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From State's control to State's control: the historical conceptualisation of censorship and content control

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1. Conceptual issues of censorship in the 21st century

There are few more straightforward accusations than the following sentence: censorship! To paraphrase Frederick Schauer, "the overly broad use of the term 'censorship' can make the concept seem impartial and thus devalue it." (Koltay, 2014) However, a quick search on the Internet reveals that the word censorship and the verb to censor are present in our lives. The practice shows what Derek Jones argues in his almost 3,000-page world encyclopedia of censorship: prior content approval constitutes censorship. The concept needs to be interpreted as broadly as possible to protect freedom of expression fully (Jones, 2015).

I argue that examining historical experience may help us understand how we have moved from the intense censorship of the 17th and 18th centuries to the 21st century, when political censorship as a concept is becoming almost meaningless and new types of (private) control mechanisms are emerging. How and why states have 'privatised' the

issue of content control, and why we see a completely different set of points on the Internet today. How this essentially free form of communication came under legal regulation and where freedom may have been lost.

It is generally accepted that freedom of expression is a fundamental human right. It is the cornerstone of democracy, a key element in protecting all human rights, and one of the primary conditions for its development. The European Court of Human Rights (ECtHR) has stated in several judgments for the product of all human beings. However, it should be noted that centuries of struggle for the fullest possible freedom of expression are in vain if censorship prevents the publication of certain opinions. There are countless definitions of what censorship is, but there is no single, widely accepted definition. Sophia Rosenfeld states that "in the realm of theory, there seems no longer be any consensus about what censorship is." (Rosenfeld, 2001) Moreover, censorship is difficult to study empirically because it often remains unnoticed. Matthew Bunn states that many historians are afraid of over-expanding the concept, as the original meaning would be lost in this case. In arguing for a broader interpretation, he also argues for introducing a 'New Censorship Theory', which would encompass "a growing share of practices and structures that shape the form and content of communication". According to him, after the classical liberal definition of censorship and the Marxist concepts that questioned it, it should be acknowledged that by the two thousand years, censorship was "a diffuse, ubiquitous phenomenon in which a host of actors (including impersonal, structural conditions) function as effective censors." (Bunn, 2015) And while, of course, accepting that an overly broad interpretive framework can undermine the effectiveness of legal regulation, **my research has demonstrated that general use of censorship can lead to complete protection of free speech.**

2. Content regulation or censorship on the Internet

In the context of censorship, it is generally accepted that the Internet has affected our lives in different ways, providing instant access to an incredible amount of information and transforming our notions of the state, the economy and education, as well as our human relationships and anxieties about the world today. In Cengiz and others v Turkey, the ECtHR stated that "the Internet has now become one of the principal means by which

individuals exercise their right to freedom to receive and impart information and ideas." (ECtHR, 2015)

However, it is now becoming increasingly clear that even democratic states face new challenges about this new medium. Suppose we follow the line of thought of Jack M. Balkin. In that case, we can say that with the emergence and spread of the Internet, there have been many cases, in addition to classical political censorship. It is also challenging to decide whether we can talk about censorship. In his writings, he consistently argues for the term 'speech regulation' rather than censorship (Balkin, 2014) which shows how some views have **changed the scope of speech and the resulting content regulation**.

3. Tools for Internet content regulation

Based on my research, the literature refers to various solutions under the heading of content restrictions in the context of Internet governance: they can include both lawful and unlawful cases. The simplest case is when the condition is for simple traffic management or network security reasons, which is, in principle, legal. To optimally manage the ever-increasing amount of traffic on Internet networks, some form of traffic management is inevitably required. To give an example of the almost incredible exponential growth in data traffic: "By 2022, traffic is expected to reach 150,000 GB of traffic per second, a 1,000-fold increase compared to the 156 GB in 2002, 20 years earlier. Ten years before that, in 1992, global Internet traffic was 100 GB per day." (World Bank, 2021) At the same time, **some interventions are less clear-cut**. Cases where private market companies restrict or slow down access to certain content, are in principle illegal under the EU's Net Neutrality Regulation, but there may be legitimate cases. In my research, **two types of content restriction by the state can be identified**: on the one hand, where the state (by a court or by law) obliges Internet access providers to restrict certain content, and on the other hand, where states restrict or make inaccessible Internet access to certain services or even build up an utterly alternative service portfolio to maintain their power, in a censorial manner. (Gosztonyi, 2020)

Based on my research, **the legal challenge is multidimensional**: to bring a mass communication tool, now used by millions and billions of people – on several continents – into a legal framework, operated and owned by (mostly) American companies with a (basically) American approach, and to address (legal) issues that are reflected differently

in different legal cultures (and even in other laws between countries with similar legal cultures). And then, we are only talking about the legal situation, not the differences between social and political arrangements. Moreover, the Internet has developed its own set of standards over the years, which users accept by their implicit behaviour – by using it. As a result, regulatory states could easily find themselves in a situation where the subject matter of regulation could only be interpreted at "different and sometimes overlapping levels – from the local to the supra-national and global" (Raboy – Padovani, 2010). Alas, "the vertical, centralized and state-based modes of traditional regulation have been complemented by collaborative horizontal arrangements, leading to a complex ecology of interdependent structures with a vast array of formal and informal mechanisms working across a multiplicity of sites." (Hinzt, 2015)

By the mid-2000s, however, political actors and the states they governed, recognising the growing problems, could no longer look the other way: they could not allow the so-called 'privatised' regulation by social media companies, i.e. the outsourcing of the state's regulatory needs, to continue. As Jack M. Balkin put it: "nation states, understanding this, have **developed new techniques for speech regulation**. In addition to targeting speakers directly, they now target the owners of private infrastructure, hoping to coerce or coopt them into regulating speech on the nation state's behalf." (Balkin, 2018)

4. The triple model of regulation

I have set up a triple system based on regulatory solutions in my research. The United States of America and the European Union have tried to regulate new media liability differently. The codification processes that led to the development of two different types of liability regimes twenty to twenty-five years ago have differed.

