

Convergence: Digital Due Process for Protecting Internet Speech



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Shaping policies to advance media freedom

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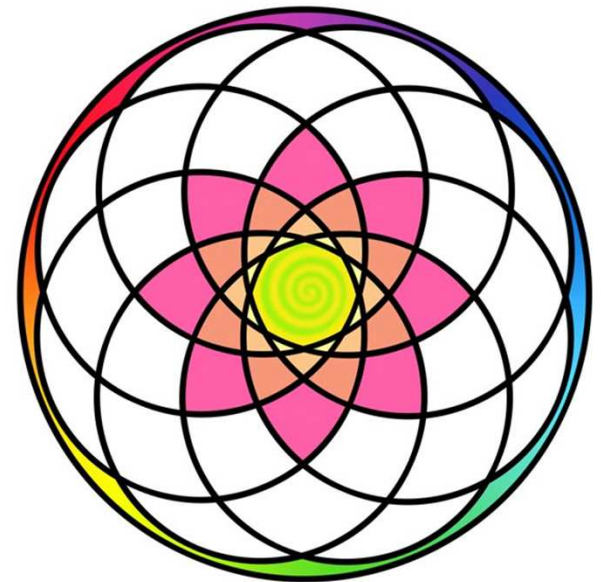
Internet Freedom of Expression Issues

- Issues set forth in the OSCE 2011 Report on Freedom of Expression on the Internet – prepared by Prof. Akdeniz
- *Internet Access, including Net Neutrality*
- *Internet Content Regulation **
- *Blocking, Filtering, and Content Removal **
- *Licensing and Intermediary Liability Issues*

*** International convergence on principles of digital due process for protecting Internet speech**

Divergence and Convergence

- While we see substantial ***divergence re substantive free speech protections*** among OSCE participating States...
- We also see a growing **convergence** re **due process/procedures for protecting Internet speech**
 - Under ICCPR
 - Under recent ECHR decisions, esp. **Yildirim v. Turkey**
 - Under U.S. First Amendment law



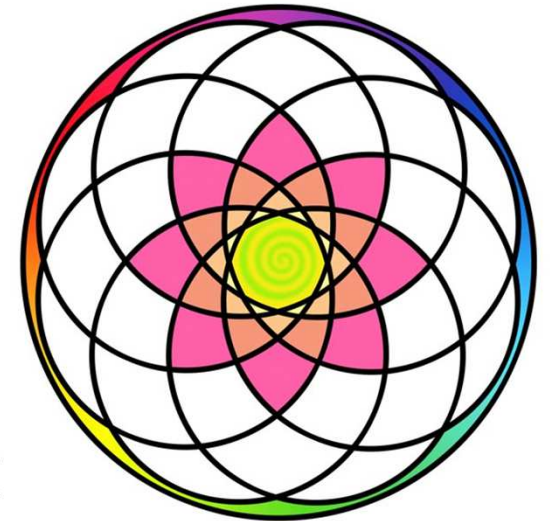
Divergence

- OSCE participating States have different definitions of illegal content, based on different cultural, moral, religious, historical differences and values
 - Racism/hate speech
 - Incitement to terrorism
 - Denial of genocide/crimes against humanity
 - Child pornography
 - Obscene/pornographic content
 - Extremist speech
 - Libel/defamation
 - Insult to leaders/founders of country



Convergence on Principles of Digital Due Process for Protecting Internet Speech

- Under International Covenant on Civil and Political Rights (ICCPR)
- Under European Convention on Human Rights and European Court of Human Rights decisions
- Under U.S. free speech jurisprudence especially prior restraint doctrine.



Convergence on Principles of Digital Due Process for Protecting Internet Speech

- Strict procedural safeguards and
- Requirement that “sensitive tools” be used for distinguishing between
 - Protected speech and
 - Unprotected speech both online and offline



Importance of Due Process/ Procedural Protections for Speech

- **“The history of freedom is, in no small part, the history of procedure.”**
-- U.S. Supreme Court Justice Felix Frankfurter
- **“Procedural guarantees play an equally large role in protecting freedom of speech; indeed, they assume an importance fully as great as the substantive rule of law to be applied.”**
-- Constitutional Law Prof. Henry Monaghan

Convergence re Digital Due Process for Protecting Internet Speech

- **U.S. Law of Prior Restraints and Content-Based Restrictions**
- **Prior restraints on speech are those occurring before/without a judicial determination of speech's illegality**
- **Greatly disfavored, strictly scrutinized**
- **Internet filtering and many Internet removal/blocking decisions embody prior restraints**
 - **Removal/blocking imposed without judicial determination of speech's illegality**
 - **Compare requests in Google Transparency Report**
- **Strict procedural safeguards must be in place before any prior restraint – including**

Convergence re Digital Due Process for Protecting Internet Speech

- Under ICCPR, ECHR decisions, First Amendment decisions:
- If any Internet speech is to be restricted:
- **Transparency/Notice/Foreseeability**
 - Affected Internet users -- content providers and end users -- must be given **notice** of such decision
 - No secret filtering/blocking
 - Obligations on search engines to be transparent
 - Authorities must be **clear and transparent** about what speech they are blocking/filtering

