

Freedom of expression and internet: should judges apply a preferred position doctrine to cases involving the internet?*

Libertad de expresión e internet: ¿deberían los jueces aplicar una doctrina de posición preferida a los casos que involucran internet?

Cláudio de Oliveira Santos Colnago

Doctor and Master in Fundamental Rights and Guarantees
Professor Faculty of Law of Vitória, Brasil
claudio@colnago.adv.br

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ABSTRACT

This paper aims to contribute to obtain an answer to the following question: should the Judiciary apply a preferred position doctrine to free speech cases involving the internet? The fast growth that the internet has experienced on the last decade converted it into an essential a plural medium of expression. This rapid progress has allowed people to access the internet from nearly everywhere, making it into a quasi-Omni-present network of people. Naturally, the insertion of the internet on people's everyday routine brought along many legal issues, one of them being the definition regarding the eventual limitations that are considered to be valid when it comes to the exercise of the freedom of expression, a fundamental human right on-line.

It is a personal opinion that this definition should be established with two standards in mind: a) freedom of expression has an intrinsic value as a human right, according to article 19 of the United Nations 1948 Declaration of Human Rights and b) every expression manifested on-line depends directly on the code that is designed by companies such as internet service providers. Therefore, the paper aims to analyze how these two standards could interact in a way of obtaining an answer as to how the free speech cases should be interpreted on the context of the Internet.

KEYWORDS

Freedom of Expression; Internet; Preferred Position.

RESUMEN

Este documento pretende contribuir para obtener una respuesta a la siguiente pregunta: ¿debería el poder judicial aplicar una doctrina de posición preferida a los casos de libertad de expresión relacionados con internet? El rápido crecimiento que ha experimentado el internet en la última década lo convirtió en un medio de expresión esencial y plural. Este rápido progreso ha permitido que las personas accedan a internet desde casi cualquier lugar, convirtiéndose en una red de personas casi omnipresente. Naturalmente, la inserción del internet en la rutina diaria de las personas trajo consigo muchos problemas legales; uno de ellos es la definición de las eventuales limitaciones que se consideran válidas cuando se trata del ejercicio de la libertad de expresión, un derecho humano fundamental en línea.

A manera de opinión personal, esta definición debe establecerse teniendo en cuenta dos estándares: a) la libertad de expresión tiene un valor intrínseco como derecho humano, según el artículo 19 de la Declaración de los Derechos Humanos de 1948 de las Naciones Unidas y b) todas las expresiones manifestadas en línea dependen directamente del código diseñado por empresas como los proveedores de servicios de internet. Por lo tanto, el documento pretende analizar cómo estos dos estándares podrían interactuar de manera que se obtenga una respuesta sobre cómo deberían interpretarse los casos de libertad de expresión en el contexto de internet.

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PALABRAS CLAVE

Internet; Libertad de Expresión; Posición Preferida.

INTRODUCTION

The paper proposes to analyze the question regarding whether judges should or should not apply a preferred position doctrine of freedom of expression on cases involving the internet-based speech. In order to do so, three major issues were subject of consideration. Initially, freedom of expression was studied as a human right that, when exercised online, gets a different perspective. Secondly, the paper investigated how the internet's architecture and the applications code can alter the characteristics of free speech, reducing or amplifying it. Subsequently, the work analyzes the misuse of proportionality by the Brazilian judges as an example of how judicial decisions may function as a factor of censorship in a democratic society. At the end, some propositions are formulated in a way to reconcile proportionality, freedom of expression and the internet architecture.

1. FREEDOM OF EXPRESSION AS A HUMAN RIGHT AND THE ROLE PLAYED BY THE INTERNET

The right to freely express ideas and opinions is considered a fundamental position, since it plays an essential role on the development of both individual and collective personalities, considering that it allows the consolidation of a more open and, therefore, freer society. This idea guided the United Nations on the elaboration of the Universal Declaration of Human Rights, in which article 19 establishes that *“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, 1948).

