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**THE ROLE OF THE SOCIAL MEDIA AND THE INTERNET
IN DEMOCRATIC DEVELOPMENT**

By

Ms Herdís Kjerulf THORGEIRSDOTTIR
(Member, Iceland)

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Introduction

1. There are two specific topics that I consider important to elaborate on in relation to social media and democracy, one in particular is net neutrality and the democratic significance of an open internet. Subsequently I will briefly touch upon the issue of fake news and the problematic aspect of content restrictions carried out by Internet service providers (ISPs), either entirely at their own initiative or in co-operation with authorities.

2. No one actually owns the Internet, and no single person or organization controls the Internet in its entirety. The Internet is more of a concept than an actual tangible entity, and it relies on a physical infrastructure that connects networks to other networks. The Internet transcends borders and territorial rule.

3. At the outset the Internet was seen as a potential new public sphere; empowering individuals to be active participants in the public discourse and hence contributing to a more efficient political democracy with an enlightened public due to the active discourse on social media. Unlike the traditional news media with editors and professional journalists the vision of the social media as the new public sphere was of the digital communication removing or lowering the barriers for democratic participation of the whole public. The social media was by many seen as a public counterforce to the traditional media monopolies, the newspaper and broadcasting conglomerates that were dominating the traditional public discourse. The social media promised to give everyone a voice.

Monopoly of multinational corporations

4. Now large multinational corporations have gained global control over the flow of information and are thus in a position to shape the political discourse and opinion formation and hence threaten the internet's democratic design. We have the same forces at work as in the traditional media landscape but now their voices are amplified by social media and they are able to reach every corner of the world and transform societies and lives. Just like the traditional media served a "gatekeeper" role* in setting the agenda for campaign discourse the same is happening on the internet with big corporations.

5. The internet's great promise was that it operated outside the purview of existing communications monopolies. The notion that the internet should afford at least a minimally competitive landscape for new entrants seems no longer relevant. Today a handful of American tech behemoths — Amazon, Apple, Facebook, Google and Microsoft† — control the most important digital infrastructure. Companies that have the technical capacity to do things, the business incentive to do them and the legal right — will most likely take advantage of what is made available to them.

6. Power is concentrated on the web in the hands of a few websites - in the words of Tim Berners-Lee the inventor of the world wide web: "*most people find news and information on the web through just a handful of social media sites and search engines*".‡ The social media, like Facebook, is just as the traditional media controlled by market forces. The stock price of Facebook like any big media corporations depends on its advertisement revenues; to grow financially and sustain its market value. Advertising on Facebook works by determining its user's interests, based on data it collects from their browsing, likes and so on. This is a very hi-tech operation.

7. The sites make money from clicks, and through algorithmic regulation create [echo chambers and filter bubbles](#) where individuals receive the kinds of information that they have either preselected, or, more ominously, that algorithms have figured out they want to hear. This allows for political advertising to be increasingly individually tailored and targeted. Instead of being a public square featuring many voices people are becoming more isolated out of touch with the whole spectrum of the public.

* https://www-cdn.law.stanford.edu/wp-content/uploads/2017/04/07_28.2_Persily-web.pdf

† See f. ex. here: <https://www.forbes.com/sites/steveandriole/2018/09/26/apple-google-microsoft-amazon-and-facebook-own-huge-market-shares-technology-oligarchy/#372d73d92318>

‡ <https://webfoundation.org/2017/03/web-turns-28-letter/>

Exploitation of data

8. *The current business model for many websites offers content in exchange for personal data.** In proprietary social media for instance, people lose control of what is being done with their data, and also cannot reap the benefits of the data themselves. As the case of *Cambridge Analytica* reveals Facebook is run as a business which exploits data for political ends. In that way it is an extension of traditional media used for political purposes in political campaigns where there is more money in politics and hence a greater voice for the wealthy and lesser one for the poor. The fact that people give away their personal information in exchange for free services enables widespread data collection by the websites, and, consequently also large-scale surveillance, the targeting of political dissidents, and a 'chilling effect' on free speech.[†]

9. Big social platforms like Facebook are more like tech companies than publishing or media companies. Unlike the traditional media companies, these new firms were not created principally to serve democratic values and do not have as their lodestar the fostering of a well-informed and civically minded electorate. Although this is not saying that the traditional media is first and foremost bound by its devotion to the public interest as too strong financial and political interests are at stake for the corporate owners of the big media conglomerates – everywhere.

