

“NET NEUTRALITY IS PART OF THE OVERALL STRUGGLE FOR HUMAN RIGHTS IN A DIGITAL AGE”

• *Interview with David Kaye* •

By Oliver Hudson

The question of net neutrality has recently garnered world-wide attention following the December 2017 decision by the United State’s Federal Communications Commission to repeal many of the landmark protections which the Obama administration had put in place. Despite the headlines, it is a topic that many of us fail to fully understand – both in terms of the wider impacts the FCC’s decision might have around the globe and also how it relates to human rights more broadly. In this interview, David Kaye - the United Nations’ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression - explains to the Sur International Journal on Human Rights how net neutrality is central to his mandate – and to democracy. He offers hope, however, that the decision may not have lasting negative consequences and that there is still an important role for civil society to protect it. Corporations too, he notes have an increasingly important place in ensuring the freedom of expression and opinion – but while on the one hand many are supporting net neutrality, in parallel they are launching initiatives, such as data caps and basic internet services, that threaten our freedom of expression and opinion in other ways. Kaye also discusses the important role that corporations, along with governments, have in combatting disinformation, propaganda and fake news – especially by supporting and developing a strong independent media. With the advent of increasingly sophisticated technology however, he ponders whether we will ever be fully able to defeat this concerning trend.

Conectas Human Rights • Can you explain to our readers how your mandate has an important role in the discussion surrounding net neutrality?

David Kaye • Sure. My mandate was created in the early 1990s. It focuses on the protection of the right to freedom of opinion and expression. That means I have a role in both online and offline issues. I address issues related to, for example, the protection of journalists in offline spaces, but also the protection of environments for freedom of expression - including online space. As the digital age has progressed, different issues have arisen that make it clear that states have the obligation both not to restrict freedom of expression directly, but also to ensure that they are not interfering with environments that facilitate the freedom of expression. In online space, that means ensuring that states do not overregulate platforms that provide for freedom of expression, that they don't overregulate the infrastructure that allows people to communicate. Over the last seven years, my predecessor Frank La Rue, and now I, have tried to focus on how freedom of expression issues play out on online space. Not just in relation to the platforms that we use every day, related to search, email and other forms of communication, for example, but also the online infrastructure - and that's how we get to issues of net neutrality.

Conectas • Can you explain to our readers how the questions of democracy and net neutrality are so closely interrelated?

D.K. • Democracy is not formally a part of my mandate. My mandate involves protecting the right of freedom of opinion and expression in the context of Article 19 of the International Covenant on Civil and Political Rights. Regarding the right of freedom of opinion, this means protecting everyone's right to freedom of opinion without interference – and that's an absolute right. Protecting the right to freedom of expression includes protecting the freedom to seek, receive and import information and ideas of all kinds, regardless of frontiers and through any media. At the inception of Article 19, and its precursor in the Universal Declaration of Human Rights, which is also Article 19, it was well understood that access to information and the freedom to seek and share information are fundamental aspects of democratic life. In fact, if you look at other sources of human rights law and freedom of expression, such as the European Convention on Human Rights, it directly connects democratic society to various fundamental human rights, including freedom of expression.

That leads us onto the question of net neutrality. Our Internet service providers and telecommunications companies should not be the ones – whether they are private actors or whether they are owned or operated by the state – deciding what kind of information or what content individuals should be receiving. That would have a distorting effect, not only on democratic life, but also access to information, whether we're talking about entertainment, information, ideas or news. Net neutrality and democracy are just as inextricably linked to one another as freedom of expression and democracy are.

Conectas • Internet service providers argue that abolishing net neutrality would allow them to offer cheaper plans to users. Considering that universal access to the Internet, particularly

in parts of the Global South, remains an obstacle, do you think that we should keep on pursuing equal access, even if that means access to the Internet may remain prohibitively expensive for some users?



D.K. • This is a really important question. There are two separate ways of thinking about it. The first is to think just about expanding access to the Internet locally, particularly in the developing world and rural areas that are outside of the main areas of connectivity around the globe, which may be in developed countries as well. I believe strongly that access to the Internet has become fundamental to people's ability to enjoy freedom of expression. It is also essential to accessing information today and to expressing oneself. If it is true that that it is so essential, this means that governments have the obligation to ensure Internet access. That means that governments should be devoting more resources to ensuring broader access – particularly in the developing world. In addition, governments in the developed world should be providing support to the developing world to expand that kind of access. This is embedded in the Sustainable Development Goals.

