Does Twitter trump Trump?

A European perspective

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Some of the biggest social media platforms recently decided to suspend the accounts of former US President Donald Trump. Even though such bans are not unprecedented (see a list by Jillian C. York), the fact that it concerned the then-still US President has triggered quite some controversy. This blog post examines the situation from the European perspective, specifically the right to freedom of expression protected by Article 10 ECHR. Would the doctrine of positive obligations mean that Donald Trump's right to freedom of expression was violated?

No censorship under US law

After the events of 6 January 2021, President Trump had (among others) his Facebook and Twitter accounts suspended or permanently banned. A move applauded by those who for the last 4 years have been accusing Trump of continuous violations of the platforms' Terms & Conditions was considered unacceptable censorship by others (see here and here). Numerous experts rushed to explain that under US law the move does, in fact, not constitute a violation of the 1st Amendment, since there was no state action (see here). Moreover, when private online platforms remove users' content, even if it happens to be the US President, they are protected by both 1st Amendment and Section 230. Coming from the European perspective, I would like to look at the situation through the lenses of Article 10 ECHR and the doctrine of positive obligations.

Obligation to protect the right to freedom of expression

The right to freedom of expression, under the ECHR, is not absolute. Restrictions could take the form of '*formalities, conditions, restrictions or penalties*' (Article 10 para. 2 ECHR), and are permissible if they comply with three conditions: They must be (1) prescribed by law, (2) introduced for protection of one of the listed legitimate aims, and (3) necessary in a democratic society. Legitimate grounds that could justify interference include national security, territorial integrity or public safety, and the prevention of disorder or crime.

The right to freedom of expression under the ECHR has, first and foremost, a negative obligation, meaning that states cannot unduly restrict the right. In Europe the right also entails a positive obligation. States are required to also protect the right from interference by others, including by private companies or individuals. Extending the scope of the ECHR to private relationships between individuals is referred to as the "horizontal effect". According to the interpretation of the European Court of Human Rights (ECtHR), the horizontal effect is indirect, meaning that individuals can enforce human rights provisions against other individuals only indirectly, by relying on the positive obligations of the State. Interference with the Convention rights by an individual may be attributed to the State, which failed to prevent the interference. The ECtHR specifically found the positive obligation present in relation to the right to freedom of expression (e.g. *Dink v. Turkey*). The duty to protect the right to freedom of expression involves an obligation for governments to promote this right and to provide for an environment where it can be effectively exercised without being unduly curtailed. Examples include cases of states' failure to implement measures protecting journalists against unlawful violent attacks (*Özgür Gündem v. Turkey*), or failure to enact legislation resulting in refusal to broadcast by a commercial television company (*Verein gegen Tierfabriken Schweiz v. Switzerland*).

The doctrine of positive obligations and the horizontal effect of the ECHR could support the argument that rules may be necessary to prevent arbitrary decisions by platforms to remove content (or ban users). But how far would this argument stretch? Does the horizontal effect of the ECHR mean that "deplatforming" Donald Trump constitutes a violation of his right to freedom of expression? And further, would European States be able introduce some type of "must-carry" obligations for online platforms to protect certain categories of speakers (e.g. politicians) to ensure effective enjoyment of the right to freedom of expression? As always, the answer is complicated.

No freedom of forum

Despite the existence of positive obligations, the ECtHR has ruled that Article 10 does not provide any "freedom of forum" for the exercise of the right to freedom of expression. This means that Article 10 ECHR does not guarantee any right to have one's content broadcasted on any particular private forum. Private platforms, therefore, cannot be forced to carry content by third parties, even if that content is not actually illegal. This is only logical. It is hard to imagine that a platform for dog owners would be forced to allow cat pictures (despite what internet cat overlords might think about that).

Such an obligation would involve a conflict between the right to freedom of expression and the right to private property and to conduct business (Article 16 ECHR and Article 1 of Protocol 1 to the ECHR). An attempt to protect the former would amount to interference with the latter. In a case concerning prohibition to distribute leaflets in a private shopping centre (*Appleby and others v. the UK*), the Court did not consider lack of State's protection as a failure to comply with positive obligation to protect Article 10 ECHR. This was because the Court also considered that a lack of protection did not destroy the "*essence*" of the right to freedom of expression. However, the Court did not entirely exclude that "*a positive obligation could arise for the State to protect the enjoyment of the Convention rights by regulating property rights*". Indeed, such was the Court's decision in *Khurshid Mustafa & Tarzibachi,* which involved termination of a tenancy agreement because of the tenants' refusal to dismantle a satellite dish installed to receive television programmes from the tenants' native country. To decide which right takes precedence in particular circumstances, the Court conducts a test of "viable alternatives". The Court analyses if parties were able to exercise their right to freedom of expression through alternative means. In *Appleby* such alternative expression opportunities existed, while in *Tarzibachi* the Court found that even though different methods existed, they were not functionally equivalent to a satellite dish.

What does this mean for Trump's ban on Twitter and Facebook? Clearly, as the then-President of the USA, Trump had ample opportunities to communicate his message to the world, whether through a friendly broadcaster or an official press conference. While it could be argued that the existing alternatives are not equivalent to the most popular social media platforms, it would be hard to argue that the essence of the right to freedom of expression was destroyed. For an ex-President, some expression opportunities might be limited but Trump's options still put him in advantage in comparison with an average unknown user deplatformed by Twitter or Facebook. These bans do happen, whether for clear violations of the Terms and Conditions or the most absurd reasons. Yet, they rarely reach similar levels of controversy.

