3

Why and How the State Should Regulate the Internet

Cathleen Powell

3.1 INTRODUCTION

This volume explores the challenges posed to human rights by the digital environment. Grounded as they are in human rights law in general, and Western human rights law in particular, many of the contributions take the individual as their focal point. From this perspective, the broader society of which the individual forms a part is not excluded from the analysis, but it is overshadowed by the individual's interests. This focus can be found expressly in the preamble to the Charter of Fundamental Rights of the European Union (EU), which states that it 'places the individual at the heart of its activities'.[1]

By contrast, society, community, or the common good, is treated as a competing interest; a tension suggested most strongly in the limitations clauses of human rights instruments. These clauses focus on restricting the extent to which social or general interests can be allowed to limit an individual's rights. An example of such a clause is article 52 of the Charter of Fundamental Rights of the EU: 'Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

The argument in this chapter is that the interests of society as a whole can and should play a more central role in the protection of human rights. In addition, I show that the heightened significance of societal interests has a particular implication for the digital environment.

My argument proceeds in three main parts. In Section 3.2, I explore the supposed tension between the individual and society, examining briefly how Western human

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[1] Charter of Fundamental Rights of the EU, OJ C 326, 26.10.2012, 391–407, preamble, para. 2.

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rights law in particular tends to see these two entities as competing rather than interdependent units. I then set out some alternative approaches to the relationship between the individual and society, in particular, the natural law-based Common Good Constitutionalism and the interactional vision of the legal philosopher, Lon L. Fuller. I suggest that Fuller's view is particularly compelling in the context of internet regulation, as it emphasises the need for (genuine) social interaction as a prerequisite for individual agency.

In Section 3.3, I use Fuller's vision as the basis for a discussion of two seminal requirements of a healthy system of internet regulation: trust and the constraint of power. In Section 3.4, I flesh out how these requirements could best be realised to create an effective system to protect individual rights and society as a whole. Section 3.5 draws together the main points of my chapter.

I need to be clear at the outset that what I am aiming to do in this chapter is to explain why the state must regulate the internet at all; that is, to establish the baseline from which individual rights analyses could proceed. The harm that my suggested approach is aimed at countering is, broadly speaking, the use of (dis)information to manipulate users of the internet. The main examples of such harm are found in disinformation, manipulation of information, and hate speech. I set out an approach that, I submit, justifies the speedy removal of disinformation or even of accurate but misleading information from the internet, the reporting and banning of social media accounts and websites, and the creation of structures that monitor and respond to inaccurate or manipulative postings in both the short and the long term. Such forms of internet regulation are already known in parts of the globe, and some of the mechanisms I propose in my conclusion may appear familiar to the European readers of this volume.

However, it is important to set out some basic design elements of internet regulation and explore their foundation. This is for two reasons. The first is that the mechanisms need to be tailored to their specific social, political, and constitutional contexts. In states with authoritarian governments, weakened governments with less technological capacity, and societies in which the government is not trusted by the subjects of law, the main features of the European or Western system may need to be adjusted. For a successful adjustment, the purpose behind the mechanism needs to be properly understood. Having said this, my second reason for suggesting the design features that I set out in Section 3.4 is that *all* societies, even those with technologically advanced governments and a seemingly healthy rule of law, need ongoing engagement between internet users, internet providers, and government authorities to sustain healthy internet regulation, avoiding both the harm caused by individual users and that caused by the government suppression of information and ideas. Thus, even for societies that already implement the basic design that I am suggesting here, it is important to understand its rationale and its positive relationship with individual human rights.

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3.2 DIFFERENT PERSPECTIVES ON THE RELATIONSHIP BETWEEN THE INDIVIDUAL AND SOCIETY

As mentioned earlier, limitation clauses in human rights instruments are often interpreted in a way that sees the individual and society as essentially in conflict. This emerges from the formulation of the clauses themselves – they make it clear that the individual and his or her rights come first – but also from the dominant role that the limitations enquiry tends to play in rights analysis. Consequently, the wording of the limitations clause might even be said to present the general interest as a necessary evil, and it certainly functions as a counterweight to the individual right. With some variation, all limitation clauses require a compelling case to be made that the limitation is necessary (not merely convenient) to achieve an important social good.

Second, the strong focus on the individual is reinforced by the tendency to shift most of the work of rights analysis to the limitations clause. Where rights are not phrased as absolute – where they are subject to limitations – the first step of rights analysis should be to determine the scope of the right in question, to see whether it has been limited or infringed. Only if the answer to the first test is 'yes' should courts and commentators consider whether the limitation/infringement is legally justifiable. However, as Michael Foran has noted, modern doctrine 'has a tendency to avoid difficult questions relating to the scope of rights, preferring instead to view virtually any interference with a claimed interest as an infringement that stands in need of legal justification'.[2] As the legal justification can only be found through the limitations clause, the court is constantly being required to weigh up the individual interest against the public interest. Such an approach assumes ongoing tension between the individual and society. It is important to note that the public interest is, in these cases, generally identified with the interests of the majority, the group purportedly represented by the legislature.[3] If this is how the public interest is to be understood, courts are repeatedly placed in the position of defending one person against a larger group. In Michael Foran's words: 'When the public is set up conceptually in tension with the individual, rights become the last great defence of the individual against an encroaching state demanding their sacrifice for the benefit of the rest of society'.[4]

How might such a stark dichotomy between individual and society be countered using legal theory? I examine two possible approaches briefly here. The first is based on natural law and the second on the philosophy of Lon L. Fuller.[5]

[2] M. Foran, 'Rights, common good, and the separation of powers' (2023) 86 *The Modern Law Review* 3, 599–628, at 605, citing N. E. Simmonds, 'Constitutional rights, civility and artifice' (2019) 78 *The Cambridge Law Journal* 1, 175–99, at 175; J. Tasioulas, 'Saving human rights from human rights law' (2021) 52 *Vanderbilt Law Review* 5, 1167–1207.

