

Six Problems with Facebook's Oversight Board. Not enough contract law, too much human rights.

Mårten Schultz

Abstract: After intense criticism against Facebook's content moderation process, CEO Mark Zuckerberg stated in 2018 his intention to set up a "Supreme Court" for the company. In January 2021 the idea became reality when Facebook's Oversight Board started reviewing complaints against Facebook's decisions. While there are reasons to be hopeful that the Oversight Board will turn out to be a positive step forward in the discussion on online speech governance, there are also reasons to be worried. This article addresses six problems with Facebook's Oversight Board in its current form.

Keywords: Oversight Board, Facebook, content moderation, self-regulation, community standards.

Chapter 1. Introduction

1.1. Background

In 2018, Facebook's CEO Mark Zuckerberg first presented the idea. An independent institution would be given the task of reviewing appeals against Facebook's content moderation decisions. "You can imagine some sort of structure, almost like a Supreme Court, that is made up of independent folks who don't work for Facebook, who ultimately make the final judgment call on what should be acceptable speech in a community that reflects the social norms and values of people all around the world." It took some time, more time than Facebook initially thought would be

needed.¹ Facebook's Oversight Board (OB/the Board) opened for business in January 2021, after a couple of years of preparation.²

Facebook is, arguably, the most important catalyst for freedom of expression in human history. When Facebook set up an independent institution and gave it the power to overrule its decisions and build its own "case law" it also established the most influential arbitrator of expression in human history. That alone is cause for concern. There are other reasons to be concerned as well. This article puts forward six problems with the OB, as it has developed in its still early stage.

Before getting on to these at times critical arguments, I want to make clear that my perception of the process behind the OB is that it was formed with the best intentions and that the first line of people that have been put in charge of the project have the best of credentials. There are reasons to be hopeful that the OB will turn out to be a starting point in the development of a new kind of institutions that can tackle the balancing act between different interests and rights in social media.³ This makes it even more important to early on address issues where the project seems to be taking a bad turn.

1.2. *The Oversight Board: A very brief description*

Facebook is one of the world's largest companies. It controls not only the Facebook social media platform but also Instagram and Whatsapp (and other companies as well).

The OB is an independent legal person that was set up by Facebook.⁴ The function of the OB is to enable Facebook and Instagram users to "appeal" decisions made by the company regarding content on the platform, such as decisions to remove posts that Facebook moderators have found

1 Kate Klonik, "The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression", *The Yale Law Journal* 129 (2020): 2450.

2 Transparency: in Berlin, June 2019, I participated in one of the six brainstorming meetings Facebook organised around the world in the process of setting up the OB, and thereafter expressed interest in being a member of the OB. My main grievance, however, is that I failed to convince Facebook to place the headquarters of the Board in Stockholm.

3 See for a sympathetic take on the value of the project Evelyn Douek, "Facebook's 'Oversight Board': Move Fast with Stable Infrastructure and Humility", *North Carolina Journal of Law and Technology* 21 (2019): 7.

4 Klonik, "Facebook Oversight Board", 2481-2487 (Discussing different kinds of independence criteria with regard to the OB).

to be in violation of the Community Standards.⁵ In April 2021, the OB also started to take on cases where users appealed decisions *not* to remove content.⁶

The Oversight Board Charter (“the Charter”) is the foundational steering document for the OB.⁷ The Charter makes clear that a case can be submitted to the OB either by a user or by Facebook itself (which is how the decision to remove president Donald Trump from the platform came before the Board). It is up to the Board to decide which cases it should take on, but the Charter states that it should prioritize cases “that have the greatest potential to guide future decisions and policies.”⁸

A trust has been set up to oversee the financing of the Board and to safeguard the independence of the Board. (The OB itself is a limited liability company based in Delaware.) The trust also oversees administration of the Board.

According to the Charter, the OB must include at least 11 members and, when fully staffed, is “likely to be forty members.”⁹ The members work part time for the OB, and are paid for their work. Facebook has allocated 130 million dollars to the trust to fund the board.¹⁰

In the Charter Facebook commits “to the board’s independent oversight on content decisions and the implementation of those decisions.”¹¹ The Board not only has the power to overrule Facebook decisions regarding content on the platform. It can also make advisory statements on Facebook/Instagram policy.¹² Facebook can choose whether to follow these recommendations or not.

5 Hereinafter Facebook should be understood as a short term for Facebook and Instagram.

6 “The Oversight Board is accepting user appeals to remove content from Facebook and Instagram”, Oversight Board, accessed June 2, 2021, <https://oversightboard.com/news/267806285017646-the-oversight-board-is-accepting-user-appeals-to-remove-content-from-facebook-and-instagram/>.

7 See “Trustees”, Oversight Board, accessed June 2, 2021, <https://oversightboard.com/governance/>.

8 Art. 2, sect. 1.

9 Art. 1, sect. 1.

10 Kate Klonik, “Inside the Making of Facebook’s Supreme Court”, *The New Yorker*, February 12, 2021.

11 Art. 5, sect. 3.

12 The process is pictured in “Rulebook for Case Review and Policy Guidance”, Oversight Board, accessed June 2 2021, <https://oversightboard.com/sr/rulebook-for-case-review-and-policy-guidance>. This opportunity was used already in one of the first decisions, 2020-003-FB-UA (2021-01-28).

