Online Communication and States' Positive Obligations: Towards Comprehensive European Human Rights Protection

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Abstract This chapter analyses the impact of the Internet and the shift in communication processes on the States' obligations emerging from the European Convention on Human Rights (ECHR). It claims that the environment created by the Internet is different from the traditional one; that is, it substantially empowers a range of private actors such as social media and other Internet platforms. That is why in the light of the actual development of the ECHR's standards, both the strict distinction between positive and negative State's obligations, and an overall preference for the latter are anachronistic. This chapter claims that it is crucial to keep developing European minimal safeguards in horizontal online relations when human rights violation is a result of a State's non-compliance with the positive duty. Against this backdrop, this chapter centers around the influence of the Internet on the exercise and protection of selected human rights and the changing nature of communication processes, as well as the game-changing shift caused by the growing power of private actors. It also includes a detailed analysis of the scope and content of positive State's obligations emerging from the use of the Internet, focusing on substantive obligations (i.e., the legal framework and the allocation of responsibilities), as well as on the issue of the public guarantees for online pluralism and procedural obligations (the duty to provide responses to allegations concerning online ill-treatment inflicted by private individuals).

I. Introduction

The traditional and long-established interpretation of international human rights laws is based on the non-interference principle, which means that such instruments as the European Convention on Human Rights (ECHR or Convention) oblige public authorities primarily to abstain from interfering with the free exercise of the rights (negative obligations).[1] Moreover, human rights were primarily conceived to protect individuals against intrusive and arbitrary acts of the State. That is why it is claimed that private actors are generally not directly bound by international human rights law, which is effective predominantly in vertical relations.[2]

1 Cf. Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge: Cambridge University Press 2019), 108.

2 Cf. Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd edn, Oxford: Oxford University Press 2014), 119–135.

Against this backdrop, the idea of this chapter is to demonstrate that due to the impact of the Internet and the shift in communication processes, both the strict distinction between positive and negative obligations, and an overall preference for the latter are anachronistic. The environment created by the Internet is different from the traditional one, i.e., it empowers a range of private actors such as social media and other Internet platforms. That is why – primarily where substantial inequalities between individuals appear – it is not enough for the States to comply only with the obligation to abstain from interfering. Accordingly, the main argument of this chapter is that it is crucial to keep developing European minimal standards of protection in horizontal online relations, when human rights violation is a result of a state's non-compliance with the positive obligation.

The key issue of this analysis is to define and develop the scope and content of these obligations, primarily referring to the online communication processes. As the existing body of literature provides a comprehensive theory of positive obligations under the Convention,[3] there is no need to keep asking if the state's positive obligations exist. Instead, we should focus on expanding them in different horizontal spheres in order to achieve more comprehensive European human rights protection. The Convention must undoubtedly be interpreted and applied in a manner that renders its safeguards practical and effective, not theoretical and illusory.[4]

With regard to the latter, this chapter sets out – in section II – to analyse the influence of the Internet on the exercise and protection of human rights and the changing nature of communication processes. Special attention will be drawn to the freedom of expression (Article 10 ECHR) and the right to respect for private and family life (Article 8 ECHR). In this analysis, some references are also made to the right to free elections (Article 3 of Protocol No. 1 to ECHR, P1–3). Section III seeks to present the game-changing shift caused by the growing power of private actors. Finally, section IV is dedicated to the issue of scope and content of positive

3 See e.g. Laurens Lavrysen, *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Cambridge-Antwerp-Portland: Intersentia 2016) and Malu Beijer, *Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations* (Cambridge-Antwerp-Portland: Intersentia 2017). Accordingly, the existence of the positive obligations under the Convention should be taken for granted, meaning that its detailed theoretical justification is not necessary.

4 ECtHR (Grand Chamber), *Mihalache v. Romania*, judgment of 8 July 2019, no. 54012/10, para. 91.

obligations emerging from the use of the Internet. It focuses on substantive obligations (i.e., the legal framework and the allocation of responsibilities), as well as on the issue of the public guarantees for online pluralism and procedural obligations (the duty to provide responses to allegations concerning online ill-treatment inflicted by private individuals).

II. Online Media and Changing Communication Processes

The new technologies, including online communication, can undermine the effectiveness of long-established public law instruments for human rights protection.[5] One of the reasons for their inadequacy is that exercising fundamental rights online is substantially different than in traditional social reality. In this regard, one of the most affected spheres is the communication process, where the constant creation of new online media and communication techniques is to be observed. They obviously have a positive impact on human rights (e.g., as far as political participation, access to information, debate on public issues, freedom of conducting business and education are concerned).[6] As noted by the European Court of Human Rights (ECtHR or Court), the Internet constitutes one of the essential foundations for a democratic society, and one of the basic conditions for its progress and for each individual's self-fulfilment.[7]

Before moving on to the detailed analysis, the definition of online media should be specified. As indicated in the legal scholarship, this concept encompasses diverse entities and a wide range of actors.[8] Primarily, it includes blogs, social media networks and video-sharing portals that

5 Cf. Jan van Dijk, *The Network Society. Social Aspects of New Media* (2nd edn, Thousand Oaks, CA: SAGE Publications 2006), 128; Molly Land, 'Toward an International Law of the Internet,' Harv. Int'l L.J. 54 (2013), 393–459 (456); Katharina Kaesling, 'Privatising Law Enforcement in Social Networks: A Comparative Model Analysis,' Erasmus Law Journal 11(3) (2018), 151–164 (153).

6 See e.g. ECtHR, *Kalda v. Estonia*, judgment of 19 January 2016, no. 17429/10; see also ECtHR, *Mehmet Reşit Arslan and Orhan Bingöl v. Turkey*, judgment of 18 June 2019, nos 47121/06, 13988/07 and 34750/07 and ECtHR, *Times Newspapers Ltd (nos. 1 and 2) v. the United Kingdom*, judgment of 10 March, nos 20093002/03 and 23676/03.

7 ECtHR (Grand Chamber), *Stoll v. Switzerland*, judgment of 10 December 2007, no. 69698/01, para. 101.

8 Cf. András Koltay, *New Media and Freedom of Expression: Rethinking the Constitutional Foundations of the Public Sphere* (Oxford-London-New York-New Delhi-Sydney: Hart Publishing 2019), 23 and 82; Emily B. Laidlaw, *Regulating Speech in*

provide platforms for their users to upload publicly available content and share it with others. It also concerns news portals which enable users to publicly comment on its content. All these actors are also called gatekeepers, traditionally understood as persons or entities whose activity is necessary for publishing the opinion of another person or entity. The latter, together with the notion of Internet platforms, is used interchangeably in this chapter.

It should be noted right at the outset that the very nature of online media enables their unlawful use.[9] A wide range of private actors may employ them for the purposes of societal fragmentation, polarization, discrimination and political disinformation.[10] Echo chambers and information cocoons are being created, causing like-minded people to speak only among themselves.[11] AI-driven systems are able to detect individual preferences, entailing that the user is no longer confronted with information of various types. It is thus not surprising that false stories easily enter the public domain and have the appearance of legitimacy. Similarly, online communication makes it easier to attack the integrity of the electoral process and the candidate's reputation and can undermine electoral equality. The phenomenon of online disinformation (sometimes denominated as 'fake news'[12]) with regard to elections seems to be one of the most important challenges for policy-makers, courts, and legal scholars.[13]

Modern communication processes have become more open and partially anonymous. Every day millions of Internet users post online comments, and many of them express themselves in ways that might be regarded as

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Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility (Cambridge: Cambridge University Press 2015).