Thus, the fundamental right of expressing ones opinions and ideas should be exercised independently on technological barriers, since it is secured to everyone to implement it “through any media”. The creation of new media, as enabled by new technologies like the internet, for example, fosters new ways of expression, since it allows new forms of communication. The internet itself, due to its open and decentralized characteristics, functions as an enabler of free speech, since it is based on instant communication. The United Nations special Rapporteur, Frank de La Rue (2011), recognized its deep inter-relations between the net and various other fundamental rights:

The right to freedom of opinion and expression is as much a fundamental right on its own accord as it is an “enabler” of other rights, including economic, social and cultural rights, such as the right to education and the right

to take part in cultural life and to enjoy the benefits of scientific progress and its applications, as well as civil and political rights, such as the rights to freedom of association and assembly. Thus, by acting as a catalyst for individuals to exercise their right to freedom of opinion and expression, the internet also facilitates the realization of a range of other human rights.

The vast potential and benefits of the internet are rooted in its unique characteristics, such as its speed, worldwide reach and relative anonymity. At the same time, these distinctive features of the internet that enable individuals to disseminate information in “real time” and to mobilize people has also created fear amongst Governments and the powerful. This has led to increased restrictions on the Internet through the use of increasingly sophisticated technologies to block content, monitor and identify activists and critics, criminalization of legitimate expression, and adoption of restrictive legislation to justify such measures. In this regard, the Special Rapporteur also emphasizes that the existing international human rights standards, in particular article 19, paragraph 3, of the International Covenant on Civil and Political Rights, and remain pertinent in determining the types of restrictions that are in breach of States’ obligations to guarantee the right to freedom of expression.

On the same way, Professor Balkin, J., sustains that the “digital revolution” enables a new perspective on the freedom of expression, since it makes possible individuals participation and interaction in a way that just could not exist on the same scale before the invention of the internet. Thus, freedom of expression acts as a catalyst that emphasizes not only a democratic society, but a democratic culture, in a way that permits individuals to participate *“in the spread of ideas and in the creation of meanings that, in turn, help constitute them as persons”* considering that *“Our continuous participation in cultural communication, our agreement with and reaction to what we experience, our assimilation and rejection of what culture offers us, makes us the sort of people that we are”* (Balkin, J., 2004).

In this context, the expansion of the internet helps the growth of a democratic culture and, doing so, also helps the personal development of any individual that may have access to it, fostering the development of humans as cultural beings. Therefore, we may say that the internet has played a major role on strengthening the core value that guides the application of human

rights: the human dignity. The act of giving individuals a tool for developing their own ideas and sustaining their opinions without previous filters represents a major role on the recognition of persons as human beings, whose dignity is not any different from any other fellow human. The same peculiar relation between the internet and free speech was considered on a UNESCO study elaborated by Dutton et al:

As a consequence, defenders of freedom of expression have raised growing concerns over how legal and regulatory trends might be constraining freedom of expression at the very time that the internet has become more widely recognized as a major medium for fostering global communication. These concerns are reinforced by surveys that provide evidence of encroachments on freedom of expression, such as through the filtering of internet content. At the same time, despite internet censorship and filtering, this network of networks continues to bring more information to increasing numbers of individuals around the world, particularly as mobile communication extends its reach to vast numbers of individuals without access to more traditional communication resources. However, technological innovation will not necessarily enhance freedom of expression. It is not a technologically determined outcome or an inherent consequence of Internet use. This report argues that it can be diminished unless freedom of expression is explicitly and systematically addressed by policy and practice (Dutton, Dopatka, Hills, Law, & Nash, 2011).

Therefore, even though the internet may be considered as an incentive for free speech and an enabler of other fundamental rights, the legal and architectural shaping that is subject to may alter this situation, closing down what once was an open network, enabling control over freedom, and silence over speech. Reality gives us this fact: the speech on the internet can only be free as long as the code that shapes the internet allows it.

2. THE REGULATION OF ONLINE SPEECH AND THE DEPENDENCE ON THE CODE

The ways one could regulate freedom of expression online would differ depending on the perspective of the regulators and of the goals that may be considered ideal ones. In a society in which prevails a democratic conception of the government, the ideal regulation would point to the maintenance of instruments by which people could freely express themselves. The ability to print and distribute pamphlets, for example, is an instrument to promote and exercise freedom of expression offline. When it comes to the internet, though, the exercise of such a fundamental right depends directly on the architecture of the network

– in other words, on the code used to program the internet applications.

