of [human rights law] are premised on the laissez-faire free market assumption that the primary aim of [human rights law] is to protect individual choice and agency against state intervention. Such conceptions tend to adhere to a form of abstract individualism that neglects power asymmetries between individual users and other actors that participate in the social media ecosystem and pays minimal attention to the systemic effects of state and platform practices on the social media environment as a whole.'

[21] Sander, 'Democratic Disruption in the Age of Social Media' (n 7), ie: '[S]tructural conceptions of [human rights law] are characterized by a greater openness to positive state intervention as a means of safeguarding public and collective values such as media pluralism and diversity. In addition, structural conceptions tend to adopt more systemic perspectives that strive to take into account imbalances of power in the social media ecosystem as well as the effects of state and platform practices on the social media environment as a whole.'

[22] Kapczynski (n 6).

[23] Natalie R Davidson, 'The Feminist Expansion of the Prohibition of Torture: Towards a Post-Liberal International Human Rights Law?' (2019) 52 Cornell Int'l LJ 109, 114.

In the area of internet policy, a similar development has taken place, with some commentators arguing that the traditional view of states as being the sole duty bearers under IHRL should be abandoned in favor of viewing technology companies as duty bearers as well.[24] However, this discourse has mostly stayed in the area of soft law, including the UN Guiding Principles and Corporate Responsibility frameworks.[25]

The question is whether these reorientations are necessary, or whether existing regimes can accommodate the more interventionist framework envisioned by these commentators. In the following, I will use the delimited area of content moderation on social media and free speech under the ECHR to see whether existing concepts in IHRL can accommodate issues related to market power.

4. The Issue in Brief

There are many issues related to content moderation – i.e., the removal or upkeep of user content – on social media platforms.[26] For instance, many governments and interest groups have focused on mandated removal of illegal content or harassment.[27] However, the reverse issue of ensuring that content stays on platforms has also been receiving attention,[28] and is the most relevant issue relating to free speech.

The legislative and policy discourse often centers around the issue of so-called 'must carry'-obligations, i.e., an obligation for a social media platform to host a

[24] Dror-Shpoliansky and Shany (n 7).

[25] See the sources cited in ibid 1255, fn 48.

[26] For a more general introduction to content moderation as a concept and its practice, see Klonick (n 2).

[27] A paradigmatic example is Germany's Network Enforcement Act: Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzdurchsetzunggesetz, NetzDG), and the EU TCO/TERREG Regulation: Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online [2021] OJ L172/79. See also the recent proposal for a 24-hour takedown obligation for any illegal content by the Danish government, which was ultimately withdrawn: FT 2021-22, tillæg A, L 146 som fremsat.

[28] On the EU level, see Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1.

piece of content whether it wants to or not.[28a] For instance, an extreme policy proposal has been that platforms should carry all content that is legal in a given jurisdiction, making social media platforms more akin to viewpoint neutral services like telephone companies.[29]

When a user has their content removed from a platform, the question is whether IHRL, in casu the ECHR, offers any mode of redress. This issue can be split into two sub-questions: First, does the ECHR *mandate* 'must carry'-obligations for social media platforms in certain situations? Second, if the former question is answered in the negative or only in a limited fashion, does the ECHR *permit* the introduction of 'must carry'-obligations by the national legislator?

The following section tries to answer the first question through an analysis of the main relevant precedent, *Appleby and Others v. UK*,[30] as well an analysis of the ECtHR's reticence to get into micromanagement of content moderation as shown in the case *Delfi AS v. Estonia* and its progeny.[31] It then attempts to answer the second question through an evaluation of ECtHR case law on compelled speech, property rights, as well as the 'procedural turn' that the ECtHR has taken in cases like *Animal Defenders International v. UK*.[32]

[28a] The term 'must carry' is borrowed from telecommunications law, where it refers to a carrier's obligation to carry certain types of content. For instance, Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Communications Code (Recast) [2018] OJ L321/36, art 114 on '"must carry" obligations' allows Member States to impose obligations to transmit 'specified radio and television broadcast channels and related complementary services' on telecommunications providers.

[29] For a critique of this approach, see Mike Masnick, 'Elon Musk Demonstrates How Little He Understands About Content Moderation' (*Techdirt*, 15 April 2022) <https://www.techdirt.com/2022/04/15/elon-musk-demonstrates-how-little-he-understands-about-content-moderation/> last checked 24 May 2022.

[30] *Appleby and Others v UK* ECHR 2003-VI 185.

[31] *Delfi AS v Estonia* ECHR 2015-II 319; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* (2016) 42 BHRC 52; *Pihl v Sweden* (2017) 64 EHRR SE20; *Høiness v Norway* (2019) 69 EHRR 19.

[32] *Animal Defenders International v UK* ECHR 2013-II 203.

5. Case Law Analysis

5.1 Positive Obligations: *Must* States Introduce 'Must Carry'-Obligations?

5.1.1 The Rights Implicated

As mentioned in pt. 4, most IHRL instruments, including the ECHR,[33] do not recognize non-state actors as duty bearers. Thus, any complaint *directly* toward a social media company filed at the ECtHR would be rejected as incompatible *ratione personae* with the Convention. The ECHR also does not directly apply horizontally in private relations (*drittwirkung*).[34]

However, as was also mentioned above, the ECtHR has interpreted the ECHR in such a way that the rights contained therein also entail positive obligations for contracting states.[35] Of relevance here is the obligation to strike a fair balance when the rights of private parties conflict. A paradigmatic example is the freedom of expression of the press weighed against the right of privacy of those subject to press coverage.[36]

There are two principal rights of the ECHR implicated in the issue of 'must carry'-obligations, which would have to be balanced under the doctrine of positive obligations:

Article 10 ECHR on freedom of expression is implicated in two ways. First, there's the freedom of expression for the user who wishes to express themselves on a platform. Second, there's the freedom of expression of the platform, who might wish to convey a certain message to users, such as not allowing violent or

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[33] ECHR arts 1, 33–34.

