# The delimitation of freedom of speech on the Internet: the confrontation of rights and digital censorship

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| KEYWORD | ABSTRACT |
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| *Censorship; Internet; Freedom of speech; Digital Legislation* | *With the emergence of the Internet, the exercise of freedom of opinion and information expanded to infinity, as well as the possibility of endless infractions and offenses derived from the unlimited use of freedom of speech. Given these circumstances, a proper delimitation is necessary between the use of freedom of speech on the Internet and the conflicts that occur. However, the legislator sometimes offers contradictory and ineffective solutions because they do not adapt clearly to this new social phenomenon. The current legislation will have to deal with major challenges especially related to the issue of attribution of responsibility for content dumping into the network, protection of minors and regulation of participation systems. It is also clear that in several current legislations, freedom of speech is a right that has been eroded since the emergence of the Internet. However, because of their international character and cultural differences between countries, such guidelines should not be uniform.* |

## 1. The delimitation of freedom of speech on the Internet

The emergence of the Internet has caused important changes in the structures of society, both politically and socially, as well as economically and culturally (García Lozano, 2015, p. 86)[1]. This new era has meant that all information and communication takes place in a space (or cyberspace) in which individuals communicate with one another.

In this new virtual social space, freedom of speech achieves its maximum splendor, since it is on the Internet where individuals can fully develop their rights avoiding any spatial or temporal boundary, at a multidirectional, interactive and decentralized level (Levy, 1999, p. 11).

When we speak about the delimitation of freedom of speech, we must first establish what type of activity or service is being done through the Internet. It is not the same, for example, a website dedicated to disseminate information and obtaining an economic benefit[2], which implies a development of the exercise of freedom of

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1. The impact of the Internet on Public Authorities has been so great that European and Spanish Legislation have used it as a way to articulate the transparency required as principle of the proper functioning of the public service.
2. Websites dedicated to newspapers or articles.

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speech, than another website dedicated to provide a certain service, in which freedom of speech is totally out of the question[3].

If we understand freedom of speech as a way to send and receive messages containing ideas and opinions and take into consideration that only certain websites or Internet activities develop the exercise of freedom of speech, we have to reckon that not all of them exercise this freedom to the same extent.

Thus, although the regulation of the network is going to ensure that these rights are not left unprotected, other uncertainties will emerge due to the unique characteristics of the Internet, such as those referred to the responsibility that derives not only from the author, but also the responsibility of the Internet access provider (Fernández Esteban, 1999, pp. 149-150).

# 2. Challenges of digital legislation

In order to properly protect the rights contained in Article 20 of the Spanish Constitution, freedom of speech is restrained by effective regulation by law, this regulation does not necessarily means a limitation. Even though, due to the nature of the Internet, this medium is not currently under any specific regulation, any abuse or excess of freedom of speech finds its answer in:

- Article 20 mentioned above.
- The Organic Law of Protection of Honor and Privacy, 1982.
- The General Law of Advertising, 1988.
- The Penal Code, 1995.

This does not imply that the Internet as a medium of communication is unregulated, but the users are subject to the general law and their freedom of speech is subject to universal minimums because it requires protection of justice against certain behaviors (Trejo García, 2006, p. 16).

It is necessary to propose a regulation, although not specific, that at least treats with sufficient effectiveness the protection of fundamental rights on the Internet while protecting the right to freedom of speech (Belda Iniesta and Aranda Serna, 2015, pp. 190-194).

## 2.1. Content's responsability

One of the keys to the attribution of responsibility for content published on the Internet is that it applies not only to the issuer of the information but also to the service provider that allows the author to connect to the virtual medium in which he expresses the content.

An analogy is usually made with the traditional media regarding the figure of the press director or the director of other means of broadcasting. A private medium such as the telephone it would be absurd to attribute responsibility to the service provider for the criminal activity that two individuals make by telephone, however, some kind of reparation can be demanded from the director of a newspaper in which some harmful contents have been published[4].

Due to the characteristics of the Internet, it is clear that immediate attribution of responsibility is not possible, but each case must be examined in depth, also taking into account the capacity that the provider may have in relation to the elimination of information that infringes any right. The dilemma of attribution of responsibility can find its answer by establishing different categories according to the degree of responsibility (Fernández Esteban, 1999, pp. 155-158):

- Full responsibility, so that the provider would respond to the content contained in the medium.

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3. Websites dedicated to bank management and public management.
4. As established by the Press and Printing Act of 1966 and Law 10/1988 of Private Television.

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- Conditional responsibility, so that the provider would only respond to the leaked content if there are two assumptions: that the provider has knowledge of the information or illegal material, and that the provider could have effectively blocked the content.
- No liability is established, so that the provider, despite giving access to the medium on which the illegal content is leaked, does not have any responsibility[5].

