4 Freedom of expression online

Matthias C. Kettemann and Wolfgang Benedek

Introduction

The protection of internet freedom and freedom of expression, as a key element of it, is challenging: "Declines outnumber gains for the eighth consecutive year. Out of the 65 countries assessed in Freedom on the Net, 26 experienced deterioration in Internet freedom". The key findings of the annual *Freedom of the Net* report by the NGO Freedom House for 2018 give little room to celebrate: "Citing fake news, governments curbed online dissent: At least 17 countries approved or proposed laws that would restrict online media in the name of fighting "fake news" and online manipulation".[1] Even democracies are at risk, as they introduce "overreaching restrictions on freedom of expression" and outsource "key censorship decisions to ill-equipped and often opaque tech companies".[2]

Protection of freedom of expression online is essential: offline just as online. In one of its fundamental cases on the role of Article 10 in online environments, the 2015 *Cengiz and Others* case, the Strasbourg judges confirmed that

> the 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.[3]

Just as freedom of expression in all its forms is widely considered the right essential to meaningful internet use,[4] the evolution of the internet has become determinative for our communicative relations. The Court again in *Cengiz*: "user-generated expressive activity on the internet provides an unprecedented platform for the exercise of freedom of expression."[5]

The internet today has become, as UN Special Rapporteur on Freedom of Expression, Frank La Rue, put in his 2011 report, a "vital communications medium which

1 Freedom House (2018) Freedom of the Net 2018: The Rise of Digital Authoritarianism, October 2018, https://freedomhouse.org/report/freedom-net/freedom-net-2018

2 Ibid., 11.

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

4 Cf. Human Rights Council Resolution 20/8, The promotion, protection and enjoyment of human rights on the Internet, 5 July 2012, para. 1: "[The Human Rights Council] [a]ffirms that the same rights that people have offline must also be protected online, *in particular freedom of expression*, which is applicable regardless of frontiers and through any media of one's choice, in accordance with Articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights" (emphasis added). Biannual resolution with the same content followed.

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

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individuals can use to exercise their right to freedom of expression, or the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers".[6] Unlike any other medium in history, "the Internet allows individuals to communicate instantaneously and inexpensively, and it has had a dramatic impact on the way information and ideas are shared and accessed".[7]

In this contribution we will first define the scope of freedom of expression online and discuss its evolution, legal basis and the case law of the European Court of Human Rights. The section allows us to clarify the extent to which freedom of expression and connected rights are protected on the internet and what limits exist. We will then discuss how standard-setting activites by institutions such as the Council of Europe are normatively important for the development of the obligations of states and other actors regarding freedom of expression. In the next section we will expose selected normative challenges of protecting freedom of expression. These are both institutional (such as the obligations structure of human rights commitments) and related to policing online content (intermediary liability exemptions). Finally, we develop some conclusions.[8]

Scope of freedom of expression (online)

Development

New opportunities for freedom of expression have been a major promise of the internet since its conception. The World Summit on the Information Society (WSIS) in its Geneva Declaration of Principles of 2003[9] and the Tunis Agenda of 2005 reaffirm the commitment to freedom of expression, which according to Article 19 of the Universal Declaration on Human Rights (UDHR) of 1948 includes the freedom "to seek, receive and impart information and ideas through any media and regardless of frontiers". The internet has opened new dimensions of freedom of expression and information, for example for bloggers, electronic media platforms, web pages, exchanges of views on social media and also citizen journalists. However, while the WSIS was mainly concerned with providing more people with access to the internet, today we are struggling with an increasing trend towards restricting freedom of expression and information on the internet.

More and more states, but also private companies use filtering and blocking technologies, bloggers and citizen journalists are persecuted and the internet is utilised to collect information on its users like through tools of facial recognition and tracking in China. Search engines show clients what they consider relevant for the user, leaving them in so-called "filter bubbles". The respective algorithms remain a business secret. Artificial intelligence selects what users can see. But misuse of the internet comes also from its users in the form of hate speech and fake news, of images of child abuse and terrorist propaganda.

6 Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Promotion and protection of the right to freedom of opinion and expression, UN Doc. A/66/290 of 10 August 2011, www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf, para. 10.

7 Ibid.

8 This contribution draws from previous work of the authors, including Kettemann (2019) *The Normative Order of the Internet* (to be published) and Benedek and Kettemann (2013) *Freedom of Expression on the Internet*. Strasbourg: Council of Europe Publishing.

9 See World Summit on the Information Society, Geneva Declaration of Principles, Building the Information Society: A Global Challenge in the New Millenium, Document, UN-Doc. WSIS-03/GENEVA/DOC/4-E of 12 December 2003, para. 4 and Tunis Agenda for the Information Society, WSIS-05/TUNIS/DOC/6(REV.1)-E, para. 42.

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The internet can be used to realise human rights and to endanger them. This raises the responsibility of the gatekeepers, of intermediaries, but also of everyone using the internet.

Legal basis

Freedom of expression is one of the key civil and political rights. In the 18th and 19th centuries freedom of expression was fought for by philosophers and economists such as Voltaire (1694–1778) and John Stuart Mill (1806–1873) as key to a liberal society and to development as a concept freeing societies from corruption. (The idea of "sunlight" being "the best disinfectant" thus has long roots.) The First Amendment to the US Constitution of 1791 adopted a wide approach to freedom of expression (and the Supreme Court has been extending the reach of the First Amendment ever since) and President Roosevelt included it in 1941 in his four freedoms to guide the post-war order.

Today a key international legal basis for freedom of expression is Article 19 of the Universal Declaration of Human Rights:

> Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any means and regardless of frontiers.