[34] DJ Harris and others, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (4th edn, OUP 2018) 26–27. However, the Convention might indirectly have an effect in horizontal relations when national courts interpret rules in private law to comply with the state's positive obligations. See, eg, the German courts' approach in *Von Hannover v. Germany (No 2)* ECHR 2012-I 351, paras 27–53, or the judgment of Rechtbank Amsterdam 18 August 2021, NJF 2021/384, NL:RBAMS:2021:4308, paras 4.9–4.11, which concerns removal of content from social media. However, as pointed out by Harris et al., this does not constitute *drittwirkung*.

[35] See n 19.

[36] Eg, *Von Hannover v Germany* ECHR 2004-VI 41; *Von Hannover (No 2)* (n 34) in toto; *Von Hannover v Germany (No 3)* App no 8772/10 (ECtHR, 19 September 2013).

hateful content, and therefore not wish to publish certain content. These two facets can somewhat reductively be referred to as the positive freedom of expression for the user and the negative freedom of expression of the platform.[37]

Article 1 of Protocol 1 (P1-1) of the ECHR[38] on the right to property is also implicated, as the platform's refusal to publish the content of the user, is an exercise of its property right, and any requirement that the platform publish content is a restriction hereof.

Thus, the issue of a person being denied access to broadcast their speech in any private forum, or conversely, mandating that the platform host their speech, becomes an exercise in balancing the involved parties' rights under articles 10 and P1-1. The paradigmatic example of this balancing is the 2003 case of *Appleby and Others v. UK*.

5.1.2 A High Bar for Freedom of Forum: *Appleby and Others v. UK*

The applicants in *Appleby* were a group of citizens living in the town of Washington in the UK. Although originally constructed by a governmental corporation, the town center of Washington, called 'the Galleries', had been sold to the company Postel, and thus most of the areas in the center of town were privately owned.[39]

In 1997, a construction permit was granted to a local college, allowing construction on an area known as 'the Arena', which was the only playing field available to the local community. The applicants were against this proposed development and wished to collect signatures to protest the permit.[40] Since the Galleries was the most trafficked area of town, they wanted to collect signatures there, but they were rebuffed by Postel, who refused to grant them permission to do so, despite other private groups having been allowed to promote their cause

[37] Not to be confused with positive and negative obligations.
[38] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1953, entered into force 18 May 1954) 213 UNTS 262 (Protocol 1) art 1.
[39] *Appleby* (n 30) paras 10–12.
[40] ibid, para 13.

previously.[41] Instead, they had to collect signatures on a much less trafficked public footpath further away.[42]

At the time, British common law conferred an 'unfettered' right of landowners to decide who was allowed on their property and for what purpose, meaning that Postel was acting entirely within its rights under domestic law.[43]

The applicants filed a complaint with the ECtHR under articles 10, 11 (freedom of assembly) and 13 (effective remedies), arguing both that the UK had violated its negative obligations under article 10 by transferring the public development to private ownership without ensuring some access for the public for the purposes of canvassing, and that the UK had violated its positive obligation to balance the freedom of the expression of the campaigners against the right to property of Postel in such a way as to ensure some sort of access for the purposes of canvassing.[44]

Conversely, the government argued that no negative obligation was engaged by the fact that they had transferred ownership to Postel prior to the company rejecting the applicants' wish to use the Galleries for canvassing. Additionally, the government argued that while there was a positive obligation to balance the rights of landowners against speakers, the fact that there was an excess of other avenues to engage the public meant that no violation arose.[45]

The Court rejected the applicants' argument regarding negative obligations, finding that the transfer of ownership to Postel did not engage any convention rights.[46] As regarded the question of positive obligations, the Court agreed with both parties that a positive obligation could arise in this area.[47] It found that the activity undertaken by the applicants concerned an essential public interest. However, it also found that freedom of expression was not unlimited and had to be balanced against countervailing rights.[48]

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[41] ibid, paras 14–17, 20.
[42] ibid, para 18.
[43] ibid, paras 22–23.
[44] ibid, paras 33–35.
[45] ibid, paras 36–38.
[46] ibid, para 41.
[47] ibid, para 39 citing Özgür Gündem *v Turkey* ECHR 2000-III 1, paras 42–46 and *Fuentes Bobo v Spain* (2001) 31 EHRR 50, para 38.
[48] *Appleby* (n 30) para 43.

Referring to comparative law materials from other jurisdictions, it concluded the following:

> [Article 10], notwithstanding the acknowledged importance of freedom of expression, *does not bestow any freedom of forum* for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property … *Where, however, the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise* for the State to protect the enjoyment of the Convention rights by regulating property rights. A corporate town where the entire municipality is controlled by a private body might be an example.[49]

Because the applicants had alternative avenues to pursue their interests, as evidenced by the fact that they ended up collecting 3,200 letters of support and their own admission that these avenues were at their disposal, the Court did not find that 'any effective exercise of freedom of expression' or 'the essence of the right' had been restricted and held that there had been no violation of the ECHR.[50]

As is evident from the Court's own pronouncements in the case, *Appleby* sets a high bar for when states may be obliged to mandate individuals get access to private property.[51] Unless 'any effective exercise' of freedom of expression is denied, or 'the essence of the right has been destroyed' no such obligation arises.