The Charter provides the structure and basic rules, but it is supplemented by other documents. More detailed procedural guidelines are found in the Oversight Board Bylaws.¹³ In addition, there is a Rule Book for Case Review and Policy Guidance.¹⁴

An outline of the arguments of this article

This article describes six problems with the OB as it has developed. These problems are partly intertwined. Under the heading “The Narrative” I criticize the use of a public law narrative, especially the language of human rights, in the discussion of content moderation. “The Bias” argues that the OB has a bias in favour of freedom of speech arguments, which may have negative effects on Facebook’s legitimate interest to control content on its platform. In “The rules” I question the OB’s choice of the sets of norms that are used in its decision-making. “The process” discusses whether Facebook and the OB has missed an opportunity to give all Facebook users access to an appeals process, to instead focus on producing guiding decisions. In “The decisions” I wonder whether a policy to highlight differences in opinions between board members in the Board’s decisions, instead of aiming at consensus, would better promote the purpose of providing guidance. Lastly, “The power shift” asks whether transfer of power of content moderation decisions to a small group of experts is dangerous.

Chapter 2. The narrative

When Mark Zuckerberg first floated the idea of establishing an external institution that would have the capacity to independently review decisions by Facebook, he referred to it as Facebook’s “Supreme Court”.¹⁵ The me-

13 “Oversight Board Bylaws”, Oversight Board, accessed June 2, 2021, <https://oversightboard.com/sr/governance/bylaws>.

14 “Rulebook.”

15 Ezra Klein, “Mark Zuckerberg on Facebook’s hardest year, and what comes next”, *Vox*, April 4, 2018, <https://www.vox.com/2018/4/2/17185052/mark-zuckerberg-facebook-interview-fake-news-bots-cambridge>.

dia quickly caught on.¹⁶ Everybody knows that the OB is not a court at all. Still, many use the description as a metaphor even today.¹⁷

In this context it is not necessary (or possible) to explain what a court is, but a simple description of what characterizes a court in a modern *Rechtstaat* illustrates why the label is misleading also as a metaphor. A court is, at least, an institution within a national state that exercises public authority. The OB is nothing of the sort. Its scope is narrow (content moderation decisions by Facebook), its authority is narrow (it can decide either that Facebook needs to put back content it has removed or that its decision stands) and it lacks the possibility to exercise any public power.

The court metaphor is part of a larger narrative.¹⁸ Companies such as Facebook – but especially Facebook – have for some time been described as nation-like entities, in Facebook's case under labels such as Facebook-istan.¹⁹ The company's representatives are partly to blame for this. More than 10 years ago Mark Zuckerberg described Facebook as something more like a government than a traditional firm.²⁰ As a result of this narrative, private law issues – such as questions about the contractual relationship between companies and their customers – are discussed in the language of public law.

A particular and important example is how the terminology of fundamental human rights and freedoms is employed: the question of content moderation has taken the form of a human rights problem. As will be discussed below, the OB and Facebook are parts of the explanation for this language. This kind of language is often misleading and perhaps harmful.

Whether fundamental rights and freedoms have a role to play in private law relationships is one of the most debated questions in private law

16 Cf. Casey Newton, "Why Facebook needs a Supreme Court for content moderation", *The Verge*, August 21, 2018, <https://www.theverge.com/2018/8/21/17762354/facebook-supreme-court-content-moderation>.

17 See, e.g., Kate Klonik, "Inside the Making of Facebook's Supreme Court", *The New Yorker*, February 12, 2021 and Klonik, "Facebook Oversight Board," 2476 ("The analogy to courts is valuable, but also imperfect."). The parable is used in Sweden as well, Anni Carlsson, "Tyst vår?," *Svensk Juristtidning* (2021): 170.

18 Evelyn Douek calls the OB "one of the most ambitious *constitution-making* projects of the modern era", Douek, "Facebook's "Oversight Board", 1 (Emphasis added.).

19 Anumap Chander, "Facebookistan", *North Carolina Law Review* 90 (2012): 1807.

20 See David Kirkpatrick, *The Facebook Effect* (New York: Simon & Schuster, 2010), 254.

in recent decades, especially in tort law.²¹ The most contested issue in this context is whether private entities (companies and persons) could be held responsible under human rights rules, an issue discussed under the heading of “horizontal human rights” or “direkte Drittwirkung”.²² It has also been a hot topic in international law.²³

However, to my knowledge, there are no examples in any jurisdiction of direct application of a general human rights catalogue as a basis for duties of private companies. There are examples of constitutions that apply human rights law to (humans and) companies, but only in a limited sense.²⁴

Furthermore, there is a risk of an intellectual fallacy here. A company’s duty to distribute another person’s piece of a information, is also a limitation of that company’s (or its owners’) right to decide what information it wants distribute.²⁵ Nuance and detail are thus necessary if one wants to frame responsibilities of a company in human rights language.