Even though the UDHR is based on a non-binding resolution of the General Assembly, it is by now largely considered to reflect customary law. In addition, in 1976 the International Covenant on Civil and Political Rights (ICCPR) was adopted, which in its Article 19 reiterates the text of the Universal Declaration and then clarifies (in para. 2) that

> shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Accordingly, the right goes beyond the freedom of the press and the freedom of the media to include individual expression in the widest sense. However, the right is not absolute or without limits. Under certain clearly defined conditions it can be restricted. No restrictions, however, can be applied to freedom of opinion, which in the ICCPR has been separated from the freedom of expression in Article 19 (1). Freedom of opinion is an absolute right, which shall never be restricted.

In the latest 2018 resolution on human rights on the internet (passed biannually since 2012), the Human Rights Council affirmed, with references to Articles 19 of the UDHR and the ICCPR, the special role of freedom of expression online: "the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice".[10]

The protection of freedom of expression under regional human rights law is similar. Article 10 (1) of the ECHR enshrines "the right to freedom of expression. This right

10 UN Human Rights Council Resolution 38/7, The promotion, protection and enjoyment of human rights on the Internet, UN Doc. A/HRC/RES/38/7 of 5 July 2018.

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shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers". Note the reference to the non-interference "by public authority": states are obliged to protect freedom of expression both as a free-standing right and as an essential "enabler" of other rights through the internet. As former UN Special Rapporteur for Freedom of Expression, Frank La Rue, wrote, "by acting as a catalyst for individuals to exercise their right to freedom of opinion and expression, the internet also facilitates the realisation of a range of other human rights".[11]

Article 19 (2) of the ICCPR guarantees interconnection technologies with its reference to the protection of expression by "any . . . media of [one's] choice". If the internet does not function, most "media" will cease to work as well. [12] This point is well made also by the Human Rights Committee, which, in the most recent General Comment on Art. 19 ICCPR, recalls the technological premises of the internet's communication function: "[a]ny restrictions on the operation of websites, blogs or any other Internet-based, electronic or other such information dissemination system, including systems to support such communication, such as Internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3".[13] Interfering with ISPs thus amounts to interfering with the right to privacy.

The jurisprudence of the European Court of Human Rights helps understand how freedom of expression, as enshrined in the ECHR, can be considered to indirectly protect the integrity of the internet. According to established case law, freedom of expression can be considered "one of the essential foundations for a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment".[14] The Strasbourg Court interprets the Convention "in the light of present-day conditions",[15] taking into account the specific nature of the internet, as a "modern means of imparting information",[16] in particular because of the greater impact, accessibility, durability and asynchronicity of information on the internet. [17]

There are several neighbouring rights which are closely related to the freedom of expression, like freedom of assembly and of association, freedom of thought, conscience and religion and the right to education as well as academic freedoms. The Committee of Ministers of the Council of Europe has adopted a recommendation on freedom of assembly and association on the internet, based on a pertinent report by experts, highlighting the role of the internet in this respect, but also challenges ranging from urban violence to the

11 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/HRC/17/27 of 16 May 2011, paras. 22 and 23. But the internet also brings about new challenges to these same human rights.

12 Molly K. Land (2013) Toward an International Law of the Internet. *Harvard International Law Journal*, Vol. 54, 393–458.

13 Cf. Human Rights Committee, General Comment No. 34, Art. 19 ICCPR, UN Doc. CCPR/C/GC/34 of 12 September 2011, para. 43.

14 E.g. ECtHR, *Stoll v. Switzerland, judgment of 1*0 December 2007, Application No. 69698/01, para. 104 with further references.

15 Ibid., para. 101.

16 ECtHR, *Mouvement Raëlien Suisse v. Switzerland*, judgment of 13 January 2011, Application No. 16354/06, para. 54 as endorsed by the Great Chamber judgment in para. 40.

17 Nina Vajic and Panayotis Voyatzis (2012) The Internet and Freedom of Expression: A "brave new world" and the European Court of Human Rights' Evolving Case Law. In Josep Casadevall et al. (Eds.), *Freedom of Expression. Essays in Honour of Nicolas Bratza*. Osterwijk: Wolf, 391–420 (395 and 399).

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prosecution of online activities and concluding that restrictions of access to the internet targeting the right to assembly on the internet also affect the freedom of expression and usually lack proportionality.

Freedom of expression and democracy are closely related. According to the European Court of Human Rights, "freedom of expression constitutes one of the essential foundations of a democratic society".[18] Independent and critical reporting by journalists is not sufficiently protected on the national level, which affects the quality of democracy.[19] Accordingly there is a need for a stronger monitoring system.[20]

Case law of the European Court of Human Rights

The ECtHR committed itself to interpreting the ECHR in the light of present-day conditions, taking into account the specific nature of the internet as a "modern means of imparting information".[21] However, because of the wider reach of the internet special care is required as the internet has "the ability to magnify the impact of problematic speech".[22] Accordingly, the ECtHR held that the impact of information is multiplied when it is displayed in public with a reference to the address of a website accessible to everyone through the internet.[23] The Court also highlighted the distinctness of the internet from printed media because of its capacity to store and transmit information, which increases the risk of harm to the enjoyment of other human rights, in particular the right to private life.[24]

The online freedom like its offline version consists basically of two main components, the freedom to express and impart and the freedom to receive information and ideas. The freedom of information includes the right to receive content produced by any media or the right of access to such content. The Court thus emphasised "the right of the public to be properly informed on matters of public interest".[25]

Freedom of expression and information online presupposes the availability of access to the internet, which therefore can be considered as a right on its own.[26] The ECtHR has recognised that "the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general".[27] Already in *Yildirim*, the Court found that the complete blocking of access to Google sites constituted an unjustified (disproportionate) restriction of internet access.[28] In *Cengiz*, the Strasbourg

18 ECtHR, *Lingens v. Austria*, judgment of 8 July 1986, Application No. 9815/82.

19 Dirk Vorhoof, The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society, EUI Working papers RSCAS 2014/12, http://cadmus.eui.eu/handle/1814/29871

20 Just see Jan Malinowski (2014) Monitoring Freedom of Expression in Council of Europe Member States: Only Desirable or also Unavoidable? In Benedek et al. (Eds.), *European Yearbook on Human Rights 2014*. Vienna: NWV, 311–332.