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[49] ibid, para 47 (emphasis added, internal citations omitted).

[50] ibid, paras 48–50. No violation of article 11 was found, referring to the same reasons (para 52). No violation of article 13 was found due to other circumstances not relevant for our purposes (paras 54–57).

[51] The issue of a platform's negative freedom of expression would presumably only strengthen this high bar and is thus not touched upon here. The article considers the issue in part 5.2.1.

Applying this standard to social media, the fact that any prospective applicant is free to, e.g., move to a different service or set up their own website, means that the obligation will virtually never be engaged. Given the importance the Court has given to internet access,[52] a complete boycott of a person by *all* platforms, internet service providers and internet infrastructure providers would most likely engage the obligation, but this scenario is so unlikely as to be academic.

This is consistent with the Court's view on access to traditional private media, where it has held that a state's positive obligations under article 10 do not entail that it provides unfettered access to private media except in situations where a legal or factual monopoly on media exists.[53]

5.1.3 Will the Court Embrace a More Expansive Approach to Freedom of Forum?

As it stands, the case law appears to not support any positive obligations of states to provide access to social media platforms or any other property except in the most extreme and unlikely cases. However, as mentioned in pt. 2, the Court is open to overturning its case law when societal conditions change. Given that public and policy discourse in recent years have centered around the outsized market power of these platforms, would the Court be willing to reconsider the *Appleby* threshold in the area of social media?

There are several reasons to believe that this would be unlikely. First, there's no indication in the Court's practice that *Appleby* is considered bad law. The passage on freedom of forum continues to be cited in newer cases,[54] albeit mostly

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[52] *Times Newspapers Ltd v UK (Nos 1 and 2)* ECHR 2009-I 377, para 27; *Ahmet Yıldırım v Turkey* ECHR 2012-VI 505, para 67; *Delfi AS* (n 31) paras 110, 133; *Cengiz and Others v Turkey* ECHR 2015-VIII 177, para 52; *Kalda v Estonia* (2016) 42 BHRC 145, para 52; *Jankovskis v Lithuania* App no 21575/08 (ECtHR, 17 January 2017) para 49.

[53] *Saliyev v Russia* App no 35016/03 (ECtHR, 21 October 2010) paras 52–53 and the authorities cited therein. Cf Aleksandra Kuczerawy, 'Does Twitter Trump Trump?' (*Verfassungsblog*, 29 January 2021) <https://verfassungsblog.de/twitter-trump-trump/> who perhaps deploys a more differentiated application of the freedom of forum doctrine.

[54] It should be noted that citations to case law might not always indicate that judges were guided by that case law, as the Court's registry is often responsible for drafting judgments

concerning access to non-public governmental premises.[55] Second, the Court's case law on intermediary liability shows that it might be reluctant to enter into micromanagement of internet policy:

In *Delfi AS v. Estonia*, the Court was seized by an online news portal (Delfi), who had been fined by the Estonian authorities, for not proactively removing comments on a news article which were of an antisemitic nature and contained death threats and incitements to violence.[56] Delfi argued that the standard of liability, which essentially mandated that Delfi actively monitor every single new comment left on its articles, was in violation of article 10.[57] Essentially the case turned on whether the state could require proactive monitoring, or whether a so-called 'notice and takedown'-system was sufficient.[58]

The court found that, *in casu*, it was not a violation of Estonia's negative obligations under article 10 to fine the company.[59] In subsequent commentary, Spano characterized the decision as having taken a stand between two opposing viewpoints on internet regulation: the 'no regulation'-approach promoted by certain technology activists and the total equivalency approach holding that liability etc. should be the same online as offline, concluding that the Court took somewhat of a middle ground.[60]

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and finding case law which supports the points made in a judgment. See William Hamilton Byrne, 'Legal Scholarship at Work: An Empirical Analysis of the Use of Theory in the Practice of International Courts and Tribunals' (University of Copenhagen 2020) 115. It might thus be more accurate to say that the precedent is still considered relevant by the Court as an institution.

[55] *Mariya Alekhina and Others v Russia* (2018) 68 EHRR 14, para 213; *Tuskia and Others v Georgia* App no 14237/07 (ECtHR, 11 October 2018) para 72; *Handzhiyski v Bulgaria* (2021) 73 EHRR 15, para 52; *Ekrem Can and Others v Turkey* App no 10613/10 (ECtHR, 8 March 2022) para 81.

[56] *Delfi AS* (n 31) paras 11–31.

[57] ibid, paras 66–67, 72–80.

[58] On the case generally, see Lisl Brunner, 'The Liability of an Online Intermediary for Third Party Content: The Watchdog Becomes the Monitor: Intermediary Liability after *Delfi v Estonia*' (2016) 16 HRL Rev 163; Robert Spano, 'Intermediary Liability for Online User Comments Under the European Convention on Human Rights' (2017) 17 HRL Rev 665.

[59] *Delfi AS* (n 31) paras 140 ff. See, in particular, paras 140, 159.

[60] Spano, 'Intermediary Liability for Online User Comments Under the European Convention on Human Rights' (n 58) 667.