Convergence re Digital Due Process for Protecting Internet Speech

- Under ICCPR, ECHR decisions, 1A decisions:
- If any Internet speech is to be restricted:
- **Precision of Speech Regulations**
 - Speech to be regulated must be precisely and narrowly defined
 - Regulation must be applied in targeted manner, to avoid collateral censorship and overbreadth
 - Must be the least restrictive means of accomplishing state's goal

Convergence re Digital Due Process for Protecting Internet Speech

- Under ICCPR, ECHR decisions, 1A decisions:
- If any Internet speech is to be restricted:
- **Appealability of decision to block/filter speech**
 - Affected Internet users must be provided with the meaningful ability to appeal decision to block/filter speech, to a judicial body

Convergence re Digital Due Process for Protecting Internet Speech

- Under ICCPR, ECHR decisions, 1A decisions:
- **Decisions to restrict speech must be necessary and supported by compelling government interests**

Convergence

- “Sensitive tools”/strict procedural safeguards for distinguishing between protected speech and unprotected speech, online and offline
 - **Transparency/Notice/Foreseeability**
 - **Precision of Speech Regulations**
 - **Appealability/judicial review of any decision to block/filter speech**
 - Any speech restriction must be **necessary and supported by compelling government interests**
- Key procedural elements of First Amendment prior restraint doctrine and content-based restrictions
- Procedures also adopted in ICCPR and ECHR free speech jurisprudence

- Report of the U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression Frank La Rue, 2011
- **Construing ICCPR**
- Sets out multi-part test for online content restrictions
 - must be provided by **law which is clear and accessible**
→ **principles of predictability and transparency**
 - must pursue one of legitimate purposes set out in ICCPR Article 19 Par. 3 → principle of **legitimacy**
 - must be **necessary** and **least restrictive means** required to achieve aim → principles of **necessity and proportionality**
 - must be applied by an **independent body** and
 - must be **adequate safeguards against abuse**, including possibility of **challenge** and **remedy** against abusive application
- These principles are especially important re **blocking/filtering mechanisms used by States for censorship**.

European Court of Human Rights Case Law

Chamber judgment in **Yildirim v. Turkey** – Dec. 18, 2012

- National of Turkey Mr. Ahmet Yildirim
- Sued Republic of Turkey for violating his rights under Art. 10 of European Convention on Human Rights
- 2009: Denizli Criminal Court (Turkey) ordered the blocking of a Google Site that was accused of insulting the memory of Ataturk.
- The Telecommunications Directorate (TIB) charged with executing the order asked the court to **order the blocking of all Google Sites** → substantially overbroad effect
- The Denizli Criminal Court complied.



- Mr. Yildirim publishes his academic works and opinions using Google Sites.
- After the order, his Google Site was blocked – and *remained* blocked even after criminal proceedings in original case were dropped.
- ECHR found a violation of Art. 10, which guarantees the right to freedom of expression, including the freedom to receive and impart information or ideas without interference by public authority.



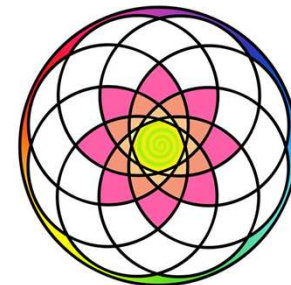
Yildirim Decision

- **Decision of the Court:**
 - **Prior restriction/restraints** – which intervened before a judgment on the merits in individual case
 - Presents “great danger” and calls for “closest examination of the Court.”
 - Must be subject to “**particularly strict legal framework**”
 - Applicable Turkish law did not comply with this strict framework
 - Did not provide sufficient **notice** to plaintiff
 - Produced a “**significant side effect**”/collateral censorship by blocking an entire platform

European Court of Human Rights


Yildirim Decision:

- Articulates and reinforces **strict procedural requirements for any restrictions on Internet speech.**
- Any content-based restriction on speech must be **lawful, prescribed by law pursuant to Art. 10(2), and must be necessary in a democratic society, corresponding to a pressing social need, and proportionate to the aim pursued**



Additional procedural principles:

*Confine reach of Internet speech restrictions to **avoid spillover***

- Yahoo! France case (2000) 
 - French organizations brought criminal action against U.S. company Yahoo! for hosting auction of Nazi memorabilia
 - French Court's judgment against Yahoo! for noncompliance, imposed severe fines
 - **Yahoo! ultimately removed material from Yahoo.com, even though material was legal under US law**
- **States should impose their speech restrictions only on their citizens and avoid extraterritorial regulatory spillover**

Additional procedural principles:

*States should not hide behind
“voluntary” nationwide filtering*



- States should not hide behind private entities that impose “voluntary” nationwide ISP filtering regimes
- U.K. /BT Cleanfeed and other countries using hotline systems/“voluntary” nationwide ISP filtering regimes
- ***Accountability/Transparency gap***
- If speech is to be restricted nationwide, **state** itself should restrict speech so affected parties can hold the state to the strictures of digital due process for protecting speech.

Divergence and Convergence

- While we see substantial ***divergence re substantive free speech protections*** among OSCE participating states
- We also see a growing **convergence** re meaningful **due process/procedures for protecting Internet speech**
 - Under ICCPR
 - Under ECHR decisions
 - Under U.S. First Amendment law
- Commend these developments because
- ***“The history of freedom is the history of procedure.”***