The public law narrative in general, including the sweeping usage of the language of fundamental human rights and freedoms, is dangerous in two different ways. Firstly, it is dangerous because it suggests that Facebook has special duties that other companies do not have; that for some reason it

21 A fresh example from Sweden is Karolina Stenlund, *Rättighetsargument i skadeståndsrätten* (Uppsala: Iustus, 2021). See also Mårten Schultz, “Rights Through Torts,” *European Review of Private Law* 17, no 3 (2009): 305 ff.

22 To take Sweden as an example, the Supreme Court shut the door on a direct application of human rights rules as a direct basis for holding a private company liable in tort in *Högsta Domstolen*, NJA 2007, 747. However, in 2015 the Supreme Court stated human rights rules may in some circumstances affect the assessment of a private party’s obligation to compensate for pure economic loss (an indirect horizontal effect of human rights), *Högsta Domstolen*, NJA 2015, 899. See also Håkan Andersson, *Ansvarsproblem i skadeståndsrätten* (Uppsala: Iustus, 2013), 618 ff., Jan Kleineman, “Konstitutionell skadeståndsrätt”, *Juridisk Tidskrift* (2018-19): 23 ff., and Mårten Schultz, “Nya argumentationslinjer i förmögenhetsrätten: Rättighetsargument”, *Svensk Juristtidning* (2011): 996 ff. (All discussing horizontal applications of the European Convention of Human Rights and Fundamental Freedoms.)

23 See, e.g., Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006) and John H. Knox, “Horizontal Human Rights Law”, *American Journal of International Law* 102 (2008): 1.

24 Cf. art. 8 of the Bill of Rights in the South African constitution.

25 There has been a debate on whether the social media giants should follow under some kind of must carry obligations. See for an early discussion on must carry obligations and digital publications European Audiovisual Observatory, *To Have or Not to Have Must-Carry Rules* (Strasbourg: European Audiovisual Observatory, 2005), <https://rm.coe.int/168078349b>.

should be treated fundamentally differently than, say, Tesla, IKEA or Pindo's Pizzeria in Ösmo outside of Stockholm. A common argument for this standpoint is Facebook's size and dominance. A company that dominates a market may have obligations under anti-trust or consumer legislation, for instance. However, if there is no legislation that states something else, then it is the contract that sets up the rules. This obvious starting point is too often missing or underestimated in the debate on tech companies' content moderation.

From the perspective of the company, there is a risk that this narrative may have negative effects on the right to property. An owner of property, for instance the owner of a company, has a fundamental right to use her property any way she likes. The law may set limitations but such limitations are only acceptable under some conditions, for instance "in so far as is necessary for the general interest" (to use the formulation in art. 17 of the European Union Charter on Fundamental Rights).

Secondly, it is dangerous to treat a private company as a state because it suggests that it has rights which it does not have. Statehood comes with privileges. One privilege is sovereignty. One facet of sovereignty is the right to control the law within a territory. But Facebook does not have the power to control the rules that govern its platform. States, and sometimes international bodies such as the European Union, control the law, not companies. It is sometimes difficult to ascertain which country's rules apply and which country's courts have jurisdiction. In the case of the big tech companies there is also, from a practical point of view, a complication in the fact that platforms have the possibility to unilaterally formulate dispute resolution clauses in the contract with users. Nevertheless, the law – in the true sense of the word – is written by legislators and in some countries the courts, not companies. Even if they are wealthy and have global reach.

Chapter 3. The bias

"Freedom of expression is a fundamental human right. Facebook seeks to give people a voice so we can connect, share ideas and experiences, and understand each other.

Free expression is paramount, but there are times when speech can be at odds with authenticity, safety, privacy, and dignity. Some expression can

endanger other people's ability to express themselves freely. Therefore, it must be balanced against these considerations.”²⁶

The quote is taken from the preamble to the Charter. Freedom of expression is indeed a fundamental human right. But so is, for instance, the right to respect for private and family life, the right to property and many other interests. If one takes a look at the European Union's Charter on Fundamental Rights there are several rights that will often conflict with freedom of expression, such as the right to protection of personal data.²⁷

The idea that freedom of speech is in some way more fundamental than other freedoms and rights is associated with the constitutional tradition in the United States.²⁸ European countries, on the other hand, do not generally consider that freedom of speech *a priori* weighs heavier than other rights and freedoms.²⁹ Sometimes freedom of speech outweighs privacy. Sometimes it is the other way around.

Comparative law observations aside, it is clear that the OB is based on a bias in favour of facilitating speech. This follows from the quoted mission statement in the Charter. Moreover, the same sentiment is iterated in the other steering documents that govern the Board. The introduction to the Bylaws starts off with the following sentence: “The purpose of the Oversight Board is to protect freedom of expression by making principled,

26 “Trustees”.

27 As Maroussia Lévesque points out, “The Board's narrow focus on freedom of speech excludes other pertinent human rights”, “Applying the UN Guiding Principles on Business and Human Rights to Online Content Moderation”, Maroussia Lévesque, accessed June 2, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789311.

