

Freedom of Expression & Information in the Time of Globalization

Week 1: The Normative Framework

Challenges that Internet has created.

- ① Borderless nature of the Internet & national sovereignty
- ② The impact of media convergence on medium-specific regulation
- ③ The responsibility of information producers & circulators
- ④ The global governance of the Internet

How to protect the global nature of the Internet?

e.g. Edward Snowden ⇒ Surveillance

Result:

- ① The multiplication of human rights violations in the digital space

- ② Trends towards internet fragmentation and re-nationalization of cyber space

not just about state conquering back the cyber space
but also space extending their control beyond the
national jurisdictions and borders

Rahe v. American Civil Liberties Union 1997

⇒ Internet more like the print media than broadcasting. Because:

- 1. no history of lesser protection
- 2. no bandwidth limit
- 3. users have control

⇒ deserve the strongest First Amendment protection

? How we define them?

? Who is the publisher?

not just governments, but also corporate sectors, users, innovators, technologists

Lawrence Lessig: 1st generation, noncommercial - researchers and hackers
2006
2nd generation, commerce
3rd generation, (future) government

Intermediary Liability

"intermediaries" entities that provide services enabling the delivery of online content to the end user

"ISP" internet service provider
web hosting providers, hosts/cache
social media platforms
search engines



? not direct speaker ↔ listener broadcasting

↑ publishers e.g. China Tort Law
↓ messengers "Safe Harbor Model" → notice and take-down
"Broad Immunity Model" e.g. U.S. Singapore

Censorship by Proxy and other Implications

Problem 1: intermediaries are overzealous in their regulatory role
Problem 2: should a private for-profit body without public representation or formal public function be tasked with an adjudication role?

Being able to force companies to police the Web according to state-dictated guidelines is a dream come true for any government. The companies must bear all the costs, do all the dirty work, and absorb the users' ire. Companies are also more likely to catch unruly content, as they are more decentralized and know their own online communities better than the State's censors.

"Whither Internet Control?" in
Liberation Technology: Social Media
and the Struggle for Democracy, 2012



Only by court orders : Chile 2010 Law , 2014 Mexico Civil Law
Terms of Services of internet companies are a product of
Due Process means : American cultural norms

- ① Easy access to, and knowledge of the rules
- ② Transparency of the process
- ③ Appeal of decisions to take down content
- ④ Transparent and regular reports on the content taken down

1. The temptation on the part of Intermediaries to err on the side of caution and censor far more content than may be required legally

2. The privatization of the censorship function

3. The absence of due process



Week 2: The Normative Framework

Journalists

Are Blogger Journalists? trust, ethics

UN Human Rights Committee General Comment 34

"journalism": a function shared by a wide range of actors including professional full-time reporters and analysts as well as bloggers and others who engage in forms of self-publication in print or online or elsewhere.

The definition of journalists includes all media workers and support staff, as well as community media workers and so-called 'citizen journalists' when they momentarily play that role.

Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/20/17 (2012)

Frank La Rue

many different definitions

US: no agreement

Arab: tautologically as a member of the National Press Association or by reference to accreditation or license

Uzbekistan: a natural person who works for the mass media

◆ NGOs that support journalists tend to define broadly

(Possible) Rights for Online Journalists:

- ① not be licensed
- ② keep their sources confidential

Search Engines

European Court of Justice, Google Spain v. Agencia Espanola de Proteccion
2014 "Right to be forgotten / de-indexed" Gonzales decision
dismiss the newspaper X was legally pursuant to a government order
uphold Google Spain ✓ data protection laws

1. A Search Engine collects, retrieves, organizes, stores and discloses personal information – all of which amounts to processing of data.

2. A Search Engine is the controller of the data it has processed.

3. The processing of such personal data is carried out "in the context of the activities" of Google Spain, as opposed to Google Inc.

4. If the data appears to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed, the information and links concerned in the list of results must be erased."

Issues ① exist? ② reach?