Social media, democracy and freedom of expression

10. Although the social media differs from the traditional media access to all kinds of information and ideas through search engines on the Internet is an indispensable element of modern opinion formation. The link between social media and democratic development is based on an ideal internet where all voices are recognized and none marginalized; with no one hoarding information or controlling access or deciding who speaks and who doesn't. The Internet provides the tool for the public's right to impart and to receive information and ideas of all kind, which is essential for the right to know and for increased transparency of the conduct of power holders and other forces shaping society.

11. Internet based modes of expression are protected under international human rights law; Art. 19(2)[‡] as stated in the UNHRC General Comment No. 34 (2011): "States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto".

12. The European Court of Human Rights has confirmed the significant role of the internet in realizing freedom of expression for democratic objectives. in *Ahmet Yildirim v. Turkey*, the Second Section of the Court emphasized that "the Internet has now become one of the principal means of exercising the right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest".[§]

13. The ECtHR has reiterated time and again that free elections, as guaranteed by Article 3 of Protocol No. 1 to the EHCR, and freedom of expression as protected under Article 10 of the ECHR, together form the bedrock of any democratic system. The two rights are inter-related and operate to reinforce each other, freedom of expression being one of the "conditions" necessary to ensure free elections. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely.** The Venice Commission has reiterated that circumstances regarding elections must

* See open letter from Tim Berners-Lee; <https://webfoundation.org/2018/03/web-birthday-29/>

† See open letter from Tim Berners-Lee; <https://webfoundation.org/2018/03/web-birthday-29/>

‡ General Comment No. 34, Human Rights Committee 102nd session Geneva, 11-29 July 2011

§ *Ahmet Yildirim v. Turkey* Judgment of 18 December 2012.

[https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU\(2014\)014-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2014)014-e)

** *Orlovskaya Iskra v. Russia*, 42911/08, 21 February 2017.

guarantee the freedom of voters to form an opinion.* This requires inter alia that voters have access to sufficient information, and that enough time is left for public debate.

14. It is firmly embedded in the ECtHR case-law and underscored by the Venice Commission time and again that freedom of political debate is at the very core of the concept of democratic society.[†] As the ECtHR has provided: “[T]he Internet has now become one of the principal means by which individuals exercise their right to freedom to receive and impart information and ideas, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest. ... Moreover, as to the importance of Internet sites in the exercise of freedom of expression, ‘in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information in general’.[‡] User-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression ...”[§]

15. The ECtHR has acknowledged that the function of creating various platforms for public debate is not limited to the press as the public watchdog role ascribed to the press may also apply to NGOs, bloggers, users of the social media.^{**} It has recognised that civil society makes an important contribution to the discussion of public affairs.^{††} The ECtHR has provided that given the important role played by the Internet in enhancing the public’s access to news and facilitating the dissemination of information (see *Delfi AS v. Estonia* [GC], § 133, ECHR 2015), that the function of bloggers and users of the social media may be assimilated to that of “public watchdog” in so far as the protection of Art. 10 is concerned.^{‡‡} Given that accurate information is a tool of their trade, it will often be necessary for persons and organisations exercising watchdog functions to gain access to information in order to perform their role of reporting on matters of public interest. Obstacles created in order to hinder access to information may result in those working in the media or related fields no longer being able to assume their “watchdog” role effectively, and their ability to provide accurate and reliable information may be adversely affected. (see *Társaság*, cited above, § 38).

16. The right to freedom of opinion and expression is a universal right which applies to all persons equally. It needs to be protected everywhere and for everyone, online and offline. States have the primary obligation to protect and ensure the right to freedom of opinion and expression: States must ensure that their legal systems provide adequate and effective guarantees of freedom of opinion and expression to all, which are applicable to their entire territory and can be properly enforced. An open internet with a pluralism of voices and views is crucial to maintain the public dialogue necessary for democracy. An informed and preferably enlightened electorate constitutes the premises for democratic elections.

17. From all the above is evident that communication on social media enjoys the same protection in international human rights law as the on the forum of the traditional media – and that individual bloggers can be recognized as having a public watchdog role – albeit have the duty just like those working in the traditional press not to overstep the boundaries set forth in the restriction clauses of the freedom of expression provisions of the international and regional treaties.

Net neutrality

18. Protecting the democratic function of the Internet from being monopolized by private corporate power calls for the equal treatment of all data sent and received without differential charges and service quality – described by the term “net neutrality”. This is the founding principle of the Internet where internet service providers (ISPs) are to treat all online data

* CDL(2017)006*Opinion No. 872 / 2016.

† CDL-AD(2017)007, Opinion No. 872 / 2016

‡ (*Cengiz and Others v. Turkey*, judgment of 1 December 2015, §§ 49 and 52).

§ *Cengiz and Others v. Turkey*, judgment of 1 December 2015, §§ 49 and 52.