The approach that analyses the code as a fundamental item of internet regulation was first elaborated by professor Lawrence Lessig, who is considered one of the great pioneers of legal studies involving the internet. In his fundamental book entitled “Code and other laws of cyberspace” (Lessig, L.,1999), subsequently updated and relaunched as “Code 2.0”¹, Lessig analyses how programming code that forms the software (which, in turn, controls the network) regulates human conduct in an almost infallible way. To reach his conclusions, however, Lessig parts of an analysis that combines various “forces of regulation” of human conduct identified by him: a) the law, b) social norms, c) the market and d) architecture. The relations between these forces of regulation, although applied in the works cited above, are well outlined in an earlier article of his own, titled “The New Chicago School” (Lessig, L., 1998).

When dealing with human conduct, Lessig makes a comparison between what he calls “Old Chicago School” with the “New Chicago School”. Both have in common the fact that they recognize that the law is not the only force capable of regulating how human beings will behave. According to Lessig, given this reality, the “Old School” argued that the law should simply recognize its inefficiency and let other forces (like the market) prevail. The “New School”, on the other hand, argues that recognizing the existence of more than one regulatory force should be understood as one more element in the search for the best form of regulation, in a distinctly multidisciplinary perspective.

It can be stated that the law and social norms have in common the fact that they work with the idea of punishment. The punishment, although institutionalized by the government when we are dealing with the law, come up as something totally disperse when it comes to social norms, due to the fact that they are originated by the society/community itself. The market regulates human conduct to the same extent that works with the idea of price, which can stimulate or inhibit the use and acts related to it, according to the context. The architecture human conduct when it determines how the physical elements are to be presented themselves in nature. This last element is best explained by Lessig as follows:

That I cannot see through walls is a constraint of my ability to snoop. That I cannot read your mind is a constraint on my ability to know whether you are telling me the truth. That I cannot lift large objects is a constraint on my ability to steal. That it takes 24 hours to drive to the closest abortion clinic is a constraint on a woman’s ability to have an abortion. That there is a highway on train tracks separating

this neighborhood from that is a constraint on citizens to integrate. These features of the world -whether made, or found- restrict and enable in a way that directs or affects behavior. They are features of this world's architecture, and they, in this sense, regulate (Lessig, L., 1998).

All four forces of regulation listed above have a strong influence on the determination of human behavior. Without excluding the possibility of other forces that may be identified, it can be stated that in general the forces act in a non-exclusive way, and may occasionally be combined to achieve the same end, as Lessig puts it:

Norms might constrain, but law can affect norms (think of advertising campaigns); architecture might constrain, but law can alter architecture (think of building codes); and the market might constrain, but law constitutes and can modify the market (taxes, subsidy). Thus, rather than diminishing the role of law, these alternatives suggest a wider range of regulatory means for any particular state regulation. Thus, in the view of the new school, law not only regulates behavior directly, but law also regulates behavior *indirectly*, by regulating these other modalities of regulation directly (Lessig, L., 1998).

In Lessig's view, regulation assumes a direct and an indirect dimension. In the direct dimension, the Law regulates directly the behavior necessary to achieve a desired result. In the indirect dimension, Law acts over other forces (market, social norms, architecture), regulating them to achieve the proposed goal. Lessig provides several examples to demonstrate how these four forces are related, as in cases of attempts to reduce the consumption of cigarettes. The government could prohibit the act of smoking, establishing that everyone who smokes should pay a fine. This would be an approach based on the Law.

However, the same government could achieve the same goal (reduce the number of people who consume cigarettes) simply forcing the rise of cigarette's price, through the inflation of taxes on its production. This would be an approach based on the market. Another option would be the establishment of educational campaigns about the dangers of cigarette smoking to people's health, in a way to stimulate society to define by itself as a community that the desired attitude by its member is not to smoke. This would be an approach based on social norms. Finally, the government could also determine how cigarette packages must be sold (with photos of people who developed lung cancer, for example) or how the cigarette itself must be manufactured (chemical composition, whether or not the use of substances

that assign flavor are allowed, etc.). This would be an architecture approach.