(France) CNL 2015 : de-list globally
a Parisian court 2014

(Canada) Egmontek v. Good 2015 IP issues $\checkmark \Rightarrow$ google.ca not enough

Google : 95% for private information 5% from criminals, politicians, etc
only 1% be appealed

\Rightarrow (maybe) every country could ask for global delisting

Arguments supporting the global delisting rights:

- ① not remove content from the Internet \Rightarrow not limit freedom of expression
- ② have already implemented for years for American copyright laws

The right to be forgotten raises thus three main questions:

- 1) The extent to which courts cite legal interpretations by other jurisdictions of new legal and technical issues they are being asked to adjudicate
- 2) The extent to which there is a universal right to be "forgotten" and what this means for the on-line world, the conditions under which this may be permissible and the responsibilities and duty-bearers this is generating
- 3) The implications of adopting a global interpretation of the right to be forgotten



Surveillance

"state surveillance": 非自愿 秘密 non-consensual, surreptitious data collection, analysis, use and data retention by state agencies

e.g. Edward Snowden "PRISM" collect vast-scale metadata

Panopticon (Jeremy Bentham): don't let the prisoners know when under scrutiny philosopher

Mishi Choudhary (India)

Repeal of Section 66 A (define punishment for sending offensive messages
2015 ← IT Act 2000 through digital devices)

copyright can be used to restrict speech

Internet Neutrality: ISP shouldn't discriminate by cost or speed

Intermediary Liability: (Europe) Delfi v. Estonia MTE v. Hungary

Week 3 : Challenges – Hate and Incitement Speech

Article 20 of the ICCPR Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

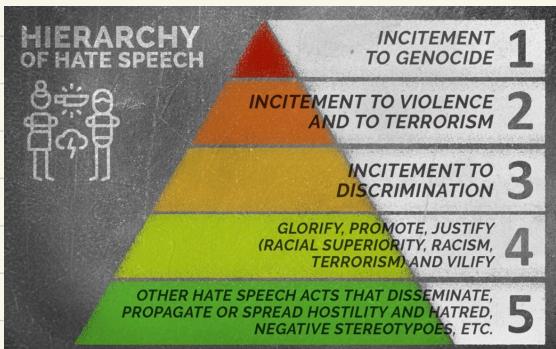
COMPARISON OVERVIEW		
SOURCE	TYPE OF SPEECH ACT PROHIBITED	KEY WORDS
GENOCIDE ICCPR, ART.20	INCITE/ INCITEMENT SPEECH	DIRECT, PUBLIC ADVOCACY NATIONAL, RACIAL OR RELIGIOUS HATRED DISCRIMINATION, VIOLENCE OR HOSTILITY
CERD, ART.4	INCITE/ INCITEMENT SPEECH DISSEMINATION	RACIAL VIOLENCE/HATRED, SUPERIORITY, DISCRIMINATION PROPAGANDA
ICCPR, ART.19	SPEECH THAT IMPACTS ON RIGHTS OF OTHER, NATIONAL SECURITY, PUBLIC ORDER	LEGALITY, NECESSITY

**NATIONAL LAW PROHIBITIONS
OF INCITEMENT CAN BE
FOUND IN:**

- CONSTITUTIONS
- CRIMINAL/PENAL CODES
- ANTI-DISCRIMINATION LEGISLATION – WITH CIVIL LAW REMEDIES TO INDIVIDUALS
- OTHER LAWS (ADMINISTRATIVE) INCLUDING PROHIBITION OF HATE SPEECH IN CERTAIN CONTEXTS
- SPECIFIC HATE SPEECH LAWS – PROVIDING CIVIL AND ADMINISTRATIVE REMEDIES



fighting words doctrine limited by the First Amendment



hate speech or offensive speech ?

incitement speech target group + speaker + audience
 ☆ Public incitement is dangerous and should be prohibited.

Incitement must be unambiguous in its intended context.

European Court of Human Rights considers :

- ① Intent
- ② Context
- ③ Status and Influence of the Speaker
- ④ Status of Persons or Groups targeted by the Speaker
- ⑤ Forms of Dissemination

incitement will constitute a legitimate restriction to freedom of expression

1. CONTEXT: IS THERE A HISTORY OF VIOLENCE, DISCRIMINATION, CENSORSHIP PARTICULARLY TARGETING SPECIFIC GROUPS?
2. THE SPEAKER: DOES HE/SHE HAVE INFLUENCE? HOLD POSITION OF POWER AND AUTHORITY? CAN HE/SHE INFLUENCE THE AUDIENCE?
3. THE SPEECH: IS THERE A DIRECT CALL FOR THE AUDIENCE TO ACT IN A CERTAIN WAY?
4. THE MEDIUM USED: IS IT PUBLIC? FREQUENT? MASSIVE IN ITS OUTREACH? (A SINGLE LEAFLET V. MASS MEDIA)
5. THE TARGET GROUP: IS THERE A GROUP/COMMUNITY TARGETED? HISTORY OF VIOLENCE AND DISCRIMINATION AGAINST THIS GROUP?
6. THE AUDIENCE: HOW LARGE IS IT? HOW RESPONSIVE IS IT TO THE SPEECH/SPEAKER? DOES IT HAVE THE MEANS TO ACT ON THE SPEECH ACT WAS THE SPEECH REASONABLY UNDERSTOOD BY ITS AUDIENCE AS A CALL TO ACTS OF DISCRIMINATION, VIOLENCE OR HOSTILITY?