## 2.2. Protection of minors on the Internet

On the premise that no legal system will be as effective as the responsible use from the user, and in the case of a minor, the education and control that the parents teach them, one of the problems to consider when facing the contents on the network is the modulation between full freedom of speech and effective protection of minors.

Internet also presents a series of features that differentiate it from the other media, since firstly Internet users who are minors make up a significant percentage of the population in the network, and these can access with relative ease contents located on millions of web pages which are in turn indiscriminately exchanged and consulted by users (De Miguel Asensio, 2002, p. 37).

Regarding the contents that can be found on the Internet, we can make the following classification:

- Lawful contents are the great majority in the network and are intended for activities, whether private or public, which do not constitute any criminal offense[6].
- Illegal contents, which are the information that is constitutive of a crime[7].
- Harmful contents, that are more complex, because it is information that despite not constituting any criminal offense and is protected by freedom of speech, can be detrimental to a certain group such as that of minors[8].

It is obvious that the last two types of contents require different treatment: thus the illegal content requires intervention by the State security forces and judicial action; while harmful content, despite being regulated in other media such as television or in the press, is very difficult to regulate on the Internet due to the inability to control the emission of information[9].

## 2.3. Participation and moderation in virtual public forums

Internet offers a great novelty with respect to the traditional models whose structure is hierarchical and unidirectional, because the users arrogate to himself a role not only passive but also active and can interact with the information through different levels like the dialogue between the users themselves.

There is not much to be said regarding the activity of the media because in most cases the Internet is just a tool for transferring their contents, that is to say, the information hardly undergoes changes. What is really new is the creation of other media in which users can debate and dialogue, not only with each other, but also with the journalists themselves or with some figure of relevance, we certainly refer to the forums, chats, social networks, blogs, among others (López, 2011, pp. 119-122).

When using these types of tools on the Internet, the media or the users themselves face several decisions, one of the most important being that when offering this possibility of dialogue it will necessarily be affected by the comments added in the discussion forums.

Therefore, most often a model of moderation is established (even the absence of model) where the first barrier of this system is usually the imposition or not of a prior registration of users.

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5. This treatment is the one that exists today for telecommunications companies that give telephone access.
6. Although the Internet goes beyond the national level, and what is illegal in one country may not be in another one.
7. Injury, slander and xenophobic messages.
8. This is the case with pornography.
9. Restrictions of contents in a segment of broadcast of certain violent or pornographic contents.

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This is usually done to avoid comments by users who are only engaged in defaming, insulting or simply *"spamming"* taking advantage of the possibility offered to them and also to restrain the access to some information by the user such as age, interests, etc. There is also, of course, the possibility that the user can communicate anonymously (Rheingold, 1996, p. 5).

Regarding the control of freedom of speech, these are the most used systems:

- With prior censorship: there is a figure, which we could call the moderator, who has the task of reviewing all information and messages sent by users to later allow or not their publication. This system has the advantage of avoiding unwanted messages (such as insults) or having any legal consequences (the user who publishes data from a third person). However, it is a system of difficult application if the flow of messages is immense and constant. A series of prohibited words can also be added that cause that the comment is not published.

- No prior censorship: it is characterized by the freedom of publication although some messages can be revised after their publication, the advantages and disadvantages are clear, for the medium it supposes a higher message traffic but more uncontrolled so it is more likely that insults and spam messages appear.

- Censorship managed by the users themselves: it consists of a valuation system given by the users themselves, so that if a comment is valued positively it is highlighted and if it is negatively valued it can be deleted. It is a very effective system because defamatory messages or spam are often quite punished by users. In addition it saves costs to the medium itself. However, it is also possible that a majority opinion is favored in a debate and that minority opinion is discriminated against (Noelle-Neumann, 1993, pp. 10-12).

# 3. Foundations for a better regulation of freedom of speech on the Internet

The division that exists in Internet between the interlocutor and the receiver of the information does not have any sense, because in Internet the communication is taken to another level in which several communicative models converge. We can distinguish several models: discussion forums, e-mail, digital press, social networks (Giddens, 2007, p. 23).

The proposed solution to the protection of the rights appears in the First Title of the Constitution in terms of freedom of speech, which being valid for the written press or television, is ineffective for the different models offered by the Internet. This is due to a variety of reasons:

- First, traditional media are considered *"unidirectional"*, that is, there is only one transmitter of the information that transmits it to a receiver (or several). On the Internet, however, the transmission of information is an interactive process on both sides, there is no receiver that is totally passive.