[3] Foran, 'Rights, common good, and the separation of powers', p. 605.

[4] Ibid., p. 606.

[5] L. L. Fuller, *The Morality of Law: Revised Edition* (New Haven: Yale University Press, 1969). See also J. Klabbers, 'Constitutionalism and the making of international law: Fuller's procedural natural law' (2008) 5 *No Foundations: An Interdisciplinary Journal of Law and Justice*, 84–112; D. Sturm, 'Lon

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Common Good Constitutionalism sees the common good as 'the set of conditions necessary for each and every member of the community to flourish'.[6] The common good is therefore not limited to the interests of the majority, but refers to the good of all individuals within the community. From this perspective, there is no tension between the individual and the broader society, or the minority and the majority:

> It is a central tenet of the common good that there is no conflict between the good of the majority and the good of the minority, once both are properly understood. This is because the good of an individual cannot be separate from the good of the community: my life is better when my friends' lives are better. My membership within a civic community grounds the bonds of a civic friendship that connects all members of a polity. It is in our shared common interest that all members of our community be capable of leading flourishing lives and that they be treated with dignity and respect. To diminish the flourishing of others, to disrespect their dignity, in the name of the common good, is to fundamentally misunderstand what makes the common good common. It also fundamentally misunderstands what it means to pursue a good life, of which membership within a flourishing political community of equals is essential.[7]

A similar approach to the virtue and necessity of community is found in the African concept of *Ubuntu*, which, in its broadest meaning, recognises that humanity is attained through community.[8] This pre-colonial concept may lie at the root of the emphasis on peoples and community in African human rights instruments.[9] The African (Banjul) Charter expressly recognises the duties of individuals, and states these duties are owed to 'family and society, the State and other legally recognised communities and the international community'.[10] Furthermore, the Banjul Charter expressly mandates that '[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'.[11] Finally, this Charter is the only human rights instrument that recognises the rights of peoples and not just of individuals, thereby including the group within its focus.[12]

Common Good Constitutionalism makes particular demands of human rights analysis, in that the first stage of the analysis – determining the scope of the

Fuller's multidimensional natural law theory' (1965–6) 18 *Stanford Law Review* 3, 612–39. Fuller's procedural natural law is explored more fully later in this chapter.

6 Foran, 'Rights, common good, and the separation of powers', p. 628.

7 Ibid., p. 606. The citation within the text refers to John Finnis: J. Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), chapter 6.

8 T. W. Bennett, A. Munro, and P. J. Jacobs, *Ubuntu: An African Jurisprudence* (Cape Town: Juta, 2018), chapter 3.

9 OAU, African Charter on Human and Peoples' Rights ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

10 Ibid.

11 Ibid., Art. 27(2).

12 Ibid., Arts 19–24.

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right – has to be taken seriously. The scope of the right must further be determined with reference to the common good. In this way, our very understanding of the right is informed by, and promotes, the values that allow members of the community to flourish.[13] The limitations analysis, with its conflict between the individual and society, will come into play less often.[14]

Since its introduction in 2020,[15] Common Good Constitutionalism has been strongly criticised as dangerous and authoritarian.[16] This chapter shows that a benign application of Common Good Constitutionalism is possible by drawing on Lon L. Fuller's legal philosophy to suggest both what the underlying values of the common good might be and to show that the understanding of that common good can, and should, be developed by the community to whose benefit it must be used, rather than by a disconnected authority.

Common Good Constitutionalism sits uneasily with liberalism to the extent that the latter excludes from a legal analysis questions 'relating to the flourishing of individuals or of what constitutes a good life',[17] adopting instead the neutrality principle.[18] Consequently, the nature of the good 'is either whatever a given individual says it is for them, or it is whatever a democratic institution determines it to be'.[19] Indeed, some liberal theorists hold that governments themselves must be neutral on 'what might be called questions of the good life … that political decisions must be, so far as is possible, independent of any particular conception of the good life or of what gives value to life'.[20] It would thus seem that the role we are prepared to afford to society, or public interest, in human rights analysis depends on whether we are prepared to accept the moral content that natural law locates within law itself.

[13] Foran, 'Rights, common good, and the separation of powers', p. 605.

[14] Ibid., p. 625.

[15] Adrian Vermeule, who introduced the term to current legal discourse, expressly draws on the classical legal tradition when he uses the concept. See A. Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Cambridge: Polity Press, 2022); C. Casey and A. Vermeule, 'Myths of common good constitutionalism' (2022) 45 *Harvard Journal of Law and Public Policy* 1, 103–46.