However, taking a position on intermediary liability was not without effects.

First, the question arose of how severe anonymous comments needed to be to make intermediary liability permissible. Thus, in *Magyar Tartalomszolgáltatók Egyesülete*, the Court had to underscore that sanctioning a small website for comments that were simply 'vulgar' was not permissible.[61]

Second, now that the Court had held that it was *permissible* to apply intermediary liability in certain circumstances, the question inevitably rose of when it was *obligatory* to apply intermediary liability. In subsequent years, the Court was seized multiple times with this very question. In *Pihl*, the applicant complained that the authorities' refusal to sanction a web portal for an anonymous comment referring to him as a 'hash-junkie' was a violation of the states' positive obligations under article 8 (right to privacy),[62] and in *Høiness*, the applicant made the same argument concerning anonymous comments of a vulgar and sexist character.[63] In both cases, the Court had to reiterate the narrowing of *Delfi* in *Magyar Tartalomszolgáltatók Egyesülete* to hate speech and incitements to violence.[64]

Delfi and its progeny illustrate why the Court might be reluctant to liberalize the rules on freedom of forum and enter into case-by-case considerations of when a state must mandate user access to a platform. The current 'effective exercise'/'essence of the right' approach of *Appleby* provides a workable high bar akin to the hate speech/violence delimitation of *Delfi*, and it is unlikely that the Court would want to engage in a very fact-specific case-by-case evaluation of user access to platforms.

Given the combination of the current high bar set by *Appleby* and the likely reluctance of the Court to micromanage the question of social media access as evidenced by *Delfi*, it is my conclusion that no positive obligation to mandate user access to social media platforms exist, except in situations which must be

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[61] *Magyar Tartalomszolgáltatók Egyesülete* (n 31) paras 75–77, 91.

[62] *Pihl* (n 31) paras 2–16, 21.

[63] *Høiness* (n 31) paras 5–42, 48.

[64] *Pihl* (n 31) para 37; *Høiness* (n 31) para 69. The cases were also decided on other grounds, such as states living up to their procedural obligations and acting within their margin of appreciation.

considered purely hypothetical such as total boycotts of a user by all internet actors or a total monopoly on content distribution on the internet.

As an aside, it is worth noting that the *Delfi* line of case law is explicitly based on considerations of the freedom of expression of *platforms* balanced against the right to privacy of the subjects of anonymous comments.[64a] While there are traces of a general appreciation of the democratic potential of the internet in those cases,[64b] the rights of the users themselves were not really considered other than through *passim* references.[64c]

This could indicate that the positive aspect of article 10 is not engaged by private content moderation at all, or that any such engagement is so miniscule as to not be considered in weighing the rights of other parties in cases that tangentially touch upon it. However, I would caution against the former interpretation. *Appleby* is still considered good law, and thus it must be assumed that its principle of article 10 being principally engaged, but setting a high bar for its violation, is still applicable. Also, while it did not consider the rights of users directly, the Court has stated in *Standard Verlagsgesellschaft mbH v Austria (No 3)* – a case about unmasking of anonymous users – that the chilling effect on user speech must be considered when determining whether mandating an online platform reveal their identities violated the *platform's* rights under article 10.[64d]

While this case was likewise not about user rights directly, it shows that the Court is cognizant of the expressive rights of users themselves, and thus an interpretation that the positive aspect of article 10 is not – principally – engaged in cases of content moderation must be rejected. However, as concluded above, a violation would not be found in virtually all circumstances.

[64a] *Delfi AS* (n 31) para 118; *Magyar Tartalomszolgáltatók Egyesülete* (n 31) para 45; *Pihl* (n 31) para 29; *Høiness* (n 31) para 68.

[64b] In particular *Delfi AS* (n 31) para 110.

[64c] Eg ibid para 44, which concerns user anonymity, not freedom of expression.

[64d] *Standard Verlagsgesellschaft mbH v Austria (No 3)* App no 39378/15 (ECtHR, 7 December 2021) para 74.

5.2 Negative Obligations: *Can* States Introduce 'Must Carry'-Obligations?

5.2.1 Negative Freedom of Expression and Compelled Speech

As touched upon in pt. 5.1.1, a state mandating that users be allowed to distribute content via a social media platform restricts that platform's negative freedom of expression, i.e., the right to not be compelled to speak.

The issue of compelled speech[65] is most well-developed in U.S. constitutional law,[66] where compelled speech is seen as a restriction of freedom of speech and thus subject to constitutional scrutiny by the courts. Conversely, according to Harris et al., it remains underdeveloped in ECtHR case law.[67]

Before touching upon the issue of compelled speech in ECtHR case law, I want to address an argument having been made against seeing content moderation as a speech act under U.S. constitutional law, whose logic might be transferred to the ECtHR space.

Langvardt has argued that social media content policies and their application are not protected speech under the free speech provision in the U.S. Constitution.[68] He first argues *de lege ferenda*, that the speech rights of, e.g., Facebook is 'overbalanced many times over by the speech interests of its … users'.[69] He then argues *de lege lata*, that moderation decisions cannot be seen as protected speech, since that would mean that many determinations made by companies based on what they see as desirable, such as placement of offices, could also be seen as speech since they are expressive of company views.[70]

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[65] Because the term compelled speech is mostly associated with US law, the following switches between 'compelled speech' and 'negative freedom of expression' or 'negative freedom of speech' depending on context. It is referring to the same concept.