The second part to consider is whether it is really going to be too expensive to allow for network neutrality. I don't think that's true. But let's assume that it were true for the moment, I could imagine a kind of transitional period in which some forms of the Internet are made available to people even while the overall Internet may not be accessible. I would see that as something temporary and very much subject to change, because otherwise you end up providing people with limited access to information rather than full access, to which they are entitled.

Conectas • In Brazil, service providers often place a data cap on broadband Internet usage. Within such packages, service providers not only offer different Internet speeds to users (500 Mbps, 1 Gbps, 2 Gbps and so on), but also limit the amount of data to be consumed in one month (100 Gb, 150 Gb, etc) – suddenly dropping Internet speed or stopping it altogether once the user reaches his or her limit. On one hand, this is not discriminating against specific kinds of platforms or content. However, in practice, written content is favoured over, for example, videos. In your opinion, do practices like these go against net neutrality, impacting access to information and limiting free speech?

D.K. • I think this is an example of where data caps need to be looked at really quite closely. If service providers have a legitimate technical reason to cap broadband Internet usage – for example, if they do not cap data on broadband usage it will make it harder for everyone to receive information – then that may be a legitimate reason. However, I'm not convinced

that such technical reasons are actually legitimate. I don't know the situation in Brazil, but often service providers put on data caps simply so they can charge users more.

Caps favour one form of media over others, which really interferes with principles of net neutrality and principles of access to information of any kind of media. So, whether we say it limits free speech or not, it certainly limits people's access to information and can be very problematic. Service providers need to work with governments in order to ensure they are able to provide broad access, doing away with these kind of data caps. Over the long term, I'm confident that this is likely to happen.

Conectas • Facebook's Free Basics service can be seen as a way to increase access to information for those who can least afford it. However, it is also criticised for being anti-competitive and favouring certain US companies and penalising Facebook's rivals. How do you see initiatives like these from a net neutrality perspective?

D.K. • This is another good question. There are several elements we should talk about when we talk about something like Free Basics. The first thing is that while a service like Free Basics offers free content, it limits the content to what is often referred to as a “walled garden” of that platform's resources and what is accessible through that platform. This is problematic because it gives the illusion of full access to Internet, when that's not really true.

The second thing to note is that sometimes services like this are offered with the argument, “We're going to increase access to information where people can't afford it”, when in fact, people already have access to information. This was true in India, for example, where Free Basics was introduced. And many people in India were quite upset about it, because it was really anti-competitive. There was already fairly widespread access to the Internet across India – not everywhere, but it was accessible – and the Free Basics service essentially competed with the broader access and the broader services that were available. Such services can therefore serve to blur the lines between accessibility and competitiveness, and so it can be deeply problematic.

The final point is to remember that on the one hand, services like Free Basics have an underlying “good will” about them. They offer Internet access to those who cannot access it. Yet they are this “walled garden”. I would rather see companies like Facebook and Google provide broad infrastructure that enables users around the world – particularly those in places where the Internet may be less accessible – to have viable access to the entire Internet. These companies have the resources necessary to assist everybody without reserving their competitive advantage. I'm deeply concerned about programmes like Free Basics.

Conectas • What impact will the December 2017 decision by the United States' Federal Communications Commission's (FCC) on killing net neutrality have globally, especially in the Global South?

D.K. • I think it's particular impact may be the model that it introduces to the rest of the

world. That said, I'm not totally certain that the US killing net neutrality will definitely have a negative impact around the world. The US's global "brand" is in competition with other "brands" around the world. For example, within the EU, countries like The Netherlands and others have really embraced net neutrality. In those environments, it has been shown to be a huge benefit to European users. To the extent that other states see the benefit of network neutrality in Europe, hopefully countries will adopt that model, and not the FCC's recent model. So, there may be a kind of values competition between what users are getting in Europe versus what companies are getting in the US. Therefore, I don't think it's a simple – "the FCC does this, so this will have a negative impact". There will be a real competition over what the Internet stands for over time.

Conectas • What do you see civil society's role as being in protecting net neutrality – especially following the crushing blow of the FCC's decision, which came after years of civil society pressure - and have you seen or are you witnessing examples of best practice in that regard?