[16] See, e.g., G. Epps, 'Common-good constitutionalism: an idea as dangerous as they come', 3 April 2020, *The Atlantic*, www.theatlantic.com/ideas/archive/2020/04/common-good-constitutionalism-dangerous-idea/609385/; D. Dyzenhaus, 'Schmitten in the US', 4 April 2020, Verfassungsblog, https://verfassungsblog.de/schmitten-in-the-usa; M. D. Kelly, 'Challenging common good constitutionalism' (2024) 15 *Jurisprudence* 1, 418–40; L. C. McClain and J. E. Fleming, 'Toward a liberal common good constitutionalism for polarized times' (2023) 46 *Harvard Journal of Law and Public Policy*, 1123–48.

[17] Ibid., pp. 1–2.

[18] R. Dworkin, 'Liberalism', in S. Hampshire (ed.), *Public and Private Morality* (Cambridge: Cambridge University Press, 1978), pp. 113–43.

[19] Foran, 'Rights, common good, and the separation of powers', p. 600.

[20] Dworkin, 'Liberalism', p. 127. See also P. Neal, 'Liberalism & neutrality' (1985) 17 *Polity* 4, 664–84; R. J. Arneson, 'Liberal neutrality on the good: an autopsy' in S. Wall and G. Klosko (eds.), *Perfectionism and Neutrality: Essays in Liberal Theory* (Lanham, MD: Rowman & Littlefield Publishers, 2003), pp. 191–208.

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Lon L. Fuller's approach could possibly be seen as a compromise between the two apparently opposing philosophies of liberalism and natural law. Fuller described his own philosophy as 'procedural natural law'.[21] The qualifier 'procedural' is important. Fuller remains neutral on (most) ethical issues within the content of law,[22] which would seem to exclude any discussion of the common good from legal enquiry. For Fuller, most substantive (what he would call 'external') moral questions fell outside the realm of law. Nonetheless, his vision of law is particularly useful for our analysis because of the minimum moral content, which he suggested is internal to law itself.[23] Second, the notions of the rule of law and equality before the law underpin the human rights documents consulted for this study.[24] If we adopt Fuller's understanding of the rule of law, then the human rights treaties themselves recognise a minimum level of common good that society needs to promote before it can meaningfully protect human rights.

What do we mean by the rule of law? Most legal philosophers agree on the basic requirements of the rule of law,[25] what Jeremy Waldron calls the 'laundry lists'.[26] These boil down to two basic ideas: first, that law must have a form that allows its subjects to understand what it demands of them and to ensure that their behaviour complies with it; second, that the law as laid down must be the law that is applied to them.[27] To fulfil the first requirement, law must be general, publicised,

[21] Fuller, *The Morality of Law*, pp. 96–7. See also Klabbers, 'Constitutionalism and the making of international law'; Sturm, 'Lon Fuller's multidimensional natural law theory'.

[22] K. Rundle 'The impossibility of an exterminatory legality: law and the Holocaust' (2009) 59 *University of Toronto Law Journal* 1, 65–125, citing the last chapter of the original edition of Fuller' s *Morality of Law* (L. L. Fuller, *The Morality of Law* (New Haven, Yale University Press, 1964)).

[23] Ibid., p. 69.

[24] The Charter of Fundamental Rights of the EU (OJ C 326, 26.10.2012, 391–407) expressly acknowledges the rule of law in its Preamble. A range of other human rights instruments require equality before the law and protection of the law in various formulations. See OAU, African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), Art. 3; UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), in its Preamble, the International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195, at 214, require equality before the law and the protection of the law; International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Arts 14 and 26; Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 1249, Art. 15.

[25] C. Murphy, 'Lon Fuller and the moral value of the rule of law' (2005) 24 *Law and Philosophy* 3, 239–62, at 240.

[26] J. Waldron, 'Is the rule of law an essentially contested concept (in Florida)?' (2002) 21 *Law and Philosophy* 2, 137–64, at 154. The 'laundry list' is generally that there be (a) (general) rules, which are (b) publicised, (c) understandable, (d) not retroactive, and (e) internally consistent (that is, not contradictory). The rules must also be (f) relatively consistent over time; that is, they may not change so frequently that the legal subjects can no longer orient their conduct in compliance with the rules. In addition, (g) compliance must not be physically impossible; that is, the law cannot demand that legal subjects act beyond their powers. Finally, the (h) administration of law must reflect the rules as announced.

[27] Fuller, *The Morality of Law*, chapter 2.

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understandable, consistent, and not impossible to comply with. To fulfil the second, it must be prospective, reasonably stable, and faithfully enforced.

Fuller's understanding of the concept of the rule of law differs from that of other scholars to the extent that he saw it as giving effect to a deeper, moral function, which was to protect and promote human agency:

> I have repeatedly observed that legal morality can be said to be neutral over a wide range of ethical issues. It cannot be neutral in its view of man himself. To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults. Every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent.[28]

Like liberalism, the agency-centred vision of the rule of law appears to take the individual as the quintessential and foundational element of law. Furthermore, Fuller's concept of agency maps closely onto the right to dignity and its associated notions of autonomy and freedom. However, law could protect agency in Fuller's conception only by coming into being and being sustained through community. Fuller used the term 'interaction' to describe the reciprocal process that shapes the content of the law, and this interaction required the engagement of the subjects of law with one another.[29] The interactional process, and not the fiat of government, creates and sustains law, because it is built on the shared understandings of the individuals who interact with one another. As Brunnée and Toope explain, the core moral quality of law, its capacity to allow its subjects to 'reason with law and make choices about their own lives',[30] generates fidelity 'to the rule of law itself and not merely to specific rules'.[31] As a result, while the ultimate purpose of law is to protect and build on human agency, its vehicle for doing so is a socially cohesive community through which the applicable norms can be created and applied.