9 The fact that the Internet can be used for illegal purposes does not mean that arbitrary and disproportionate public measures are possible. In the recent ECtHR's case-law an interesting comparison was made, when the Court stated that suppressing information about the technologies for accessing information online on the grounds they may incidentally facilitate access to extremist material is no different from seeking to restrict access to printers and photocopiers because they can be used for reproducing such material, ECtHR, *Engels v. Russia*, judgment of 23 June 2020, no. 61919/16, para. 30.

10 Siva Vaidhyanathan, *Antisocial Media: How Facebook Disconnects Us and Undermines Democracy* (New York: Oxford University Press 2018).

11 Cass R. Sunstein, *#Republic: Divided Democracy in the Age of Social Media* (Princeton: Princeton University Press 2017), 13–16.

12 ECtHR, *Brzeziński v. Poland*, judgment of 25 July 2019, no. 47542/07, paras 35 and 55.

13 Adam Krzywoń, 'Summary Judicial Proceedings as a Measure for Electoral Disinformation. Defining the European Standard,' 22(4) GLJ (2021), 673–688 (676).

offensive and malicious.[14] These factors affect the exercise and protection both of the right to privacy (reputation, Article 8 ECHR) and freedom of expression (Article 10 ECHR). Defamatory and other types of clearly unlawful speech can be disseminated as never before, worldwide, in a matter of seconds, and sometimes remain persistently available online.[15] Similarly, the issue of online anonymity is crucial as far as the mentioned rights are concerned, since it provides a certain sense of safety when expressing views and ideas. The opportunity to remain anonymous has inspired users to express opinions – on both public or private matters – who previously, perhaps being afraid of the consequences, had remained silent.[16] However, while being one of the fundamental values for the functioning of the Internet, anonymity, together with the lack of accountability and interpersonal social control, can foster online aggression.[17]

The ECtHR seems to be partially conscious that Internet-based communication involves structural differences not present in traditional media, and this has an important impact on the Convention rights. According to the Court, some aspects of the Internet as a platform for the exercise of freedom of expression – such as the potential for user-generated expressive activity – are unprecedented.[18] Posting a comment on a freely accessible popular Internet portal or blog has a very powerful effect nowadays.[19] In the Court's opinion, the same applies to the comments on somebody's Facebook profile.[20] The Court also emphasises also that an individual is confronted with vast quantities of information circulating via online

14 ECtHR, *Tamiz v. the United Kingdom*, decision of 19 September 2017, no. 3877/14, para. 80.

15 ECtHR (Grand Chamber), *Delfi AS v. Estonia*, judgment of 16 June 2015, 64569/09, para. 110.

16 Koltay (n. 8), 14.

17 András Sajó and Clare Ryan, 'Judicial reasoning and new technologies. Framing, newness, fundamental rights and the internet' in: Oreste Pollicino and Graziella Romeo (eds), *The Internet and Constitutional Law. The protection of fundamental rights and constitutional adjudication in Europe* (London-New York: Routledge 2016), 3–25 (20).

18 ECtHR, *Akdeniz v. Turkey*, decision of 11 March 2014, no. 20877/10, para. 24; ECtHR (Grand Chamber), *Ahmet Yildirim v. Turkey*, judgment of 18 March 2013, no. 3111/10, para. 54 and ECtHR, *Delfi AS* (n. 15), para. 110.

19 ECtHR, *Fatullayev v. Azerbaijan*, judgment of 22 April 2010, no. 40984/07, para. 95.

20 ECtHR, *Beizaras and Levickas v. Lithuania*, judgment of 14 January 2020, no. 41288/15, para. 127. The ECtHR has also analysed the weight of the 'like' button and its role in online communication, see ECtHR, *Melike v. Turkey*, judgment of 15 July 2021, no. 35786/19, para. 51.

media, which involves an ever-growing number of players.[21] Once connected, Internet users may no longer enjoy effective protection of their privacy in some spheres, as they expose themselves to unwanted messages, images and information.[22] Similarly, a person who runs a blog presenting his/her political views, willingly exposing himself/herself to public scrutiny, should be more tolerant towards criticism and interference with their private life.[23]

With regard to the latter, the Court emphasizes that the Convention principles governing traditional media cannot be automatically applied to online media due to the different kinds of risks they pose. As indicated in the case-law, 'the Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information. The electronic network […] is not and potentially will never be subject to the same regulations and control. The risk of harm posed by content and communications on the Internet to the […] human rights and freedoms […] is certainly higher than that posed by the press.'[24] That is why the scope of 'duties and responsibilities' concerning the individual exercise of the freedom of expression (Article 10(2) ECHR) depends – among other things – on the potential impact of the medium.[25]

Against this backdrop, the main argument following from this part is that the changing nature of the communication processes and the emergence of the online media require the adoption of a more proactive approach towards Convention guarantees of privacy, freedom of expression and the right to free elections. Such a conclusion corresponds well with the established understanding of the Convention as a living instrument, which must be interpreted in the light of present-day conditions, so as

21 ECtHR, *Stoll* (n. 7), para. 104.
22 ECtHR, *Muscio v. Italy*, decision of 13 November 2007, no. 31358/03.
23 ECtHR, *Balaskas v. Greece*, judgment of 5 November 2020, no. 73087/17, paras 48–50.
24 ECtHR, *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, judgment of 5 May 2011, no. 33014/05, para. 63. See also ECtHR, *Węgrzynowski and Smolczewski v. Poland*, judgment of 16 July 2013, no. 33846/07, para. 58 and *Arnarson v. Iceland*, judgment of 13 June 2017, no. 58781/13, para. 37.
25 ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, judgment of 2 February 2016, no. 22947/13, para. 56.

to reflect the increasingly high standard required in the sphere of human rights protection.[26]

III. Private Governance Systems and Fair Balance Between Private Actors on the Internet

Although the international human rights protection system was initially created to protect individuals from unlawful acts of public authorities (i.e. the State), the privatization of some public tasks and functions, and the problem of the horizontal application of human rights, are not new issues.[27] It is commonly argued that States may breach their international human rights obligations where they fail to take appropriate steps to prevent, investigate, punish and redress a private actor's abuse.[28] Also, the Court claims that genuine, effective exercise of human rights may require positive measures of protection, even in the sphere of relations between individuals.[29]

The Convention system provides the 'prohibition of abuse of rights' clause (Article 17 ECHR), which expressly lists States, groups and persons whose actions may jeopardize Convention rights or limit them beyond the permitted extent. This is clear evidence of the fact that already in 1950, there existed the conviction that human rights can be used by an individual to attack another person. It has therefore become a truism that States are not the only agents responsible for violations. Nonetheless, in the context of the Internet, this affirmation seems even more complex since the online environment creates a field for the variety of conflicts between private actors. Some of them (i.e., gatekeepers) are not only able

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26 See e.g. ECtHR (Grand Chamber), *Demir and Baykara v. Turkey*, judgment of 12 November 2008, no. 34503/97, para. 146 and ECtHR (Grand Chamber), *Öcalan v. Turkey*, judgment of 12 May 2005, no. 46221/99, para. 163.

27 See e.g. Mark Tushnet, 'The issue of state action/horizontal effect in comparative constitutional law,' I.CON 1 (2003), 79–98 and John H. Knox, 'Horizontal Human Rights Law,' AJIL 102 (2008), 1–47.