** *Magyar Helsinki Bizottság v. Hungary*

†† *Steel and Morris v. the United Kingdom*, no. [68416/01](#), § 89, ECHR 2005-II; and *Társaság*, § 38

‡‡ *Magyar Helsinki Bizottság v. Hungary*; see *Animal Defenders International v. the United Kingdom* [GC], no. [48876/08](#), § 103, ECHR 2013

equally and provide the conditions for unfettered user access, without discrimination based on content or source.

19. The Committee of Ministers of the Council of Europe in Recommendation of 2016 on protecting and promoting the right to freedom of expression and the right to private life with regard to network neutrality called on European states to safeguard the principle of **network neutrality** in the development of national legal frameworks in order to ensure the protection of the right to freedom of expression and to access to information, and the right to privacy.*

20. Abolishing the policy of “net neutrality” (enacted in 2015[†]), as the the United States Federal Communication Commission agreed to do in December 2017, allows Internet Service Providers (ISPs) to block or throttle (slow down) websites and charge for faster download and upload speeds. In these circumstances, online services, applications, and websites can be granted preferential treatment for any number of reasons, be they commercial or ideological. This measure is akin to internet blocking and may mark the end of the open inter-operable, free internet where near-monopolies (giants) will control internet access.

21. The ending of Net Neutrality in the United States also sets a dangerous precedent for less democratic countries where ISPs of state-owned and censored. Authorities now have an excuse to give faster lanes of access to pro-government outlets. European content and service providers serving customers in the United States will be affected by the decision of the US FCC to repeal net neutrality rules, as they will not be protected by rules from practices such as blocking, throttling or prioritization.[‡]

22. EU rules on net neutrality (open internet) apply as of 30 April 2016, following the adoption of Regulation (EU) 2015/2120 on 25 November 2015 by the European Parliament and the Council.[§] This regulation creates the individual and enforceable right for end-users in the EU to access and distribute internet content and services of their choice. The Regulation also enshrines the principle of non-discriminatory traffic management. Common EU rules on net neutrality ensure that the same provisions apply across Europe. The enforcement of open internet rules within the EU is the task of national regulatory authorities which should respect the guidelines adopted by the body of European Regulators for Electronic Communications (BEREC) in 2016. Accordingly, it is not up to internet service providers to arbitrate the success or failure of the services and content distributed. The rules enshrine the principle of net neutrality into EU law: no blocking or throttling or discrimination of online content, applications and services.**

23. Enabling big corporations to control the internet is akin to blocking it from the active participation of everyone. The monopoly of big corporations hinders new companies from entering the marketplace and limits the pace of innovation. Having access to a wide variety of information and ideas provides voters with better understanding of what types of interests are aligned with which candidates and parties prior to elections.

24. States remaining inactive under such circumstances are failing in their duty to guarantee freedom of expression and an opportunity to access information to everyone within their jurisdictions. States should in any case be recommended to consider legally strengthening users' rights to an open Internet.

* **Recommendation CM/Rec(2016)1 of the Committee of Ministers to member States on protecting and promoting the right to freedom of expression and the right to private life with regard to network neutrality** (Adopted by the Committee of Ministers on 13 January 2016, at the 1244th meeting of the Ministers' Deputies)
https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1e59

[†] The net neutrality regulations enacted in 2015 sought to stop the ISPs giving preferential treatment to sites and services that paid them to accelerate their data officially expired in June 2018.

[‡] http://www.europarl.europa.eu/doceo/document/E-8-2018-000856-ASW_EN.html?redirect

[§] https://eurlex.europa.eu/legalcontent/EN/TXT/?uri=uriserv:OJ.L_.2015.310.01.0001.01.ENG&toc=OJ:L:2015:310:TOC

^{**} <https://ec.europa.eu/digital-single-market/en/open-internet-net-neutrality>

Content regulation by private corporations

25. There is great cause for concern regarding the numerous laws that States have adopted in recent years to regulate online content. Private tech companies are also censoring content which they consider “harmful” and they are not accountable nor are their measures transparent.

26. Currently many States have on their agenda to tackle the issue of “fake news” with legislation. This poses a threat to interfering with the fundamental right of freedom of expression and information. Exaggerated speech enjoys protection under Art. 10. As reiterated by the Venice Commission “the mass media are not the only category that should be entitled to a high level of freedom of expression. Thus, persons who impart information and ideas on matters of public interest and contribute to the public debate on such matters, including members of campaign groups and elected representatives, should be allowed a high level of freedom of expression, including a certain degree of exaggeration and even provocation as long as they act in good faith and exercise due diligence in order to provide accurate and reliable information”.*

27. “Fake news” is a vague concept as there are different varieties of what constitutes untrue, incorrect, fictitious messages. Propaganda and attempts to dis-inform or distract the public’s attention has always been part of media tactics, spin doctors, politicians and so forth. Enabling authorities to interfere with the public discourse on the forum of the social may be gravely abused to silence dissidents and prevent discussion which challenges mainstream thought and restricting criticism of societal attitudes.