[66] *W Va State Bd of Ed v Barnette*, 319 US 624 (1943), on government mandated saluting of the national flag, is the genesis of the compelled speech doctrine.

[67] Harris and others (n 34) 595.

[68] Kyle Langvardt, 'Platform Speech Governance and the First Amendment: A User-Centered Approach' (2020) The Digital Contract: A Lawfare Paper Series, 4–10 <https://www.lawfareblog.com/platform-speech-governance-and-first-amendment-user-centered-approach> last checked 24 May 2022.

[69] ibid 5.

[70] ibid 7

Second, he argues that if Facebook (and presumably other social media) was a state actor, its moderation decisions would not be seen as government speech.[71]

The first argument is unconvincing, as content moderation is simply not like choosing a new office space or increasing employee wages:[72] Text and audiovisual messages are at the *core* of freedom of expression, and therefore the choice to host or not host them are as well.[72a] The argument might hold more merit regarding more ancillary decisions related to content, but not whether to allow it on a platform or not.

The second argument is also unconvincing, as it completely neglects that most free speech regimes treat government speech completely differently from private speech.[73] Therefore, arguments akin to the ones made by Langvardt must be discarded, and restrictions on content moderations must therefore be seen as principally engaging negative freedom of expression.

However, as mentioned, ECtHR practice on compelled speech is extremely limited.[74] Early Commission practice from the nineties appeared to acknowledge a protection against compelled speech in article 10. In the Commission report in *K v. Austria*, the Commission said that 'the right to freedom of expression by implication also guarantees a "negative right" not to be compelled to express

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[71] ibid 8–10.

[72] ibid 7.

[72a] Since the initial writing of this article, two rulings by US federal appeals courts have brought this issue to the fore. The federated states of Florida and Texas have enacted legislation restricting social media platforms' ability to moderate content. See Fla Stat §§ 106.072, 287.137, 501.2041; Tex Bus & Com Code §§ 120.001–151; Tex Civ Prac & Rem Code §§ 143A.001–08. In *Netchoice, LLC v Att'y Gen, Florida*, 34 F 4th 1196 (11th Cir 2022), the Florida law was found to partially violate platforms' right to freedom of speech. In *NetChoice LLC v Paxton*, 49 F 4th 439 (5th Cir 2022) – which has been widely criticized as inconsistent with precedent – no such violation was found. Parties in both cases are in the process of attempting an appeal to the Supreme Court.

[73] In the US, acts which would be considered speech if done by private actors could be seen as censorship, and in the ECHR system, government speech is not protected directly. The latter is not strictly due to the substantive aspect of article 10, but the fact that governmental entities cannot be victims under the Convention. See *Municipal Section of Antilly v France* ECHR 1999-VIII 435. A state actor might have success invoking the ECHR before national courts, however.

[74] '[C]ase law on the "negative" right protected under Article 10 is scarce.' *Gillberg v Sweden* (2012) 34 BHRC 247, para 85.

oneself' subject to the limitations in article 10(2).[75] However, the case was settled once it reached the Court.[76] In *Strohal v. Austria*, the Commission accepted the applicant's invocation of this negative right but found the restriction justified.[77]

The issue did not come to the fore again before 2012 in the case of *Gillberg v. Sweden*. The case concerned a professor of adolescent psychiatry who had conducted a research project on ADHD and DAMP over a period of 15 years. According to the applicant, he had promised participants that the study data would be kept confidential. Ten years after the study, two people wished to get access to the study materials, a request which was in the final instance granted by the administrative courts. However, the applicant refused to grant access to the locker where the files were stored, and they were ultimately destroyed by his colleagues. He was subsequently prosecuted and convicted for misuse of office.[78]

In deciding the question of whether the criminal prosecution violated article 10, the Court did not unequivocally affirm the Commission case law, but instead said that it 'does not rule out that a negative right to freedom of expression is protected under Article 10 of the Convention, but finds that this issue should be properly addressed in the circumstances of a given case.'[79] In the specific case, where the property rights belonged to the University where the study was conducted, and the people requesting access had a countervailing right to access public documents under article 10, no violation was found.[80]

A clearer affirmation of negative freedom of expression came four years later in *Semir Güzel v. Turkey*.[81] The case concerned a chairman of a meeting of a

[75] *K v Austria* App no 16002/90 (Commission Report, 13 October 1992) para 45. It should be noted that the issue of negative freedom of expression had been touched upon in the area of refusing to give evidence before this, but the argument was rejected. *Ezelin v France* (1991) Series A no 202, para 33.
[76] *K v Austria* (1993) Series A no 255-B.
[77] *Strohal v Austria* App no 20871/92 (Commission Decision, 7 April 1994) 'The Law', para 2.
[78] *Gillberg* (n 74) paras 9–38.
[79] ibid, para 86.
[80] ibid, paras 85–94.
[81] *Semir Güzel v Turkey* App no 29483/09 (ECtHR, 13 September 2016).

political party who was sanctioned for not interfering when participants in the meeting started speaking in Kurdish.[82]

In *Semir Güzel* the Court explicitly affirmed that 'the Convention organs have … considered that the right to freedom of expression by implication also guarantees a "negative right" not to be compelled to express oneself.'[83] However, it also qualified the assessment by stating that 'in deciding whether a certain act or form of conduct falls within the ambit of Article 10 of the Convention, an assessment must be made of the *nature of the act or conduct in question*, in particular of *its expressive character* seen from an objective point of view, as well as of the *purpose or the intention* of the person performing the act or engaging in the conduct in question.'[84] *In casu*, the Court found that the decision by the chairman not to intervene could be seen as expressive, and that article 10 was therefore engaged.[85]

In light of the above, it appears that article 10 does entail a negative freedom of expression, but that any refusal to speak (or in this case host content) must have some sort of expressive purpose. One might ask whether the automatic nature of most of the content removal on social media platforms lives up to this requirement.[86] However, I would argue that, if it can be substantiated that a removal is motivated by normative values regarding content,[87] such as not wanting to host violent, abusive or sexual content, even if it's legal, a content moderation decision can still be seen as expressive.

