Online freedom of expression: edge cases and safety valves

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Shirin Ebadi makes a very good case that freedom of expression is an important foundation for democracy, that democratic governments have cause to safeguard and repressive ones cause to fear. She also points out that technology can hold such governments accountable, by opening up new channels of communication, and fostering the development of networks of citizens intent on exercising their rights.

But whilst freedom of expression supports democracy, the reverse isn't also true. Indeed, freedom of expression and democracy are often in opposition. Freedom of expression is the freedom to speak out when the majority wish you wouldn't, and would shut you up if they could. The same is true of human rights in general – they are protections against the tyranny of the democratic majority.

What this means is that democratic governments won't always be inclined to support technologies that further human rights. Respecting human rights is a moral decision for governments, rarely a political one. The Universal Declaration of Human Rights is after all the legacy of modern history's biggest moral catastrophe. Today, even the most democratic of governments still don't always make the moral choice, especially when it comes to the rights of minorities and foreigners.

Equally, respecting human rights isn't always in the best interests of corporations – and corporations have fewer legal obligations to do so. This makes it problematic for us to place too much of our trust in the power of technology to safeguard freedom of expression. Much of the technology on which activist citizens depend (such as Web-based social networks, mobile telephone networks and smartphones) are of large corporations. Indeed, Google's CEO Eric Schmidt once boasted, “The hardware and software created by private companies in free markets are proving more useful to citizens abroad than state-sponsored assistance or diplomacy”.

An unfortunate economic fact is that market forces incline corporations to maximise their profits, human rights be damned. Granted, some corporations do factor human rights into their behaviour, and may even make reference to public interest guidelines in doing so; for example, the ISO 26000 standard on social responsibility, and the principles of the Global Network Initiative that explicitly deal with freedom of expression online. But when profits and human rights conflict, corporations are no more likely than governments to make the moral choice – think of the “three strikes” penalties for copyright infringement, strongly pushed by industry yet denounced by the UN Special Rapporteur on freedom of opinion and expression.

So we can't rely on technologies maintained by corporations to protect our freedom of expression against governments. Neither can we trust governments not to infringe the rights of Internet users through covert surveillance and state-sponsored malware. In some cases, governments and corporations can keep each other's failures in check; for example, Google and Twitter both maintain records of government take-down requests, and governments have applied antitrust and privacy law against the abusive practices of companies such as Microsoft and Google.

But more often we find governments and corporations colluding to defeat the freedom of expression of Internet users. Think of the Indian and Saudi governments demanding back-doors into encrypted Blackberry emails, and the United States subpoenaing communications from Twitter. Between them, corporations and governments are fashioning the Internet into a controlled ecosystem: networks that are silently monitored and logged, and devices that are locked down with patents, locked bootloaders, signed apps and TPMs (Technological Protection Measures).

So to recap: governments can't be relied on to protect online freedom of expression. Corporations can't be relied on to do so. What about civil society? To a point, the answer is yes; civil society

does have an important role to play as a watchdog for human rights online, combating the infringement of those rights by either governments or corporations. Within the limits of its resources, civil society can use subversive technologies, can participate in formal policy processes, and can shape the development of powerful social norms, that uphold the right to freedom of expression online.

For example, the key enabling paradigm for civil society's role in shaping technology is that of free and open source software. Open source applications such as Tor can be used to bypass the blocking of social networks (by governments), and open source jailbreaks can cut digital locks (placed by corporations) that prevent consumers from customising their own digital devices. As to participation in formal policy processes, nobody doubts that civil society's intervention was instrumental in the defeat of freedom-threatening instruments such as ACTA, PIPA and SOPA, and civil society's leadership of the Internet Rights and Principles Coalition has produced a powerful statement of shared norms that is explicitly grounded in human rights.

