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## **Blocking of Content. Between Freedom of Speech and the Regulation of Digital Media**

**Keywords:** freedom of speech, digital media, digital content, social media, content blocking

**Słowa kluczowe:** wolność słowa, media cyfrowe, treść cyfrowa, media społecznościowe, blokowanie treści

### **Abstract**

Nowadays, the concept of digital media, is nothing new. The article refers to the conditions of legal change implied by the vast progress and revolutionary digital transformation that has taken place when the media, which are an integral part of the communication process, have entered the realm of image culture, a sphere where they obliterate traditional modes of communication, creating a new sphere of influence, without a clear separation between the sender and the receiver. Hence, digital content has become the basis for the construction of a new system of axiology, so relevant in terms of constitutional values.

### **Streszczenie**

#### **Blokowanie treści. Między wolnością słowa a regulacją mediów cyfrowych**

Media cyfrowe zmieniają cały świat, nakierowując jego działania na rozwój szeroko pojętej komunikacji, wykorzystującej najnowsze technologie cyfrowe. Artykuł odnosi się do warunków zmian prawnych podyktowanych ogromnym postępowaniem i rewolucyjną zmianą cyfrową, które dokonały się w momencie gdy media, będące składową procesu komuni-

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kowania, wkroczyły w obszar kultury obrazkowej, w sferę gdzie zacierają dawne sposoby przekazu, tworząc nowy obszar oddziaływania, gdzie użytkownik jest jednocześnie inicjatorem i konsumentem danej informacji, bez wyraźnego podziału na nadawcę i odbiorcę. W ten sposób treści cyfrowe stały się podstawą budowania nowego systemu aksjologii, tak istotnej z punktu widzenia wartości konstytucyjnych. Ich blokowanie wkracza w obszar jednej z najważniejszych reguł dla państwa demokratycznego – wolności słowa.

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## I. Digital media areas of regulation

Communication by the media should take a specific form and any crisis, regardless of current geopolitical situations prevailing in the world, e.g., in connection with the pandemic or the armed conflict in Ukraine, can be perceived as an opportunity for the imposition of opinions and ideas from different backgrounds. Moreover, there are so-called *moral entrepreneurs*, i.e., people who aspire to the role of *guardians* or *managers of morality*, using mass media to appeal for an appropriate response<sup>2</sup>. Virtually every message may have overt and covert functions that are not articulated. However, it becomes important not only to highlight the scale of the threat and to characterise the possible methods of neutralising it but also to consider the structure of a vulnerable society, its legal culture and the nature of the legal system.

The media are in permanent interaction with public opinion. News coverage may destabilise the relationship between the public and state structures implementing state security policy. Significantly, the rapid introduction of extra-coordinated rules in social life requires complete legitimacy to implement and respect new legal standards. In practical terms, this applies to the media, which, after all, are not limited to professional publishers and editors, but often include social media and forums with different reach – sometimes wider than television or the press.

It should be emphasised that when analysing the media environment, it is possible to speak of the issue of editorial responsibility only to a certain extent, and this translates into the issue of responsibility for content affecting public

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<sup>2</sup> L. Miś, *Problemy społeczne: teoria, metodologia, badania*, Kraków 2007, s. 102.

safety and order, public morality, protection of the environment, protection of health as well as human rights and freedoms. Furthermore, the post-truth phenomenon alters the rules for accepting information as fact.

While analysing the role of digital media in defining the question of their future regulation, it is worth incorporating the assumptions of the securitisation theory, according to which security is indicated not as an objective system-structural state, but as a certain well-defined social process<sup>3</sup>. Moreover, the dominant role of digital media and the occurrence of the aforementioned phenomena mean that the media are beginning to construct reality rather than reflect it, as was their original purpose.

## II. Freedom of speech as a basic principle of digital democracy

The emergence of a modern legal framework has been accompanied by incomplete regulation. One crucial aspect is that regulation should relate to a variety of areas of social activity. J. van Dijk wrote: “In a democracy, the impact of potential action on actual decisions is entirely dependent on authority relations in the political system and the media”<sup>4</sup>. This is reflected in the fact that public authorities often exercise their power with modern forms of transmission. Digital democracy has one fundamental premise, which is the creation of a uniform regulatory scheme and the application of an identical legal framework, based on the constitutional principles of the state, for all technological areas.