In conclusion, introducing 'must carry'-obligations regarding content which social media flatforms find disagreeable will – at least in some cases – constitute a restriction of the right to negative freedom of expression under article 10. Because of the sparse case law on negative freedom of expression, it is difficult to make an isolated assessment of the factors involved in determining whether any

[82] ibid, paras 7–8.
[83] ibid, para 27 (internal citations omitted).
[84] ibid, para 28.
[85] ibid, para 29.
[86] At this point it should be acknowledged that a different, less platform-friendly reading of the Court's holding in *Semir Güzel* than the one I advance below could support Langvardt's first argument. See the text accompanying n 70.
[87] According to Klonick, platforms are guided by normative values when moderating speech. Klonick (n 2) 1618–22.

restriction would be deemed permissible under article 10(2). However, most of the considerations advanced below in pt. 5.2.2 regarding article P1-1, would likely apply to article 10(2) as well, albeit with a stricter proportionality assessment. A final analysis is conducted in pt. 5.2.3.

5.2.2 Property Rights

As evidenced by the Court's holding regarding public access to private property in *Appleby*, it seems safe to assume that a 'must carry'-restriction would constitute a restriction of platforms' property rights under article P1-1.

Article P1-1 contains three limbs concerning state intervention in property rights.[88] States might expropriate property ('deprived of his possessions'[89]) or 'control the use of property' in accordance with the general interest or for tax purposes.[90] State conduct which falls short of these restrictions might still constitute restrictions on peaceful enjoyment of property.[91] However, expropriation and control of use of property also constitute restrictions on peaceful use.[92]

Mandating that third parties should be allowed access to, and use of private property falls under the limb of control of the use of property. Analogies can be drawn to protected tenancy schemes, which also limit property owners' ability to refuse access to their property.[93]

Despite nominally containing different standards for the permissiveness of restrictions, in practice, all article P1-1 restrictions are subjected to a fair balance test.[94] However, the weighing of factors in the balancing test varies depending on what type of restriction is referred to.[95] In addition to the fair balance test, control of property must pursue a legitimate aim and be lawful – both in the

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[88] *Sporrong and Lönnroth v Sweden* (1982) Series A no 52, para 61.
[89] Protocol 1, art 1, 1st paragraph, 2nd sentence.
[90] ibid, art 1, 2nd paragraph.
[91] ibid, art 1, 1st paragraph, 1st sentence. It follows from *Sporrong and Lönnroth* that recourse to restriction of peaceful enjoyment as a ground of restriction is subsidiary to the other two. Harris and others (n 34) 863.
[92] *James and Others v UK* (1986) Series A no 123, para 37.
[93] *Statileo v Croatia* App no 12027/10 (ECtHR, 10 July 2014) para 117.
[94] Harris and others (n 34) 863–64.
[95] ibid 864–65.

sense of having a formal legal basis and living up to standards of accessibility, precision and foreseeability.[96]

As regards the question of a legitimate aim, it is not difficult to imagine various grounds for introducing a 'must carry'-obligation, at least for larger platforms. Considerations of promoting robust public debate,[97] ensuring a plurality of views[98] or – in certain cases – reducing monopoly-like effects,[99] would all satisfy the criteria of a legitimate aim. According to Harris et al., the Court does not subject the invoked legitimate aim to strict scrutiny,[100] and thus, if the aim is sincere, it would most likely satisfy the requirements of article P1-1.

As regards the question of legality, it is difficult to say anything in the abstract. However, it is clear that when identifying *who* legislation applies to, and *what* obligations are incumbent on them, recourse to broad terms like 'social media platform', 'large market share', 'dominant' and 'due regard for freedom of expression' etc., runs the risk of falling afoul of the precision and foreseeability requirement. While the ECHR's quality of law-requirement is not a requirement of absolute certainty,[101] more specific definitions of what a platform is, how large a market share it must have, as well as its obligations under the law, improves the chance of the law living up to the requirement of legality.

Finally, there is the question of a fair balance. States are generally given a wide margin of appreciation in this area, and the principal argument for a measure being in violation of article P1-1 is whether an applicant bears an 'individual and excessive burden'.[102] This leads to two principal considerations:

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[96] ibid 865–69. This conception of legality is sometimes referred to as quality of law.

[97] The interest of promoting public debate runs through the totality of article 10 case law. See, eg, in the area of freedom of information, *Társaság a Szabadságjogokért v Hungary* (2009) 53 EHRR 3, para 27; *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v Austria* (2013) 36 BHRC 697, para 36.

[98] *Melnychuk v Ukraine* ECHR 2005-IX 397, 406. See also, *mutatis mutandis*, *Manole and Others v Moldova* ECHR 2009-IV 213, para 100.

