

How should free speech on social media be controlled?

INTRODUCTION

Social media platforms have gradually become incredibly accessible in that even the most basic and therefore cheapest of smartphones can support applications such as Facebook. Their pervasive presence in today's society runs through an oblique trajectory cutting across social classes: from children, to students, to workers of any kind and to politicians.

It is hard to approach any form of 'freedom control' without feeling as though one treads on eggshells trying to safely navigate between pieces of political correctness and the need to safeguard the most vulnerable social media users. Before engaging in a discussion as to how freedom of speech can be controlled on social media, it is important to explore the reasons for the need of control in the first place.

The answer is simple: posting online can be safely and effectively compared to being a speaker in a public event. The social platform is the floor, the post is the speech and the readers are the audience. There is one crucial difference: there is no specific background knowledge required that entitles the user to post in the same way that a speaker may be selected based on their expertise. As a result, the listener of the speech as well as the reader of the post may become interested, captivated and ultimately persuaded. Persuaded to believe a finding that may not be true but that seems somehow validated by the popularity it gains by those who share the post in question without investigating whether there is a provable, objective factual basis behind it.

Is preventing social media users to declare propositions that may be misleading a threat to freedom of speech? Arguably it is not, and in this essay I will explore how the dangers of promoting the spread of wrong information - especially when it is concerning public policies – does not amount to a threat to freedom of speech.

SOCIAL MEDIA AND POLITICS

Facebook became a political tool.

As participation to social networks increased, it transpired that the online users are a significant and receptive portion of the population whose ideas and political affiliation can be monitored, influenced and swayed via social media. This suspicion materialised as a result of what is known as the *Facebook-Cambridge Analytica Data Scandal* which unveiled that the company 'Cambridge Analytica' harvested the users' personal data for the purpose of political advertising by building psychological profiles. The personal data that was obtained by Cambridge Analytica was then divulged for the assistance of the 2016 American presidential campaign; this company was also alleged to have interfered with the Brexit Referendum.¹

¹ 'Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach' *The Guardian*, (London, 17 March 2018) <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>, accessed 23rd February 2021.

In more recent times, social medias have been accused of recklessly allowing for the amplifying of the false information surrounding the most recent US Presidential Election which then led to the assault of the Capitol building on 6th January 2021.²

Although the accusations against Cambridge-Analytica only resulted in a hefty financial penalty for the misappropriation of personal data, it is clear that if a social network can be even remotely involved in political events of this magnitude, the content that is allowed to be posted as well as the way personal data is handled should be subject to the most meticulous of scrutiny.

One may think that prior to social media, information and disinformation were spread in the same way on a paper format, through newspapers and tabloids, and this is not disputed. However, publication of fake news, especially when damaging towards an individual, is subject to legal repercussions in the form of slander and defamation. These legal actions are not a threat to freedom of speech but they are a remedy to the publication of fundamentally wrong and harmful information. This therefore bears the question as to why should there not be any form of accountability for online publications? These can have a very similar effect, if not magnified by the speed in which a post can be delivered to a worldwide audience and the lack of an editor filtering out the equivalent of a 'bad article'.

An issue of responsibility.

Social media platforms, beyond creating a space that allows for discussion, has also become a forum whose interactions between users have been monetised³ through advertising companies that benefit from the data they collect from social media. The advertising industry is subject to the rules of the market which prohibit false or misleading adverts through the Consumers Act 2015 as well as the Sales of Good Act 1979. It is safe to say that every industry that deals with the public, is regulated by a net of rules designed to prevent the worst case scenario from happening: in the case of publicity, that would be fake advertising or the sale of a faulty item. So far, social media have financially benefitted of the forum that have created, without being held accountable for the content they allow. It is time for social platforms to be controlled to prevent the worst case scenario from happening this being harm on the users themselves through the spread of hateful speech and false information.