21 European Court of Human Rights, Research Division (2015) Internet: Case-law of the European Court of Human Rights, June 2015.

22 Vajic and Voyatzis 395, 399.

23 ECtHR, *Mouvement Raëlien Suisse v. Switzerland*, judgment of 13 January 2011, Application No. 16354/06, para. 54.

24 ECtHR, *Editorial Board of Pravoye Delo and Shteckel v. Ukraine* (5 May 2011), Application No. 33014/05, para. 63.

25 ECtHR, *Sunday Times v. United Kingdom* (26 April 1979), Application No. 6538/74.

26 Benedek and Kettemann 41, 75.

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

28 ECtHR, *Yıldırım v. Turkey*, judgment of 18 December 2012, Application No. 3111/10.

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judges confirmed that a wholesale blocking of access to YouTube had been a violation of Article 10.

Access to the internet is a functional precondition for exercising freedom of expression (on the internet). The Parliamentary Assembly of the Council of Europe called for a right to internet access, according to which "everyone shall have the right to Internet access as an essential requirement for exercising rights under the European Convention on Human Rights".[29] On the global level the rapporteurs on freedom of expression of the human rights protection mechanism stated in their annual joint declaration already in 2011 that freedom of expression "imposes an obligation on states to promote universal access to the Internet".[30]

There is actually a dual right to internet access, which is crucial for human rights protection: access to internet content (threatened, inter alia, by filtering) and access to the internet per se (threatened, inter alia, by underdeployment of ICTs). Physical access to the internet and access to content on the internet are both necessary to ensure freedom of expression online.[31] Having the infrastructure (cables, computers, routers) necessary to access the internet in place is not enough. The right to internet access includes access to content "without any restrictions except in a few limited cases permitted under international human rights law".[32]

A limited right to access to the internet has also been confirmed by the ECtHR in two prisoner cases: in *Kalda v. Estonia*, the Court found a violation of Article 10 because the authorities had denied a prisoner access to three internet websites containing *legal* information relevant to prepare his defence. The judges found there was no general duty to grant prisoners access to the internet, but if states provide access, they can not arbitrarily withhold access to specific sites containing legal information.[33] In *Jankovskis v. Lithuania* a prisoner complained that he had not been given access to the website of the Ministry of Education and Science after the Ministry had answered his written request for educational information with a reference to its website. The Court found a violation of Article 10 as the interference by the Lithuanian authorities was not necessary in a democratic society. It once more observed that the internet played an important role in people's everyday lives, also because certain information was exclusively available on the internet.[34]

The exercise of freedom of expression using the internet needs clear rules, which take the specificities of the internet into account. Regarding online journalism, the ECtHR requested a "sufficient domestic legal framework on how to use information obtained from the Internet", the absence of which hinders the ability of the press to exercise its vital function as a public watchdog.[35] From this follows a positive obligation to create an appropriate domestic regulatory framework to ensure freedom of expression on the internet, in particular of journalists. However, with regard to publication on the internet, the "duties and responsibilities" referred to in Article 19 (2) need to be

29 Council of Europe, Parliamentary Assembly, The Right to Internet Access, Resolution 1987 (2014).

30 International Mechanisms for Promoting Freedom of Expression, Joint Declaration on Freedom of Expression and the Internet (2011), www.osce.org/fom/78309?download=true, para. 6 (a).

31 Cf. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, UN Doc. A/HRC/17/27 of 16 May 2011, para. 3 (and chapters IV (access to content) and V (availability of infrastructure) of the report).

32 Ibid., para. 3.

33 ECtHR, *Kalda v. Estonia,* judgment of 19 January 2016, Application No. 17429/10.

34 ECtHR, *Jankovskis v. Lithuania*, judgment of 17 January 2017, Application No. 21575/08, 2017.

35 ECtHR, *Editorial Board of Pravoye Delo and Shteckel v. Ukraine* (5 May 2011), Application No. 33014/05, para. 64.

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reinforced. In the context of responsible journalism, the ECtHR emphasises that "in a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media . . . monitoring compliance with journalistic ethics takes an added importance."[36] In another case it stated that the specific responsibility of journalists also applies to the publication of information on the internet, like public internet forums.[37]

This principle is also relevant with regard to the increasing problem of fake news.[38] The publication of false information on the internet is not protected by the ECHR.[39] In such cases the Court may resort to Article 17. In the case of xenophobic remarks of a politician on his website the Court found that there was a pressing social need to protect the rights of the immigrant community. Incitement to racial discrimination and hatred could not be excused by the passions evoked by an electoral process.[40]

The freedom of expression has also to be balanced with other human rights as in particular the right to respect for private and family life. Particular protection is provided to minors.[41] Private persons enjoy higher protection than politicians. If the information does not come within the scope of any public or political debate on a matter of general importance,[42] even information already available on the internet may be restricted from reproduction as the protection of private life prevails over the sole purpose of satisfying the curiosity of a particular readership.[43]

Limitations of freedom of expression online

Principles

Freedom (of expression) on the internet also has its negative aspects: hate speech, glorification of terrorism, promotion of genocide and sexual exploitation of children are present online. These four categories of "speech" are prohibited by international law and all states are obliged to criminalise them. The majority of online expression, however, is less clear-cut. As the Council of Europe Recommendation on internet intermediaries puts it,

> the rise of the Internet and related technological developments have created substantial challenges for the maintenance of public order and national security, for crime prevention and law enforcement, and for the protection of the rights of others". Especially within social networks "targeted disinformation campaigns, designed specifically to sow mistrust and confusion and to sharpen existing divisions in society, may also have destabilising effects on democratic processes.

