COURTS AND LIABILITY OF INTERNET INTERMEDIARIES: A SYSTEM ANALYSIS

Internet intermediaries have extensive knowledge on the activities performed online, since they operate as a link between users and the Internet. As Marta Maroni claims in her paper *"A Court's Gotta Do, What a Court's Gotta Do. An Analysis of the European Court of Human Rights and the Liability of Internet Intermediaries through Systems Theory" (EUI Working Paper RSCAS 2019/20)* the position hold by intermediaries is one of power, making them prominent actors within the Internet ecosystem. Intermediaries cannot only enhance "private forms of governance" but can also improve the effectiveness of state policies. The decision on how to regulate them, including the imposition of liability on users' activity, may affect the way people experience the Internet and may influence the development of the Internet itself.

Strict liability for offensive behavior, demonstrated by the users of an intermediary, shall result in an obligation to monitor the users' activity and could discourage intermediaries from providing their services and developing new ones. A middle-ground solution is formed on the grounds of *Section 230 of the US Communications Decency Act (1996)* which envisages immunity from liability for information provided by third-party users. Such a solution is rooted in the argument of the First Amendment – namely to protect free speech –, as well as in the aim to "preserve the vibrant and competitive free market that presently exists" online (CDA).

The focus of Maroni's paper is to analyze the extent to which the ECtHR's rulings have been influenced by its desire to preserve the role of law as a system capable of reproducing and maintaining itself in the online environment. According to Luhmann's systems theory, the purpose of the legal system is to stabilize *normative expectations*. Remedies in this respect, are both the legal structure and the expectations that trigger its operations. It would be counterproductive for the legal system to abandon the *possibility* of protecting those who expect protection.

Applying this methodology, Maroni considers two seminal cases: "*Delfi v. Estonia"* (2015) and "*MTE v. Hungary"* (2016). Both "*Delfi"* and "*MTE"* deal with specific types of intermediaries that provide services and content and are often more exposed to liability because of their visibility. Greater attention is paid to the "*Delfi" case*, as it represents the first ruling on the matter and has been generally criticized for potentially leading to a scenario where online providers might filter user-generated content. Furthermore, it alludes to the European regulatory framework, as the parties involved disagreed on the interpretation of the E-Commerce Directive (Directive 2000/31/EC) and its implementation in national legislations.

The second case, *MTE v. Hungary*, gains its importance as an attempt to balance the more rigid court stance, taken in the "*Delfi" case*.

In the above-mentioned cases, the ECtHR focused mostly on the *duties and responsibilities* that intermediaries should bear. The Court considered particularly relevant characteristics of "Delfi" as a professionally managed, commercially run Internet news portal, which sought to attract a large number of comments on the news articles it published. The ECtHR ruled that "Delfi" was liable, as users of the platform "engaged in clearly unlawful speech, which infringed the personality rights of others and amounted to hate speech and incitement to violence against third parties". Moreover, "Delfi's" decision to allow anonymous comments implied that it took responsibility for such comments.

The draft does not attempt to neglect or downplay any harm caused by online violent or indecent speech, bullying, and stalking. Nor does it neglect the tension created by entities, such as Internet intermediaries, which nowadays have an increasing role as information gatekeepers. Nevertheless, the aim is to provide a convincing explanation of the Court's approach from the systems' perspective. The need for this action comes from the fact that the remedy adopted seems somewhat at odds with the idea of the pluralistic freedom of expression, emphasized by the same court in 1976 – a freedom which is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or indifferent; but also to those that offend, shock or disturb the State or any group of its population.

If the "*Delfi"* case were examined in light of the E-commerce Directive and the case law of the CJEU, the court of inquiry should have established whether "Delfi" should have been regarded as an intermediary and, if so – what had it been its role with regards to the comments at issue. Furthermore, the case law of the European Court of Justice could have provided useful insights for assessing the case at hand, since in the "*Google France"* and "*L´Oreal"* cases commercial gain was considered irrelevant for interpreting the E-commerce Directive.

In the "*MTE"* case, the ECtHR simply claimed that the statements "did not constitute clearly unlawful speech and they certainly did not amount to hate speech or incitement to violence". A relevant factor that led the Court to decide differently was the fact that the company's behavior had already been the subject of various complaints to the country's consumer protection bodies. Here, the ECtHR paid particular attention to the fact that the right to a good reputation does not require the same level of protection as personality rights. For the Court, the consequences may result, directly or indirectly, in a narrower interpretation of freedom of expression online, which could have severe disadvantages for a non-commercial website.

When deciding upon these cases, the Court repeatedly mentions the benefits but factually focuses on the risks brought forth by the Internet. The overarching question is: what would be the case if it would become impossible to grant remedies to those affected? Fundamental to the "D*elfi" case,* for instance, is the apparent threat of the law losing grounds in the online environment.

The analysis aims to demonstrate that the concern of the Court in these cases exceeds the mere exercise of balancing between freedom of expression and unlawful speech. It relies upon a second narrative that strives to preserve the power of law by the creation of a stricter environment in which it can function.

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