In the United States of America, the Internet first appeared as a subject of regulation in 1994, commonly known as Section 230(c)(1) of the Communications Decency Act (CDA). **In the United States of America, the state has effectively 'privatised' to protect free speech and remove** illegal or harmful content. "It gave Internet startups and their investors the confidence that they could fill their platforms with content from ordinary users, without attracting any legal liability for anything those users might write." (Reynolds, 2019). This is what we call **the immunity model**.

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The **European Union** has developed a different regime: the regulatory framework (the Electronic Commerce Directive, ECD) **uses a threefold definition.** The first two ('mere conduit' and 'caching') give service providers immunity from liability under the US regime. However, under the rules applicable to hosting providers, the provider is in principle responsible for the content hosted on it and is exempt from liability if:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

The (relative) novelty of the European system is, therefore, this commonly used 'notice and take-down system', which has thus introduced a multi-stage system of conditions and procedures: the intermediary service provider must have a certain knowledge of content that is manifestly illegal and must take steps to remove it within a specified time. Therefore, it can be concluded that, in contrast to the US legislation, the European Union has opted for a different model (also known as **the 'safe harbour model'**), which focuses on a non-automatic exemption.

In both Europe and the United States, however, discussions about the creation of a new framework have been flaring up again and again since the mid-2000s, with the next step being the modification of CDA230 in one place and the creation of the DSA-DMA framework in another. But a third way has emerged: the **Chinese model, which is based on editorial responsibility**. The Chinese solution is based on **Internet sovereignty**, i.e. the (near) perfection of the idea that countries worldwide have the right to choose how they develop and regulate their Internet. As Nicolas P. Suzor put it, the most consistently censored content is that which "try to organize any form of physical meeting or protest." (Suzor, 2019) The question that Chinese leaders running the Golden Shield are seeking to answer is **whether there can be a solution in the 21st century that simultaneously ensures economic openness and development while at the same time ensuring information closure.** The answer will probably not be known for some years, but it is already clear that the country's "surveillance systems remain the most advanced and pervasive in the world". (Freedom House, 2020)

A system based on total surveillance, which, as a rule, does not allow millions of private users to make mistakes because it cuts them off from information. Suppose information gets through, whether by deliberate 'safety valves' or other means, the ISPs and platforms will be held clearly liable, without immunity or indemnity. A continuous monitoring obligation complements this on the part of the providers, i.e. free opinions would have to pass through three 'gates' to reach the public:

- users' self-censorship;
- economic censorship (general monitoring);
- state censorship (Golden Shield).

5. Censorship in the two thousand years

By 2021, it seems that the **receding founding ideas of cyber libertarianism are** now – regardless of the actual outcome – left with us in the naturally liberating nature of technology and the Internet, and their ongoing – seemingly hopeless – struggle for the decentralisation of communication, where everyone (privileged and disadvantaged alike) can have the space of communication they deserve. The impracticality of **cyber paternalism** seems remote but not impossible. **Blocking Internet content for political purposes** was still commonplace in many countries in the 2020s: Chinese Internet sovereignty is the most widespread solution. Still, Russia caught up by the summer of 2021: it experimented with the technology for a few years and finally succeeded in physically disconnecting itself from the international Internet network as a test between 15 June and 15 July 2021.

6. Summary

My research reveals how opinions and the various contents that are or were published have been regulated over the centuries by the state and the church, sometimes in religious, sometimes in moral, sometimes in political guises. As technology has made it increasingly possible for more and more people to access content, the legal and political tools have been refined considerably over time. The struggle for freedom of expression seemed to reach a turning point with the advent of the Internet, which was seen in the early days as a means of communication offering complete freedom. However, the myth

of a rights-free space soon began to dissipate, and the emergence of, to borrow Jack M. Balkin's phrase, the 'new governors of digital expression' (Balkin, 2018), the tech companies that grew to unimaginable power in the publishing of speech and content. All this against a backdrop of cautious attempts by states to regulate, either by granting them almost total immunity, as in the case of the United States or by setting up a set of rules as imprecise as those in the ECD. The cross-border nature of the Internet is being addressed by individual solutions from States that are increasingly seeking to close themselves off, but these have not yet produced long-term, legally sound solutions. Still, "the Internet's promise of open access to independent and diverse sources of information is a reality mostly for the minority of humanity living in mature democracies." (Bennett – Naim, 2015) It would be hard to argue that a few decades after the emergence and widespread adoption of the Internet, the world knows exactly where it is going. Bernát Török notes, however, that "the irrationality that is increasingly manifested in public discourse, the confinement to echo chambers, or the lack of credible organs that are commonly accepted and considered trustworthy by a critical mass of society, are not merely the products of the social media age." (Török, 2021)

There is certainly no quick and straightforward solution to this complex issue. As Alan Dershowitz puts it, "we should be cautious about approving short-term solutions that pose long term dangers." (Dershowitz, 2021)

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