36 ECtHR, *Stoll v. Switzerland, judgment of 10* December 2007, Application No. 69698/01, para. 104.
37 ECtHR, *Fatullayev v. Azerbaijan* (22 April 2010), Application No. 40984/07, para. 94.
38 European Parliament, Final Report of the High Level Expert Group on Fake News and Online Disinformation, 12 March 2018, https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation
39 ECtHR, *Schuman v. Poland*, 3 June 2014, Application No. 52517/13.
40 ECtHR, *Féret v. Belgium* (16 July 2009), Application No. 15615/07.
41 ECtHR, *K.U. v. Finland*, judgment of 2 December 2008, Application No. 2872/02.
42 ECtHR, *Editions Plon v. France* (18 May 2004), Application No. 58148/00.
43 ECtHR, *Ovchinnikov v. Russia* (16 December 2010), Application No. 24061/04, para. 50.

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Freedom of expression, different from freedom of opinion, is not an absolute right. Pursuant to Article 10 (2) ECHR

> the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Freedom of expression can thus be restricted. In international human rights law, the conditions can be found in Article 19 (3) ICCPR. Any restriction of online content needs to follow a three-part cumulative test, i.e. the restriction must be provided by law, it must be based on the purposes foreseen by Article 19 (3) ICCPR (or Article 10 (2) ECHR) and must be necessary and proportionate with regard to the aim pursued.

The most elaborate doctrine of legitimate restrictions or interferences has been developed in the decade-long pre-internet jurisprudence of the ECtHR. As the Strasbourg court has confirmed passim in *Yildirim* and *Cengiz*, *t*he principles for restrictions offline also apply online. In determining what is "necessary in a democratic society", the Court uses a test looking at the concept of "pressing social needs". The objective of the Strasbourg court is a pluralist society governed by democratic means, to which pluralist media have an important contribution to make. The limitations are to be considered as exceptions for which the least restrictive form of interference is to be chosen, which requires the application of the principle of proportionality. Depending on the existence of a more or less consistent European practice, but also other factors, the Court applies the doctrine of *margin of appreciation* according to which the interfering country has more or less leeway to restrict the right.

Practice

In the first of a series of cases against Turkey's blocking of internet platforms, *Yıldırım v. Turkey* (2012), the Court confirmed that publishing information online constitutes a means of exercising freedom of expression,[44] and that the public had a right, under Article 10, to receive it.[45] In particular, the court held that state measures stopping access to specific sites engaged the responsibility of the state under Article 10.[46]

In the 2015 *Cengiz and Others v. Turkey* judgment, the Court went further and clearly committed to the importance of the internet as a forum for freedom of expression (which, again, presupposes its integrity). The Court's reasoning for rejecting a Turkish ban of YouTube on the application of three academics underlined the importance of the internet: "[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

44 ECtHR, *Yıldırım v. Turkey*, judgment of 18 December 2012, Application No. 3111/10, para. 49.

45 Ibid., para. 50.

46 Ibid., para. 53, with reference to *Vereinigung demokratischer Soldaten Österreichs et Gubi v. Austria*, judgment of 19 December 1994, para. 27.

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political issues and issues of general interest". The internet as a whole has thus become an important means to exercise freedom of expression. Specific sites, especially "[u]ser-generated expressive activity on the Internet[,] provides an unprecedented platform for the exercise of freedom of expression". This also applies to consuming news and disseminating information: "in the light of [the Internet's] accessibility and its capacity to store and communicate vast amounts of information, [it] plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general".[47]

In *Stoll* the Court held that where the freedom of the press was at stake, the authorities have only a limited margin of appreciation to claim a pressing social need.[48] The main ground or value for limitations in practice is the protection of the reputation or rights of others. Among them the respect for private life and the protection of minors have given ground for several internet cases.[49] For the protection of minors also the protection of health and morals and the prevention of crime can play a role.[50]

According to Article 19 UDHR, freedom of expression can be exercised by any means, which includes artistic, cultural or satirical expression. This is also true for Article 10 ECHR.[51] However, there might be a need to balance this expression with the right to reputation as part of the right to private life and with the right to freedom of religion.

Standard-setting

Most major international institutions and organisations that deal with human rights have developed normative instruments regarding freedom of expression online. The European Commission, for instance, has adopted the EU Human Rights Guidelines on Freedom of Expression Online and Offline.[52] Within Europe, the Council of Europe is most active in terms of standard-setting.[53]

The 2018 Council of Europe Recommendation on the roles and responsibilities of internet intermediaries underlined the importance of freedom of expression on the internet and of the internet for freedom of expression: by "enhancing the public's ability to seek, receive and impart information without interference and regardless of frontiers, the Internet plays a particularly important role with respect to the right to freedom of expression".[54]

47 ECtHR, *Cengiz and Others v. Turkey*, judgment of 1 December 2015, applications nos. 48226/10 and 14027/11, paras. 49 and 52.

48 ECtHR, *Stoll v. Switzerland, judgment of 10* December 2007, Application No. 69698/01, para. 105.

49 ECtHR, *K.U. v. Finland*, judgment of 2 December 2008, Application No. 2872/02.

50 ECtHR, *Mouvement Raëlien Suisse v. Switzerland*, judgment of 13 January 2011, Application No. 16354/06, para.72.

51 Benedek and Kettemann 33.

52 Council of the European Union (2014) EU Human Rights Guidelines on Freedom of Expression Online and Offline, Brussels 12 May 2014.