28 See e.g. Rikke Frank Jørgensen, 'When private actors govern human rights' in: Ben Wagner, Matthias C. Kettemann and Kilian Vieth (eds), *Research Handbook on Human Rights and Digital Technology. Global Politics, Law and International Relations* (Cheltenham-Northampton: Edward Elgar Publishing 2019), 346–362 (349).

29 See e.g. ECtHR, *Özgür Gündem v. Turkey*, judgment of 16 March 2000, no. 23144/93, para. 43 and *Herbai v. Hungary*, judgment of 5 November 2019, no. 11608/15, para. 36–38.

to threaten other individual rights but are also accountable for solving conflicts between individual rights that occur online. Those private actors are likewise responsible for the enforcement of some online rights and freedoms.[30] As a consequence, public authorities are obliged to increasingly rely on Internet platforms and scrutinize their actions.[31]

Against this backdrop, the category of 'new governors' is emerging.[32] Online media are seen not only as companies that conduct their business based on the shift in communication but also as entities that exercise powers similar to public authorities. They cannot be treated as mere intermediaries and facilitators of the speech of others, since they have become active political actors and holders of considerable power for shaping opinion.[33] Important evidence of this privatization of governance, also reflecting an aspiration to interpret and apply fundamental rights, is the creation of a series of documents (e.g. terms of use, terms of service) which are characterized by their constitutional nature and attempt to function as bills of rights, coordinated with a progressive institutionalization of the platforms.[34] Private companies have therefore become arbiters and engineers of free speech, and one of the most important sources of news and information. They control the flow of information and set binding rules for the end-users. In this environment, the exercise of political and civil rights – such as freedom of expression, the right to respect for private life and the right to free elections – cannot be explained in terms of 'limited government.'[35]

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30 E.g. the right to be forgotten, see Giovanni De Gregorio, 'From Constitutional Freedoms to the Power of the Platforms: Protecting Fundamental Rights Online in the Algorithmic Society,' European Journal of Legal Studies 11 (2019), 65–103 (69).

31 Oreste Pollicino, Giovanni De Gregorio and Laura Somaini, 'Europe at the Crossroad: The Regulatory Conundrum to Face the Raise and Amplification of False Content in Internet' in: Giuliana Ziccardi Capaldo (ed.), *The Global Community Yearbook of International Law and Jurisprudence 2019* (Oxford: Oxford University Press 2020), 319–356 (320).

32 Kate Klonick, 'The New Governors: The People, Rules, And Processes Governing Online Speech,' Harv. L. Rev. 131 (2018), 1598–1670.

33 Natali Helberger, 'The Political Powers of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power,' Digital Journalism 6 (2020), 842–854; David Kaye, *Speech Police: The Global Struggle to Govern the Internet* (New York: Columbia Global Reports 2019), 19.

34 Cf Rory Van Loo, 'Federal Rules on Platform Procedure,' U. Chi. L. Rev 88 (2021), 829–895 (866).

35 Kai Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press 2012), 31.

In this context, the necessity of broadening the scope of long-established legal concepts is being raised as an issue, since it seems doubtful that the traditional interpretation of certain human rights categories is fit-for-purpose in the modern digital world. This shift should respond to the mentioned emergence of online non-state intermediary social forces.[36] One of the most important tools that can be used to legitimize their power and balance horizontal relations is the language of human rights.[37] It provides the universal set of values that both the State and – especially if holding some kind of power – private entities should respect, protect and promote. These processes are already visible on the national (constitutional) level. The best example is the recent German case-law on the horizontal application of fundamental rights by the platforms. The latter have a legal obligation to consider users' fundamental rights and avoid any arbitrary acts.[38]

Obviously, as some scholars claim, almost every conflict in the private sphere can be described in terms of a clash between different fundamental rights, and it can potentially lead to the extension of constitutional (human rights) obligations to every private relationship.[39] Nonetheless, in order to avoid the latter state of affairs, some additional criteria could be adopted. First, public intervention in horizontal relations should primarily take place when these relations are characterized by a lack of balance between private entities, which is common as far as the Internet is concerned. Second, as the Convention does not create the possibility to present an application against private actors[40], it is precisely the concept of positive obligations that could be an effective remedy. One of the crucial responsibilities of the public authorities is, therefore, the establishment of a fair

36 Gunther Teubner, 'Horizontal Effects of Constitutional Rights in the Internet: A Legal Case on the Digital Constitution,' The Italian Law Journal 3 (2017), 193–205 (193).

37 Nicolas P. Suzor, *Lawless: The Secret Rules That Govern Our Digital Lives* (Cambridge: Cambridge University Press 2019), 169–170.

38 Federal Court of Justice, *III ZR 179/20*, judgment of 29 July 2021 and *III ZR 192/20*, judgment of 29 July 2021. See also Matthias C. Kettemann and Torben Klausa, 'Regulating Online Speech: Ze German Way' (Lawfare Blog, 20 September 2021, available at: https://www.lawfareblog.com/regulating-online-speech-ze-german-way).

39 De Gregorio (n. 30), 100.

40 The application to the ECtHR must be 'verticalized,' see Claire Loven, "Verticalized' cases before the European Court of Human Rights unravelled: An analysis of their characteristics and the Court's approach to them,' NQHR 38 (2020), 246–263.

balance (e.g., by creating a legal framework, ensuring political and social pluralism, and providing an adequate response to allegations) between the conflicting rights of private actors on the Internet. Thanks to the latter, an individual can insist on the State's international responsibility when he/she is able to prove that a violation inflicted by other individuals is a result of the State's non-compliance with a positive obligation.

IV. Horizontal Positive Obligations and the Internet

1. General Remarks

Horizontal positive obligations, as indicated in recent studies, govern relations between private persons.[41] They are typically triangular, since they are invoked by individuals against State to oblige its authorities to intervene in horizontal relations. The responsibility of the State exists because of the link between private ill-treatment and the failure to comply with the positive obligation. Horizontal positive obligations can be of a substantive or procedural nature, depending on whether they oblige public authorities to put in place a legislative and administrative framework to effectively protect human rights against threats inflicted by private individuals, or to provide adequate and effective responses to the allegations concerning violations committed by private parties.

In the case of online communication, the nature of the relations is even more complex, and the triangular model seems to be insufficient for describing them adequately. First of all, there can indeed be a conflict between an individual (Internet user) and a gatekeeper (i.e., online media, Internet platform). In this situation, the public authorities are legitimized and obliged to intervene in order to prevent the latter from abusing its position and infringing individual rights. Secondly, it is possible that one person attacks another (e.g., incitement to violence or comments undermining someone's reputation), using the services provided by a platform. In this scenario, in the light of the Convention, the State may also be obliged to intervene in those multi-actor relations. Moreover, making the situation even more complex, the Internet creates an environment where some violations can be attributed to automatic systems, such as bots and Artificial

41 Lavrysen (n. 3), 78–79.

Intelligence.[42] The impact of the individual infringement does not depend entirely on human actions; for example, Internet search engines are able to amplify the scope of the interference that results from the acts of third parties.[43]

The most common critique of the State's positive obligations is based on the argument that its further development would cause a considerable financial burden for the public authorities. For this reason, the ECtHR emphasises that under the Convention, positive obligations should be interpreted in such a way that they do not impose excessive (impossible or disproportionate) costs on the State.[44] Moreover, in determining the scope and nature of positive obligations, the factor of knowledge turns out to be crucial. The responsibility of the State for compliance with its positive obligations is based on the foreseeability on the part of the State of an actual or potential harm.[45]