We should also not forget that Trump has a long history of tweets that violate platforms' Terms and Conditions. Not banning him earlier was a result of special treatment – an exception attributed to the newsworthiness and public interest of his tweets. For comparison, an unrelated account which tweeted the exact same words as the President got suspended within 3 days (for glorifying violence). Although Twitter's bending of its own rules has been criticized by many, it is not entirely unreasonable to leave more room to the content of the President of the USA. But even Twitter's patience reached its limits when the President's comments amounted to incitement to insurrection.

Article 10 ECHR protects expression that offends, shocks or disturbs. The scope for restrictions on political speech is narrow and requires strict scrutiny. However, hate speech and incitement to violence do not constitute an expression worthy of protection (see here). The ECHR does not provide a specific definition of hate speech but instead prefers a case-by-case approach. Moreover, per Article 17 ECHR, the Convention does not protect any activity aimed at the destruction of any of the rights and freedoms contained in the Convention, to prevent the so-called "paradox of tolerance". This provision has been interpreted to exclude protection of speech that endangers free operation of democratic institutions or attempts to destroy the stability and effectiveness of a democratic system. It goes beyond the scope of this blog post to analyse if Trump's tweets and posts actually fall within this category of expression, but the mere possibility of such qualification shows that his speech is not merely controversial. Thus, it is not unthinkable for platforms to prohibit it through their internal rules.

Europe against censorship?

Under the ECHR, the banning of Trump's accounts could be viewed as an interference with his right to freedom of expression. However, private entities are not bound by the ECHR and its horizontal effect is only indirect. The only option under Article 10, therefore, would be to attribute the interference to states, for failure to effectively protected Trump's rights. But again, the right to freedom of expression under ECHR is not absolute. This means that not every interference is considered a violation. The circumstances of the present case (including the context and impact of Trump's speech), makes a qualification as a violation seem unlikely.

I have previously argued that states should introduce laws to ensure more protection of online expression in order to comply with their positive obligations under Article 10 ECHR. It would be hard to imagine, however, that such laws would force platforms to carry all and any content by one privileged group of users, such as politicians or heads of states. Especially so, if the content amounted to hate speech or incitement to violence. Nevertheless, some politicians have proposed laws that would prohibit removal of speech that is not explicitly considered hate speech by national legislation (which would have provided protection to Donald Trump's tweets as well as speech targeting minority communities, see more here).

Following the decisions to ban Trump's accounts, policymakers around the world have expressed their concern about the immense power of private platforms to "silence" world leaders (see here, here and here). The strong pro-speech stance of EU politicians is commendable, but not exactly consistent with a general trend in recent years. For some time now, European politicians and the EU have been trying to convince online platforms to "do more" to police content of their users. National laws such as the German NetzDG, the Austrian KoPlG and the French Avia Bill all require more effective moderation of online spaces. This means, more and faster removals. Under the threat of high fines, these laws require platforms to limit dissemination of illegal content as well as harmful content, such as disinformation. In an attempt to catch up with national legislations, the EU has been steadily introducing mechanisms encouraging online platforms to (more or less) voluntarily moderate content, for example the 2016 Code of Conduct on hate speech, the 2018 Code of Practice on Disinformation, the update to the AVMS Directive and the proposal on Terrorist Content Regulation (currently in the final stages of negotiation). One would think that Twitter's proactive approach, in light of these initiatives, would be appreciated. The somewhat confusing political reaction has led to questions whether the recently proposed Digital Services Act (DSA) would address the problem of powerful platforms making arbitrary decisions about speech they allow online.

The DSA aims to rebalance the responsibilities of users, platforms and public authorities according to European values. It includes mechanisms to encourage online platforms to conduct voluntary monitoring and moderation of the hosted content, in particular in Article 6. A strong risk exists that such an encouragement would lead to more private censorship (see my analysis

here). At the same time, the DSA clearly states that its goal is to ensure more protection for fundamental rights online. Recital 22, in particular, states that the "*removal or disabling of access should be undertaken in the observance of the principle of freedom of expression*". How could the DSA ensure more protection to the right to freedom of expression, and what would it mean for banned accounts? Would it privilege certain actors?

The DSA's contribution to more effective protection of the freedom of expression comes in form of procedural safeguards. These strengthen due process, clarify notice and take down procedures, improve transparency of the decision making and ensure redress mechanism for removal or blocking decisions. It will not prohibit Twitter from introducing its own internal rules but will require that the rules are clear and unambiguous and applied in proportionate manner (Article 12 DSA). Any blocked user would also have to be informed about the reasons for blocking and possibilities to appeal the decision, e.g. through internal complaint-handling mechanisms, out-of-court dispute settlement and judicial redress (Article 15). The goal of the introduced safeguards, therefore, is to regulate the process and not to regulate the speech. Adding these safeguards could have an overall positive effect on the enjoyment of the right to freedom of expression. This positive effect would be achieved without introducing any must-carry rules for certain types of content (e.g. speech by heads of states) that could potentially interfere with other rights and interests at stake.

Conclusion

Donald Trump's presidency came to an end last week. The decision to suspend his Facebook account has been now referred to the Oversight Board and his Twitter account remains suspended. Despite the initial surprise, we are slowly getting used to hearing less from him. Politicians around the world, however, might be still struggling with the effect. This is, therefore, a good moment for reflection on their side: do they want online platforms to remove (or ban) more and faster? Or do they want more increased protection of the right to freedom of expression, but only for themselves and their supporters? It will be interesting to see how the discussion unfolds, especially in the context of the DSA. But surely certain stakeholders must be starting to realize that it might be difficult to have your cake and eat it too.

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