Douglas Sturm made a similar point about Fuller's conception of freedom:

> It should be made clear that Fuller's understanding of freedom is not individualistic in character. More than once, Fuller has indicated his strong rejection of that theory of natural law whose substance consists in the proclamation of the 'natural, inalienable and sacred rights of man' precisely because of its individualistic bent. To posit the value or goal or goodness of freedom in Fuller's usage of that term is not to desire that each man attain a state of total and absolute independence. On

[28] Rundle, 'The impossibility of an exterminatory legality', citing the last chapter of the original edition of Fuller's *Morality of Law*.

[29] See Postema's discussion of the different aspects of interaction in G. Postema, 'Implicit law', in W. J. Witteveen and W. van der Burg (eds.), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999), pp. 253–75, at 255.

[30] J. Brunée and S. Toope, *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press, 2010), pp. 29–30.

[31] Ibid., p. 53.

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> the contrary, the choices one can make, the purposes one can pursue, without collaborative social effort and without appropriate forms of human intercourse are trivial, if any such totally independent choices are in fact possible. More definitively, the natural law of 'keeping alive the creative, choosing, and purposive side of man's nature' is *intrinsically* societal…[32]

Because community is a prerequisite for and guarantor of individual agency, it is inaccurate and misleading to treat the individual and the community as adversaries. To support human rights through regulating the internet, we should therefore encourage rules that strengthen the community and, in particular, ensure genuine engagement and communication.[33]

If human agency requires community and communication, then a healthy system to regulate the internet will promote trust between internet users and accurate information. This will require the active involvement of the state but, as I argue here, the state will need both the support and the constraint that is provided by non-state actors engaging with it. I explore each of these factors in more detail in the following sections.

3.3 SEMINAL FEATURES OF GOOD INTERNET REGULATION

3.3.1 *Trust*

For Fuller, communication had a pivotal moral function because he saw 'maintaining communication with our fellows' as the overriding aim of human aspiration.[34] Its further moral value lay in its role in creating law. In Fuller's theory, 'law is constructed through rhetorical activity producing increasingly influential mutual expectations or shared understandings of actors'.[35] Through interaction and rhetorical activity,[36] actors are also able to 'generate shared knowledge and shared understandings that become the background for subsequent interactions'.[37]

Communication must clearly be more than cheap talk to give rise to genuine interaction,[38] so we need to ask what *kind* of communication creates shared understandings and legal norms. Drawing on Habermas's notion of communicative

[32] Sturm, 'Lon Fuller's multidimensional natural law theory', p. 616.

[33] J. C. Barker, 'The politics of international law-making: constructing security in response to global terrorism' (2007) 3 *Journal of International Law and International Relations* 1, 5–24, at 24. For the form that this communication should take, see Brunée and Toope, *Legitimacy and Legality in International Law*, p. 31, and I. Johnstone, 'Legislation and adjudication in the Security Council: bringing down the deliberative deficit' (2008) 102 *American Journal of International Law* 2, 275–308, at 279.

[34] Fuller, *The Morality of Law*, p. 185.

[35] J. Brunée and S. Toope, 'International law and constructivism: elements of an interactional theory of international law' (2000) 39 *Columbia Journal of Transnational Law* 1, 19–74, at 65.

[36] Brunée and Toope, *Legitimacy and Legality in International Law*, p. 31.

[37] Ibid., p. 13.

[38] Barker, 'The politics of international law-making', p. 27.

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action, Cornelieu Bjola suggests that communication moves beyond 'instrumental bargaining on the basis of fixed preferences' to a more reasoned process, including 'a mode of interaction between actors based on the logic of arguing; that is, of convincing each other to change their causal or principled beliefs in order to reach a reasoned consensus'.[39] Similarly, Ian Johnstone points out that '[d]eliberation is not a communicative free-for-all, in which any argument is as good as any other; the felt need to offer reasons others can accept in principle sets the parameters of discourse'. Seen in this way, communication must be based on reason and principle.

Compare this standard with the kind of exchanges that result on the internet when users create and share disinformation or manipulate the processes of internet communication, either to amplify or suppress information or ideas, or to eviscerate the expertise and authority of qualified actors. The internet is particularly vulnerable to this form of abuse owing to the difficulty of verifying the identity of the persons behind the posts, or when a post is being artificially enhanced or suppressed by the manipulation of algorithms or the use of robots. Such abuse makes principled or reasoned discussion impossible, and every argument is indeed as good as the next because there is no way for the readers to ascertain which information or actors they can rely on. As a result, the posts that are more likely to be believed are those that align with the views that the reader already holds; a situation which reinforces existing divisions between groups in society rather than stimulating genuine interaction across boundaries of difference. This means that shared understandings cannot arise across a community as a whole. People misled by disinformation and manipulation will not have engaged in the process whereby shared understandings and norms are formed, they will not be able to make informed decisions themselves, and they will not trust the authorities who are attempting to make and implement informed decisions. Those governed by the law will not feel fidelity to it. As a result, disinformation and manipulation threaten the rule of law and also weaken government programmes set up to protect public health or welfare, or any other common good. It is therefore not surprising that the EU describes online disinformation practices as 'public harms', specifically harms to the integrity of electoral processes, and as 'threats to our way of life',[40] which undermine trust and confidence in democratic politics. One of the best examples was the disinformation around COVID-19, as reported by the EU,[41] and by monitoring bodies all over the globe.[42]

[39] C. Bjola, 'Legitimating the use of force in international politics: a communicative action perspective' (2005) 11 *European Journal of International Relations* 2, 266–303, cited by Barker, 'The politics of international law-making', p. 24.