With regard to the latter, two arguments should be highlighted. First of all, the positive obligation to provide a necessary balance between conflicting rights on the Internet does not necessarily entail high (excessive) costs. Unlike some other rights (e.g., social rights), these obligations usually do not impose direct financial transfers on behalf of the State. Public authorities do not have to create a new public system (i.e., infrastructure) or mechanism of redistribution of income and wealth. They can employ the instruments already created and being used by the private actors or oblige them to apply their own instruments according to certain rules (e.g., notice-and-take-down system).[46] In the case of online human rights conflicts, it is primarily a matter of organizing some processes and balan-

42 Natali Helberger, Sarah Eskens, Max van Drunen, Mariella Bastian and Judith Moeller, 'Implications of AI-driven tools in the media for freedom of expression,' Background Paper to the Ministerial Conference Artificial Intelligence – Intelligent Politics, Challenges and opportunities for media and democracy, Cyprus, 28–19 May 2020 (Council of Europe 2020), 11. See also: Ronald K.L. Collins and David M. Skover, *Robotica. Speech Rights and Artificial Intelligence* (Cambridge: Cambridge University Press 2018).

43 ECtHR, *M.L. and W.W. v. Germany*, judgment of 28 June 2018, nos 60798/10 and 65599/10, para. 97.

44 ECtHR (Grand Chamber), *O'Keefee v. Ireland*, judgment of 28 January 2014, no. 35810/09, para. 144 and ECtHR (Grand Chamber), *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)*, judgment of 30 June 2009, no. 32772/02, para. 81.

45 Lavrysen (n. 3), 131–137.

46 Cf. Giancarlo F. Frosio, 'The Death of 'No Monitoring Obligations': A Story of Untameable Monsters,' Journal of Intellectual Property, Information Technology and Electronic Commerce Law 8 (2017), 199–215 (208).

cing individual rights. Secondly, as far as the criterion of knowledge is concerned, there is absolutely no doubt that modern governments are fully conscious of the multiple possibilities of illegal use of the Internet and the harmful effects it can cause to freedom of expression, the right to respect for private life and the right to free elections.[47] Public authorities are also able to easily foresee which are the exact aspects of online communication processes that require intervention in the first place.

Apart from that, there is another type of limit of the State's positive obligations under the Convention. It cannot be expected that human rights are never affected, especially when online communication is so intense and complex. For this reason, in the light of the ECHR, public authorities do not have a duty to introduce absolute guarantees. In the majority of cases, there is no obligation with regard to results, but there are obligations with regard to the measures to be taken.[48] Similarly, States are allowed a margin of appreciation in complying with positive obligations. The reason – as in a negative obligation scenario – is that national authorities are sometimes in a better position to strike a fair balance between competing private interests.[49]

Finally, it has to be emphasized that the State's obligation to ensure the individual's freedom of expression (Article 10 ECHR) does not give private citizens or organisations an unfettered right of access to the media in order to put forward opinions.[50] Similarly, the Convention does not establish a freedom of forum.[51] The latter substantially limits the scope of the State's positive obligations concerning online communication, since an individual is not legitimized to claim the right to use a particular space – especially private – in order to express an opinion. However, when the ban on access to the property (other private space or forum) 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

47 The Court stated that already in 1999 public authorities should have been conscious of the fact that the anonymous character of the Internet can foster its use for criminal purposes, see ECtHR, *K.U. v. Finland*, judgment of 2 December 2008, no. 2872/02, para. 48.

48 ECtHR, *Frumkin v. Russia*, judgment of 5 January 2016, no. 74568/12, para. 36.

49 Lavrysen (n. 3), 194.

50 ECtHR, *Murphy v. Ireland*, judgment of 10 July 2003, no. 44179/98, para. 61 and *Saliyev v. Russia*, judgment of 21 October 2010, no. 35016/03, para. 52.

51 ECtHR, *Appleby and others v. the United Kingdom*, judgment of 6 March 2003, no. 44306/98, para. 47.

of the Convention rights by regulating property rights.[52] Applying these arguments to online platforms, it can be claimed that public authorities are legitimized to limit their discretion in order to provide a fair balance between rights and freedoms. It does not automatically imply that there is a possibility to introduce a law prohibiting the removal or moderation by social media of lawful content, which is at the same time contrary to their community standards (internal rules). From the Convention standpoint, public authorities do not have such a far-reaching positive obligation, and national law, which obliges the platforms to host the content they do not want to host, may amount to the violation of Article 10 ECHR.

2. *Substantive Obligations and Effective Allocation of Responsibility in Online Communication*

After having analysed the changing nature of communication and the emergence of powerful online media, we can now move on to the issue of the nature and content of the State's positive obligations. As mentioned before, there are two types of positive obligations concerning horizontal relations: substantive and procedural. In this section, attention will be drawn only to the substantive ones, while the procedural obligations constitute the subject of the following section. Nonetheless, since it is sometimes difficult to distinguish between the substance and procedure, some references to the latter will also be made in this part.

Substantive positive duties oblige public authorities to apply *ad hoc* measures or to create a legal framework.[53] The latter should be put in place when *ad hoc* responses are insufficient to provide effective human rights protection.[54] As far as online communication is concerned – as already explained – the complexity of horizontal relations and the lack of balance between multiple actors make *ad hoc* measures rather inadequate. Moreover, reducing substantive positive obligations to *ad hoc* responses may imply that dealing with human rights conflicts depends on the discre-

52 ECtHR, *Khurshid Mustafa and Tarzibachi v. Sweden*, judgment of 16 December 2008, no. 23883/06, *Berladir and others v. Russia*, judgment of 10 July 2012, no. 34202/06, para. 58 and *Remuszko v. Poland*, judgment of 17 July 2013, no. 1562/10, para. 79.

53 ECtHR, *Köpke v. Germany*, decision of 5 October 2010, no. 420/07.

54 Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (London-New York: Routledge 2012), 107.

tionary powers of the State. It creates the risk of unequal treatment and discrimination and often the necessity of judicial intervention.

In the context of online communication, the obligation to adopt a regulatory framework turns out to be of fundamental importance under the Convention. The task of national law-makers is to reconcile various individual claims.[55] The most common horizontal conflicts appear between the freedom of expression (Article 10 ECHR) and the protection of privacy (Article 8 ECHR). As indicated, online media and communication techniques facilitate verbal attacks on reputation and other personal rights. Freedom of expression can also be (ab)used in order to disseminate false electoral information, infringing the guarantees of free elections (P1–1).

Against this backdrop, the most important challenge for the legislative framework is the effective allocation of responsibility in online communication.[56] In other words, under the Convention, national legislative bodies have a positive obligation to create a legal framework in order to decide who is responsible for the expressions that infringe individual (Article 8 ECHR) and/or collective rights (P1–1), and under which circumstances. First of all, the national authorities have at their disposal traditional enforcement instruments such as criminal responsibility.[57] Nonetheless, introducing domestic legal provisions criminalising online conduct which violates the Convention right of another person may be insufficient and ineffective, as evidenced by the penalization of dissemination of electoral disinformation. This common form of law enforcement exists in almost every European country,[58] but is no longer operative towards the massive spreading of false electoral information online.[59] The legal framework for the allocation of responsibility must therefore be more detailed and sophisticated, reflecting the complexity of online communication.