28 “Applying the UN Guiding Principles on Business and Human Rights to Online Content Moderation.” See, for a strong case in favour of setting freedom of speech protection at the centre against an analysis of international law, Evelyn Mary Aswad, “To Protect Freedom of Expression: Why Not Steal Victory from the Jaws of Defeat”, *Washington & Lee Law Review* 77 (2020): 609.

29 There is a large body of literature comparing US and “European” freedom of speech traditions. See, e.g., Sionaidh Douglas-Scott, “The Hatefulness of Protected Speech: A Comparison of the American and European Approaches”, *William & Mary Bill of Rights Journal* 7 (1999): 305 (focusing on hate speech). This characterization is oversimplified. For instance, it does not hold in a comparison between constitutional protection of speech in Sweden and the USA. Arguably, Sweden has the strongest protection of free speech in the media in the world, if one considers both substantive as well as procedural rules. See Mårten Schultz, *Det här får man inte säga i det här landet!* (Stockholm: Stiftelsen Juridisk Fakultetsslitteratur, 2021), 11.

independent decisions about important pieces of content and by issuing policy advisory opinions on Facebook's content policies."³⁰

The OB thus has protection of freedom of expression as its primary goal.³¹ This is an unfortunate formulation. The Board here uses the term in the way Facebook's critics have often used it, when the company is accused of "censorship". Removal of content by Facebook restricts the possibility to reach other people but it is not a restriction of freedom of speech. It may be a breach of contract, if Facebook has failed to follow the terms of the agreement, but it is not censorship.

It is also unfortunate because this bias entails that Facebook's legitimate interest in excluding different types of content from its platform is undermined. It is perfectly legitimate to want to exclude nudity, profanity, hate speech, false information and pictures of snakes, even if this means that the platform excludes information that may be legally published in every country on the planet. When the Board taps into the language of freedom of speech and thereafter, in its first batch of decisions, overrides most of Facebook's content moderation decisions (of which none were clearly in conflict with the terms of service) it sent a signal, "When in doubt: restore".³²

Most of all, however, it is unfortunate because it is questionable to assign freedom of speech – or any fundamental (negative) human right or freedom – a *general* priority.³³ The issue whether there is a hierarchy of

30 "Oversight Board Bylaws." The Rulebook expresses it somewhat differently in its introduction: "The Oversight Board was created to make principled, independent, and binding decisions on what content Facebook and Instagram should allow or remove, based on respect for freedom of expression and human rights", "Rulebook".

31 Cf. Klonik, "Facebook Oversight Board", 2475.

32 The decisions are published on "Board Decisions", Oversight Board, accessed June 2 2021, <https://oversightboard.com/decision/>. A good example of this is decision 2021-005-FB-UA (2021-05-20), which dealt with a Turkish meme that questioned the Armenian genocide.

33 This assertion rests on a distinction between negative and positive human rights and freedoms, which rests upon Isaiah Berlin's famous dichotomy of negative and positive concepts of liberty. (Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969). This distinction has been the subject of lively political, moral and conceptual debate, but in this context a short description will have to suffice. Negative human rights and freedoms oblige someone (typically the Government) to not act so that another person's freedoms are restricted. To take freedom of speech as an example, this right protects any person from being actively silenced by the government, or from being punished for speaking. A negative right does not, however, oblige the government to act to make sure that

human rights has been debated.³⁴ However, in decision-making such as the one that the OB is involved in, which necessarily involves weighing interests against each other, a presumption in favour of one of these interests may have a negative effect. If my speech may risk causing another person's death it makes no sense to view my right to expression as a *prima facie* prioritized right over the other person's right to life. In cases involving a conflict of rights or freedoms, or interests of this kind, a decision maker must or at least should aim at neutrally weighing the interests against each other taking into account the circumstances of the individual case.

Chapter 4. The rules

The relationship between Facebook and its users is contractual. When conflicts arise between two parties to a contract the first question is: "What does the contract say?" When a decision maker, for instance a judge, settles a contractual dispute the starting point of the analysis is always the set of rules that forms the contract. Only in special circumstances will the decision maker need to set aside that term of the contract, for instance if it does not meet the requirements of consumer protection laws or if it is discriminatory. There are thus situations in which "external" rules enjoy priority over the "internal" rules in the contract. Still the main rule is that the contract applies and exceptions are only made if there is a clear legal rule that says otherwise.

The OB has taken another path. Already in the first decisions it became clear that the Board uses three sets of norms in its handling of cases:

everyone can be heard. In the category of negative rights we thus find the provisions of the European Convention of Human Rights. A positive right, on the other hand, obliges someone, often the Government, to act to help someone get or achieve something. To take an example from the freedom of speech sphere in Sweden, the Swedish constitutional Freedom of the Press Act includes arguably the world's most far-reaching obligation to disclose public documents. More often, perhaps, positive rights are thought of as social rights, such as the right to education and medical treatment. Many have been critical of the distinction between positive and negative rights (see, e.g., Henry Shue, *Basic Rights* (New Jersey: Princeton University Press, 1996, Second Edition)). In this context – which focuses on the obligations of a private company and not a government – I will presuppose that the distinction is helpful and indeed necessary, rather than arguing for it.

