

INADEQUACIES OF LEGAL DISCOURSE IN SOCIAL AND ONLINE ACTIVISM: EXPLORING REASON AND EMOTION ON INTERNET GOVERNANCE¹

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Abstract: The paper analyzes the relationship between law, reason and emotion in the light of recent changes in the field of social and online activism, particularly with regard to social interactions within digital networks. With the consolidation of the Internet, freedom of expression gave rise to several social phenomena throughout the world, from the Arab Spring uprisings in Africa and in the Middle East, to Wall Street protesters occupying parks in New York City. Internet tools and social platforms have been enabling an array of forms of social mobilization. Under contemporary law, digital interactions decreased the distance between users and information, allowing citizens to better claim rights, organize protests, express political views and identify peers with similar interests online. However, it also hampered the establishment of traditional face-to-face social relations, raising the awareness of the importance of transparency, compliance and information mechanisms related to the origin of online posts and online profiles. In many jurisdictions, legal mechanisms have been put into force to make more stringent liability rules, condemn users, take down webpages and remove

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allegedly offensive content. In different trends, online activism can be purported as wrongful and even criminalized, whereby digital freedom is considerably restricted. Such governmental stance can bring about the derangement of civil liberties and freedom of speech. In an ever-growing online community, it is particularly relevant for Internet users to be able to express themselves freely and to have their civil rights assured in digital environment. In view of that broader spectrum, the paper discusses the urgent needs for legal institutions and the Internet community to gather efforts in order to ensure that freedoms and users rights are properly safeguarded. What is the proper legal framework for protection of online users interests? Would it foster development, freedom of speech and democratic values? What is the role played by law under the aegis of the world wide web and contemporary society at a national, regional and global level?

1. Introduction

According to the 2014 Freedom on the Net Report², there has been a decline on Internet freedom over the last four years, whether by means of the criminalization of

2. According to the report: “*Freedom on the Net 2014 – the fifth annual comprehensive study of internet freedom around the globe, covering developments in 65 countries that occurred between May 2013 and May 2014 – finds internet freedom around the world in decline for the fourth consecutive year, with 36 out of 65 countries assessed in the report experiencing a negative trajectory during the coverage period*” (Freedom House 2014).

online dissent, prosecution against digital activities, increased governmental surveillance capabilities, content control and attacks against journalists and citizens worldwide. Such an insecure cyber environment for users, especially the vulnerable ones (LGBTI, women, opposing parties, small Internet business, among others), goes against the very own nature of the Internet.

On one hand, such media is ever-growingly being used worldwide, with many different purposes: educational, political, economic, social, scientific and cultural. On the other hand, it has also provided tools for criminal activities, online scams, bullying and other malicious deeds. These negative doings that accompanied the accessibility and the widespread of the Internet over the last decades have given rise to take-down orders, censorship, surveillance, data collection and many other governmental interferences with the fundamental right of freedom of opinion and expression.

According to Frank La Rue (United Nations General Assembly 2011), the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression for the United Nations:

The Special Rapporteur believes that the Internet is one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies. Indeed, the recent wave of demonstrations in countries across the Middle East and North African region has shown the key role that the Internet can play in mobilizing the population to call for justice, equality, accountability and better respect for human rights. As such, facilita-

ting access to the Internet for all individuals, with as little restriction to online content as possible, should be a priority for all States.

That being said, it is necessary to currently consider the Internet an indispensable enabling space or empowerment medium for fundamental rights, such as freedom of opinion and expression³. Taking this idea into account, several questions arise and will be discussed throughout this paper. We wonder if current Internet governance mechanisms, whether municipal or international, are able to ensure that freedoms and users rights are properly safeguarded. The first part of the article deals with the current concerns on protection of freedoms and users rights, alongside some of the proposals discussed at global level, such as the late initiatives undertaken by the United Nations, the NETmundial⁴ or the Internet Governance Forum. In the second part, we discuss if a legal framework for Internet governance principles would foster development, freedom of speech and democratic values online. To a certain extent, this linkage also gives

3. According to article 19 of the International Covenant on Civil and Political Rights: “a) Everyone shall have the right to hold opinions without interference; b) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice” (United Nations General Assembly 1966). Also, according to article 19 of the Universal Declaration of Human Rights: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers” (United Nations General Assembly 1946).

4. NETmundial refers its meetings as a “global multi-stakeholder meeting of the future of Internet governance”.

room for questioning whether a broader debate on law, reason and emotion may be associated to the legal discourse and its inadequacies to capture the reality of forms in social and online activism.

2. Internet governance mechanisms, freedoms and user’s rights

After the scandals following surveillance actions taken by the United States against governmental leaders such as Dilma Rousseff (Brazil) and Angela Merkel (Germany), which were exposed by the former NSA’s employee Edward Snowden⁵, these two nations and other countries launched the global project on Internet governance, privacy and user’s rights in the United Nations⁶.