The technological revolution, the first stage of which was the construction of a digital world, has entered another process of transformation affecting issues that are crucial for democratic societies because they relate directly to the foundations and axiology of constitutional freedoms. The sense of uncertainty about tomorrow, resulting from the inability to assess and control the technological future, has recently taken on real form, as the new digital society is a community whose rules are unknown, and new social order, without the definition of common values and the establishment of protective norms, raises anxiety. Technological corporations, so-called BIG TECH, are becoming the decision-mak-

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<sup>3</sup> M.C. Williams, *Words, Images, Enemies: Securitization and International Politics*, “International Studies Quarterly” 2003, vol. 47, iss. 4, p. 512.

<sup>4</sup> *Ibidem*, p. 145.

ers on issues hitherto in the domain of public authorities and the courts. This also applies to such an important sphere as freedom of speech. This is particularly relevant as regards social media, as online communities are a powerhouse with enormous communicative capacity and expansion, as well as opportunities for manipulation, due to the specific nature of online technologies.

### III. Legal basis for freedom of speech

The principle of freedom of social media is the foundation for the functioning of all digital players and determines the role of digital media in any society. The inclusion of this idea in widely accepted international documents has helped to spread the idea and also to establish its content. Article 10 of the European Convention on Human Rights, “Freedom of Expression”, guarantees that “Everyone is entitled to freedom of expression”. This right shall include the freedom to express opinions and to receive and impart information and ideas without interference by public authorities and regardless of national borders<sup>5</sup>. Article 11 of the Charter of Fundamental Rights of the European Union (2010/C 83/02) “Freedom of expression and information” ensures that everyone has the right to freedom of expression. Furthermore, the principle of media freedom underpins the functioning of all media players and determines the role of audio-visual media in society.

The legal media system serves as a reflection on the level of development of society. In the judgment of the Constitutional Court of February 20, 2007, the Court referred to the history of this ideology, assuming that: “The inclusion of this idea in universally accepted international documents has contributed to its dissemination, as well as to the definition of its content. However, from the provisions contained in international documents, it is evident that today it is not only about freedom of speech, but about freedom of expression in all forms in the broadest sense, guaranteeing at the same time freedom to hold opinions”<sup>6</sup>.

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<sup>5</sup> Convention for the Protection of Human Rights and Fundamental Freedoms concluded in Rome on 4 November 1950, subsequently amended by Protocols no. 3, 5 and 8 and supplemented by Protocol no. 2 (Dz.U. 1993, no. 61, item 284), hereinafter “the Convention”.

<sup>6</sup> File ref. no. P 1/06 (Dz.U. 2007, no. 36, item 234).

Digital media, due to the development of the web and, consequently, a new range of influence, have directly impacted on the world view of both individuals and society as a whole for a long time. In this regard, though, one should note the duality of the norms relating directly to media services. Freedom of the media (press) was considered an essential element of politics, which allows for a balance between the governed and the ruled.

In the relationship between the media and the state, the responsibility for mass media lies with the state. Most importantly, it is the state's responsibility to guarantee, through appropriate legislation, formal and practical respect for freedom of speech and freedom of the media. The differences in the understanding of freedom of speech also allow for the prospect of the Polish legislator introducing entirely new legislative solutions, appropriate to its own national needs. The principle of freedom of speech and freedom of the media, as emphasised by E. Nowińska, is not only about the privileges associated with freedom of speech, but also about the duty to disseminate information, given that "a free press fulfils the citizen's right to reliable - that is, true and honest, clear, not misleading, responsible - information. Although the beneficiaries of freedom of the press are primarily journalists, it must be remembered that it serves society as a whole"<sup>7</sup>. This stance applies to all media operating today.

#### **IV. Grounds for restricting freedom of speech**

According to the Constitutional Tribunal, the constitutional freedom formulated in Art. 54 sec. 1 of the Constitution of the Republic of Poland is one of the manifestations of human freedom, a freedom to which every human being is naturally entitled from birth, a freedom derived from the essence of human nature and constituting a fundamental value that positive law should take into account)<sup>8</sup>.

Generally, it may be said that the opinion-forming and creative functions of the modern media under the conditions of globalisation, individualisation

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<sup>7</sup> E. Nowińska, *Wolność wypowiedzi prasowej*, Warsaw 2007, p. 49.

