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CONDITIONS OF ACCESSIBILITY OF SOCIAL MEDIA IN PUBLIC SPHERE²

Abstract

Social media are today an essential part of the public sphere. They are the main places where citizens come together to share information, to debate, to discuss, or to deliberate on common concerns. Social media plays an important role in the implementation of public debate. The analysis presented here allows us to conclude that currently, social media do not meet the conditions for the public sphere. Consequently, the realization of other rights is compromised. Social media require legislators to regulate them accordingly. States have positive obligations in the form of enabling their citizens to realize public debate. It is, therefore, necessary to launch an appropriate legislative process aimed at normalizing the activities of social media to guarantee these features. The state, acting to protect citizens' rights in the digital age, should establish regulations to guarantee the pluralism and autonomy of this new public sphere.

Key words: Public sphere; social media; Digital public space; Public debate; Media Transparency

INTRODUCTION

The Modern democratic societies are based on the functioning of a public sphere, which allows citizens to freely express their opinions, discuss common issues, and participate in political life. The public sphere is a place where free and equal citizens gather to exchange information and debate common issues. The intensive development of the Internet has led to most of the previous communication being moved online and has become one of the most important sources of information. Its key role in the communication and

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information processes of societies has meant that it is now an important means of enabling public debate.

The research hypothesis posed within the article is based on the question: should social media be considered public spaces? The determination that social media is a public space implies the need to provide it with the qualities inherent in such a space. The research context is based on the theoretical and practical aspects of the functioning of public spaces, with an emphasis on the importance of regulation in ensuring that social media meet democratic standards. The main objective of the work is to propose a regulatory framework that will enable social media to act as modern agoras, open and accessible to all citizens.

The article is an important contribution to the current debate on whether and how to regulate social media. This work aims to propose concrete solutions that can contribute to the improvement of public spaces in the digital age. By analyzing the existing challenges and proposing appropriate regulations, the work seeks to protect the fundamental principles of democracy and civil rights in the context of the rapidly evolving social media.

To be able to answer the research questions, on the one hand, we use research methods typical in legal studies combined with IT knowledge. As a result, our research material includes judicial decisions and relevant literature on legal and IT scholarships.

1 CHARACTERISTICS AND FUNCTIONS OF A PUBLIC SPHERE

The idea of public life, as opposed to private affairs on the one side and affairs of office on the other, can be dated back to classical European antiquity. Aristotle was the first to separate the sphere of domestic family life - the *oikos* - from the sphere of public political life - the *polis* (Kołodziejczyk, 2024). The private sphere is divided into the sphere of intimate private life and private personal life. The former consists of a person's inner experiences and is beyond the possibility of interference. The second consists of events of personal and family life that are intended for those closest to the person. This sphere is also protected from unauthorized access. The sphere of public accessibility is outside the protection of the privacy regime (Kopff, 1971).

The distinction between private and public spheres is extremely important as it entails momentous legal consequences. The contemporary legal system has developed different norms protecting private space as a space of individual autonomy (Milczarek, 2020) and others regulating the conditions of public space. The assessment of whether we are dealing with private or public space is therefore crucial for identifying the legal consequences of the actions taken and the subjective rights we will be entitled to.

The public sphere is a place "where free and equal citizens come

together to share information, to debate, to discuss, or to deliberate on common concerns" (Odugbemi, 2008). The performance space of the public sphere has been transformed over the centuries, adapting to the spirit of its era. In ancient Greece, this function was performed by the Agora, the central place of assembly, commerce, and political debate. It was here that citizens could participate directly in democracy, discussing and deciding public affairs. In ancient Rome, this function was performed by the Forum Romanum. During the medieval period in Europe, this space was associated with market squares and churches. During the Enlightenment, public life was realized in salons and cafes, which became important venues for intellectual and political discussions (Bentele, Nothhaft, 2010). The public sphere provides "a close-to-the-ground, locally informed, dispersed arena for detecting problems, exploring them and bringing them to public view, suggesting solutions, and debating whether the problems are important and worth addressing" (Cohen, Fung, 2021).

A leading researcher of the concept of public space is Jürgen Habermas. His concept of a public sphere is widely accepted as the standard work but has also been widely challenged as the concept of the public sphere is constantly developing. By the 'public sphere' we mean first of all a realm of our social life in which such a thing as public opinion can be formed. It is a basic requirement to mediate between state and society and in an ideal situation permits democratic control of state activities. To allow discussions and the formation of public opinion a record of state-related activities and legal actions must be publicly accessible. Participants in the public sphere are private individuals, who come together to rationally and critically discuss public affairs, above all the actions of governments, and who want to have an influence on institutionalised opinion- and will-formation (Habermas, 1996). The public sphere is private in its constitution but political in its function (Reese-Schäfer, 2001). According to J. Habermas, communicative structure is an essential part of the public sphere. The public sphere constitutes a much-differentiated network for communicating information and opinions that is reproduced using communicative action (Habermas, 1992).