5. BBC. 2014. “Edward Snowden: leaks that exposed US spy programme.” US & Canada. Retrieved June 13, 2015 (<http://www.bbc.com/news/world-us-canada-23123964>).

6 “Brazil then placed itself at the forefront of international reform. Together with Germany, Brazil sponsored a United Nations resolution that was the first major United Nations statement on the right to privacy in 25 years. It is obviously noteworthy that both Dilma Rousseff and Angela Merkel were reported to have been victims of US espionage activities a short time before this effort. Yet, motivated by public outrage following Snowden’s revelations that their leaders had been spied upon by the United States, Brazil and Germany helped create new momentum for the global discussion on digital privacy and led with strong democratic and human rights principles. Taking off from the foundational consensus resolution at the UN Human Rights Council in 2012 that ‘affirms that the same rights that people have offline must also be protected online’, Brazil and Germany extended the global consensus explicitly to ‘The Right to Privacy in the Digital Age’ at the United Nations Gen-

Even though Snowden's accusations involved both State and civil society's data being spied on, it was threats to government official's privacy that was mainly at stake here. As remarked by Richards (2015:185), the Snowden's episode paved way to a broader comprehension about the existing "secret legal methods" deployed by telephone and Internet companies and NSA itself to access a vast amounts of personal information available online and offline.

Notwithstanding, the accusations propelled a worldwide discussion on Internet governance, which has to do not only with privacy, but also international trade and economic affairs on technology, sharing economy, security matters, confidentiality of communications and fundamental rights. According to Virgilio Almeida, the Brazilian Secretary for Information Technology Policy of the Ministry of Science, Technology and Innovation (MCTI), Brazil's international position is to give:

[...] Support for multi-stakeholder approaches in matters of Internet governance and also the multilateral relations between states in this process, especially in subjects like cybercrime, cyber-attacks and transnational economic issues over the network⁷.

At municipal level, Brazilian Congress passed the Digital Bill of Rights (*Marco Civil da Internet*) in April 2014, seeking to establish a comprehensive piece of

eral Assembly". Canineu, M.L. and E. Donahoe. 2015. "Brazil as the global guardian of Internet freedom?" *Human Rights Watch*. Retrieved June 13, 2015 (<http://www.hrw.org/news/2015/02/13/brazil-global-guardian-internet-freedom>).

7. Canineu, M.L. and E. Donahoe. 2015. "Brazil as the global guardian of Internet freedom?" *Human Rights Watch*. Retrieved June 13, 2015 (<http://www.hrw.org/news/2015/02/13/brazil-global-guardian-internet-freedom>).

statutory legislation dealing with right to privacy, freedom of expression online, net neutrality, and Internet server's liabilities, among others⁸. Internationally, its position follows the same set of principles, but with a multi-stakeholder approach. This means that not only State actors and international organizations ought to be involved in the making of Internet governance rules, but also non-governmental groups, academics, members of the private sector, etc.

China, India and Russia (Brazil's partners at the BRICS group), on the other side, have been pushing for a multilateral approach, which would exclude these non-governmental actors from the discussion and, very likely, favor the stand of undemocratic nations to broaden their control of the Internet.

A new meeting of the NETmundial, the Internet Governance Forum, is set to take place in Brazil again, this year. On its first meeting, which also took place in Brazil (2014), delegates issued a statement (NETmundial 2014:4) with provisions such as:

Freedom of expression: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

With regard to net neutrality, the statement (NETmundial 2014:11) reads as follows:

Net neutrality: there were very productive and important discussions about the issue of net neutrality at NETmundial, with diverging views as to whether or not to include the specific term as a principle in the outco-

8. Law No. 12.965, as of April 23 2014. Full text in English available at: <https://www.apc.org/en/system/files/APPROVED-MARCO-CIVIL-MAY-2014.doc>.

mes. The principles do include concepts of an Open Internet and individual rights to freedom of expression and information. It is important that we continue the discussion of the Open Internet including how to enable freedom of expression, competition, consumer choice, meaningful transparency and appropriate network management and recommend that this be addressed at forums such as the next IGF.

The document also provides a roadmap for the discussions on Internet governance for the future, its multi-stakeholder approach and a necessary connection with the rights to freedom of association and assembly. The characterization of Internet governance as necessarily linked with human rights, transparency, democratic participation and cooperation of all stakeholders has been gaining more momentum internationally. Within this context, issues such as cyber-crimes, jurisdiction, benchmarking systems, neutrality and financing are yet to be further developed over the next years.