It is, however, possible to indicate certain situations when criminalization of acts of online expression is inevitable and in the light of the Convention constitutes a basic State's positive obligation. The Court has

55 ECtHR, *K.U.* (n. 47), para. 49.

56 For the notion of allocation of responsibility see Stefan Somers, *The European Convention on Human Rights as an Instrument of Tort Law* (Cambridge-Antwerp-Portland: Intersentia 2018), 29.

57 Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford-London-New York-New Delhi-Sydney: Hart Publishing 2004), 225.

58 OSCE, The Representative on Freedom of the Media, *International Standards and Comparative Approaches to Countering Disinformation in the Context of Freedom of the Media* (OSCE 2020), 27–42.

59 Krzywoń (n. 13), 685.

noted that a criminal law response is appropriate in cases concerning incitement to commit acts of violence against others (incitement to hatred and hate speech).[60] It has even gone further, pointing out that criminal law measures constitute a positive obligation and are required under the Convention with respect to direct verbal assaults and physical threats motivated by discriminatory attitudes.[61] Where acts that constitute serious offences are directed against a person's physical or mental integrity, only efficient criminal law mechanisms can ensure effective protection and serve as a deterrent.[62] All these arguments are obviously fully adequate as far as infringements inflicted by individuals who take place in online communication are concerned. The penalization of such acts is necessary, as online incitement to violence, hatred, and discrimination can be very harmful. Under the Convention, public authorities are therefore obliged to take positive actions when the volume and seriousness of online attacks on human rights (e.g., privacy or reputation) can cause individual harm.[63] Nonetheless, even a simple online comment and the lack of effective public prosecution can lead to the State's international responsibility. As the recent case-law shows, the posting of a single hateful comment on someone's Facebook account, suggesting that he/she should be 'killed,' was sufficient to be taken seriously.[64] In these circumstances, expecting that victims will exhaust other national remedies, including civil law measures, may turn out to be manifestly unreasonable, since public authorities should act proactively and apply criminal law provisions in order to protect Internet users against personal attacks.[65]

More recently, the ECtHR has also examined the issue of the responsibility for the statements published by third parties on the 'wall' of publicly accessible Facebook accounts. The Court accepted the criminal conviction of the account's owner (politician) for incitement to hatred or violence, following his failure to take prompt action in deleting hate speech con-

60 ECtHR, *Belkacem v. Belgium*, decision of 27 June 2017, no. 34367/14 and ECtHR, *Delfi AS* (n. 15), paras 153 and 159.

61 ECtHR, *R.B. v. Hungary*, judgment of 12 April 2016, no. 64602/12, paras. 80 and 84–85; ECtHR, *Király and Dömötör v. Hungary*, judgment of 17 January 2017, no. 10851/13, para. 76 and ECtHR, *Alković v. Montenegro*, judgment of 5 December 2017, no. 66895/10, paras 65 and 69.

62 ECtHR, *Identoba and Others v. Georgia*, judgment of 12 May 2015, no. 73235/12, para. 86 and ECtHR, *M.C. v. Bulgaria*, judgment of 4 December 2003, no. 39272/98, para. 150.

63 ECtHR, *Delfi AS* (n. 15), para. 137.

64 ECtHR, *Beizaras and Levickas* (n. 20), para. 127.

65 ECtHR, *Beizaras and Levickas* (n. 20), para. 128.

tent.[66] The lack of vigilance and responsiveness in relation to the comments posted by others may therefore justify such intrusive measures as criminal responsibility, especially if the unlawful speech is publicly accessible for a long time. This judgement demonstrates that national authorities may comply with a part of their positive obligations under the Convention by holding responsible the account's owner who seriously neglects to monitor the content of the 'wall.'

With regard to the latter, the challenge for public authorities consists of an inadequate configuration of the criminal responsibility, primarily its personal scope and nature of sanctions, as well as its appropriate application (procedural aspect). As one of the main challenges both for the law-makers and courts in this respect is the definition of the online hate speech, the Court recently tried to present its conceptual understanding. It indicated a variation of possible thresholds: from the gravest forms excluded from the protection to 'less grave' ones which do not fall entirely outside of Article 10 ECHR but are subject to important restrictions.[67] National authorities should therefore be aware of different ways that hatred can be incited online. They must adopt the view that hate speech does not necessarily entail a call for an act of violence or other criminal acts. On the one hand, online attacks on persons committed by insulting, holding up to ridicule, slandering, publicly mocking and denigrating specific groups of the population (e.g., on the basis of sexual orientation) can be sufficient to allege non-compliance with positive obligations.[68]

On the other hand, the Court seems to be conscious of the vulgarization of online communication. A lot of statements which in common traditional discourse are undoubtedly considered as offensive, when expressed online, constitute little more than 'vulgar abuse.' For the ECtHR, this reflects the character of the communication on many Internet portals.[69] In other cases, the Court noted that the clearly offensive and shocking language used in a blog post (e.g., calling for police officers to be killed)

66 ECtHR, *Sanchez v. France*, judgment of 2 September 2021, no. 45581/15, paras 90 and 100.

67 ECtHR, *Vejdeland and Others v. Sweden*, judgment of 9 February 2012, no. 1813/07, para. 55 and ECtHR, *Beizaras and Levickas* (n. 20), para. 125. There is also some margin of appreciation related to the national historical experience. The latter can be a weighty factor to be taken into account when determining the online use of some symbols, see ECtHR, *Nix V. Germany*, decision of 13 March 2018, no. 35285/16.

68 ECtHR, *Carl Jóhann Lilliendahl v. Iceland*, decision of 12 May 2020, no. 29297/18.

69 ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt* (n. 25), para. 77 and ECtHR, *Tamiz* (n. 14), para. 81.

does not justify interference with the freedom of expression, since the national courts never looked at how many people had actually read the blog.[70]

As has already been mentioned, the simple criminalization of some sorts of online behaviors is not sufficient to comply with the positive obligations under Article 8 and Article 10 ECHR. The current Convention standard entails not only the obligation to criminalize and prosecute certain online behaviors, but a duty to elaborate a system that deals with two specific aspects of liability of the Internet platforms: liability for their own acts of delegated power, and liability for user-generated content. It has to be borne in mind that in both cases, the complexity of online communication requires detailed consideration of the roles, capacities, knowledge and incentives of the different stakeholders (online media, users and public institutions). In other words, it seems that in a digital world, allocating the responsibility to a single central actor would not lead to the necessary balance between all the parties.[71]

The first aspect concerns the issue of delegating power to gatekeepers and holding them liable. In order to effectively protect human rights in horizontal online relations, public authorities often transfer some tasks and obligations to private actors. The crucial element of this model is the accountability of the latter for their governance. This doctrine has been presented in the ECtHR's case-law concerning the organization of the labour market, but it perfectly matches the online communication environment. The Court noted that delegating the power to legislate, or regulate, important issues to independent organisations acting on that market, requires, in the light of the Convention, that these organisations are held accountable for their activities.[72]

As a consequence, public authorities, who – in the first instance – are not obliged to solve individual conflicts, should actively monitor how these private actors (Internet platforms) deal with horizontal infringements caused by users' activity. From the Convention standpoint, when some

70 ECtHR, *Savva Terentyev v. Russia*, judgment of 28 August 2018, no. 10692/09, para. 79.

71 Natali Helberger, Jo Pierson and Thomas Poell, 'Governing Online Platforms: From Contested to Cooperative Responsibility,' The Information Society 34 (2018), 1–14.