34 Cf. Tom Farer, "The Hierarchy of Human Rights", *American University International Law Review* 8 (1992): 115.

Facebook's Community Standards, Facebook's values, and international human rights law.

Facebook's Community Standards are part of the terms of service in the contract between Facebook and its users. The Community Standards include rules against violence and incitement, bullying and harassment, and hate speech, to give a few examples.

The introduction to the Community Standards states that Facebook limits expression "in service of one or more of the following values": "Authenticity", "Safety", "Privacy", and "Dignity". These values make up a set of general principles that the more specific Community Standards rest upon and make up a second set of norms that the OB apply in its decision making.

The third norm source used by the OB comes from international human rights law.³⁵ The OB uses the formulation "Relevant Human Rights Standards considered by the Board". More specifically, the Board refers to "The UN Guiding Principles on Business and Human Rights (UNGPs)" which were endorsed by the UN Human Rights Council in 2011. These principles establish "a voluntary framework for the human rights responsibilities of private businesses".³⁶

There are, at least, two problems with this selection of normative sources. The first problem is that it does not take sufficient account of the priority of the contract. When someone sets up an account with Facebook a contract is formed. The contract includes different terms that the parties agree upon. These terms include the community standards but also Facebook's values, but not any reference to the UNGPs. When a dispute between Facebook and a user is resolved under principles of human rights law it means not only that Facebook's actions are tested against a normative framework it has not accepted but also that the decision maker overrides the rules that both parties had agreed upon. The inclusion of human rights principles in the OB's set of rules thus amounts, in a way, to disregard of the will of both Facebook and its users as expressed through the contract.

A second problem with the norm sets the OB has chosen is unpredictability. It is often not too difficult to assess if a post adheres to the Community Standards or not. We know, for instance from Facebook's

35 See, for arguments for using international human rights law in the OB, Aswad, "Freedom of Expression", 609.

36 "Applying the UN Guiding Principles on Business and Human Rights to Online Content Moderation."

experiences of handling content with nudity, that there will always be difficult cases. In most cases, however, it is not too difficult to foresee how the Community Standards would be interpreted in a particular case. In contrast, it is much more difficult to predict the result of an interpretation based on Facebook's general values or human rights principles.

Chapter 5. The process

"I think in any kind of good-functioning democratic system, there needs to be a way to appeal."³⁷ This statement comes from Mark Zuckerberg, in one of the earlier interviews in which he talked about the need for independent judicial review. Zuckerberg later wrote, in an open letter in connection with publication of the Charter: "If someone disagrees with a decision we've made, they can appeal to us first, and soon they will be able to further appeal to this independent board."³⁸

One of the purposes of the OB was to provide Facebook users with a channel to voice their dissatisfaction with the company's decisions, for instance a decision to take a post down. If a moderator at Facebook unfairly decides to remove a picture that someone has published in a Facebook group, the OB is able to overrule and correct the decision. The OB is thus, in a way, supposed to provide access to justice.

When this is written, in April 2021, more than 220 000 complaints have been appealed to the Board.³⁹ Only a few cases have been decided. It is clear that most of the millions of people that will appeal to the OB will never be heard by the Board.⁴⁰ This is primarily a result of the sheer number of complaints and how the organization is currently set up.

How many decisions the OB will produce is also affected by how the decision-making process is construed. The first decisions indicate, even if they do not show, that the OB has chosen quality over quantity. Each decision rests upon thorough analysis. The Board will not only take into

37 Klein, "Mark Zuckerberg on Facebook's hardest year".

38 "Establishing Structure and Governance for an Independent Oversight Board", Facebook, accessed June 2, 2021, <https://about.fb.com/news/2019/09/oversight-board-structure/>.

39 "Announcing the Board's next cases and changes to our Bylaws," Oversight Board, accessed June 2, 2021, <https://oversightboard.com/news/288225579415246-announcing-the-board-s-next-cases-and-changes-to-our-bylaws/>.

40 Cf. Evelyn Douek, "Facebook's "Oversight Board", 5 f.

account the material put forward by the appellant and Facebook but will also, if it thinks it is necessary, conduct its own research. This costs not only money but time, which likely affects the number of decisions it will be able to produce.

It remains to be seen how many cases the OB will take on. Out of the billions of decisions Facebook make every year, only a few – maybe a couple of dozen – will be heard.⁴¹ These cases will likely be high profile disputes, regarding influential people (Donald Trump) or with connections to world politics (genocide or military conflicts). In a special document, *Overarching Criteria for Case Selection*, the Board has stated the following: “The Oversight Board will select cases for review that raise important issues pertaining to respect for freedom of expression and other human rights and/or the implementation of Facebook’s Community Standards and Values. These cases will be of critical importance to public discourse, directly or indirectly affect a substantial number of individuals, and/or raise questions about Facebook’s policies. These cases will reflect the user base of Facebook and ensure regional and linguistic diversity.”⁴² The practicalities of the selection process are regulated in the Bylaws.⁴³