FREEDOM OF SPEECH

Freedom of speech is now a triangle⁴

Up until the end of the twentieth century, the regulation of freedom of speech followed a bilateral model that saw governments on one side and the speaker on the other. Social medias are a third element that boldly interposed itself between the Government and the people, transforming the model

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Marie-Andrée Weiss, 'Regulating Freedom of Speech on Social Media: Comparing the EU and the US Approach', TTLF Working Papers No. 73, Stanford-Vienna Transatlantic Technology Law Forum (2021). page 5, available at <https://law.stanford.edu/publications/regulating-freedom-of-speech-on-social-media-comparing-the-eu-and-the-us-approach>, accessed on 18th February 2021

³ Gary Drenik, Should Social Media Platforms Be Regulated?, *Forbes*, (London, 10 February 2020) available at: <<https://www.forbes.com/sites/jonpicoult/2021/02/26/the-key-to-continuous-business-improvement--think-like-the-us-ntsb/?sh=44193e5b4f50>>, accessed on 15th February 2021.

⁴ Jack M. Balkin, Free Speech Is a Triangle, 118 COLUM. L. REV. 2011 (2018), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186205, accessed on 23 February 2021

in a triangle which outmoded the bilateral relationship that had been in place for centuries. It follows that the regulations in place thus far are no longer adequate to cater for this new scenario.

Social medias are subject to users regulations, however breaches are monitored by the reading of an algorithm produced by post or a comment and therefore some comments may be automatically deleted and users blocked access from the platform because the post in question matches the respective algorithm. The problem with this is that it causes frustration with the user, whose comments may be taken out of context, which in turn may result in the user abandoning the platform. From the point of view of the social media platforms, restrictions to the content that their users are allowed to post may be detrimental to their business because users may decide to leave said platform and when the number of 'leavers' becomes substantial this translates into financial loss.

It is therefore clear that these companies will be adamant that their financial interest should be safeguarded whereas governments will want to uphold the rule of law imposing conditions for social medias to trade within the limits of each state's legal boundaries when it comes to freedom of speech.

Different approach to freedom of speech.

It is important to remember that Social Media platforms are *international* companies and as such when designing a legal framework the first hurdle would be to address the heterogeneous approach to freedom of speech that is unique to each country. In order to acknowledge this, it is not necessary make a comparison with a totalitarian regime: it suffices to compare the approach between two countries in an arguable similar position in terms of civil rights such as the US and the UK.

The corresponding legislation protecting the freedom of speech are the First Amendment and Article 10 of the Human Rights Act 1998 respectively.

Both provisions seek to protect the people's right to freedom of expression from government intervention however comparatively, American citizens benefit from a far greater level of leeway in this area, shielded by the exercise of the First Amendment. This remains the case even when those opinions become extremely harsh, offensive and designed to attack personal views and choices of others which in England and Wales would be undoubtedly criminalized under the Public Order Act 1986, and, if racially or religiously aggravated, by the Crime and Disorder Act 1998. A prime example of this is the landmark case won by the Phelps family.⁵

In this case, Mr Albert Snyder sued a number of members of the Phelps family belonging to the Westborough Baptist Church after they picketed his son's funeral (who was a U.S. Marine) in accordance with their religious beliefs.⁶ They In fact believe that God is punishing the United States, in the form of slain soldiers, because of its tolerance of homosexuality.

They express their beliefs often by attending military funerals where they display signs reading bold statements such as "*God Hates the USA*", "*Thank God for 9/11*" or "*Thank God for Dead Soldiers*," as they did in the case of Mr Snyder.

The claimant argued that their actions caused him severe emotional distress whereas the respondents claimed that the signs they displayed are protected by the exercise of the First amendment. The Supreme Court found in the respondents' case by an overwhelming majority of eight to one.

Would the Phelps have been found guilty of aggravated harassment in an English Court? If the case had been tried in a Crown Court by a jury, the outcome cannot be certain - however it is difficult to believe that in this jurisdiction the wording above would not be found to be threatening, abusive and insulting and that it did not cause the complainant harassment, alarm or distress.⁷

⁵ Snyder v. Phelps, 562 U.S. 443 (2011)

⁶ <https://www.godhatesfags.com>

⁷ Public Order Act 1986, s4A

The unreconcilable approach towards freedom of expression becomes evident in the wording of the court rulings as well as in those of the legislation itself: if the Supreme Court ruled that ‘*the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable*’⁸ on the other hand the European Convention of Human Rights states that the exercise of freedom of expression “*may be subject to restrictions or penalties as are prescribed by law and are necessary in a democratic society...for the prevention of disorder or crime... [or] for the protection of the reputation of the rights of others...*”.⁹

The discrepancy in approach towards freedom of speech even in two jurisdictions that share common legal and cultural bonds therefore leads to a number of questions: if the Phelps posted those messages on Facebook, how should the social media respond? Would it be different if the user posting said messages was based in the UK? If so, can an international body determine the admissibility of online content by applying a blanket policy enforceable in every state?