A public sphere should serve the needs of its users and be characterized by a certain set of features (Habermas, 1989). The characteristics of a public space will be its (Holub, Habermas, 1991):

1. Openness and accessibility: Public space should be open to all citizens, regardless of their social, economic, or political status. Everyone should be able to participate in public debate.
2. Equality of participants: In public spaces, all participants should be treated equally. This equality means that the voices of all participants have equal weight and that discussions are not dominated by individuals or groups with more power or resources.

3. Rationality of discourse: Discussions in public spaces should be based on rational arguments and not on violence, manipulation, or propaganda. Participants should seek consensus through the exchange of views and arguments.
4. Transparency of communication: Information and arguments presented in public spaces should be clear, understandable, and accessible to all participants. Transparency of communication is key to enabling informed participation in the debate.
5. Autonomy of public space: Public space should be independent of external influences such as political or economic power. This allows for free and independent discussions on public issues.
6. Criticality and openness to new ideas: Public spaces should be open to a diversity of views and ready to critically analyze them. Discussions should encourage the expression of new ideas and the questioning of existing norms and values.

The public sphere fulfills several significant social roles. The first function, which is opposition and accountability, tries to restore power in the hands of the people, and public criticism and thus puts pressure on the competent authorities to act against the illegitimate sources of power. The second function of the public sphere refers to influence over policy. Civil society identifies problems, interests, and needs within a society, and brings them to the public sphere agenda. The third function of the public sphere is to promote a different way of social life publicly to achieve social change. The public sphere provides the expansion of such ideas and practices in a society (Kuljiš, 2017).

Public space takes on significant importance in democratic countries, where it is the voice of participating individuals that has the power to determine the direction of the state. Today we consider it as a *sine qua non* of liberal democracy (Adut, 2012). However, public influence is transformed into communicative power only after it passes through the filters of the institutionalized procedures of democratic opinion - and will formation and enter through parliamentary debates into legitimate lawmaking (Habermas, 1996). Public spheres do not stop at national borders. In an increasingly interdependent world, global attention can be focused on single issues- transnational public spheres (Habermas, 2004).

2 SOCIAL MEDIA AND PUBLIC SPACES

Social media is a collection of online applications, constructed on the ideological and technological assumptions of the Web 2.0 concept, allowing the creation and exchange of user-generated content (Kaplan, Haenlein, 2010). Their role was initially limited to serving only a social function, focusing on keeping

in touch with one's closest group of friends. Today, social media has undoubtedly become a place where citizens come together to share information, to debate, to discuss, or to deliberate on common concerns. They are a vital component of political and economic life and a significant source of information. They are a sphere of our social life where public opinion is formed (Gorodnichenko, 2023; Imrovič, 2016). Activities on social media are public and have an unlimited audience. They are an intermediate structure between the political world and the private world.

According to the jurisprudence of the Polish Supreme Court, a public place is web services such as information portals, corporate portals, open discussion forums, blogs, and vlogs, access to which is not limited and therefore not protected by a login and password, limiting the possibility of the owner of the service to gain access to a separate web space for Internet users (IV KK 296/17). A public place will therefore not be such services which are intended for a significantly limited number of users only.

Despite the criticism of considering social media as a public place (Nawrocki, 2019), another interpretation would be inconsistent with its actual function and characteristics. Critics point out that social media is closer to traditional media and that a public place can only be a place in the physical sense of the word (e.g. a square).

Cyberspace is quickly becoming an alternative 'place' for everyday economic, cultural, and other human activities. It ought, therefore, to be designed according to the principles, theories, experiences, and practices that have been guiding physical place-making for thousands of years (Kalay, Marx, 2003). Place in the digital era is experienced through its digital representation (Główczyński, 2024). As already highlighted, the key element of the realm is not the physical structure but the communicative structure. The argument that a public sphere must have a physical dimension ignores the dynamic development of technology and changes in how people interact. The rapid development of new technologies opens new opportunities, penetrating into all areas of life (Imrovič, Jankol'a, Lukáč, 2018). Virtual spaces offer new opportunities for community building, information exchange, and public participation that are not constrained by geographical barriers.