- This confluence of information causes that there is no clear role that defines who is the sender and receiver of the information, any Internet consumer can expose their ideas and opinions under the same conditions as any other[10].

- In this way, communication on the Web does not distinguish between the public and the private media, since any user thanks to the multidirectional nature of the Internet may wish to stop being a spectator to become an actor, (Wacks, 2000, p. 199).

## 3.1. The confrontation of rights and *"personality right"*

It would be necessary to rethink the legal framework as it is understood in the traditional way and to create a new legal framework that adapts to this new reality, taking into account the right to communicate in an interactive and multidirectional way.

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10.   Contrary to what happens in the press or television.

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An illustrative case was the sentence handed down in 2009 by the German Supreme Court which was later confirmed by the German Constitutional Court[11]. The web page had the following function: users could register anonymously and access a list of teachers in which there appeared their names, surnames, school and subject taught, so that they could evaluate them according to a scale of notes (Klink, 2011, pp. 88-93).

The conflict arose when the teacher, after knowing that all the personal information on the website appeared along with the average grade given by the students (which was very low in this case), demanded that all personal data and the qualification of the students be erased.

The Court considered three conflicting rights: the freedom of speech of students to give their opinion, the right of the provider of the website to maintain it to have a benefit, and the right of the teacher to protect their personal data (Domínguez Mejías, 2016, pp. 58-59).

These rights have their limits in other rights, which must obviously be weighed, such as: freedom of speech, communication, press and information. This weighting of rights must also be based on a legitimate interest, so that the State may violate the personal rights of an individual with the purpose of investigate a crime.

This personality right is thus configured to protect the person to act freely and develop their personality and human dignity. This right in turn encompasses other rights: the right to honor, protection from insults, defamation and slander; right to privacy, protection from the disclosure of personal data and the privacy of another; right to name, protection against impersonation without the consent of the person concerned, especially on the Internet; right of image, protection against disclosure without permission of photos or drawings of the affected, also include words or stories located in a wrong context.

After the *"spickmich.de"* case, some guidelines were given in which freedom of speech prevails over the personality right, such as:

- No degrading comments.
- That there is a legitimate interest.
- That it only affects the professional life and not the personal life.

This last point, that the students' comments affected the professional life of the teacher and not their personal sphere, was what motivated the German court to dismiss the lawsuit.

While freedom of speech may lead to a conflict with this right, especially where it is emphasized that a negative assessment may endanger a business, it is obvious that in relation to the provision of services, the users have the right to know the competence of the services to be contracted (Klink, 2011, pp. 97-98).

## 3.2. Proposals for the good use and promotion of the Internet

It is well-known the Community Action Plan approved in 1999 by the European Union, which is based on three basic principles:

- Promote the responsible use of the Internet, through education for minors and also through technical resources that promote the control of information by the user[12].
- Provide users with complaints mechanisms if they feel harmed. It would also require greater self-regulation which, in turn, does not entail imposing new prohibitions limiting freedom of speech, thus, if certain content can be broadcast on television, it would not be prohibited in the Internet.
- Raising awareness and sensitizing users (Klink, 2011, pp. 94-96).

It is a basic pillar for a better functioning of the Internet that each user can decide whether or not to access given information. In relation to minors, the role that parents play is vital, because it will be them who will decide which class of information the minor could access:

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11. Judgment of the German Supreme Court (Bundesgerichtshof-BGH) of June 23, 2009, VIZR 196/08.
12. Mechanisms of filtering and classification of contents.

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- Mark web pages the way a package is labeled, so that it is not necessary to access the information to know its content[13].
- Qualify the content on a scale that classifies them by different values.
- Content filtering, which is complemented by the first principle so that the user can avoid the information to which he does not want to access[14].

## 4. Threats to freedom of speech on the Internet

In recent years, the influence of the Internet has expanded as a means of disseminating information as well as a challenge to the controls imposed by governments on the media. This increasing influence corresponds to the increase in the number of users worldwide: about three billion people use the Internet, which doubled the values of five years ago.

However, with the increasing use of the Internet to communicate, obtain information, socialize or buy products, governments have intensified their efforts to regulate and in some cases closely control this new medium. When several dissident groups began using the Internet to share information with audiences both inside and outside the country in the late 1990s, governments devoted tremendous material and human resources to the construction of a censorship and surveillance apparatus at different levels. Although China is the most representative example, similar dynamics are beginning to emerge in many other countries (Kelly and Cook, 2011, pp. 88-89).

A growing number of governments are beginning to regulate or restrict the free flow of information on the Internet. Authoritarian states are increasingly blocking and filtering websites associated with the political opposition, coercing website owners into removing politically and socially controversial content, and detaining bloggers and common users for disseminating information contrary to the views of the government.