53 Benedek and Kettemann (2013). See also Council of Europe, Internet Governance Standard Setting, www.coe.int/en/web/freedom-expression/internet-standard-setting

54 Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of Internet intermediaries, adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies, 2.

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Further recommendations of the Council of Europe were dedicated to internet freedom,[55] network neutrality,[56] transboundary flow of information on the internet,[57] human rights for internet users,[58] and human rights issues with regard to search engines[59] and providers of social networking services.[60]

Freedom of expression also includes expression under anonymity, which is controversial with some governments which want to have a stricter control of expression on the internet. While anonymous defamation or stalking clearly is unlawful, writing under pseudonyms has a long history offline and also is used online for different reasons, not at least in order to express criticism under repressive regimes. One special case is "whistleblowing", which is in the public interest, but the author fears silencing reactions. The Parliamentary Assembly of the Council of Europe (PACE) in 2010 adopted a resolution for the protection of whistle-blowers in view of their contribution to the fight against corruption.[61] According to a report of the UN Special Rapporteur on Freedom of Opinion and Expression to the UN Human Rights Council, the right to anonymity and to encryption needs to be respected and shall only be restricted under certain conditions.[62] Although there might be good reasons to introduce real-name policies (it tends to increase the quality of discourse and decrease personal attacks), there is the danger of a "chilling effect" of the prohibition of anonymity.

Selected normative challenges of protecting freedom of expression online

Positive and negative obligations of states

As states have the primary responsibility and ultimate obligation to protect human rights and fundamental freedoms in the digital environment, all regulatory frameworks they introduce, including self- or co-regulatory approaches, have to include effective oversight mechanisms and be accompanied by appropriate redress opportunities.[63]

55 Council of Europe, Recommendation CM/Rec(2016)5 of the Committee of Ministers to member States on Internet freedom.

56 Council of Europe, 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.

57 Council of Europe, Recommendation CM/Rec(2015)6 of the Committee of Ministers to member States on the free, transboundary flow of information on the Internet.

58 Council of Europe, Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users.

59 Council of Europe, Recommendation CM/Rec(2012)3 of the Committee of Ministers to member States on the protection of human rights with regard to search engines.

60 Council of Europe, Recommendation CM/Rec(2012)4 of the Committee of Ministers to member States on the protection of human rights with regard to social networking services.

61 Council of Europe, Parliamentary Assembly (PACE), Resolution 1729 (2010).

62 UN Special Rapporteur on Freedom of Opinion and Expression (2015), David Kaye, Report on encryption, anonymity and the human rights framework, UN Doc. A/HRC/29/32 of 22 May 2015.

63 Council of Europe, Recommendation CM/Rec(2018)2 of the Committee of Ministers to member states on the roles and responsibilities of internet intermediaries (2018) ('Recommendation on internet intermediaries'), para. 1.1.3.

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States are, of course, not the only actors in ensuring human rights online. As the 2018 Recommendation of the Council of Europe on internet intermediaries notes, a

> wide, diverse and rapidly evolving range of players, commonly referred to as "Internet intermediaries", facilitate interactions on the Internet between natural and legal persons by offering and performing a variety of functions and services. Some connect users to the Internet, enable the processing of information and data, or host web-based services, including for user-generated content. Others aggregate information and enable searches; they give access to, host and index content and services designed and/or operated by third parties.

Internet intermediaries have duties under international and national law. In line with the UN Guiding Principles on Business and Human Rights and the "Protect, Respect and Remedy" Framework, intermediaries should respect the human rights of their users and affected parties in all their actions. This includes the responsibility to act in compliance with applicable laws and regulatory frameworks. Internet intermediaries also develop their own rules, usually in form of terms of service or community standards that often contain content-restriction policies. This responsibility to respect within their activities all internationally recognised human rights, in line with the United Nations Guiding Principles on Business and Human Rights, exists independently of the states' ability or willingness to fulfil their own human rights obligations.[64]

States have also misused intermediaries in the past to introduce filters and enforce laws that violate international human rights commitments. Therefore, as the Recommendation notes, any norms applicable to internet intermediaries, regardless of their objective or scope of application, "should effectively safeguard human rights and fundamental freedoms, as enshrined in the European Convention on Human Rights, and should maintain adequate guarantees against arbitrary application in practice".[65]

It should be noted that member states do not only have the negative obligation to refrain from violating the right to freedom of expression and other human rights in the digital environment. As the Recommendation confirms,

> they also have a positive obligation to protect human rights and to create a safe and enabling environment for everyone to participate in public debate and to express opinions and ideas without fear, including those that offend, shock or disturb state officials or any sector of the population.

This positive obligation to ensure to all citizens on a state's territory or under its control all applicable rights and freedoms encompasses the obligation to ensure that private companies comply with relevant human rights guarantees.

Global intermediaries and national laws

A specificity of the internet is the role of the private sector. The vast majority of communicative spaces on the internet are privately held and owned. This is due to the powerful

64 Ibid., para. 2.1.1.
65 Ibid., preambular para. 6.

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role of intermediaries, companies that enable our online activity. As the Council of Europe Recommendation on roles and responsibilities of internet intermediaries describes them,

> [they] facilitate interactions between natural and legal persons on the Internet by offering and performing a variety of functions and services. Some connect users to the Internet, enable the processing of information and data, or host web-based services, including for user-generated content. Others aggregate information and enable searches, and give access to, host and index content and services designed and/or operated by third parties. Some facilitate the sale of goods and services, including audio-visual services, and enable other commercial transactions, including payments.[66]

These intermediaries, including social media companies, have become important normative actors by controlling the private spaces in which communication takes place. Globally, by the end of 2017, Facebook had reached two billion active monthly users, YouTube 1.5 billion, WhatsApp 1.2 billion, WeChat 889 million, Instagram 700 million and Twitter 330 million.[67] The number of domain name registrations in all Top Level Domains surpassed 330 million with 130 million alone in .com, 145 million in country-coded Top Level Domains and 21 million in more recently developed new generic Top Level Domains.[68] The numbers hint at the importance of developing a normative order of the internet.