[40] European Commission, 'Shaping Europe's digital future. The 2022 Code of Practice on disinformation', https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation.

[41] EU, 'Fighting disinformation', https://commission.europa.eu/strategy-and-policy/coronavirus-response/fighting-disinformation_en.

[42] C. Cortés and L. F. Isaza, 'The new normal? Disinformation and content control on social media during Covid-19' (2021), CELE, Palermo University, www.palermo.edu/Archivos_content/2021/cele/papers/Disinformation-and-Content-Control.pdf.

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The constitutive role of communication in the creation and maintenance of the legal and social order renders the integrity of internet communication particularly important. Expressed in terms of a rights analysis, the heightened social importance of reliable communication would suggest either that the scope of the individual's freedom of expression should be more narrowly defined, or that, if that freedom is found to have been limited by the regulation of the internet, society's interests should weigh more heavily in a proportionality analysis. In this regard, we can distinguish between the people who create or knowingly distribute false or misleading information and the people who unwittingly or negligently encourage or disseminate it. In the case of the former group, I would argue that the scope of freedom of expression does not extend to the right to knowingly misrepresent information or mislead. In the case of the latter group, the scope of freedom of expression can more plausibly be argued to include this group's behaviour; that is, to include the right to unknowingly disseminate false or misleading information. However, in this case, at the point where freedom of expression has been found to have been limited, society's interest in accurate and good faith communication should play a stronger role in justifying the limitation of that right.

The internet needs to be regulated because a lack of regulation leads to distrust and a breakdown of common values. But simply putting a regulator in charge of the internet with no way of ensuring that the regulator itself is trustworthy compounds the problem. In the area of COVID-19, for example, there were many examples of state actors spreading disinformation, either by denying the existence or spread of the disease or by suggesting cures with no medical efficacy.[43] Moreover, we have seen how control and censorship of the media (social and registered journalism) has been used to justify government abuses and war.[44] Ironically, the power to regulate cannot itself be left unregulated. It needs to be structured in an interactive manner, which ensures that the regulator is in dialogue with responsible stakeholders.

3.3.2 *(The Constraint of) Power*

States have a monopoly on legitimate violence within their territories, control over the executive arm of government, including its security apparatus, and the ability to pass new legislation. If states abuse this power, they pose a threat to democratic values and the common good. On the other hand, and despite the power they may enjoy over their subjects, states are simultaneously often weaker than powerful social media corporations, such as Meta and X. From both perspectives, states need

[43] UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression – Disinformation and freedom of opinion and expression', 13 April 2021, UN Doc. A/HRC/47/25.

[44] M. Susi et al., *Governing Information Flows During War: A Comparative Study of Content Governance and Media Policy Responses After Russia's Attack on Ukraine* (Hamburg: Verlag Hans-Bredow-Institut, 2022).

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to act in concert with non-state actors and broader society to be effective and compliant with the rule of law.

Fuller's theory explains why the state is both too weak and too strong to act alone. The state needs the buy-in of its subjects because law is formed out of the engagement of those subjects with each other and the government. Fuller claims that, in practice, interaction was part of all lawmaking, 'even … those [forms] apparently dominated by enacted law and formal law-making and law-applying institutions'.[45] This was both because there is a horizontal element in apparently vertical lawmaking procedures, such as adjudication or even the drafting of legislation,[46] and because the subjects of law are engaged in a vertical process of interaction with the lawgiver.[47] Non-state actors thus help the state to create the law.

Particularly in the context of internet regulation, there is a practical reason why the state needs the help of broader society. The state often cannot *enforce* the law; that is, it cannot effectively regulate the internet without the engagement of non-state actors. Particularly where the government is not fully trusted by its citizenry, and where that government does not have the expertise to quickly identify disinformation, manipulation of the internet, or hate speech, non-state actors need to assist and collaborate with the government if it is to respond effectively to such misuse. Collaboration of this kind actually empowers the state meaningfully to counter the dangers posed by the internet.