Even in more democratic countries, freedom of speech on the Internet is being undermined through legal harassment, opaque censorship, or scrutiny. This shows that the increase and intensification of controls in the countries that show this trend generally fit into one of the following three patterns (Kelly and Cook, 2011, pp. 88-89):

- FIRST INDICATIONS OF INTERNET CONTROL FOR POLITICAL REASONS. Early indications of political censorship and violation of users' rights in countries that previously did not have Internet controls often emerge in pre-election periods or during elections. Many of these incidents represent the first time a website is blocked in the country, a user is arrested or a restrictive law is passed (Oates, 2013, p. 87). For example, in Azerbaijan, authorities temporarily blocked several websites that satirized the president in 2009, and imprisoned two young activists who broadcast a video that mocked the government (Barry, 2009).
- ACCELERATION AND INSTITUTIONALIZATION OF INTERNET CONTROLS. In countries where the authorities have already shown a tendency towards political controls on the Internet, this negative trend is dramatically accelerating and new institutions are being created specifically for censorship. For example, in Pakistan, where temporary blockades have been frequent in recent years, a new Interministerial Committee for the Evaluation of Websites was established in mid-2010 to mark websites for blocking on the basis of loosely defined offenses against the State or religion.

In Thailand, the government has long blocked Internet content and has taken legal action against users who disseminate critical information on the monarchy. However, the number of arrested offenders and blocked websites increased dramatically, coinciding with the ability of senior officials to extrajudicially order the blocking

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13. What is called PICS (Platform for Internet Content Selection).
14. Keywords, blacklists, whitelists, and locks.

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of websites under a state of emergency in the country that lasted from April to December 2010 (Zittrain and Palfrey, 2008, p. 40).

- CONSOLIDATION OF INTERNET CONTROL AND CENSORSHIP DEVICES. Even in countries with the most robust Internet surveillance and censorship systems, measures are being taken to eliminate some websites and to reinforce these devices. In China, blogs on political and social issues have been closed, space for anonymous communication has been reduced and the government has stepped up efforts to counter measures that try to circumvent censorship. In Bahrain, Iran, Ethiopia, and Tunisia there has been an increase in censorship and detention in the context of popular protests or electoral controversies (Zittrain and Palfrey, 2008, pp. 34-35).

After the elections in Iran in 2009, the state's centralized filtering system evolved to a point that was able to block any website in the country within hours, and arrested more than fifty bloggers. In Vietnam, in addition to blocking websites, restricting some social communication tools and instigating cyber attacks, authorities demonstrated their strength by sentencing four activists to thirty-three years in prison for using the Internet to report human rights violations and for keeping pro-democracy points of view (Posner, 2011).

These new restrictions on the Internet worldwide are, in part, a consequence of the explosion in popularity of advanced applications such as Facebook, YouTube and Twitter, through which ordinary users can spread their own content, share information and connect with large audiences. The activists use Twitter and YouTube to inform the outside of the government's violent response to their protests, so that many governments in their censorship campaigns have begun to address these new applications. In addition, these new platforms facilitate the increase of user participation and expose the general population to the same type of sanctions faced by well-known bloggers.

Among the most recent cases, we can highlight that of a Chinese citizen who was sent to a labor camp for a satirical message on Twitter, or that of an Indonesian housewife who faced a large fine for an email that she sent to her friends complaining about a local hospital. As the new technologies usually attract young people, many of those arrested are teenagers, including an eighteen-year-old Iranian blogger who wrote about women's rights (Schroeder, 2010; Boiwen and Marchant, 2015, p. 18).

## 5. Conclusions

The Internet is a tool that has meant a revolution in which the mechanisms by which citizens exercise the fundamental right of freedom of speech have multiplied seemingly without limits. Freedom of speech (in particular on the Internet) will also behave like an ideal thermometer that measures the democratic *"state"* of a country.

The delimitation of freedom of speech is to be understood as the confrontation of the right to freedom of speech with other rights relating to the personal sphere such as the right to honor or privacy, and even with rights in other areas such as intellectual property rights.

However, in the relationship between legislation and the regulation of the Internet, the first one is usually always one step behind because of the mutability that characterizes the network, so that laws are often seen to be meaningless or simply result ineffective to regulate the current situation.

All this does not mean that the present legislation is useless and that a completely new legal regime must be built on the Internet and freedom of speech, but it tells us that an effort should be made to accept the Internet as an intrinsic element that is part of the current social reality (not as an foreign reality) in order to be able to adapt properly to this new reality.

In this way it will be possible to glimpse the configuration of a new legal system that would allow to combine and modulate the freedom of speech in Internet, and to offer solutions to the conflicts that would occur.

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