In other words, the OB will not provide every user with a fair and equal chance to get the Board to review their case. The decision to focus on issuing guiding decisions and policy recommendations instead of a general possibility to appeal may seem obvious in light of how many Facebook users there are and how many content moderation decisions Facebook and Instagram make every single day. It is still a lost opportunity to provide all users with an internal access-to-justice mechanism. The scale of such a system would, of course, be enormous. But, as a comparison, the European Court of Human Rights in Strasbourg covers 47 nations and a population of more than 800 million people and still manages to work as a “full” court in the real sense of the word.⁴⁴

41 See Shira Ovide, “Facebook Invokes its Supreme Court”, *The New York Times*, January 22, 2021.

42 “Overarching Criteria for Case Selection”, Oversight Board, accessed June 2, 2021, <https://oversightboard.com/sr/overarching-criteria-for-case-selection>.

43 “Bylaws”, Art. 1, sect. 3.

44 “The European Convention of Human Rights – how does it work?”, Council of Europe, accessed June 2, 2021, <https://www.coe.int/en/web/impact-convention-human-rights/how-it-works>.

Chapter 6. The decisions

It can be concluded already now that the OB will produce first-class decisions. The process seems rigorous and the Board has based its assessments on thorough research. But one thing seems to be missing: transparent minority opinions.

The Bylaws do allow for dissenting opinions. In 3.1.7, “Draft Decision and Recommendation”, the following is stated: “After concluding deliberations, a board panel will draft a written decision, which will include: a determination on the content; the rationale for reaching that decision; and, if desired, a policy advisory statement. The decision will also include any concurring or dissenting viewpoints, if the panel cannot reach consensus.”

The last sentence indicates that the Board strives towards unanimous decisions. This is underlined in a “procedural note” that accompanies many of the OB’s decisions:

“The Oversight Board’s decisions are prepared by panels of five Members and must be agreed by a majority of the Board. Board decisions do not necessarily represent the personal views of all Members.”

In the Oversight Board decision on whether Facebook was right to restrict then president Donald Trump from posting on the platform – the Board found that Facebook’s decision was not in itself wrong but that the sanction, indefinite suspension, was not supported by the company’s rules – it was mentioned that a minority had a different opinion on some issues, albeit not on the main issue of whether it was within Facebook’s right to suspend the president.⁴⁵ However, the minority view is not clearly elaborated and is just briefly noted in the majority decision.

Whether dissenting opinions are a good thing or not has long been widely discussed in legal circles, but it is a fact that a dissent can provide important contributions to a discussion of how to weigh different interests against each other. Particularly good examples of this can be found in the area of freedom of speech. Oliver Wendell Holmes’ dissent in *Abrams v. the United States* sparked a debate that changed and broadened freedom of speech discourse in the USA.⁴⁶ In the further development of the OB

45 “Decision 2021-001-FB-FBR”, Oversight Board, accessed June 2, 2021, <https://oversightboard.com/decision/FB-691QAMHJ/>.

46 See e.g., Thomas Healy, *The Great Dissent, How Oliver Wendell Holmes changes his mind - and changed the history of free speech in America* (New York: Metropolitan Books, 2014), discussing Holmes dissent in *Abrams v. United States* from 1919.

– and I say this in spite of my background as a lawyer in perhaps the most consensus-driven country in the world – surely it would be fruitful to emphasize the differences rather than the compromise.⁴⁷

Chapter 7. The power shift

It is worth mentioning, since it is sometimes forgotten, that when Facebook decides to remove a user's content because of alleged violations against the rules there is always a possibility for the user to go to court if she believes that the decision is in violation of the contract. There has always been a way to "appeal" Facebook decisions – the national courts.

In practice, however, it is often difficult and risky to bring a company such as Facebook to court. Moreover, it is not always clear what it would mean to win a case regarding wrongful moderation of content.⁴⁸ Even if one believes the company has made the wrong decision it will not be worth the trouble or cost to take Facebook to court. Not even Donald Trump has thought it worth the effort.

Many countries have independent and private appeals functions that deal with complaints against media companies. Facebook is not only a tech company, but has also taken over some functions traditionally associated with media companies (for instance through Facebook News).⁴⁹ The OB has been established to fill a function similar to that of private institutions that have been developed in many countries to address complaints against traditional media.

Early sceptics of the OB project saw Facebook's actions as a strategy to deflect criticism against the company for its decisions on content moderation issues.⁵⁰ The suspicion was that Facebook would keep doing what it was doing – getting rid of users and content that the people in Facebook's headquarter in Menlo Park don't like – while using the OB for whitewash-

47 See for a general discussion of the merits of public reasoning and the OB, Douek, "Facebook's "Oversight Board", 66-76.

48 Cf. Matthias C. Kettemann et al., "Back up: can users sue platforms to reinstate deleted content?", *Internet Policy Review* 2 (2020): 9.

49 Facebook News is still only available in the USA, "Get Started with Facebook News", Facebook, accessed June 2, 2021, <https://www.facebook.com/news/getstarted/>.