The architecture approach is essential to the exercise of fundamental rights on the internet, because it is from there that we can better understand the role of law in the regulation of human behavior in the network, which may prove to be more effective in its indirect (by regulating other forces, especially the architecture of the code that generates the software that enables the Network function) than in the direct dimension. It is based on the understanding of the deep interrelation between the four regulatory forces and the prominent role that architecture takes on internet regulation that the question of the proper interpretation for the exercise of fundamental rights in the network can best be undertaken.

Therefore, even though the internet's original architecture was designed to promote free speech (enabling people to send messages directly to each other, without any kind of filter, for example), in an almost romantic anti-regulation ideology (well exemplified by Barlow's "The Declaration of Independence of Cyberspace", Barlow, J. P., 1996), one must not forget that the internet, as culture, is a changeable institute. The way it is today is not necessarily equal to the way it was yesterday and, how it will be tomorrow depends on how many changes (and how deep these changes are) would be implemented on the network's code. Surely, Barlow's Declaration is a powerful document that helped to sustain an ideology that was against government's interference, based on liberal ideas, like self-regulation and the "invisible hand" of the market reference. This way of thinking, on the other hand, has enabled the real regulators (programmers writing application codes that inform services like Google, Facebook, Twitter, Yahoo, etc.) to sustain its positions on shaping the internet according to its own interests. Companies like that may carry and promote really good values for the internet as a human creation, but they are also embedded by values of its own that may not correspond to the public's interests.

For example, the fundamental right of freedom of expression. The definition, regarding how broad the protection to the right to express ideas is, will depend mostly on the country that regulates it. Some of them, like the United States, will establish a strong protection to almost all kinds of expression, with the single exception of those that promote immediate violence ("fighting words" doctrine). Other countries have a different conception of freedom of expression, defending it as a fundamental right, but understanding that some kinds of speech (promotion of violence, hate speech, indecent content, etc.) are not subject to protection. These different national conceptions of freedom of expression may collide when it comes to the internet's code, since the most popular online services have a tendency on following United States standards

regarding free speech, due to the fact that these services are all located in North America.

When it comes to situations like fundamental rights collisions, in which judges have to weight constitutional values in order to reach a decision, the code's influence is paramount to the effectiveness of the ruling. The interrelation between the internet's architecture and the effectiveness of freedom of expression was well explained by Professor Balkin (Balkin, J. M., 2009).

Technological design, aided and abetted by intellectual property and telecommunications law, can foster relatively closed, proprietary architectures and standards, or relatively open, easily adoptable ones. The internet can become a special purpose data transport system like cable television or traditional phone service, or it can remain a general purpose system for moving information that allows lots of different business models and experiments with new services and applications. These decisions have real consequences for the system of freedom of expression. Free speech values increasingly depend on policies that promote innovation and keep incumbent businesses from blocking new ideas, services, and applications. They depend on regulatory decisions that keep the internet open, either by limiting liability (as in the case of section 230) or by discouraging anticompetitive behavior (as in the case of network neutrality rules).

That said, we can easily note that freedom of expression cases related to the internet depend on a profound analysis by judges, in order to prevent rulings and decisions that may shape the internet's code to a "closed system" that instead of fostering, would prevent innovation and, therefore, reduce the effectiveness of the internet on promoting culture, public awareness and liberty. Since free speech is a fundamental right, there has been some consensus on the use of the proportionality technique as a secure framework destined to solve collisions of fundamental rights. On the other hand, the misuse of this important technique could convert judges into censors, as it has been common on the Brazilian reality. Thus, on the next item we will approach the question regarding how judges should not apply the proportionality technique on internet cases based on the Brazilian reality.

3. HOW CAN MISUSE OF PROPORTIONALITY BY JUDGES BECOME CENSORSHIP: THE BRAZILIAN CASE?

Brazil is one of the countries that lead the international ranking on orders to remove content from the internet, according to the reports by Google. Brazil, a so-called Democratic State in which prevails the rule of law, is one of the ranking leaders, with one peculiarity: the content removal requests presented by Brazil are mostly originated on the Judiciary, due

to concrete complaints turned into lawsuits. The sole fact that are judges, and not administrators that are originating the requests, though, does not automatically exclude the proper critic over them.