But there are other cases in which there is no accord within civil society. As a case in point, Ms Ebadi calls for an "international regulation", which apart from guaranteeing freedom of expression (as the Universal Declaration already does), could also "assist the southern countries in their attempt to access the Internet". That a basic level of Internet access has become a right of the citizen is increasingly well recognised, with several countries having enshrined this as a legal right. But civil society is split on the appropriate role of government in securing such access as a matter of distributive justice. For example in 2012, two self-styled Declarations of Internet Freedom were released by civil society and private sector actors, one of which calls for policy makers to "Promote universal access to fast and affordable broadband networks," whilst the other warns that "Government is the greatest obstacle to the emergence of fast and affordable broadband networks".

Another case in point is the tension between freedom of expression and the regulation of hate speech, as illustrated by reactions to the provocative anti-Islamic film, *The Innocence of Muslims*. Rather than a difference of political ideology, this is a cultural and religious division that perhaps goes even deeper. The Universal Declaration and its derivative International Covenants offer little guidance on the underlying moral question of how an appropriate balance is to be struck in such cases. Whilst, admittedly, the Islamic world had little input into the original drafting of the Universal Declaration, and alternative instruments more compatible with Sharia law have since been put forward (with notable deviations on issues of gender and religion), it is both unthinkable and unnecessary for any country to resile from that instrument simply in order to curtail hate speech.

But as to where the dividing line between legitimate criticism and hate speech should be drawn, civil society has found no more consensus than governments or the private sector. Google, for its part, made a decision in the *Innocence of Muslims* case that could most charitably be described as arbitrary, taking the film down in some jurisdictions and leaving it up in others, without justifying this decision even according to its own guidelines, let alone to any external standard against which it could be held accountable. This doesn't necessarily mean that the decision was wrong, but the process by which it was taken was most certainly lacking.

What comes out of this is that civil society, whilst having an important role to play in upholding freedom of expression online, is no more qualified than governments or corporations to make moral determinations on the application of that right. Neither can we prevail upon the Internet itself to sort out right from wrong, as the Internet is not a culturally neutral artifact. Embedded in the architecture of the Internet are design choices that tend to favour freedom of expression over control, but these choices, well-justified as they may be as general policies, carry no moral weight of their own that would assist in the resolution of hard cases.

What, then, is the answer? How can we uphold a right to online freedom of expression that flows from the ethical principles embodied in the Universal Declaration, yet is culturally neutral? If not through government fiat as an expression of the will of domestic majorities, or through decisions

made by industry guided by an invisible hand, or through the persuasive influence of civil society research and advocacy, or simply through the effect of the Internet's architecture, how else are we to develop and apply policies to give effect to freedom of expression or other human rights online?

The best answer we have is that we should do so by combining the strengths and weaknesses of all those stakeholders in a multi-stakeholder policy development process intended to explicate common principles or guidelines upon which governments, the private sector and civil society can agree as a basis for their respective actions, such as passing legislation or concluding treaties, moderating online services containing user-generated content, and inculcating shared norms of online behaviour.

Admittedly, it won't be possible to reach a meaningful consensus on common principles in all cases, as there are some issues that are just too divisive. There is some online speech that many Muslims, for example, simply can't abide, for reasons that are as dear to them as the First Amendment is to Americans. In such cases the default outcome, and the correct one, is that a more specific local policy will override a more general global principle. In this case that means blocking of the offending content at the local level, through a process compliant with the domestic rule of law. But to minimise the overreaching potential of such local policies, it is important to fully exhaust the potential for the development and application of principles at a higher level, before an edge case devolves to the domestic level.

This is nothing new in international law. Take the example of intellectual property law: international law establishes the principle that moral rights and geographical indicators are to be protected. However as domestic legal traditions on these doctrines vary so substantially, this represents only a thin consensus, which is implemented comprehensively in countries such as France, and in much more limited fashion in others such as the United States. Thus, at the higher level the principles established are general and universal, and at the lower level they are more fine-grained and divergent. So too it is with freedom of expression online – and there is nothing new in this, either.