50 See for a discussion on the OB as a way to outsource controversy Douek, "Facebook's Oversight Board", 23-26 f. Kate Klonik says that this is perhaps "the most common criticism against the Board", Klonik, "Facebook Oversight Board", 2488.

ing purposes. The company would keep the power and the OB would take the responsibility. This line of criticism can still be heard.⁵¹ There is nothing in the first round of decisions that indicates that the OB sees itself as having the role of helping Facebook with public relations.⁵² However, as the project has developed, a very different risk has emerged. The members of the OB are becoming the most powerful people in deciding the limits of speech in human history. This concentration of power is in itself worrying.

A reminder of how the process behind content moderation at Facebook used to work.⁵³ A person that wanted to use the company's product signed a contract and agreed to various terms such as the Community Standards.⁵⁴ The Community Standards were continuously changed. Before changing the rules, Facebook would seek input from people and organizations around the world.⁵⁵ At the end of the day, it was Facebook that decided what kind of rules it wanted and users' decision whether to stay on the platform or to leave.

The introduction of the OB has changed the power structure. Now the power is concentrated in a small group of experts.⁵⁶ A few dozen people get the last word on how to interpret the rules that govern the possibility to use the largest platform for communication and interaction that ever existed. They have also been given the power to affect the rules

51 See, e.g. the statements by Marietje Schaake, international policy director at Stanford University's Cyber Policy Center and a member of an alternative organization, called the "the Real Facebook Oversight Board", in Billy Perrigo, "Facebook's New Oversight Board Is Deciding Donald Trump's Fate. Will It Also Define the Future of the Company?", *Time*, January 29, 2021, <https://time.com/5934393/facebook-oversight-board-big-tech-future/>.

52 Rather, there are signs that it sees itself as a watchdog: Oversight Board (@OversightBoard), "Where Facebook limits users' expression without good reason, we will call them out. Over time, we hope this will ground Facebook's decisions in human rights and benefit users everywhere.", Twitter, May 26, 2021, 2:08 p.m., <https://twitter.com/OversightBoard/status/1397524951909941252>

53 See for a background Klonik, "Facebook Oversight Board", 2427-2448.

54 These standards were previously not communicated to public/users. See Nicholas P. Suzor, *Lawless. The Secret Rules that govern our Digital Lives* (Cambridge: Cambridge University Press, 2019).

55 In fact, Facebook still listens to stakeholders in the development of community standards. See "Stakeholder Engagement", Facebook, accessed June 2, 2021, https://www.facebook.com/communitystandards/stakeholder_engagement.

56 There are other ways to interpret this development. One interpretation is that this is a shift from "Mark [Zuckerberg] decides" to "a transparent process", see Chinmayi Arun, "Facebook's Faces", *Harvard Law Review Forum* 135 (2021).

that govern them and decide how their own work should be organized.⁵⁷ The members of the OB are not only “judges”: they are also partly in charge of their own legislation. This is a unique concentration of power over access to freedom of expression to billions of people. At no time in human history have so few people exercised this much control over so many other people's possibility to be heard.

Chapter 8. Concluding Remarks

Facebook's Oversight Board is the most ambitious attempt at construing a private access-to-justice function for content moderation issues in social media. The project in itself is laudable, but there are also problems or potential problems that need further discussion. This article raises six such problems of different kinds.

The most important objection could be boiled down to: “not enough contract law, too much human rights law”. To iterate: Facebook's relationship with its users is based on contract. A user that signs the contract has accepted its rules. If the user breaks the rules, the company has a right to use the remedies that follow from the contract, if no clear rules speak to the contrary. This banal observation is sometimes lost in a discussion where Facebook is compared to states, the OB is compared to a Supreme Court and the interest of users in accessing Facebook is labelled as a freedom of speech-issue. “My house, my rules” is still a good starting point.

Bibliography

- Andersson, Håkan. *Ansvarsproblem i skadeståndsrätten*. Uppsala: Iustus, 2013.
- Arun, Chinmayi. “Facebook's Faces.” *Harvard Law Review Forum Volume 135* (2021): *to be published*.
- Aswad, Evelyn Mary. To Protect Freedom of Expression: Why Not Steal Victory from the Jaws of Defeat.” *Washington & Lee Law Review* 77 (2020): 609-659.
- Berlin, Isaiah. *Four Essays on Liberty*. Oxford: Oxford University Press, 1969.
- Carlsson, Anni. ”Tyst vår?.” *Svensk Juristtidning* (2021): 169-178.
- Chander, Anumap. “Facebookistan.” *North Carolina Law Review* 90 (2012): 1807-1842.

57 The Board can only decide its own rules if 2/3 of the Board agrees upon it and if the amendment does not conflict with the Charter, see “Bylaws”, art. 5, sect. 1.