Unfortunately, judges in Brazil tend to grant orders of content removal in a misapplication of the proportionality technique and without the proper consideration of the importance of free speech for an open and democratic society. Lots of cases may exemplify this lack of consideration regarding freedom of expression. We will limit ourselves on quoting three of them that are very representative: a) the "Meu carro falha" case ("My car fails"), b) the "Falha de São Paulo" case and c) the "Lei seca" account case.

In the first case, a consumer posted a video posted on the internet complaining of the poor quality of her car, that was still under warranty and which malfunctioning was not resolved by the dealership. The language was polite, even though it was a frustrated consumer. Subsequently, the carmaker Renault filed a lawsuit against the consumer and obtained an injunction, determining that the video should be removed from the internet, under penalty of a daily fine to be paid by the consumer. Renault said that the video was harmful to its image as a company. The consumer did not have an opportunity to defend herself, before the injunction was issued. There was a huge repercussion of the case online, and the lawsuit ended in a common agreement between both parties. The consumer never removed the video, even though this attitude made her suitable of paying a fine.

In the second situation, some critics of the newspaper "Folha de São Paulo" created a website with a well modified version of the newspaper, entitled "Falha de São Paulo" ("Failure of São Paulo"), in which was formulated humorous criticism of the aforementioned journalistic vehicle. The company "Folha da Manhã S.A." (owner of the rights of the newspaper), however, understood that the website address (www.falhadespaulo.com.br) would imply a violation of its rights over the brand "Folha de São Paulo" and filed a lawsuit in order to obtain its removal, obtaining partial victory. The case was treated as a violation of brand situation, and the freedom of expression arguments were not dully considered.

In the third example, the Police Transit Authority of Vitória/ES submitted a request to the local judge in order to "...remove the electronic pages on the social networks Facebook and Twitter that have the goal of alerting drivers of the state of Espírito Santo on the existence of police sieges" related to the prevention of accidents caused by consumption of alcohol. Basically, the authority argued that there were some twitter accounts and facebook groups that were created solely to alert drivers of the places where there were police sieges, what would allow drivers to divert from them.

Without giving the opportunity for any kind of previous hearing from members of the civil society, that could raise a lot of serious questions regarding the request, the injunction was granted, determining the “immediate termination” of pages on Facebook and Twitter. Free speech was not considered at all in the reasoning Estado do Espírito Santo (2012).

In all of the three cases, the injunctions were granted invoking the technique of proportionality, that would allow judges to weight the constitutional values on the case in order to define which one would prevail, even though the application of proportionality itself was not done on the proper way, since the core arguments that should be analyzed were not even mentioned or, if mentioned, were not taken seriously. These three examples demonstrate that when misused, proportionality can be converted from a technique that should enhance control over judges into a tool of censorship. Since freedom of expression is a human right, any tool of censorship (meaning the prohibition of certain types of speech), should be considered non-desirable under the focus of fundamental rights.

However, the growth on the use of proportionality as a criteria to solve cases involving human rights collisions may bring with it a threat to the rights themselves, depending on how the technique is applied. If freedom of expression should always be considered a weak right, that fact would not prevail against ones image or privacy; for example, the way for the creation of a judicial censorship would be inaugurated. From now on, we will use the example of the application of proportionality by the Brazilian Judiciary to consider how the misuse of such an important tool may degenerate the judicial interpretation of the law into judicial censorship.

Can judges be censors of speech? The question demands an analysis of the scope of protection of the fundamental right of freedom of expression, as well as the verification about what would be the appropriate legal consequences in cases of events not protected by such a right, usually called “abuse of rights”.

It is important to consider that, on the subject of morality, the 1988 Brazilian Constitution did not contain any clause regarding the necessity for speech to observe “morals and good customs”, unlike the former Constitutional text (Constitution of 1969). Rather, the current charter points towards the rejection to any kind of censorship. Article 5th, section IX, states that “*it is free the expression of intellectual, artistic, scientific and communication activity, regardless of censure or license*”. By its turn, Paragraph 2nd of article 220 establishes that “*it is forbidden any censorship of political, ideological and artistic nature*”.

However, the Constituent Assembly of 1988 conceived the possibility of abuse on expression, establishing clear consequences for these cases, such as compensation for material or moral damages and

the right of reply, to be upheld by the abuser. It is also worth noting that the American Convention on Human Rights (Pact of San José, Costa Rica) dealt with the matter to determine, in its Article 13.2 that the exercise of freedom of expression “...cannot be subject to prior censorship but the subsequent liability, which shall be expressly provided by law and which are necessary to ensure” other relevant values, such as: “a) the rights or reputations of others; b) the protection of national security, public order, or the health or morals”.