On the other hand, the engagement of non-state actors also prevents the imbalance of power between state and subject from threatening the rule of law. Interaction is necessarily a reciprocal process, even when there is a power imbalance between the parties to the interaction. As Cheng explains:

> To Fuller, no power relation is completely devoid of any measure of interaction between the power-holder and the subject of his power, especially over the course of time. This inevitable degree of reciprocity, in turn, imposes a constraint on the exercise of power by the power-holder, while allowing for the possibility of resistance and negotiation by those subject to the power.[48]

The state bears the primary moral duty of protecting the subjects of law against threats to their lives, health, and other resources.[49] It has the authority to exercise coercion, through regulation,[50] or even criminalisation,[51] when this proves necessary

[45] Postema, 'Implicit law', p. 259.
[46] D. E. Wueste, 'Fuller's Processual philosophy of law' (1986) 71 *Cornell Law Review* 6, 1205–30.
[47] See Postema's discussion of the different aspects of interaction in Postema, 'Implicit law', pp. 259–65.
[48] H. H. L. Cheng, 'Beyond forms, functions and limits: the interactionism of Lon L. Fuller and its implications for alternative dispute resolution' (2013) 26 *The Canadian Journal of Law and Jurisprudence* 2, 257–92, at 268.
[49] R. A. Duff and S. E. Marshall, '"Abstract endangerment", two harm principles, and two routes to criminalisation' (2015) 3 *Bergen Journal of Criminal Law and Criminal Justice* 2, 131–61, at 148.
[50] Ibid., p. 133, cites J. S. Mill, *On Liberty* (1859) in chapter 1, para. 9.
[51] J. Feinberg, *Harm to Others* (New York: Oxford University Press, 1984), p. 26.

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to fulfil its duty. But both criminalisation and regulation can be manipulated by the state to favour a particular party, such as the government in power, and silence the input of the other actors in the internet community. In the context of the internet, a reciprocal process of interaction needs to be built into the very design of the regulatory process to prevent the coercive power enjoyed by the state from threatening the rule of law.

3.4 A LAWFUL PROCESS OF REGULATION

In this concluding section, I suggest some basic design elements of a healthy system of internet regulation, one that permits and indeed requires of the state that it protect society against disinformation, manipulation, and hate speech, and yet constrains the power of the state in order to protect individual agency and the rule of law.

The outline of my suggested regulatory system must generally be broad, as the details of the particular mechanisms employed for regulation depend on a number of extraneous factors. These include whether and how states control the activities of transnational corporations within their own jurisdictions, the technological capacity the state and civil society can provide, and the traditional modes of civic engagement within any particular society. Nonetheless, I suggest there are common features that all well-regulated internet communities will share.

As set out in Section 3.3, we are aiming to ensure a community in which participants have a minimal level of trust in each other and the government, and in which power – both state and private – is sufficiently constrained. As argued in Section 3.2, the main tool to achieve these ends is ongoing engagement and responsiveness between the parties. This process, which we would call interaction under a Fullerian approach to the rule of law, ensures that the necessary shared understandings can arise; understandings that form the foundation of the legal system adopted by the participants. Particularly in the case of the internet, ongoing engagement will also help to monitor compliance with the norms that emerge from this foundation.

Ongoing and effective interaction is best achieved by a multi-tiered design. At the first level of such a framework, the internet and online service providers regulate themselves in dialogue with their users. At the second level, non-state actors monitor the use of the internet, engaging with both the service providers and the state. At the third level, the state plays an active role in internet regulation, co-ordinating between the first two tiers of non-state actors.

3.4.1 *Self-Regulation*

At the first level, service providers self-regulate. This term, 'self-regulation', is a slight misnomer, as I suggest that it be mandated by the state itself, and that penalties be attached to egregious failures by service providers to prevent serious harm through

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their users' traffic on the internet. However, the horizontal and internal nature of the regulation is important; the platform must itself publish and enforce a code of conduct based on international best practices, and encourage debate among users of its platform on what the code of conduct should look like.

Singapore provides an example of self-regulation that is promoted by the statutory authority,[52] the Infocomm Media Development Authority.[53] This government board encourages content providers to develop industry codes of practice in order to promote self-regulation and codes that complement existing internet content regulations.[54] The dialogue between users of the platform and the platform, and among the users themselves, provides the first step in developing shared understandings that recognise the harm that can be caused by internet traffic and build consensus on how to avoid the harm.

The role that the users of the internet can play is illustrated by the process followed in South Korea whenever the Korean Communications Standard Commission (KCSC) instructs an internet provider to remove content from its platform.[55] Upon receiving a request for deletion or rebuttal of the information, the provider of information and communications services must delete the information or take a temporary or any other necessary measure.[56] This content can be hidden, but not deleted, for thirty days, to allow either the platform or the user to challenge the decision. An example of such an engagement arose in 2015, when the entire platform of an adult cartoon service was blocked because part of its content had been considered obscene. The platform operator challenged this ruling on the basis that the site used an age authentication system and therefore complied with the law. The decision to block the site was met with public outcry, and subsequently the commission removed the blocking order.[57]

3.4.2 *Independent Regulatory Bodies*

The second tier of regulation needs to be provided by independent regulatory bodies. These bodies need to be structurally independent of the government and steered

[52] Infocomm Media Development Authority, 'Internet regulatory framework', www.imda.gov.sg/regulations-and-licensing-listing/content-standards-and-classification/standards-and-classification/internet.

[53] Infocomm Media Development Authority, 'Who we are', www.imda.gov.sg/About-IMDA/Who-We-Are.

[54] Infocomm Media Development Authority, 'Internet regulatory framework'.

[55] The operation of the KCSC is prescribed in chapter 5 of the Act on the Establishment and Operation of Korea Communications Commission (KCCA), last amended by Act No. 11711, 23 March 2013, www.law.go.kr/LSW/lsInfoP.do?lsiSeq=137296#0000.

[56] Article 44-2(2) of Act on Promotion of Information and Communications Network Utilization and Information Protection, https://elaw.klri.re.kr/eng_service/lawDownload.do?hseq=38422&type=PDF.