72 ECtHR, *Evaldsson and Others v. Sweden*, judgment of 13 February 2007, no. 75252/01, para. 63. See also ECtHR, *Muscio* (n. 22), where the Court indicated that an Internet provider operates under the terms of agreement with the State and under its supervision and can be held liable for damages.

irregularities are detected, there should be a public response. The latter is a common pattern in the 'notice-and-take-down' systems, as evidenced, for example, by the German law.[73] When a user alleges a horizontal violation, the gatekeeper should immediately and effectively deal with it. At the same time, through a system of financial responsibility, the State supervises how the platform resolves this horizontal conflict.

The second aspect consists in deciding when and under which conditions Internet platforms can be held liable for user-generated content that threatens the rights and freedoms of third-parties. This positive obligation to establish a legal framework requires balancing different rights and interests and considering various circumstances and threats. As indicated in the legal scholarship, when the State holds one private party, A, liable for the speech of another private party, B, and A has the power to block, censor, or otherwise control B's access to free speech, the phenomenon of 'collateral censorship' can occur.[74]

Important principles ruling the liability of Internet platforms for the user-generated content have been presented in the Court's case-law. The ECtHR has confirmed that imposing a liability on the news portals for some categories of offensive (anonymous) comments posted by its users can be an adequate way of protecting the human rights of others, especially in cases concerning incitement to violence and hate speech.[75] Public authorities should therefore oblige the platforms to monitor and remove clearly unlawful comments without delay, even without notice from the alleged victim or third parties. However, the imposition of this liability is justified and proportionate only when users post 'extreme comments' in reaction to an article published on a professionally managed and commercial portal. As the Court sees it, this doctrine does not automatically concern 'other

73 Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz -NetzDG); the Network Enforcement Act of 1 September 2017), available at: https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/BGBl_NetzDG.pdf; see Thomas Wischmeyer, 'What is illegal offline is also illegal online – The German Network Enforcement Act 2017' in: Bilyana Petkova and Tuomas Ojanen (eds), *Fundamental Rights Protection Online. The Future Regulation of Intermediaries* (Cheltenham-Northampton: Edward Elgar Publishing 2020), 28–55.

74 Jack M. Balkin, 'Free Speech is a Triangle,' Colum. L. Rev. 118 (2018), 2011–2056 (2019).

75 ECtHR, *Delfi AS* (n. 15), para. 162. See also János Tamás Papp, 'Liability for Third-Party Comments before the European Court of Human Rights – Comparing the Estonian Delfi and the Hungarian Index-MTE Decisions,' Hungarian Yearbook of International Law and European Law 4 (2016), 315–326.

fora on the Internet' (e.g., a discussion forum, a social media platform, a private person running a blog).

While developing this model in further cases, the Court in principle confirmed the possibility of holding Internet platforms liable, but also established some limits. It indicated that objective liability for allowing unfiltered comments – that might be illegal – may sometimes imply 'excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet' (Article 10 ECHR).[76] Moreover, the Court took into consideration the fact that this particular case concerned offensive comments that did not constitute hate speech or direct threats against individuals, and that the gatekeeper had taken important preventive measures.[77] Similarly, the Court excluded the Internet platform's liability in the case of hyperlinking the defamatory content.[78] In further cases, examined from the perspective of the victim of the alleged horizontal violation, the Court emphasized that the limited liability of the gatekeepers (Internet platforms and blog operators) does not violate Article 8 ECHR when the impugned comments do not amount to hate speech or incitement to violence.[79] The size of the platform and time factor (how long the comments remain accessible online) are also important.[80]

The lack of a specific legal framework for dealing with the issue of the liability of gatekeepers for the third-party acts (comments) necessitates the use of traditional civil law instruments. It entails an unnecessary burden for the aggravated party, can lead to the negative phenomenon of libel tourism,[81] and in some cases, to the deprivation of any judicial protection. As evidenced by one of the cases, the ECtHR accepts that refusing to pursue a civil claim against the owner of the platform (Google Inc., which provided a blog-publishing service where some defamatory comments concerning the applicant were published) falls within the national margin of apprecia-

76 ECtHR, *Magyar Tartalomszolgáltatók Egyesülete & Index.hu Zrt* (n. 25), para. 82.
77 ECtHR, *Magyar Tartalomszolgáltatók Egyesülete & Index.hu Zrt* (n. 25), para. 64, see also ECtHR, *Jezior v. Poland*, judgment of 4 June 2020, no. 31955/11, para. 56.
78 ECtHR, *Magyar Jeti Zrt v. Hungary*, judgment of 4 December 2018, no. 11257/16.
79 ECtHR, *Høiness v. Norway*, judgment of 19 March 2019, no. 43624/14, para. 69.
80 ECtHR, *Rolf Anders Daniel Pihl v. Sweden*, decision of 7 February 2017, no. 74742/14, paras 25 and 31–35; a comment did not amount to hate speech or an incitement to violence; it had been posted on a small blog run by a non-profit association; it was taken down the day after the applicant made a complaint; and it had only been on the blog for around nine days.
81 See e.g., Trevor C. Hartley, 'Libel Tourism and Conflict of Laws,' ICLQ 59 (2010), 25–38.

tion.[82] Due to the transnational nature of the claims, the Court agreed with the argument of the national authorities, namely that the damage and any eventual vindication would be minimal, and that the costs of the exercise would be out of all proportion to what would be achieved.

Concluding this section, it is necessary to emphasize that the system that provides a simple exemption from liability, even when the Internet platforms play a passive role, is not sustainable from the Convention standpoint. National authorities, therefore, have a positive obligation to create a legal framework and properly enforce it (the procedural aspect, discussed below). It is necessary to decide when these gatekeepers are liable for third-party acts (comments) and what the limits of such liability are.[83] The lack of balance in these horizontal relations (between multinational private entities and individual users) and the anonymity of the online communication entail that it is insufficient for the aggravated party to have access only to traditional civil law instruments. The crucial issues are defining the personal scope of the liability[84] and identifying the preventive measures that platforms could adopt to detect potentially illegal content. With regard to the latter, the national authorities should ensure that all the procedures are not designed in a manner that incentivises the takedown of legal content (e.g., due to inappropriately short timeframes). Moreover, the legal framework should satisfy the quality requirement, since one of the positive obligations under the Convention is to create foreseeable law.[85] Due to the constant development of online communication techniques, States are also obliged to provide a periodical assessment of the adequacy of such laws and address any gaps.

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82 ECtHR, *Tamiz* (n. 14), para. 90.

83 The existence or non-existence of moderation, and its prior or ex post nature can have important implications for the establishment of the liability, see Koltay (n. 8), 204.

84 As indicated by the ECtHR, *Delfi AS* (n. 15), para. 115, the liability concerns 'professionally managed and commercial' portals, although a question is being raised if this doctrine may be also applied to other types of hybrid intermediaries that host user comments, including professionally managed career sites or widely read blogs that are affiliated with commercial institutions, see Lisl Brunner, 'The Liability of an Online Intermediary for Third Party Content. The Watchdog Becomes the Monitor: Intermediary Liability after Delfi v Estonia,' HRLR 16 (2016), 163–174.