Network effects and mergers have led to the domination of the market by a relatively small number of key intermediaries, including Silicon Valley's "AMAFAGs" (Apple, Microsoft, Amazon, Facebook and Alphabet's Google) and the Chinese BATs (Baidu, Alibaba and Tencent).[69] As the 2018 Recommendation warned, these few companies have growing power: "[the] power of such intermediaries as protagonists of online expression makes it imperative to clarify their role and impact on human rights as well as their corresponding duties and responsibilities, including as regards the risk of misuse by criminals of the intermediary's services and infrastructure".[70]

Due to the multi-layered nature of the regulatory framework governing services provided by or through intermediaries, their regulation is challenging. As they operate in many countries and data streams, especially for cloud-based services, and often cross many countries and jurisdictions, different and conflicting laws may apply.[71] This is exacerbated by, as the 2018 Council of Europe recommendation identified, "the global nature of the internet networks and services, by the diversity of intermediaries, by the volume of Internet communication, and by the speed at which it is produced and processed".[72]

66 Recommendation on Internet intermediaries, preambular para. 6.
67 Robert H. Zakon, Hobbes' Internet Timeline 10.2, www.zakon.org/robert/Internet/timeline
68 Ibid.
69 Wolfgang Kleinwächter (2018) Internet Governance Outlook 2018: Preparing for Cyberwar or Promoting Cyber Détente?, CircleID (6 January), www.circleid.com/posts/20180106_Internet_governance_outlook_ 2018 _preparing_for_cyberwar_or
70 Council of Europe, Recommendation on Internet intermediaries, preambular para. 11.
71 Ibid., para. 6.
72 Ibid., preambular para. 9.

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Intermediaries are subjected to national judgments and laws. Consider the German *Netzwerkdurchsetzungsgesetz*[73] to increase enforcement of national speech-related provisions in social networks, which has, however, been received critically.[74]

There is substantial literature on the duties of private entities in international law, especially with regard to the duties of transnational corporations.[75] Much of it is applicable to internet standard-setters, but also to internet content companies, such as search engine providers and social networking services.[76] A key notion is that the corporate responsibility of companies does not diminish state obligations. The *United Nations Guiding Principles on Business and Human Rights* ("*Ruggie Principles"*) establish, *first*, a state duty to protect human rights, *second*, a corporate responsibility to respect human rights and, *third*, a right to access to remedies for victims of business-related abuses.[77] The corporate responsibility encompasses a responsibility to avoid violations and to address negative human rights impacts directly linked to the operations and committed through business relationships, including formal and informal agreements – including thus non-commercial relationships of internet exchange points and server administrators.

Similarly, the Council of Europe, in two recommendations for search engine companies and social network services, first addresses member states, reminding them to develop and promote, in consultation with the private sector and civil society, strategies to protect freedom of expression and other human rights.

Following the UN Guiding Principles on Business and Human Rights, intermediaries have an independent obligation to respect human rights, a "corporate responsibility to protect" that is independent of the state's duty to safeguard human rights. Companies comply with these obligations for example through transparency reports, increased control of subcontractors along the supply chain and Human Rights Impact Assessments.[78] There are also a number of human rights-focused initiatives that technology companies take part in, such as the Global Network Initiative.[79] Members commit themselves to

73 Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG), Federal Gazette 2017 Part I No. 61, 7 September 2017.

74 Georg Nolte (2017) Hate-Speech, Fake-News, das »Netzwerkdurchsetzungsgesetz« und Vielfaltsicherung durch Suchmaschinen. *ZUM*, 552; Fiete Kalscheuer (2017) Christian Hornung: Das Netzwerkdurchsetzungsgesetz – Ein verfassungswidriger Schnellschuss. *NVwZ*, Vol. 1721, Nikolaus Guggenberger (2017) Das Netzwerkdurchsetzungsgesetz in der Anwendung. *NJW*, 2577.

75 Especially after the adoption of the UN Guiding Principles on Business and Human Rights. See Radu Mares (Ed.), *The UN Guiding Principles on Business and Human Rights. Foundations and Implementation*. Leiden: Nijhoff, 2011; and, for a comprehensive analysis, Wesley Cragg (Ed.) (2012) *Business and Human Rights*. Cheltenham: Edward Elgar. For the international trade dimension relevant for aspects of ICTs, see Alistair M. Macleod, Human rights and international trade: normative underpinnings, in ibid., 179–196.

76 Council of Europe, Committee of Ministers (4 April 2012), Recommendation CM/Rec(2012)3 on the protection of human rights with regard to search engines and Recommendation CM/Rec(2012)4 on the protection of human rights with regard to social networking services.

77 See the "Ruggie Principles": Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31 of 21 March 2011.

78 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31 of 21 March 2011.

79 Global Network Initiative (GNI), Principles on Freedom of Expression and Privacy, www.globalnetworkinitiative.org/principles/index.php.

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self-developed (but human rights-based) principles and seek to improve their performance through an Accountability, Policy and Learning Framework.[80]

The fundamental friction here lies in the diverging interests between intermediaries and states. Intermediaries, especially the providers of social networking services, prefer a liberal approach to content – the content's attractiveness being commensurate with its diversity. States, however, are obliged to ensure protection of human rights (from the prohibition of violent hate speech to that of the sexual exploitation of minors). In some cases – as in the case of copyright infringement – takedowns usually follow a stakeholder/rightsholder request ("notice and takedown").