3. Development, freedom of speech and democratic values online

The relationship between freedom of speech and Internet governance is rather complex, in the sense that even though public displays of opinion ought to be protected, there are cases in which state and judicial matters may prove to be necessary. Private information disclosed online or racist and xenophobic comments are clear examples of the existing controversies surrounding the clash between legal remedies and freedom of expression (Strossen 2001:2114). Hate speech and incitation to violence are also varieties of online expressions that must be subject

to a balanced scrutiny by legislators and courts. One of the reasons relies on the fact that very often these acts can be associated to harmful events affecting targeted users and citizens and, therefore, inherently contravene moral values, such as human dignity and integrity.

These situations, however, must be distinguished from online activism, which consists of a range free expression of thoughts and ideas regarding political matters, at the Internet⁹. By acting as a catalyst for individuals to exercise their right to freedom of opinion and expression nowadays, the Internet also facilitates the realization of a range of other human rights. As to the exercise of political rights, Zittrain (2010:568) contends that:

An important cluster of work to be done here is to ensure that important ideas can reach people who want to absorb them. It is not enough for the *New York Times* to publish world-class news. It must take active steps to reach those whose governments or peers prefer they not see it. Well over half a billion people have their Internet activities routinely and automatically channeled away from unapproved sites and topics.

Accessibility is, then, a key issue when it comes to overcoming democratic deficits, by means of providing citizens with more information about their rights, their means of association and protest¹⁰, as well as

9. Constraints on political activism and a lack of media diversity have previously made the Internet the main refuge of freedom of expression and political dissent. So why would it now turn against its own refugees?

10. Another form of protest that has been gaining supporters all throughout the world is called “hacktivism”, and it consists of: “Hacktivism is an international group of hackers, human rights workers, lawyers and artists that have evolved

key matters regarding political candidates in their disputes for elections. In places where the Internet and other media suffer constant censorship, it is hard to access valuable information about candidates and dissenting opinions. Hence, the political race is not really evenly disputed in those cases¹¹. Emotional bias in public reactions against political candidates is also a qualitative feature for the legal assessment of online activism and its potential legal consequences in case of disputes adjudicated by national courts.

Notwithstanding the past Internet developments, information technology is not, by itself, able to overcome democratic deficits. This may be true in countries like Cuba, China or North Korea, where speech is highly monitored when made public. But in other nations, such as Brazil and the United States, for example, Internet access is just part of the problem.

out of the CDC [Cult of the Dead Cow]. Hactivismo assumes as an ethical point of departure the principles enshrined in the universal declaration on human rights and the international convention on civil and political rights. They also support the free software and open-source movements. Through CDC, Hactivismo has distributed Hactivismo, and the CDC has targeted Islamic states. The CDC, Etoy and Electric Hippies are to name a few organisations of many who similarly participate in hactivism. There is debate internally within these groups regarding what is considered to be acceptable ethical behavior with regard to hacking activities (Hearn; Mahncke and Williams 2009).

11. Such was the case for the political runner up in Brazil's last presidential election. He filed suit against Google and Bing to prevent users from seeing negative comments and content when his name was typed on their search engines. Olhar Digital. 2015. "Aécio perde processo que pedia remoção de links do Google e do Bing." Retrieved June 14, 2015 (<http://olhardigital.uol.com.br/noticia/aecio-perde-processo-que-pegia-remocao-de-links-do-google-e-do-bing/48809>).

The Internet definitely enables better access to information, but it still has to deal with non-neutral platforms, which allow more or less access to specific information, according to its interests¹².

4. Concluding remarks

The architecture of Internet governance still has a lot of room for further development. The institutionalization of principles, the global expansion of human rights related to the digital realm and the codification of international procedures have been raising more reflection and discussion on this topic.

Increasingly, contemporary stakeholders have been acting by means of institutionalized and non-institutionalized ways to review policies protect their interests and act upon users. Whether due to State interests, whether to the scandals following Edward Snowden's leaks, this debate has also increased its attention to the issue of freedom of speech, privacy, net neutrality and Internet governance in main international fora.

Although there is still the need for better understanding of the relationship between the various interests involved in this matter, it is possible to assume that State

12. Rules regarding discrimination against specific content providers or users are also very important for freedom of expression (and innovation), due to the fact that the users' right to access and to better distribute information online has much to do with the development of new tools and services online. In addition, non-transparent traffic management of networks, by means of content and services' discrimination or impeding connectivity of devices, can even hamper such innovation (Ministry of Foreign Affairs of the Netherlands 2014).

actors can perform either by censoring and controlling online content (by means of their Judicial, Executive and Legislative branches), or by protecting freedom of speech on the Internet (or both). Yet the expansion of human rights indicates from the outset the possibility of designing a freer framework for users online, towards the existence of a global digital culture. This culture is directly associated to a common conception of net neutrality, civil liberties and the institutionalization of these principles internationally.

To the extent that it online activism increases forms of access to information, converging and exposing political stands, as well as advancing the subjective performance of citizenship in the digital world, there are several new conflicts and contradictions to be analyzed by the stakeholders currently shaping the future of the Internet. Within this context, between cyber-optimists and cyber-pessimists, which is your stand?

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