Traditional media (television, magazines, radio), through a strong division between content senders and receivers, do not fit into the Habermasian definition of the public sphere because, unlike social media, it does not allow openness to all citizens and is constituted in every conversation in which individuals come together. Digitalization is leading to the expansion and fragmentation of the public sphere and is turning all participants into potential authors (Habermas, 2022). In the social-media space, there is a conjunction of two powers: to obtain and to communicate information (*Sunday Times v Great Britain*). Social media

corporations are not a producer of information, but only a space for citizens to present it. Citizens present opinions to a mass audience and interact with other users. Traditional media are entitled to present mainly one point of view (the right-wing Fox News, The Daily Telegraph, or the left-wing The Guardian or New York Times). When one point of view is favored by social media (in the form of algorithm settings), public opinion is manipulated, as the user is 'made to believe' that a particular opinion is common among the public and is thus disrupted from accessing information. The provider of content to social media (the user) cannot be treated like a journalist and affords the same protection or requirements as the content he or she provides. Treating, as critics point out, social media in the legal regime of traditional media would significantly change the legal tools that can be used.

Some researchers argue for the recognition of the Internet as a public place (Camp, Chien, 2000). One should disagree with this view. From a computer science standpoint, the Internet is a well-defined technological infrastructure of meticulously classified and categorized computers, cables, and code. In any other context, it is a gross category error to invoke the unity of the Internet (Geiger, 2010). We can characterize the Internet as a public infrastructure (Rasmussen, 2014). The Internet is a medium through which portals that we can judge as public (e.g. social media) but also private spheres (such as user clouds, and closed groups) operate. As such, the Internet cannot be considered a public sphere.

Social media is an environment of prosumers who are both consumers and producers of content (Milczarek, 2022). The user in social media is the primary subject of the public sphere (Benkler, 2006). The construction of this new sphere in a networked society takes place through the construction of communication protocols between different communication processes (Castells, 2009). Content shared through social profiles has a potentially unlimited audience. Social media in open and accessible public spaces and forums should expect to encounter and hear from those who are different, whose social perspectives, experiences, and affiliations are different (Young, 1990). The digital public sphere becomes the place for sharing our private reflections about public matters.

An analysis of the evolution of perceptions of public space in this context leads to the conclusion that social media constitutes a public place (Camp, Chien, 2000). This implies the need to adapt the Habermasian model of the public sphere to new conditions (Ochman, 2015).

3 SOCIAL MEDIA AS A NEW PUBLIC SPACE

In the contemporary digital age, the landscape of the public sphere has been significantly altered by the rise of social media platforms. Habermas

identifies fragmentation and privatization as the most serious threats to a properly functioning public sphere (Habermas, 2022). At the beginning of the 20th century, many social media platforms were created. However, the online market tends to monopolize. Thus, despite the theoretical plurality of social media choices, it is de facto dominated by a few sites (Facebook, X, TikTok) that impose their terms on all users. This monopolistic social media landscape limits the diversity of opinions and makes the decisions of a few companies have a huge impact on the global public debate.

In addition, the social media sector has created its regulations and operating rules, often detached from common legal norms. The decisions on social-media concerns are arbitrary and final. The censorship applied by platforms is based on artificial intelligence algorithms, which carry out the exclusion of specific content from the portal. The amount of removed material is increasing year on year. The way the algorithm works, and thus the extent of preventive censorship, is not subject to public scrutiny. This creates opportunities to control and manipulate the social-media debate (Gillespie, 2012). Concerns' policies are uniformly applied without regard to national legal systems (e.g. they will remove a post reporting the sale of cannabis, even if the user is in a place where the distribution of the drug is legal). It is also worth mentioning the blocking of accounts of legitimate politicians Donald Trump or Janusz Korwin-Mikke. This has resulted in their removal from public discourse. The formulation *Lex Facebook* (Bygrave, 2015) is beginning to be adopted, as Facebook treats its Terms of Service and Standards as *lex specialis* to national law.

The justification that Facebook is a private portal and users who do not accept its provisions should simply stop using it cannot be considered. Although the portal belongs to a private company, now, by being a public sphere, it also performs public functions (Hooker, 2019). This situation imposes, as it were, obligations and standards on the portal that it must meet. It is therefore negative to deprive some citizens of the opportunity to function in a public sphere such as social media. Social media should be treated as trustees of the information of its end users (Balkin, 2011), not as disposers of it.