In other cases, intermediaries may also be required to take initiative in order to counteract the spread of illegal content. Here it is up to the intermediaries themselves (at least on a first decision-making level) to balance between rights while facing a dilemma: erasing too much may make the service less attractive; deleting too little may make it unattractive as well, make companies liable for hate speech and might make states pass laws impacting negatively the business models of intermediaries, such as the German *Network Enforcement Act* of 2018.[81]

Intermediary liability exemptions

In principle, Article 14 of the E-Commerce Directive[82] provides strong protection for information society services through whose platforms users make content publicly available. Member States may only hold a provider responsible for content stored in the user order when he "actually has knowledge of the illegal activity or information" or "the illegal activity . . . is evident".[83] However, a general search obligation amounting to prior censorship would be contrary to European law (Article 15 (1) of the E-Commerce Directive and the jurisprudence of the CJEU, especially *SABAM v. Netlog NV*).[84] Demanding a preemptive filtering system would alter the network's functionality and violate freedom of expression. In *Delfi v. Estonia*, the ECtHR decided that, with regard to the rights and interests of others and to society as a whole, state parties were allowed under certain conditions to hold intermediaries (in this case an internet news portal) liable and demand a certain form of de facto live screening of content to filter for obvious cases of illegality.[85]

The *Delfi* conditions include that a commercial news portal is at issue; that the company did not immediately delete the incriminated comments (the company did so up to six weeks after their publication); that comments were clearly illegal by being, for instance, qualified "hate speech"; and that the portal allowed the authors to remain anonymous. However, under the Strasbourg intermediary liability regime, intermediaries fulfil the

80 GNI, Accountability, Policy and Learning Framework, February 2015, https://globalnetworkinitiative.org/ content/accountability-policy-and-learning-framework, including common discussions on the results of accountability review within the framework of the stakeholder-led Telecommunications Industry Dialogue, www.telecomindustrydialogue.org

81 Georg Nolte (2017) Hate-Speech, Fake-News, das »Netzwerkdurchsetzungsgesetz« und Vielfaltsicherung durch Suchmaschinen. *ZUM*, 552.

82 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). *OJ L* 178, 17.7.2000, 1–16.

83 Ibid., Article 14.

84 CJEU, *SABAM v. Netlog NV* (16 February 2012), C-360/10.

85 ECtHR, *Delfi* AS *v. Estonia* (16 June 2015), Application No. 64569/09.

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role of assessing, prima facie, whether a post is merely offensive (and then waiting for a "notice" or deleting on their own volition) or "in itself" already illegal (and to be deleted immediately). In *MTE and Index.hu ZRT v. Hungary* (2016), the ECtHR qualified its approach, emphasising that the "notice-and-takedown" procedures remained legitimate and sufficient unless the comments themselves were clearly unlawful.[86]

In *Pihl v. Sweden* (2017)[87] concerning comments made on the blog of an individual, the Court limited oversight duties of platform providers by noting that not only the nature of the statement and the context but the size (here: small) and (non-)commercial nature of the platform were important elements in deciding upon the possibility of direct liability of the actual author and the (financial) consequences of the national decision on removal or non-removal of contents.

We know from the case law that the ECtHR generally gives freedom of expression a very high priority. Under established case law of the European Court of Human Rights, "freedom of expression constitutes one of the essential foundations for a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment".[88] Under the ECtHR, even opinions that can "offend, shock or disturb"[89] are protected. In the cases *Yıldırım v. Turkey*[90] and *Cengiz and Others v. Turkey*[91] this approach was applied to the internet.

On the other hand, freedom of expression does not extend to statements and representations prohibited under international law. These include calls for genocide, terrorism, serious discrimination in the form of violent hate speech and sexual exploitation of minors. Here intermediaries are obliged to become active on their own with the deletion of corresponding content under the ECtHR's *Delfi* jurisprudence.[92]

National laws that in effect provide for de facto filtering duties ex ante to stop the reappearance of "copies" of the incriminated content are in violation of the liability exemptions for host providers contained under the E-Commerce Directive.[93] In an Austrian case, the CJEU has been asked to clarify what constitutes a copy and whether internet platforms must ensure that the same or effectively similar content is not uploaded.[94]

The prohibition on national laws providing for general monitoring sits uneasily with the 2018 Recommendation by the European Commission on measures to effectively

86 ECtHR, *MTE and Index.hu* ZRT v. Hungary (2 February 2016), Application No. 22947/13.

87 ECtHR (3rd section), *Pihl v. Sweden* (7 February 2017), Application No. 74742/14.

88 ECtHR, *Stoll v. Switzerland* (10 December 2007), Application No. 69698/01., para. 101.

89 ECtHR, *Handyside v. UK* (7 December 1976), Application No. 5493/72, para. 49.

90 ECtHR, *Yıldırım v. Turkey* (18 December 2012), Application No. 3111/10.

91 ECtHR, *Cengiz and Others v. Turkey*, judgment of 1 December 2015, applications nos. 48226/10 and 14027/11.

92 ECtHR, *Delfi* AS *v. Estonia* (16 June 2015), Application No. 64569/09.

93 Cf. CJEU, *McFadden vs. Sony* (15 September 2016), C-484/14 (duties of access providers); CJEU, *SABAM v. Netlog NV* (16 February 2012), C-360/10 and *Scarlet v. SABAM* (24 November 2011) (no general monitoring duties for providers), C-70/10 and *L'Oréal/ebay* (12 July 2011), C-324/09 (some preventive duties for "non-active" providers do not violate EU law).