- Clapham, Andrew. *Human Rights Obligations of Non-State Actors*. Oxford: Oxford University Press, 2006.
- Council of Europe. "The European Convention of Human Rights – how does it work?" Accessed June 2, 2021, <https://www.coe.int/en/web/impact-convention-human-rights/how-it-works>.
- Douglas-Scott, Sionaidh. "The Hatefulness of Protected Speech: A Comparison of the American and European Approaches." *William & Mary Bill of Rights Journal* 7 (1999): 305-346.
- Douek, Evelyn. "Facebook's "Oversight Board": Move Fast with Stable Infrastructure and Humility." *North Carolina Journal of Law and Technology* 21 (2019): 1-78.
- European Audiovisual Observatory. *To Have or Not to Have Must-Carry Rules*. Strasbourg: European Audiovisual Observatory, 2005. <https://rm.coe.int/168078349b>.
- Farer, Tom. "The Hierarchy of Human Rights." *American University International Law Review* 8 (1992): 115.
- Healy, Thomas. *The Great Dissent, How Oliver Wendell Holmes changes his mind - and changed the history of free speech in America*. New York: Metropolitan Books, 2014.
- Kettemann, Matthias C. Tiedeke, Anna Sophia. "Back up: can users sue platforms to reinstate deleted content?" *Internet Policy Review* 2 (2020): 9.
- Kirkpatrick, David. *The Facebook Effect*. New York: Simon & Schuster, 2010.
- Klein, Ezra. "Mark Zuckerberg on Facebook's hardest year, and what comes next." *Vox*, April 4, 2018, <https://www.vox.com/2018/4/2/17185052/mark-zuckerberg-facebook-interview-fake-news-bots-cambridge>.
- Kleineman, Jan. "Konstitutionell skadeståndsrätt." *Juridisk Tidskrift* (2018-19): 23-40.
- Klonik, Kate. "Inside the Making of Facebook's Supreme Court." *The New Yorker*, Feb. 12, 2021.
- Klonik, Kate. "The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression." *The Yale Law Journal* 129 (2020): 2418.
- Knox, John H. "Horizontal Human Rights Law." *American Journal of International Law* 102 (2008): 1-47.
- Lévesque, Maroussia. "Applying the UN Guiding Principles on Business and Human Rights to Online Content Moderation." Accessed June 2, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789311.
- Newton, Casey. "Why Facebook needs a Supreme Court for content moderation." *The Verge*, August 21, 2018, <https://www.theverge.com/2018/8/21/17762354/facebook-supreme-court-content-moderation>.
- Ovide, Shira. "Facebook Invokes its Supreme Court." *The New York Times*, January 22, 2021.

- Perrigo, Billy. "Facebook's New Oversight Board Is Deciding Donald Trump's Fate. Will It Also Define the Future of the Company?." *Time*, January 29, 2021, <https://time.com/5934393/facebook-oversight-board-big-tech-future/>.
- Schultz, Mårten. *Det här får man inte säga i det här landet!*. Stockholm: Stiftelsen Juridisk Fakultetslitteratur, 2021.
- Schultz, Mårten. "Nya argumentationslinjer i förmögenhetsrätten: Rättighetsargument." *Svensk Juristtidning* (2011): 989-1018.
- Schultz, Mårten. "Rights through Torts." *European Review of Private Law* 17 (2009): 305-333.
- Shue, Henry. *Basic Rights*. New Jersey: Princeton University Press, 1996, Second Edition.
- Stenlund, Karolina. *Rättighetsargument i skadeståndsrätten*. Uppsala: Iustus, 2021.
- Suzor, Nicholas P. *Lawless. The Secret Rules that govern our Digital Lives*. Cambridge: Cambridge University Press, 2019.
- Facebook and Oversight Board Sources
- Facebook. "Establishing Structure and Governance for an Independent Oversight Board." Accessed June 2, 2021, <https://about.fb.com/news/2019/09/oversight-board-structure/>.
- Facebook News. "Get Started with Facebook News." Accessed June 2, 2021, <https://www.facebook.com/news/getstarted/>.
- Facebook. "Stakeholder Engagement." Accessed June 2, 2021, https://www.facebook.com/communitystandards/stakeholder_engagement.
- Oversight Board. "Announcing the Board's next cases and changes to our Bylaws." Accessed June 2, 2021, <https://oversightboard.com/news/288225579415246-announcing-the-board-s-next-cases-and-changes-to-our-bylaws/>.
- Oversight Board. "Bylaws." Accessed June 2, 2021, <https://oversightboard.com/sr/governance/bylaws>.
- Oversight Board. "Decisions." Accessed June 2, 2021, <https://oversightboard.com/decision/>.
- Oversight Board. "Decision 2021-001-FB-FBR." Accessed June 2, 2021, <https://oversightboard.com/decision/FB-691QAMHJ/>.
- Oversight Board. "Overarching Criteria for Case Selection." Accessed June 2, 2021, <https://oversightboard.com/sr/overarching-criteria-for-case-selection>.
- Oversight Board. "The Oversight Board is accepting user appeals to remove content from Facebook and Instagram." Accessed June 2, 2021, <https://oversightboard.com/news/267806285017646-the-oversight-board-is-accepting-user-appeals-to-remove-content-from-facebook-and-instagram/>.
- Oversight Board. "Rulebook for Case Review and Policy Guidance." Accessed June 2, 2021, <https://oversightboard.com/sr/rulebook-for-case-review-and-policy-guidance>.
- Oversight Board. "Trustees." Accessed June 2, 2021, <https://oversightboard.com/governance/>.