28. The German law (the Network Enforcement Act) which took effect in the beginning of 2018 requires large social media platforms, such as Facebook, Instagram, Twitter, and YouTube, to promptly remove “illegal content,” as defined in 22 provisions of the [criminal code](#), ranging widely from insult of public office to actual threats of violence. Faced with fines up to 50 million euro, companies are already removing content to comply with the law.†

29. The German law has been harshly criticized. It can set a dangerous precedent for other governments in an attempt to control the discourse taking place on social media. Russia, Singapore, and the Philippines – have directly cited the German law as a positive example as they contemplate or propose legislation to remove “illegal” content online. [The Russian draft law](#), currently before the Duma, could apply to larger social media platforms as well as online messaging services.‡ The creation of central bodies to decide what is “true” or not is going down the slippery slope of censorship.

30. Equally criticized was the ECJ landmark judgment in May 2014 regarding data protection and the “right to be forgotten” on the Internet in the case of Google against Spain. This judgment sent shock waves throughout Europe and beyond as ECJ ruled that individuals have – under certain conditions – the “right to be forgotten” and that Google must delete “inadequate, irrelevant or no longer relevant” data from its results when a member of the public requests it.§ This decision will have enormous implications as it paved the way for private censorship on the internet. In his famous book 1984 Orwell warned that: Who controls the past controls the future. Who controls the present controls the past.

31. Any form of prior interference with freedom of expression and information on the internet by private parties threatens the robust discourse which presumably results from a large open public forum. It is crucial that the CoE member states set an example by not relying on or encouraging private corporations to interfere with online communication without ensuring themselves that human rights are protected and due process guarantees are upheld in line with the ECHR, as also emphasized by the CoE Commissioner for Human Rights.**

* CDL-AD(2013)024, Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan, §37

† Human Rights Watch, February 14, 2018

‡ Human Rights Watch, February 14, 2018

§ [https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU\(2014\)014-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2014)014-e)

** See also: <https://www.coe.int/en/web/commissioner/-/arbitrary-internet-blocking-jeopardises->

32. There should be considerable leeway for authorities to set rules requiring that purchasers of advertisements or sponsors be identified and to block posts that falsely identify the author or impersonate legitimate users.

33. As the Venice Commission has frequently reiterated an open, robust public debate is the cornerstone of democracy. Hate speech, direct incitement to violence does on the other hand not fall under the protection of Article 10.*

Recommendations

34. The problems addressed here are complex and the solutions far from simple. There is little dispute that the Internet should be an open platform. States should thus be recommended to consider legally strengthening users' rights to an open Internet.

35. From the perspective of both constitutional law and international human rights law it is crucial to take into account the reality of the influential actors outside the the elected authorities preventing the realization of fundamental rights.[†] Civil and political rights need not only be protected from the elected authorities but also those with the financial power to distort the democratic processes by for example influencing elections with their control of the information flow. Various suggestions to enhance corporate social responsibility have been put forth in recent years and these would also apply to corporations controlling the social media; i.e. emphasis on self-regulation, shared values and balancing financial goals with social goals. These are all worthy aims but do not seem to be taken seriously as the grip of the corporate giants has gotten tighter.

36. It is crucial that states set an example by not relying on or encouraging private corporations to interfere with online communication without ensuring themselves that human rights are protected and due process guarantees are upheld in line with the ECHR

37. States should ensure that any restrictions on access to Internet content affecting users under their jurisdiction are based on a strict and predictable legal framework regulating the scope of any such restrictions and afford the guarantee of judicial oversight to prevent possible abuses. In addition, domestic courts must examine whether any blocking measure is necessary and proportionate, and in particular whether it is targeted enough to impact only on the specific content that requires blocking.

38. In a democracy, voters must arm themselves with the power of information and knowledge. Voters must be the decision-makers not the ones manipulated. The danger lies in the monopoly and financial power to maneuver the public discourse. The effort needed is to break up the oligarchy of tech companies controlling the social media at present and hence to a great extent the voting behavior of citizens turned social media consumers. The promise of an open, free Internet is that voters can become more informed, more rational and more engaged than they ever in the past have been.

freedom-of-expression?desktop=true

* CDL-PI(2016)011

[†] H. Thorgeirsdottir, Journalism Worthy of the Name: Freedom within the Media and the Affirmative Side of Article 10 of the ECHR. Kluwer Law International (2005).