85 ECtHR, *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, judgment of 7 June 2012, no. 38433/09, para. 156.

3. The State as a Guarantor of Online Pluralism

A specific sphere of positive substantive obligations concerning online communication is related to the role of the State as a guarantor of pluralism. The essence of democracy – the only political model contemplated by the Convention[86] – is to allow diverse political programs to be proposed, disseminated and debated, even those that call into question the way a State is currently organized. The democratic order can be threatened if a single voice within the media, with the power to propagate a single political viewpoint, becomes too dominant. As a consequence, public authorities have, in addition to their negative duty of non-interference, a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism.[87] This refers to both political pluralism and the pluralistic society; in these spheres – rather than relying on the mere absence of State regulation – policy intervention should ensure that a plausible framework exists.[88]

The responsibility of the public authorities as to the ultimate 'guarantor of pluralism' is recognized both under Article 10 ECHR and P1–3. With regard to the latter, the adoption of positive measures, which ensure a favourable environment for participation in public debates, is of fundamental importance.[89] It concerns allowing all persons to express their opinions, ideas and political viewpoints without fear.[90] Moreover, as indicated in recent studies, there is no doubt that substantive political equality can be a basis for positive free speech rights, with an ideal of equal distribution to communicative resources.[91] Public intervention should take place, especially in order to open up the media to different viewpoints.[92] Under

86 ECtHR, *Refah Partisi (the Welfare Party) and Others v. Turkey*, judgment of 13 February 2003, nos 41340/98, 41342/98, 41343/98 and 41344/98, para. 86.
87 ECtHR, *Centro Europa 7 S.R.L. and Di Stefano* (n. 85), para. 134.
88 Thomas Gibbons, 'Providing a Platform for Speech: Possible Duties and Responsibilities' in: Andrew T. Kenyon and Andrew Scott (eds), *Positive Free Speech: Rationales, Methods and Implications* (Oxford-London-New York-New Delhi-Sydney: Hart Publishing 2020), 11–23 (19).
89 ECtHR, *Dink v. Turkey*, judgment of 14 September 2010, nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, para. 137.
90 ECtHR, *Khadija Ismayilova v. Azerbaijan*, judgment of 10 January 2019, no. 65286/13 and 57270/14, para. 158.
91 Jacob Rowbottom, 'Positive Protection for Speech and Substantive Political Equality' in: Kenyon and Scott (eds) (n. 88), 25–41 (26).
92 ECtHR, *Communist Party of Russia and Others v. Russia*, judgment of 19 June 2012, no. 29400/05, paras 125–128.

Article 10 ECHR, not only the freedom of the press to inform the public is guaranteed, but also the right of the public to be properly informed. National authorities are therefore obliged to create a pluralistic public service that transmits impartial, independent and balanced news, information and comment.[93] This duty concerns both establishing favourable conditions for the audience to be exposed to a variety of content and removing obstacles to this exposure to diversity and pluralism. As already mentioned, this positive obligation concerning the variety of views that should reach the public does not imply, however, the possibility of compelling platforms to host speech they do not want to host. Positive duties in the sphere of pluralism are not so far-reaching to oblige private entities to publish any lawful opinion or statement.

Positive obligations are also crucial for organizing democratic elections under conditions that will ensure the free expression of the opinions of the people in the choice of the legislature. In the light of Convention provisions (primarily P1–1, but also Article 10 ECHR), there must be an adequate legal response towards certain phenomena (primarily electoral disinformation), especially those which could lead to serious consequences, resulting in a loss of public confidence in democratic procedures, and the violation of individual rights (i.e., lower public esteem and depriving a person of the necessary public trust, and damaging the candidate's reputation).[94]

Against this backdrop, it is possible to indicate three detailed positive measures that – in the light of the Convention – are necessary for providing political and social pluralism in online communication.

First of all, anti-discrimination rules must be established. In the context of the Internet, particular importance should be given to the protection of minorities, because online communication processes and their anonymity expose them to significant risk. As indicated in the ECtHR's case-law, the State's positive obligations are of particular importance for persons holding unpopular views or belonging to minorities, since they are more vulnerable to victimisation.[95] This obviously concerns not only the existence

93 ECtHR, *Manole and Others v. Moldova*, judgment of 17 September 2009, no. 13936/02, para. 101.

94 ECtHR, *Brzeziński* (n. 12), paras 35 and 55; according to the Court, public authorities have a duty to rectify electoral disinformation as soon as possible to preserve the quality of public debate.

95 ECtHR, *Bączkowski and Others v. Poland*, judgment of 3 May 2007, no. 1543/06, para. 64.

of the legal framework, but also its appropriate enforcement (procedural aspect), as evidenced by some of the ECtHR's recent case-law.[96]

Secondly, in order to ensure the political and social pluralism of online communication, transparency is of fundamental importance. As already indicated in the previous parts of this study, gatekeepers are able to create complex systems of governance and bureaucracy that can rule end users' behavior arbitrarily and without transparency. They use algorithms and automated systems, which could lead to the exclusion of certain groups of people or users with particular characteristics from accessing diverse and pluralistic information. Under the Convention, this automation of editorial processes and AI-driven tools, therefore, requires that the public authorities identify potentially vulnerable groups and oblige Internet platforms to ensure the transparency of their governance.[97] The public should at least understand the basis on which algorithmic decisions are made and have the minimal knowledge to verify them. The policies of the gatekeepers, including the use of algorithms, should be under public surveillance, and Internet platforms must be made accountable for violating them. An example of complying with this positive obligation is already available since, in France, the legislation introducing transparency requirements for political advertising on social media was adopted in December 2018.[98]

Finally, States must comply with the obligation to provide measures combating online disinformation. If the public authorities allow false (e.g., electoral) information to be produced and massively disseminated in online media, without offering legitimate actors (e.g., candidates) any effective measures, the pluralism protected by Article 10 ECHR and P1–3 is directly affected. Remaining passive towards disinformation and adopting only a policy of non-interference may also have an impact on the electoral equality and the fairness of the electoral process. Against this backdrop, one of the positive measures adopted in some countries (e.g., France and Poland) are summary judicial proceedings, which are able to halt a part of electoral disinformation.[99] The Court has already confirmed that the

96 ECtHR, *Beizaras and Levickas* (n. 20), paras 125–128.

97 Helberger, Eskens, van Drunen, Bastian and Moeller (n. 42), 20–25.

98 Loi n° 2018–1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information, available at : https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037847559&categorieLien=id.

99 Rachael Craufurd Smith, 'Fake news, French Law and democratic legitimacy: Lessons for the United Kingdom?' Journal of Media Law 11 (2019), 52–81 and Amélie Heldt, 'Let's Meet Halfway: Sharing New Responsibilities in a Digital Age,' Journal of Information Policy 9 (2019), 336–369 (346).

provision of such a summary remedy serves the Convention's legitimate aim of ensuring the fairness of the electoral process.[100] They provide a partial solution to the problem of false information; nonetheless, they have to be adequately designed and applied (procedural aspect), as there is a choice between different models of such proceedings.[101]

4. Procedural Obligations and Investigation into Horizontal Online Violations

In the light of the Convention, States also have to comply with a number of procedural obligations. They have been extended from the majority of its provisions, including freedom of expression (Article 10) and the right to respect for private life (Article 8).[102] There is no doubt that an adequate official response to allegations contributes to the effective protection of substantive human rights.[103] Importantly, the current Convention standard obliges the public authorities to hold an investigation both when the alleged infringement involves violence and in a non-violent context.[104] Several of these procedural aspects have already been mentioned in this study, but since both types of obligations are often conflated, the separation of substance and procedure is not easily done, and in these situations, the Court effectuates a single global examination.[105]

Against this backdrop, in the case of online communication – due to its complexity – there are various aspects of the procedural positive obligations concerning horizontal violations of human rights (primarily freedom of expression and protection of private life). They are obviously of a different nature than with regard to other rights violations, such as, for example, the right to life or the prohibition of inhuman treatment (Article 2 and Article 3 ECHR). As already said, individuals can allege that the violations were committed directly by gatekeepers or committed by other

100 ECtHR, *Kwiecień v. Poland*, judgment of 9 January 2007, no. 51744/99, para. 55; ECtHR, *Kita v. Poland*, judgment of 8 July 2008, no. 57659/00, para. 50 and ECtHR, *Brzeziński* (n. 12), para. 55.