In light of the arguments discussed thus far, the answers to the questions above points to one solution: the formulation of a balanced agreement, in the form of an enforceable legal contract, between governments and companies. Times have changed since the ‘*The Declaration of Independence of Cyberspace*’¹⁰ and the increasingly pivotal role social medias have acquired now calls for some form of government intervention which was strongly repudiated when the cyberspace was first introduced. The now triangular relationship between government, media and the people can only be regulated from within each state and because of the plurality of interests involved – those being the companies’ financial interest, the government duty to protect the public and the people’s freedom of speech – harmony between these three elements can only be achieved with the intervention of an independent body accounting for the needs of each party.

The UK government may have found the solution, time will tell whether it delivers the results wished for.

THE SOLUTION

The Proposed Legal Framework

As a result of the Online Harms White Paper published in April 2019, the UK Government has scheduled to introduce the ‘Online Safety Bill’ in 2021¹¹. The Solution this Government has canvassed is to establish a regulated duty of care on social media companies towards their users in order to protect their online safety through an Independent Regulator whose duty is to oversee and impose the standard dictated by the legislation.

The Independent Regulator identified is a company called ‘Ofcom’ whose role will be to issue Codes of Practice, in line with government Guidance. Breaches of the Codes will be enforced through the imposition of significant financial penalties.

This regulatory framework will apply to companies whose services host user generated content or facilitate interaction between users, one or more of whom is based in the UK, as well as search

⁸ Texas v. Johnson, 491 U.S. 397 (1989)

⁹ European Convention of Human Rights, 1953, Art 10(2).

¹⁰ John Perry Barlow, ‘A Declaration of Independence of the Cyberspace’, available at: <https://www.eff.org/cyberspace-independence>, accessed on 19th February 2021

¹¹ Claudine Tinsman, ‘Will the government’s online safety laws for social media come at the cost of free speech?’, *The Conversation*, (London, 23 December 2020) available at: <https://theconversation.com/will-the-governments-online-safety-laws-for-social-media-come-at-the-cost-of-free-speech-152352>, accessed on 22 February 2021.

engines. These rules will cover user generated content in order to provide oversight over what is posted online so that the spread of misinformation can be spotted and prevented.

Why would this system work?

On a superficial consideration of this proposal it is not hard to see how an independent regulator may be perceived like an Orwellian presence in an otherwise free environment however, upon closer scrutiny, it transpires that this is not the case. The role of an independent regulator within social media would not serve as a totalitarian unseen figure that would automatically remove content and ban users; the Independent Regulator will act as a referee. The Regulator's main duties will be to ensure that social media companies respect and protect their users by running an effective system of reporting harmful content and it will also ensure that these platforms do not allow the spread of misinformation and disinformation. What exactly amounts to harmful content will be addressed in the statute.¹²

The regulation of these companies is no different from the regulation of any other economic sector: it is a contractual relationship between economic entities and the states these entities trade in. The harsh criticism about the curtailing of freedom of speech is perhaps born out of a lack of analysis and the lack of appreciation as to the power that social media platforms have gained over the years.

If in 1996 John Perry Barlow said about the cyberspace that '*We have no government – nor we are likely to have one*'¹³ the position now has shifted and the consensus, certainly in so far as the policy in the European Union is concerned, is that '*what's illegal offline is also illegal online*.'¹⁴ Drafting measures that limit what can be posted online in order to prevent harm to the users should not be considered a limitation to the users' freedom, to the contrary; the regulation of online publication should be regarded the same way as the highway code: a set of rules which is aimed to ensure each user's safe navigation.

¹² Secretary of State for Digital, Culture, Media & Sport and the Secretary of State for the Home Department, Online Harms White Paper: Full Government Response to the consultation, December 2020

¹³ See above at 10

¹⁴ Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, p.2, 'Tackling Illegal Content Online –Towards an enhanced responsibility of online platforms, Communication' COM(2017) 555 of September 2017

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