It is also worth noting the distinctive flow of information characteristic of the digital infrastructure of the public sphere in which there are (i) many more providers and distributors of content; (ii) people thus enjoy vastly greater choice among kinds and providers of content, and (iii) particular content can be directed (or targeted) by providers, advertisers, social media platform companies, or other actors to particular users or groups of users (Cohen, Fung, 2021). Due to the speed of information and its unverified nature, a lack of oversight of social media can have potentially negative consequences for both the individual citizen and the community (e.g. disinformation, hate speech, fake news, information bubbles (Milczarek, 2023). Bruns suggests that search engines and social

media, together with their recommendation and personalization algorithms, are centrally culpable for the societal and ideological polarisation experienced in many countries (Bruns, 2019).

As this analysis has shown, there are significant differences between traditional public spaces and social media. Firstly, social media spaces are owned by private actors who exercise extensive governance; second, this sphere is characterized by the possibility of unlimited preventive and consequential censorship and control of information flows; thirdly, it has a wide range of content audiences (Milczarek, 2022); and fourth, it is characterized by the speed of information dissemination. These differences in the functioning of traditional and digital public spaces have far-reaching consequences for the quality and integrity of public debate.

Nowadays, leaving social media outside state regulation has led to its malfunctioning, resulting in a dysfunctional public debate (e.g. Brexit, the 2016 Clinton - Trump election, the anti-vaccine movement). Habermas' diagnosis of the dangers of digitization is grim. Epistemically, the worry is threefold: first, citizens will lose access to trustworthy sources of facts and information upon which to build considered opinions; second, citizens will become skeptical and distrustful of all sources of facts and information, including trustworthy ones; and, finally, citizens will believe that fellow citizens have lost access to trustworthy sources of fact and information and so lose trust in democracy (Chambers, 2023). It is therefore necessary to review the fundamentals of social media.

4 CONCLUSIONS: REGULATION OF SOCIAL MEDIA AS A PUBLIC SPHERE

Social media are the consequences and causes of new relationships in the networked public sphere (Brol, Czetwertyński, 2015). The social-media space is fundamentally different from other public spaces. The application of existing legal solutions, due to the scale of infringements and the speed of information dissemination, is ineffective. This implies the need for a separate regulation that takes these differences into account.

Critics of potential regulation, whether state or corporate, point out that through control they colonize and thereby destroy the potential of social media in the public sphere (Fuchs, 2014). The analysis presented here allows us to conclude that the current functioning of social media does not meet the conditions for public places, including accessibility, the balance of participants in the debate, and the possibility to express views within common law standards. The result of this is the disruption of public debate and thus a threat to democratic processes (Barber, 2003). Control is therefore necessary.

Although the management of social media is handled by private corporations, responsibility for violations nevertheless lies with the state, which has positive obligations to ensure an adequate level of protection of rights. According to the doctrine of the horizontal impact of constitutional rights (*Drittwirkung*), there is an extension of state responsibility to the actions of various private actors (Wróblewska, 2014). Responsibility for the proper functioning of public places is, in this relationship, a state responsibility concerning the law-making plane, the law-application plane, and the actions of state officials of a factual nature. For the social media sector to meet Habermas' conditions of public space, it should be regulated in a way that provides the following key features and functions:

1. Openness and accessibility: Public space should be accessible to all citizens. Regulations should therefore ensure that access to social media platforms is not restricted. Social media corporations should therefore not be able to block users and thus eliminate them from public spaces,
2. Equality of participants: All participants in discussions on social media platforms should be treated equally. This means that algorithms and content moderation mechanisms must be transparent and ensure that no group or individual has an advantage over others. In practice, this may mean introducing regulations regarding the transparency of algorithms and content management mechanisms.
3. Rationality of discourse: Discussions should be based on rational arguments and not on violence, manipulation, or propaganda. Regulations should therefore promote transparency of information and counter disinformation through appropriate fact-checking mechanisms and sanctions for spreading false information.
4. Autonomy of public space: Public space should be independent from external influences such as political or economic power. This means that regulations should ensure that content moderation decisions are not made based on external pressures, but according to clear and publicly available rules by an independent body.
5. Criticality and openness to new ideas: The public space should be open to a diversity of views and ready to critically analyze them. Social media platforms should therefore promote pluralism of opinion and ensure that different points of view can be freely expressed and discussed.
6. Accountability of platforms: As a public space, social media should be held accountable for its operation. This means that platforms should be legally obliged to protect user data, prevent abuse, and comply with legal standards by national and international law.

In the context of these challenges, it may be necessary to create a new

regulatory framework that takes into account the specificity of social media as a modern public space. States should work towards implementing such regulations that promote openness, transparency, and accountability while protecting fundamental democratic principles and freedom of expression.

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