[57] Freedom House, 'South Korea: freedom on the Net 2021 country report', https://freedomhouse.org/country/south-korea/freedom-net/2021, citing Sung-won Yoon, 'Watchdog hit for excessive digital censorship', 30 March 2015, *Korean Times*, www.koreatimes.co.kr/www/news/tech/2015/04/133_176155.html.

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by civil society. At the same time, these independent bodies must be designed and set up in such a way as to ensure that they genuinely do represent the public interest and operate in a transparent and accessible manner.

Recognition is growing that the involvement of civil society is crucial for healthy internet regulation. Civil society can fulfil two roles: developing the rules and policies by which the internet should be governed, and monitoring compliance with the normative system. A good example of the former can be found in the creation of the African Declaration on Internet Rights and Freedoms.[58] This declaration is a pan-African initiative aimed at 'promoting human rights standards and principles of openness in internet policy formulation and implementation' across the African continent.[59] The idea for the declaration emerged from the African Internet Governance Forum in Nairobi, Kenya, in 2013,[60] at which participants came from government, the private sector, civil society, and regional and international organisations.[61]

International bodies such as UNICEF can play a role in the constitution and functioning of internet regulation at the domestic level, and some of the domestic bodies fulfilling this function can be self-constituting, particularly those offering essential technical expertise.[62] However, non-state bodies require the backing of the government and need to remain in communication with it, for reasons explored further here.

I submit that these bodies need to be independent of the state because the government should not be identifying trends or disinformation itself, particularly in states with weak democracies. If an autocratic government exercises unilateral control over the internet, the rule of law is broken. Particularly egregious examples of this form of abuse have been seen when dictatorial governments in Africa have shut down the internet completely during protests or elections.[63] By contrast, if external bodies are doing the job of regulation, they can function as an interlocutor

[58] African Declaration on Internet Rights and Freedoms, 'About the initiative', https://africaninternetrights.org/en/about.

[59] Association for Progressive Communications, 'African Declaration on Internet Rights and Freedoms Coalition: promotion of freedom of expression a priority for Southern Africa', www.apc.org/en/news/african-declaration-internet-rights-and-freedoms-coalition-promotion-freedom-expression.

[60] African Declaration on Internet Rights and Freedoms, 'About the initiative'.

[61] In all, 195 participants attended from twenty-nine countries. See the African Internet Governance Forum – AfIGF 2013, 23 September 2013, 'Final draft report', www.intgovforum.org/en/filedepot_download/7508/1620.

[62] An effective South African example of such a body is the Centre for Analytics and Behavioural Change. See The Centre for Analytics & Behavioural Change, https://cabc.org.za/. Real411, 'Report digital disinformation', www.real411.org/.

[63] I. Gagliardone and A. Brhane, 'Ethiopia digital rights landscape report – digital rights in closing civic space: lessons from ten African countries' (2021), https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15964/Ethiopia_Report.pdf.; C. H. Powell and T. Schonwetter, 'Africa, the Internet and human rights', in M. Susi (ed.), *Human Rights, the Digital Society and Law: A Research Companion* (New York: Routledge Publishing, 2019), pp. 316–34.

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with whom the government has to interact, and to whom it must justify its exercise of power. In this way, they help to ensure the necessary checks and balances in internet regulation.

Independence can be achieved only by the correct design of the regulatory body and of its connection with the state. First of all, the power to regulate must be given to an external body; that is, a body that is structurally separate from the state. But, second, the regulatory authority may not be subject to political interference. Singapore provides an example of a body without structural independence. Under the Protection from Online Falsehoods and Manipulation Act of Singapore, government ministers can order the publication of corrections and the retraction of content they assess to be false or against public interest.[64] The regulatory body is thus embedded within government itself. However, South Korea provides an example of an apparently independent regulatory body that is still subject to strong political interference. The KCSC is established through legislation and identifies itself as a private organisation; however, all nine members of the Commission are appointed by the president.[65] Consequently, a nominally independent 'private' organisation is factually 'under the direct control of the President'.[66]

In addition to politicised appointments, the KCSC has been criticised for its lack of transparency.[67] The norms that it applies when it suppresses internet communications are opaque, and it enjoys wide discretion in its decisions.[68] A similar criticism is levelled at the new power enjoyed by the Film and Publications Board in South Africa,[69] a board whose core members are also appointed directly by the relevant minister.[70]

The problematic role of the government in appointing incumbents to these regulatory bodies highlights another important design element of healthy internet regulation, namely, a transparent process for the selection of office holders. Such a selection process addresses two problems at once. First, it reduces the chance that the regulatory body will be beholden to the government and thus lack independence. But second, it also helps to ensure that such bodies do, in fact, represent the public interest. These independent bodies do not have a democratic mandate, which

[64] Tech Against Terrorism, 'The Online Regulation series | Singapore – tech against terrorism', 5 October 2020, www.techagainstterrorism.org/2020/10/05/the-online-regulation-series-singapore/.

[65] J. Lee, 'A private organization directly under the president? Structural contradiction of the Korea Communications Commission', www.mediatoday.co.kr/news/articleView.html?idxno=97350.

[66] Ibid.