Article 10 vs. Article 17 (Europe)
freedom of expression copyright, reputation

National Security

Impacts of the terrorism

- ① Development of new policies
- ② National security laws punish expressions that have little to do with violence or terrorism
- ③ Online expression has been targeted in the fight against terrorism
- ④ Surveillance over private communication
- ⑤ The real threats of terrorism and concerns for national security have shrunk the public space and public debate

US Patriot Act

"counter speech": denounce the hate speech
create viral content and viral trends

respond to the hate speech : focus on the means of communication

What governments can do to respond to hatred :

1. Enable civil society efforts to design and deliver alternative campaigns for equality
2. Establish a legal regime that promotes and protects civil society
3. Establish a legal regime that promotes pluralism of expression and means of communication

Week 4 : Freedom of Expression in the Digital Age

Defamation

unlawful attacks on a person's reputation

Elements in balancing **defamation** and freedom of expression:

- ① Truth
- ② Reasonable publication
- ③ Opinion: not a statement of fact but an expression of opinion
e.g. humour, satire
- ④ Absolute privilege: if reported from Parliament or judicial proceedings
- ⑤ Statements of others

Shouldn't be classified into defamation

last decade
(progressively include)
notions.

abstract symbols
state, etc

⇒ decriminalization
of defamation

It is not only about powerful people using reputation threats to maintain their power. It is also about established systems and institutions using the notion of reputation to protect and maintain their grip over society.



⇒ defamation laws shouldn't be used when there is a civil law alternative

Three Part Test = legal (provision) + legitimate (grounds)
+ necessary (proportionate)

Where is the jurisdiction for online content?

content first produced, server located, platform headquarters
content read, content downloaded,

"libel tourism" defamation plaintiffs seek the best court
e.g. UK and US

{ Multiple Publication Rule: Each publication of allegedly defamatory can form the basis of a new defamation claim

Single Publication Rule: A person can bring only one claim of defamation for each mass publication

(emails, retweets, reposts, etc.) \Rightarrow trend to adopt single

concerns about the autocomplete of search engines

entertainment tycoons v. Google Hong Kong 2014

Decriminalization of Defamation Laws "damage awards"

Singaporean blogger criticized pensions \rightarrow fine, lose job (civil)

Russian journalist \rightarrow imprison (criminal) 80% countries

Defamation laws can be easily abused to silence people.

"Public interest offense" some countries, only if the allegations made are purely of public interest

Otherwise, have to bring the full proof of their allegations.

\Rightarrow Problematic: anonymous source, leaked materials, confidential

Defense: ① Truth ② Matter of public interest ③ Matter of opinion

No imprisonment national countries \leftrightarrow Inter. Human Rights Courts

Privacy Online

France Grand Chamber 2005 *Coudert and Hachette Filipacchi v. France*

an interview of a former lover of Albert II of Monaco

⇒ public interest, illegitimate child than could have an influence on the future heritage and the hereditary nature of the principality of Monaco.

⇒ rights of the mother and the child

An attack against a journalist is not only a violation of his or her right to impart information, but also undermines the right of individuals and society at large to seek and receive information. Indeed, without respect for freedom of expression, and in particular freedom of the press, an informed, active and engaged citizenry is impossible. An attack against a journalist is therefore an attack against the principles of transparency and accountability, as well as the right to hold opinions and to participate in public debates, which are essential for democracy.

Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, para. 4, A/HRC/20/17, June 4, 2012 para 54, A/HRC/20/17



Protection of Journalists and Human Rights Defenders

ICCPR Article 6

UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, issued a Joint Declaration on Crimes Against Freedom of Expression



Future, greater accountability
feel freer,
economically wealthier
want knowledge/information

repression bases on the fear that the openness is a direct challenge to their interest

2020. 3. 18

My Comments

Pros:

- ★ the normative framework
- ★ law suits

Cons:

- ? Assume journalists are morally perfect
 - e.g. fake shocking news \Rightarrow more clicks & money
 - e.g. media bias

? The Spectrum