Moreover, the Pact of San José, Costa Rica is reasonably clear in prohibiting censorship. Would, therefore, such conduct contemplated in the list of constitutionally compatible solutions for the possible abuse of freedom of speech solutions, especially when arising from a misuse of the concept of proportionality, “remodeled” in mere insincere balancing?

The judicial censorship ends up being contrary to all the important functions that are performed by the fundamental right of freedom of expression, whether in the individual point of view (by preventing people from expressing their views and opinions – “chilling effects”), either under the collective approach (to prevent that society becomes aware of certain opinions or facts). For these reasons, it is important to adopt a preferential position conception of freedom of expression over other constitutional values, while enumeration standards to guide the weighting.

To consider freedom of expression as a preferential fundamental position, does not mean adopting a conception by which this would be an absolute right that would always prevail against any other, even because one cannot deny that there may be, at least in theory, situations in which judicial censorship of certain expressions can be presented as the most appropriate solution. Take hate speech for example.

As stated by Toller (Toller, F. M., 2010), “...certain expressions or the publication of certain news can cause some serious damage of irreparable character”, and in face of them, the pecuniary compensation does not fully restore the damage suffered by the victim. However, Toller himself also recognizes that legal prohibitions of expression do involve a very serious issue, what recommends that their weighting should always be preceded by a “serious scrutiny” while emphasizing that “...not every case in which could be later established responsibilities deserves, reasonably, the establishment of a previous judicial constraint”.

Therefore it is possible to verify that everything points to the fact that Brazilian law does not admit naturally or normally a judicial decision that may censor people’s expressions. Although a decision that forbids expression may be considered possible in some cases, it should always be seen as an exception, since the Constitution clearly rejects censorship. This,

however, has not been the behavior of most of the Brazilian Judiciary, with honorable exceptions. Utilizing the “proportionality” and converting simple questions sometimes in collisions of fundamental rights, the trend of Brazilian judges is precisely to convert themselves into “society’s superego” (Maus, I., 2000), using bad decision-making techniques to disguise an unrestricted arbitrary decision. In other words, Brazilian judges tend to conclude anything, using any argument, without proper reflection and discussion. In this scenario, the list of standards to direct the application of proportionality, while important, would be of little value if they could be easily ignored by the Judiciary.

The landscape in jurisprudence is certainly not the ideal one. To solve it, however, it does not seem to be useful to simply abolish the application of proportionality on the judicial practice, since the extent that any other technique could replace it with the same additions or even bigger problems. It seems that the necessary change in order to readjust the judicial review is a “course correction” in the application of the proportionality technique, which cannot function ignoring the need of a worthy consideration of the applicable arguments. Judges cannot, therefore, balance anything by any reason: there is a duty to consider seriously all the possible arguments applicable to the case. How would it be, then, this “course correction”? Adopting the idea of an abstract broad protection and once identified the collision of fundamental rights, the judges should seek a solution through the known three-step analysis of the proportionality technique: a) adequacy, b) need and c) proportionality *stricto sensu*.

For Alexy, R., the case determines the weight of each principle to be considered in the ruling. This weight will condition the precedence of the fundamental right in that case (conditional precedence). Hence the formulation of the “rule of collision”: “*The conditions under which a principle has precedence in the face of another constitute the factual support of a rule that expresses the legal consequence of the principle that has precedence*” (Alexy, R., 2008).

Thus, the application of the “rule of collision” leads to the formulation of a rule (concrete rule, in the case of proportionality applied by judges) establishing the prevalence of one fundamental right over the other in that specific case. In these situations, such resulting rule is considered by Alexy, R., “a standard fundamental right conferred”, because even if not expressly mentioned in the Constitution, it is supported by an argumentation referred to fundamental rights. And it is precisely this argumentation that deserves a “course correction”, demanding a reputable concrete reasoning of the restrictions on freedom of expression. After all, if any argument would be good enough to sustain a concrete rule formulated by the judiciary, the role

of Alexy’s theory of principles would be precisely to serve as an adjunct to the practice denounced by Ingeborg Maus: the disguise of arbitrary decision making. Alexy himself points out in the sense that this would not be his desire, to seek his theory to reinforce the inter-subjective control of the ruling.