[67] Freedom House, 'South Korea: freedom on the Net 2021 country report', https://freedomhouse.org/country/south-korea/freedom-net/2021, citing Sung-won Yoon, 'Watchdog hit for excessive digital censorship', 30 March 2015, *Korean Times*, www.koreatimes.co.kr/www/news/tech/2015/04/133_176155.html.

[68] Ibid.

[69] Bowmans, 'South Africa: Films and Publications Amendment Act comes into operation', https://bowmanslaw.com/insights/technology-media-and-telecommunications/south-africa-films-and-publications-amendment-act-comes-into-operation/.

[70] South African Government 'Films and Publications Amendment Act, Act No. 11 of 2019', section 4.

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means that some kind of public process is needed to ensure responsiveness and legitimacy for the authority that they exercise, particularly for those bodies that are formulating policy. The selection process should ideally consist of public interviews conducted by mixed panels representing both the legislature and experts in the field of internet regulation.[71] Such a process ensures the interaction from which shared understandings can be built by promoting trust in the incumbents of the regulatory bodies.

Legislation or regulation is then needed to confer on this body the power that resides, by default, in the state itself: the power to regulate the internet. These powers serve two functions. They are, on the one hand, a check on inadequate self-regulation by service providers, while on the other hand, they serve as both a check on and support for the government in its duty to prevent harm through internet usage. Particularly where the government faces challenges of technical capacity, there needs to be coordination between rapid information task teams, which are properly constituted, to respond effectively to immediate crises and provide watchdog analysis of future or emerging threats. In relation to disinformation, this needs to be a real-time response, so that inaccurate and damaging information can be removed immediately if needed.

However, immediate responses are not always necessary. Monitoring and response bodies can also be assigned to different target areas that need to be addressed, such as terrorism, incitement, hate speech, and xenophobia. Such bodies may react in a more long-term manner and even coordinate counter-campaigns against harmful internet initiatives.

Although these bodies need to be independent of the government, they need to be supported by the government to be effective, a point discussed further in the next section. They need to operate under clear rules and procedures, and remain responsive to the engagement of the public as well as the government. As seen in the example of the KCSC, public response to the rulings of this independent authority can help it to refine and clarify the norms that it is meant to be applying.

3.4.3 *The Role of the State*

The state is needed partly because deleting and retracting does not eliminate the activity behind the information shared online, such as terrorism, incitement, hate speech, and xenophobia. Engaging with this reality is beyond the capacity of the task team; this is when the involvement of the state is warranted. We have many recent examples of occasions when the state should have acted, but did not. The online trends and chatter leading up to the 6 January riots in the US in 2021 made the riots

[71] While these bodies themselves may be susceptible to political influence, the open nature of their interviews does at least provide some level of a check in the form of public responses to the interview process.

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foreseeable. Similarly, the Centre for Analytics and Behavioural Change picked up the indicators of the approaching riots before they began in South Africa in June 2021.[72] The presence of the state, through the police, was needed, whether or not the police themselves were gathering the primary information.

The role of the state requires clear delineation because its involvement in internet governance must be a justifiable intervention addressing credible and serious threats to the peace and security of citizens and the state as a whole. It would intervene in two main contexts. The first is proactive suppression of a serious forthcoming danger, such as xenophobic attacks, riots, and insurrection. These threats call for a multi-departmental response that only the state has the capacity to execute. In these cases, the state's involvement should work based on the analysis, predictions, and recommendations made by independent task teams in the event that a preemptive response is required to maintain societal peace and security.

The second context in which the state has a role to play is in the prosecution of serious crimes committed online. These include hate speech in some jurisdictions and may also encompass the deliberate distribution of misinformation, especially during elections. And, of course, it includes all the offences that are also offences when committed offline. There is no reason why the normal law enforcement processes should be hindered because the crime is taking place in the digital space. Therefore, a component of the amendment to the internet regulation law in South Africa was that internet service providers were to inform the Film and Publication Board whether they had reported the presence of the prohibited content, as well as the particulars of the individual maintaining, hosting, distributing, or in any manner contributing to the content, to an official of the South African Police Service.[73]

3.5 CONCLUSION

In this chapter, I have attempted to pan out from an analysis of specific rights affected by internet regulation to then focus in on the basis for that regulation. I argue that this basis is the rule of law, and that the rule of law, properly understood, requires an approach to rights analysis that recognises and fosters the community in which the rights are exercised. Under such an approach, we interpret individual rights in such a way as to benefit all the members of the community, and we are prepared to limit individual rights if this is necessary to maintain genuine interaction between the subjects of law. In Fuller's view, this process of interaction creates the shared understandings from which a community develops a legal system, and nurtures

[72] The Centre for Analytics & Behavioural Change, '2021 June riots', https://cabc.org.za/search/2021Juneriots/.

[73] *Business Tech*, 'South Africa's internet censorship laws are now in full effect – and legal notices are going out', 31 October 2022, https://businesstech.co.za/news/government/639087/south-africas-internet-censorship-laws-are-now-in-full-effect-and-legal-notices-are-going-out/.

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and develops the particular norms that make communal life possible. It is thus a prerequisite for the very existence of the individual rights.

With the focus on maintaining interaction and responsiveness, I then suggest some basic design elements for internet regulation. The general model I propose is backed up by the coercive power of the state and allows for significant limitation of individual rights to prevent the manipulation of information. However, such limitations are themselves bounded by a structure in which the necessary actors remain in dialogue with one another and keep the state responsive to the views of internet users.

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