[99] *Mutatis mutandis*, *Manole and Others* (n 98) paras 98–99; *Centro Europa 7 SRL and Di Stefano v Italy* ECHR 2012-III 339, para 134.

[100] Harris and others (n 34) 866 citing *Ambruosi v Italy* (2000) 35 EHRR 125, para 28.

[101] *Sunday Times v UK* (1979) Series A no 30, para 49.

[102] Harris and others (n 34) 863 citing *Sporrong and Lönnroth* (n 88) para 73.

First, it is likely that a blanket 'must carry'-obligation for all social media platforms regardless of their size, governance structure or thematic scope, would be seen as excessively burdensome in some cases. For example, if a law viewed a small volunteer-run community with 500 users as covered by the law, it would be burdensome to introduce stringent limits on moderation considering the limited economic and personal resources available to that community. Similarly, such an obligation for a community with very explicit thematic delimitations – not just general conduct guidelines – for instance a platform dedicated only to discussion of a certain TV-show, would be disproportionate seeing as there is a limited need under the legitimate aims listed above to interfere with them.

Second, it is likely that very stringent requirements, such as carrying all legal content, would be disproportionate, as this would virtually take away all agency given to a platform, which would go above what legitimate aims of monopoly controls and furthering public debate can justify, and also not facilitate furthering of public debate or similar, as it would risk creating a hostile environment. In this context, it is worth noting that content which is not illegal under domestic law can still engage obligations under the Convention.[103]

In conclusion, while the requirements of legality and legitimate aim should be easy to satisfy, any law introducing 'must carry'-obligations must be sufficiently and clearly delimited to be in accordance with article P1-1. Namely, the law must be limited to market actors of a certain size, and probably also thematic breadth, and any requirements made of the platforms must be circumscribed by the legitimate aims, and thus a total prohibition on removing legal content would be excessive.

However, the question remains of what the limits of these required delimitations are.

[103] See *Beizaras v Lithuania* (2020) 71 EHRR 28, where hateful anti-LGBT internet comments which were deemed not to be illegal by a national prosecutor still engaged the positive obligations of the state under article 8.

5.2.3 The Proportionality Assessment, Margin of Appreciation, and the 'Procedural Turn'

Pt. 5.2.2 gave a broad overview of what article P1-1, and most likely article 10(2), requires of any law mandating 'must carry'-obligations. However, as with most assessments of proportionality under the ECHR, it is difficult to say anything more specific about where the ECtHR would draw the line.[104]

In this context, it is worth looking at the broader institutional developments at the ECtHR in recent years. It has been argued by commentators that, from the first half of the 2010's forward, the ECtHR has been willing to give a larger margin of appreciation to states in situations where it is evident that the national decision-maker has conducted a loyal and thorough weighing of all relevant human rights considerations related to the decision (the 'procedural turn').[105] This applies both to decisions in concrete cases,[106] and the legislative process.[107]

This development is evidenced by the Court's judgment in *Animal Defenders v. UK*, which concerned a blanket ban on political advertising. The applicant contended that such a ban was a violation of article 10, with reference to the Court's judgment in *VgT Verein gegen Tierfabriken v. Switzerland*, which had found a similar Swiss ban to be in violation of the Convention.[108] However, in *Animal Defenders*, the Court found that, despite the fact that the margin of appreciation was – in principle – narrow due to the fact that the restriction concerned political debate, due regard had to be given to the fact that both the UK legislator and the UK courts had carefully considered the implications of *VgT* and why – in their view – the UK rule was Convention compliant. Taking this into account, and because there was no European consensus on the question,

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[104] Jonas Christoffersen, 'Menneskerettens proportionalitetsprincip' [2015] UfR 115, 116 and the sources cited in fns 8–9.

[105] Spano, 'Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity' (n 12) 497–99; Mikael Rask Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79 LCP 141, 171; Cumber and Lewis (n 12) 611–12 and the sources cited in fn 1.

[106] *Savran v Denmark* App no 57467/15 (ECtHR, 7 December 2021) para 189.

[107] *Animal Defenders* (n 32) paras 108–10, 113–16.

[108] *VgT Verein gegen Tierfabriken v. Switzerland* ECHR 2001-VI 243.

the Court found that the prohibition on political advertising was not in violation of the Convention.[109]

What *Animal Defenders* and subsequent case law shows, is that when the national legislator performs a thorough, reasoned, and loyal assessment of the human rights implications of legislation, and the Courts do the same, the relevant law will be subject to less strict scrutiny in Strasbourg.

Thus, considering the previous sections, it is likely that any *well-reasoned* delimitation of a 'must carry'-obligation, which is sufficiently precise, limits itself to somewhat large market players and does not introduce a total prohibition on taking down legal content, would survive scrutiny by the Court.[110]

6. Is a 'Structural Turn' or New Duty Bearers Necessary in the Area of Content Moderation?

To sum up the preceding sections, the ECHR does not *require* that states introduce 'must carry'-obligations for social media companies, but it probably *allows* for such obligations to be introduced by the national legislator, provided that they are sufficiently circumscribed. With this in mind, is a further 'structural turn' or the addition of new duty bearers necessary in this area?[111]

This of course largely depends on how one sees the desirability of state intervention in this area. The present article does not take a stand on whether introducing 'must carry'-obligations is a good idea,[112] but assumes that a proponent of a structural approach to IHRL might think so.

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[109] *Animal Defenders* (n 32) paras 102–25.