D.K. • Civil society plays a really important role. Maybe the best example is the role played by civil society in India in promoting net neutrality. There, we have seen a deep engagement by think tanks, public policy-oriented institutes, academics, lawyers and even by the court to protect individual access to the Internet and protect net neutrality. That has been really essential. It's been great to see how civil society has acted in just a variety of spheres – in terms of legislative lobbying, research and litigation.

We also need to remember that some companies have been very strong proponents of net neutrality. Google is a good example. My hope is that those companies, which are really the ones that are visible to the public and that tend to be seen in a more positive light than, for example, a person's Internet service provider, will engage with civil society in order to promote net neutrality.

Conectas • Do you still see hope for net neutrality rules, or was the FCC's decision the first nail in the coffin for the principle?

D.K. • In the US, the future for net neutrality is not set in stone. Members of Congress on both the Democratic and the Republican side have really been sceptical of the FCC's decision on net neutrality. So, there is still hope for net neutrality in the United States. And as I was saying earlier, net neutrality has been embraced by many, many countries outside the United States. So, to the extent that those countries can promote their vision of net neutrality and their vision of broad access to the Internet, there is still serious hope for net neutrality worldwide. Now, there are other models of Internet regulation promoted by countries like Russia, China and some others that are deeply problematic. When we are talking about net neutrality, we have to recognise that it's part of the overall struggle for human rights in a digital age.

Conectas • It is impossible to talk with you and not discuss the question of fake news. How does fake news, disinformation operations and targeted political propaganda

challenge the concepts of freedom of expression and opinion and how are you addressing these concerning trends?

D.K. • Disinformation and propaganda are often designed to interfere with the individual’s ability to access information. It happens in a number of different ways. It can happen by essentially crowding out traditional or legitimate sources of information. It can work to throw confusion into actual legitimate debates. It has a number of functions that are tantamount to interference with freedom of opinion and freedom of expression.

There is though a considerable amount of research that remains to be done around disinformation online: how it operates, exactly how big of a problem it is. It is clear that the nature of the problem is serious - but the extent of it remains a bit open at the moment. So, we need to be very careful about how we approach issues of disinformation and propaganda. It’s important for the companies whose platforms are being abused with disinformation and targeted political propaganda to be transparent and disclose as much information as possible about the use of their platforms, to be extremely open to researchers so that we can have accurate research. It’s also essential for companies to be really clear about the rules that they are adopting around such issues such as how they configure information. For example, if you’re searching information and you get 10 results, how are you able to assess what’s legitimate and what’s fake? Not all users are sophisticated consumers of the news and of information. And sometimes, even the sophisticated user has a hard time discerning fact from fiction. The more that the companies can share about this, the better.

The other side of this is what governments are doing to regulate the issue. They need to tread really cautiously, for a couple of reasons. First, for many, many years – decades even - authoritarian regimes have used rules and policies against the dissemination of false information in order to limit access to information, dissent and government criticism. That’s deeply problematic and I don’t want to see democratic governments essentially feeding into the process of validating that kind of approach of authoritarian governments.

The other thing I’m concerned with is democratic governments using this moment – even if in good faith by trying to protect their democratic space – and essentially using disproportionate measures and focusing on the prohibition and the penalty for disinformation, rather than thinking about what they can do to support traditional forms of media and journalism. I would like to see governments devoting more resources to media literacy, by funding media literacy programmes, for example. I would like to see them dealing more with the concentration of the media, ensuring that companies are not limiting access to information from smaller sources of information or independent voices. It is difficult for governments to actually fund independent media, but they should be promoting independent media in very explicit ways to ensure it is protected as it is the best way to counter to disinformation.

Conectas • What do you anticipate the future holding for fake news – have we seen the worst of it, or is the worst of it still to come?

D.K. • I hate to end up on a downer, but I'm afraid that technology is moving in such a way that it is going to make it easier for disinformation to work, and harder for individuals to discern fact from fiction. This is certainly the case with the deeply troubling manipulation of video, audio and text – which is making it harder to identify independent, verifiable sources of news. Since we do know that the future is going to bring us serious challenges, it's important for governments, philanthropies and the media itself to be prepared for how they are going to address questions of false information. How is the independent press going to deal with and report on fake information and how technology is being distorted in order to undermine information and freedom of information? This is a really serious challenge for governments and for civil society moving forward. There are many organisations that are attempting to meet that challenge but it's an open question as to how successful we will be.

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*Interview conducted by Oliver Hudson (Conectas) on 23 May 2018
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