In the application of proportionality *stricto sensu*, in which the judge shall verify that the intensity of the restriction of a fundamental right (which could be classified as light, medium or heavy) is justified by the importance (low, medium or high) of the completion of a conflicting right, the decision making regarding the evaluation of the degree of restriction and weight of importance cannot arise from an implicit positioning or a presupposed conclusion, under the consequence of affecting the suitability of the reasoning of the court decision. Thus, judges must appraise these aspects (degree of limitation as opposed to the degree of importance of each fundamental right in that case) to explicitly justify their reasons.

For this reason, a court decision that addresses a case of collision of fundamental rights involving freedom of expression would have to consider that, in order to achieve coherence with the basic concepts stated by constitutional values, should therefore recognize the existence of an intrinsic value related to freedom of expression, since it contributes to individual (human dignity) and collective (democratic value) fulfillment, and the potential of its contribution to the intellectual growth and good information. Likewise, should recognize the intrinsic worthlessness of any form of censorship arising from decisions of different actors relevant to the conformation of fundamental rights, specially the American Convention on Human rights, which expressly prohibits prior censorship and determines that all the consequences of the abuse of the term should be provided by law. Thus, judges must assume a non-absolute preferred position of freedom of expression when colliding with other fundamental rights, according to Dworkin’s lesson:

Therefore, if we recognize the overall value of free speech, we should accept a presumption against censorship or prohibition of any activity when this even arguably expresses a belief about how people should live or feel, or when opposes established beliefs or widespread beliefs. The presupposition need not be absolute. Can be overcome by showing that the injury producing activity that the threat is serious, probable and uncontroversial, for example. But should, nevertheless, be a strong presumption to protect the long-term goal of ensuring, in spite of our ignorance, the best conditions in our power to human development (Dworkin, R., 2005).

Thus, the assumption of a *prima facie* preferred position of freedom of expression does not mean an

opinion to an absolute prevalence of such right over others, but as a result of a course correction in the application of the proportionality technique, in a way that judges may always pursue the decision that best reflects the applicable law in a particular case, in the context of a constitutional pursuit of a freer and more equal community of people. We believe that the proposed course correction may bring an incentive to Brazilian judicial practice, in order to eliminate the questionable habit of considering anything under any argument in order to undermine freedom of expression.

This proposition is fully applicable when it comes to freedom of expression exercised on the internet, mostly when considered the positive effects on the internet over free speech, functioning as a medium that may promote a more open and transparent society and may empower individuals when giving them the opportunity to express themselves more freely. Judges should weight in their decisions the profound dependence between freedom of expression online and the code that shape internet applications. This means that there are possible rulings that may go further than the mere binary decision of removing a content from the internet or not doing so.

Since the internet has a global scale and the human conduct is shapeable according to the code, judges should weight if there may be alternative measures that could implement constitutional values in an intermediate way. Instead of removing content from the internet, the determination to an internet Service Provider to suspend may be a more proportional way of solving the issue, for example. Other feasible alternative would be the partial restriction of the content, regarding the location of the author and the applicable legislation: a post that could be considered harmful in Iran, for example, may be interpreted differently so in Brazil. Therefore, restricting the availability of the disputed speech could be an intermediate solution that, based on the preferred position doctrine and on the importance of the code, finds the proportionate decision for the issue.

CONCLUSION

It is a personal opinion that freedom of expression can be strongly fueled by the nowadays internet. This does not mean that the internet's architecture will necessarily foster free speech forever. Bad weighting in judicial decisions, for example, may function as a censorship factor, closing what was once open, enslaving what once was free. Therefore, if there was already a strong argument for judges to apply a preferred position on offline free speech cases, when it comes to online expression these arguments become stronger, since the internet is vital for the maintenance of a democratic society and the influence of bad decisions on code elaboration is way higher than over offline speech. Adopting a preferred position doctrine can be an incentive for judges to escape the mere

binary possibility of removing/not removing content from the internet, pursuing creative forms of ruling as a way of preserving a free and open internet.

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