What is new is that policies made at the local level on Internet content regulation, whether by governments or by private actors, may affect users anywhere in the world, over whom the policy-maker has no legitimate claim of authority. It is for this reason that a multi-stakeholder transnational policy development process is required, so that such policies, at least in broad outline, are devised in a globally democratic manner more suited to the borderless medium and community that is the Internet.

This cannot be done in an institutional vacuum; seeking even a rough consensus on policy issues amongst stakeholders with such deep divisions is a fraught task which has to be approached methodically. The task is all the more ambitious when those around the table are culturally diverse and may come from communities at different stages of economic development.

But thankfully, it can be done. There are well-studied and practised techniques of deliberative democracy that can be used to subvert adversarial negotiation tactics, in favour of deep and authentic deliberation on policy issues with the objective of promoting understanding and consensus. There are also forms of organisation, such as the consociation, designed specifically to balance the power of stakeholder groups with deep divisions, in which none is willing to fully submit to the rule of the others. Through the use of these techniques and structures, it is eminently possible to craft an institutional framework within which all stakeholders can collaborate on the development of high-level shared principles.

The closest we have to this at present is the Internet Governance Forum, but in its present form it doesn't quite cut it as a mechanism for policy development. This is not because the IGF's mandate in the Tunis Agenda precludes this – quite the contrary, it calls the IGF to undertake not only discussion (paragraph 72(a)), discourse (72(b)) and the exchange of best practices (72(d)) between stakeholders, but also to develop recommendations (72(g)) that can be transmitted to decision-

makers through appropriate high level interfaces (72(c)). In any case, the Tunis Agenda also calls for a parallel process towards enhanced cooperation on Internet-related public policy issues, which more explicitly includes "the development of globally-applicable principles on public policy issues", involving all stakeholders in their respective roles, but led by "governments, on an equal footing".

Whether the political will for such institutional reform exists is another question altogether. Since the enhanced cooperation mandate was agreed in the Tunis Agenda in 2005, it seems that many stakeholders would rather accept a broken Internet governance regime than move towards something better, even if this means that governments and corporations continue to develop Internet-related policies in a fragmented and uncoordinated fashion, without methodically considering their transnational impacts or their human rights implications.

So let's assume that nothing is likely to change in the short term – does this leave the online freedom of expression that Internet users enjoy to the whim of powerful actors such as the Iranian government, Google Inc and the United States Department of Homeland Security?

Not entirely. A famous aphorism of Electronic Frontier Foundation (EFF) co-founder John Gilmore is that the net interprets censorship as damage and routes around it. Whilst not as accurate as it once was, an underlying truth in this is that when the human rights of Internet users are infringed, there tends to be a safety valve that allows them to reassert those rights. The more egregious the infringement, the more pressure will build, and the more vital the role of the safety valve when it blows. The same phenomenon of the social safety valve is seen in the offline world, when citizens rise up against oppression by practising civil disobedience and physical protest.

Online, we find Wikileaks providing a safety valve against the secrecy of corrupt regimes and businesses. Jailbreaking of locked-down devices is a safety valve for those denied access to liberating communications technologies. Media piracy can provide a safety valve for disadvantaged consumers denied access to knowledge by TPMs or single-tier pricing models. Encryption technologies, such as Tor for the Web and GPG for email, are a necessary safety valve for those whose communications are subject to arbitrary interception.

Each of these safety valves can also be abused to evade legitimate laws and policies that do not infringe human rights. This ensures that governments and the private sector will always treat them warily, and seek to stigmatise or outlaw their use. Not coincidentally, it is mainly through civil society that these platforms and technologies have been developed and propagated. But until we reach that utopian state of cultural and ideological consensus on a comprehensive set of public policies for the Internet, safety valves such as these will retain an important role in counteracting the abuse of human rights such as freedom of expression online.