101 Krzywoń (n. 13), 682–687.

102 Lavrysen (n. 3), 16–17 and 51–52.

103 E.g. ECtHR, *Tysiąc v. Poland*, judgment of 20 March 2007, no. 5410/03, para. 113.

104 Eva Brems, 'Procedural protection – An examination of procedural safeguards read into substantive Convention Rights' in: Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR* (Cambridge: Cambridge University Press 2013) 137–161, (144).

105 Lavrysen (n. 3), 49–50.

individual users. Nonetheless, the latter can entail the liability of the user or the liability of the platform, since we have identified situations where the Internet platform can be held liable for third-party content. This entails important differences as far as the entity obliged under the Convention to launch the investigation is concerned. In certain situations, it would be the positive obligation of national authorities (to conduct an official investigation into online threats inflicted by private individuals, e.g., hate speech or the lack of adequate reaction of the platform with regard to the threats of other users) and in other circumstances, the State would have surveillance duties over the investigation initiated by the gatekeeper. The majority of these procedural positive obligations would have a remedial function, since they regulate an adequate response once a human right is horizontally affected in online communication.

In all these situations, the Convention standards require an effective investigation to be held, which – in principle – should be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. The lack of any appropriate procedures to deal with alleged horizontal infringements is incompatible with the Convention standards.[106] As far as the qualitative aspect of the investigation is concerned, due to the nature of online communication and the impact of the violations, this duty has to comply with the following general requirements. Firstly, the procedural framework should avoid excessive formalism. Every act of a horizontal violation must be easy for the Internet user to notify. Secondly, the time frame plays an important role since, in online communication, the flow of information is faster than in traditional media. In order to avoid the viral effect of an illegal act (i.e., an online comment), the investigation should be prompt, whether conducted by the state authorities or the gatekeeper. Nonetheless, when the gatekeeper is obliged to deal with a notification from an individual user concerning alleged illegal content, the time frame should not be inappropriately short in order to avoid 'private censorship.'

The national authorities usually delegate some procedural responsibilities to Internet platforms and enable them to deal with the allegations in the first instance. This subsidiary model is compatible with the Convention standards, and the allocation of tasks and avoiding one central actor – as claimed in the previous parts of this study – guarantees a better balance between different rights and freedoms. Nonetheless, the delegation of these procedural competences, as mentioned before, requires public

106 ECtHR, *K.U.* (n. 47), paras 43 and 46.

surveillance and implies that gatekeepers are held liable for how they investigate each case and react towards illegal third-party content.

Moreover, due to the anonymity of online communication, Internet platforms are sometimes in a better position to identify a person who threatens another individual's rights. Generally speaking, anonymity can constitute one of the limits of the procedural positive obligations under the Convention. As evidenced by one of the cases before the ECtHR, objective technical difficulties in identifying the person who threatens third-party rights can constitute a legitimate reason to refuse to institute legal proceedings. According to the Court, due to the fact that the sender of unwanted and offensive communications concealed his/her email address, any official investigation never had a chance of success. In these circumstances, the State's inaction did not amount to a violation of the Convention.[107]

Another limit of the procedural obligations is the volume and seriousness of the infringement. This issue overlaps with the problem of the criminalization of certain online conduct, discussed in the previous part of this study. Some extreme online acts require prompt official reaction and for a prosecution to be launched.[108] In other cases, both the gatekeeper and public authorities are obliged to determine if the ill-treatment inflicted by the private individuals exceeded the 'real and substantial tort' threshold.[109] On the one hand, they should be conscious of the scale and vulgarization of online communication, and, on the other, be aware that illegal acts can become viral and that minorities are especially vulnerable to victimisation. It is also necessary to mention that, in the context of online communication, the issue of extraterritoriality can constitute a challenge as far as procedural obligations are concerned.[110]

There is, therefore, a certain margin of appreciation as far as procedural positive obligations are concerned. This is associated with the difficulties of identification, the massive scale of online communication, and the fact

107 ECtHR, *Muscio* (n. 22).

108 E.g., ECtHR, *Beizaras and Levickas* (n. 20), paras 127–128.

109 ECtHR, *Tamiz* (n. 14), paras 50–53 and 82.

110 See e.g., *Perrin v. the United Kingdom*, decision of 18 October 2005, no. 5446/03, where the Court accepted the reasoning of the national courts that if the courts only were able to examine publication related cases if the place of the publication fell within the court jurisdiction, it would encourage publishers to publish in countries where prosecution was unlikely. See also Catherine Van de Heyning, 'The boundaries of jurisdiction in cybercrime and constitutional protection. The European perspective' in: Pollicino and Romeo (eds) (n. 17), 26–47 (37–38).

that in some online fora, the abusive tone is frequent. As indicated in the recent scholarship, this leads to the conclusion that, due to the difficulties of enforcement being sometimes disproportionately large, no legal recourse is needed for minor infringements of personality rights committed anonymously.[111]

V. Concluding Remarks

This analysis has shown that the State's obligations emerging from Article 8 and Article 10 ECHR, and P1–1, are not exclusively positive or negative. Insisting on a strict distinction between them and privileging the State's negative duties with regard to online communication is anachronistic. The negative understanding of the freedom of expression and protection of privacy does not provide the conceptual apparatus to deal with many current problems. The changing role of private entities – gatekeepers – implies that both these categories are mutually dependent, and the doctrine of the Convention as a living instrument does not permit one to be considered in isolation from another.

In this study, we have identified a number of substantive and procedural positive obligations concerning horizontal relations, primarily online communication. Developing its content usually does not entail high and excessive costs for the public authorities, since such positive obligations do not imply direct financial transfers and wealth redistribution. Moreover, public authorities have sufficient knowledge and are fully aware of the multiple possibilities of online ill-treatment inflicted by private individuals.

This study has shown that the regulatory framework is of fundamental importance. It should be able to deal with the issue of allocating responsibility for the content posted online. Under the Convention, public authorities should monitor the acts of power delegated to Internet platforms and decide who is liable for user-generated content, and under which circumstances. This legal framework must be detailed and sophisticated but cannot be reduced to criminal law enforcement. Minimal Convention standards also oblige the public authorities to adopt measures that ensure pluralism and a favourable environment for public debates (anti-discrimination rules, transparency mechanisms, measures against electoral disinfor-

111 Koltay (n. 8), 203–204.

mation). The Convention also creates a complex system of procedural obligations concerning horizontal violations of human rights.

All these positive duties, in the context of international law, form part of the broader concept of the normative order of the Internet, which integrates norms materially and normatively connected to the use and development of the Internet.[112] Nonetheless, the discussed examples of the State's duties are not comprehensive, since in both cases – the positive and negative dimension – it is hard to indicate an exhaustive collection. Similarly, as the positive aspect of human rights does not concern the legal review of restrictions, there are choices to be made with regard to the positive dimension of freedom, and they necessarily involve a certain degree of discretion on the national level.

112 Matthias C. Kettemann, *The Normative Order of the Internet. A Theory of Rule and Regulation Online* (Oxford: Oxford University Press 2020), 46.