[110] In the same direction, Sander, 'Democratic Disruption in the Age of Social Media' (n 7) 168–69.

[111] To avoid wordiness, the following simply refers to the structural turn as encompassing both.

[112] There are cogent normative arguments against such an obligation. See, eg, concerning an obligation to host all legal content, Masnick (n 29); Berin Szoka and Ari Cohn, 'Musk, Twitter, Why The First Amendment Can't Resolve Content Moderation (Part I)' (*Techdirt*, 4 May 2022) <https://www.techdirt.com/2022/05/04/musk-twitter-why-the-first-amendment-cant-resolve-content-moderation-part-i/> last checked 24 May 2022. However, as Facebook's own practice shows, it is possible to use IHRL as a guiding

With this viewpoint in mind, is it sufficient that the ECHR *allows* for intervention in this area, or should European human rights law proactively take into account market power and mandate such intervention or view social media companies as duty bearers?[113] The normative priors for this question will most likely be influenced by whether one considers states to be sufficiently proactive within the space left to them by the ECtHR.

One perception, which could be labeled the 'proactive structural turn', views the allowance of state intervention by IHRL as insufficient, as the rules of IHRL should themselves proactively regulate market power. While not a full-throated example of this, Kapczynski's argument that IHRL should take into account the market power of pharmaceutical companies approaches this direction.[114]

Another perception, which could be labeled the 'permissive structural turn', views the allowance of state permission as sufficient, as it is then up to states to introduce the regulation, they deem necessary. This is essentially the approach of the ECtHR in *Animal Defenders* and thus the status quo.

The proactive structural turn seems attractive at first glance. After all, introducing what is essentially a continent-spanning minimum regulatory rule – either as a positive obligation or as directly applying to social media companies – through IHRL, could be a powerful counterweight against the influence of large tech companies. However, I would argue that the permissive structural turn is preferable.

My view is informed by the same considerations which I argued would make the Court reticent to extend the freedom of forum doctrine.[115] Essentially, human rights are designed to be minimum standards, and in their practical

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principle for content moderation decisions. See, most recently at the time of writing, Case decision 2021-016-FB-FBR (Oversight Board, 1 February 2022) pt 4 <https://oversightboard.com/decision/FB-P9PR9RSA/> last checked 24 May 2022. But see Barrie Sander, 'Freedom of Expression in the Age of Online Platforms: The Promise and Pitfalls of a Human Rights-Based Approach to Content Moderation' (2020) 43 Fordham Int'l LJ 939, 968 ff.

[113] In essence, whether the space between the proverbial floor and ceiling of the ECHR needs to be narrower than it is. Federico Fabbrini, *Fundamental Rights in Europe* (OUP 2014) 37–38.

[114] Kapczynski (n 6).

[115] See pt 5.1.3.

application by the ECtHR, it has been acknowledged that states need a certain room for maneuver in their implementation. A detailed regulation of content moderation via positive obligations would essentially entail the ECtHR becoming more akin to a court like the Court of Justice of the European Union, which interprets regular legislation concerning content providers. This is not the role envisioned for the ECtHR, and the ECHR is a poor instrument on which to base such detailed regulations.

A secondary consideration is that there might very well be many ways of implementing 'must carry'-obligations with various benefits and drawbacks, and which take into account local interests. Superseding these by introducing a rigid 'must carry'-obligation via positive obligations would prevent potential constructive developments in this area. I realize that this is an argument to subsidiarity, which might not convince opponents of the procedural turn in the Court's case law. It is also akin to the 'laboratories of democracy' concept from U.S. constitutional law,[116] which has been criticized for leading to a regulatory race to the bottom in some contexts.[117] However, I do not believe the latter criticism is justified, considering that a European consensus seems to be emerging in favor of regulating tech giants. Additionally, harmonization can be achieved in other ways than directly through human rights treaties, which the EU Digital Services Act shows.[118]

Thus, in my view, the ECHR – through its permissive view of government intervention in this area – sufficiently addresses the concern of proponents of the structural turn in IHRL. It is, in fact, quite structuralist already. However, the present article only investigates a small part of IHRL and should not be taken as saying that a more structural approach to IHRL in other areas, such as the one proposed by Kapzcynski, is not warranted.

7. Conclusion

In this article, I wished to investigate the merits of a proposed structural reorientation of IHRL by analyzing the issue of freedom of forum vis-à-vis social

[116] *New State Ice Co v Liebmann*, 285 US 262, 311 (1932).
[117] *Liggett Co v Lee*, 288 US 517, 559 (1933) (Brandeis J, dissenting).
[118] Reg (EU) 2022/2065 (n 28).

media under the ECHR, by asking whether the ECtHR provides an effective legal basis for the protection of freedom of expression in the area of social media content moderation. Through my analysis of ECtHR case law, I found that current case law does not support a positive obligation to introduce 'must carry'-obligations except in exceptional circumstances, and that it is unlikely that this case law will change. However, my analysis of the case law on negative freedom of expression, property rights, and the 'procedural turn' of the ECtHR led to a conclusion that states are free to introduce 'must carry'-obligations (within certain limits), should they wish to do so. I argued that ECHR law – at least as it stands in this limited area – is sufficiently structuralist already, in that it largely allows states to intervene against social media market power in the way they see fit.

Thus, the answer to the research question posed at the beginning must be that the ECtHR *does* provide an effective legal basis for the protection of freedom of expression in the area of social media content moderation, so long as states utilize the room for maneuver given to them.