94 OGH, 6Ob116/17b, 25 October 2017, K&R 2018,144 – Miese Volksverräterin II: The questions run as folllows: "1. Is it contrary to Article 15 [E-Commerce Directive] to order a host provider, which has not immediately removed unlawful information, not only to remove this illegal information within the meaning of Article 14 (1) (a) of the Directive, but also other information identical in terms of its wording [wortgleich]: a. worldwide? b. in the respective Member State? c. of the respective user worldwide? d. of the respective user in the respective Member State? 2. As far as question 1 was answered in the negative: Does this also apply to the information identical in terms of the content [sinngleich]? 3. Does this also apply to information identical in terms of content [sinngleich] as soon as the operator becomes aware of this fact?"

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tackle illegal content online.[95] It suggests to states that encourage hosting service providers to take "proportionate and specific proactive measures in respect of illegal content". If these measures are automated (as they would have to be), they need to be "proportionate and subject to effective and appropriate safeguards". These safeguards should ensure that filtering and takedown decisions are "accurate and well-founded" and that human oversight and verifications are present and "detailed assessment of the relevant context" is performed.[96] This seems unlikely to be respected in light of the number of removal decisions that are handled by platforms.

Conclusion

The internet has become a vital medium of communication that mediates much of our lived experience and through which individuals exercise their human rights, especially through the enabling right to freedom of expression, including the right to seek, receive and impart information and ideas of all kind, regardless of frontiers. The internet as a "principal means" (*Yıldırım*) to exercise freedom of expression and the latter right as an "essential foundation for a democratic society and one of the basic conditions for its progress" (*Stoll*) are closely connected.

Para. 1 of the Human Rights Council Resolution on the promotion, protection and enjoyment of human rights on the internet (2018) affirms that "the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice". The primary normative objects here are the rights which are applicable online just as offline. But indirectly, the internet's intangible dimension of offering a space for the exercise of these rights is protected as well. The internet's integrity is a structural condition of the exercise of human rights, which are both challenged by technology[97] and realised through it.

Protecting the internet in both its dimensions – kinetic and non-kinetic, including a protective normative framework – lies in the common interest of all states. Its functioning is precondition for the exercise of freedom of expression, the key enabling right of the information society, by any media of one's choice and independent of borders.

The European Court of Human Rights has developed a substantial and robust jurisprudence on freedom of expression. Even if an expression should "offend, shock or disturb"[98], it is protected. Transferred into the internet age by the *Yıldırım*[99] and *Cengiz*[100] cases (access to the internet as the principal means to exercise freedom of expression must be ensured, restrictions must be proportionate), the principle remains applicable today.

The internet, as we have argued, is also a place of violations of rights, a place that is misused to radicalise people and to spread hateful speech. Therefore, freedom of expression does not extend to statements and representations prohibited under international law. These include calls for genocide, terrorism, serious discrimination in the form of violent

95 European Commission Recommendation of 1 March 2018 on measures to effectively tackle illegal content online (C(2018) 1177 final), http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=50095, para. 19.

96 Ibid.

97 Cf. Giovanni Sartor (2017) Human Rights and Information Technologies. In Roger Brownsword, Eloise Scotford and Karen Yeung (Eds.), *Oxford Handbook of Law, Regulation, and Technology*. Oxford: OUP, 424–450.

98 ECtHR, *Handyside v. UK* (7 December 1976), Application No. 5493/72, para. 49.

99 ECtHR, *Yıldırım v. Turkey* (18 December 2012), Application No. 3111/10.

100 ECtHR, *Cengiz and Others v. Turkey*, judgment of 1 December 2015, applications nos. 48226/10 and 14027/11.

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hate speech and sexual exploitation of minors. Just as states, intermediaries are obliged to become active on their own to delete such content under the ECtHR's *Delfi* jurisprudence.[101] With regard to most other content, however, intermediary liability exemptions have proven an important tool to enhance freedom of expression.

States have a duty to protect their citizens with regard to the internet (and regarding their online activities, including the exercise of freedom of expression). In so doing, they are obliged to protect them from the activities of third parties as well, be they other individuals or companies. Tech companies, too, including social networking platforms, have a corporate social responsibility to respect human rights within their sphere of influence, which – on the internet – is growing rapidly as the majority of relevant communicative acts takes place in private spaces. The special role of intermediaries is another challenge for regulating the internet. As the majority of online spaces lies in private hands, it is private law that prima facie frames many norm conflicts online. When states react belatedly through laws or judgments, these may lead to over-blocking or legal conflicts between competing jurisdictions.[102]

As the *Freedom of the Net 2018* report by Freedom House posits, "[f]or democracy to thrive, citizens must have freedom of expression and access to a public forum that allows rational discourse".[103] As this contribution has shown, freedom of expression on the internet even extends to certain kinds of *irrational* discourse, to shocking, offending and disturbing content. After all, content that everyone agrees with hardly needs protection. Without doubt, however, the internet fulfils a key function as a public forum for freedom of expression to be realised. Freedom of expression, as part of internet freedom, needs to be secured against the "rise of digital authoritarianism". This is, as both the *Freedom of the Net 2018* report and we conclude, "fundamental to protecting democracy".[104]

101 ECtHR, *Delfi* AS *v. Estonia* (16 June 2015), Application No. 64569/09.

102 See the evolution of the "right to be forgotten": Years of uncertainty followed the CJEU judgment in *Google Spain and Google* (2014). They culminated in a 19 July 2017 referral decision by the French Conseil d'État, of its case *Google Inc.,* n° 399922, to the CJEU to clarify the geographical reach of its 2014 ruling (de-listing globally or only within the EU). The right to erasure ("right to be forgotten") can now be found in Article 17 GDPR.

103 Freedom House, Freedom of the Net 2018: The Rise of Digital Authoritarianism October 2018, https://freedomhouse.org/report/freedom-net/freedom-net-2018, 14.

104 Ibid., 32.

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