<sup>8</sup> Judgment of the Constitutional Tribunal of February 20, 2007; file ref. no. P 1/06 (Dz.U. No. 36, item 234).

of the message and the interplay of power and the public sphere are of significant importance as regards the realisation of the values referred to in Art. 31 sec. 2 and sec. 3 of the Constitution of the Republic of Poland. The Constitution ensures the protection of citizens' rights and freedoms. Restrictions on the exercise of constitutional rights and freedoms may only be established by law and only if they are necessary in a democratic state for its security or public order, for the protection of the environment, public health and morals, or for the rights and freedoms of others. Said restrictions must not affect the essence of rights and freedoms. In the field of the media, this applies in particular to freedom of speech as a general value. The freedom to disseminate information - includes both providing content to entities individually chosen by the disseminator and disseminating information, i.e., making it available to the public and, therefore, to non-individualised addressees, especially through social media, which is social networking sites. The principle of freedom of speech and social media is a rule that includes the privilege, as well as the duty, to disseminate information, as a free press fulfils the citizen's right to reliable and responsible information and it serves society as a whole.

## V. Conflict of values

It is indisputable that international documents have guided the normative content of the idea of freedom of speech in written constitutions; especially those that came into force during the period of an established catalogue of rights and freedoms in a democratic state. From the wording of the provisions in international documents, it is apparent that, in the age of the digital revolution, it is not just about freedom of speech in the traditional sense, but about a broadly defined freedom of speech (expression), guaranteeing both freedoms of opinion and freedom of form of expression, within the limits set by the legal norm and not by the self-regulatory principles adopted by BIG TECH. These limits are determined by superior values related to the rights of the individual<sup>9</sup>. Under the conditions of this conflict, there is no clearly defined balance between the entitlements of an individual and the restrictions

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<sup>9</sup> Judgment of the Court of Appeal in Poznań of June 15, 2011; file ref. no. IACa 477/11, LEX no. 898647.

and rights that are supposed to protect the public interest. Since the conflict between public and individual interests is obvious<sup>10</sup>.

## VI. Digital content blocking and freedom of speech

Procedures such as the monitoring, blocking and removal of digital content are closely linked to the notion of public interest, or as the European legislator desires, general interest. Nevertheless, it should be emphasised that the general interest in European terms is not always the same as the public interest in national terms, at the Member State level, and that the legal instruments we currently use to protect the public interest in traditional means of communication are becoming indispensable in cyberspace. This sector has a key role to play in the formation of social attitudes, as it is one of the main means of transmitting shared core social and cultural values. Therefore, the question must be asked whether the values mentioned here are still valid when it comes to the regulation of web content, including the regulation of the blocking of digital content<sup>11</sup>.

It must be stressed that the imposition of an obligation on intermediaries, the so-called service providers, to determine the limits of freedom of expression online is not only an organisational and financial burden for them, but it also raises fundamental constitutional concerns. Undoubtedly, it is always necessary to consider the possibility for the person whose content has been blocked to appeal to a court, where the parties in criminal or civil proceedings should settle the dispute – simply because the intermediary sometimes finds it difficult to judge when the right to freedom of expression on the Internet is abused. Principles regarding the blocking or removal of unlawful content should be as clear and precise as possible, and the responsibilities should take into account the size and type of entity that would be subjected to them. Developing effective solutions to this issue would certainly require coordinated action and cooperation between regulators, social organisations

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<sup>10</sup> K. Chałubińska-Jentkiewicz, *Media audiowizualne: konflikt regulacyjny w dobie cyfryzacji*, Warszawa 2011, p. 47.

<sup>11</sup> More on this topic in: K. Chałubińska-Jentkiewicz, *Prawna ochrona treści cyfrowych*, Warszawa 2021.

and digital service entrepreneurs. The development of a new concept incorporating the reality of today's digital services, is required. The diversity of national rules across EU countries and the inconsistency of regulators' actions across the EU can certainly add further concern to this issue. Similarly, the use of algorithms that automatically filter content – in terms of their transparency and accountability – requires wider and detailed analysis, including at the national level.

The prohibition of general content monitoring seems obvious, but this does not exclude the possibility of filtering to identify specific illegal content. Likewise, the use of algorithms or other technologies for automatically identifying and filtering content certainly requires in-depth analysis and thorough dialogue with various stakeholders, a result of which it will be possible to address the problem of the prevalence of illegal content, both transparently and proportionately, taking into account, on the one hand, the obligations imposed on digital service providers (also depending on their size) and, on the other hand, the public interest and the freedoms guaranteed – standardised rules for the removal of illegal content such as illegal hate speech.

The entity responsible for designing the filtering system should provide a general and publicly available explanation of how it works (including the expected use case, constraints and risks, the type and generation of the algorithm used, the sources of the data used and the expected results – so-called output data); an individual explanation for each user affected by the automated decision, including the reasons for the decision and personal data actually used; an assessment of the risk and impact of this system on the environment and documentation of important technical decisions (such as the choice of loss functions or so-called fairness metrics), which can be used by the regulator to clarify any confusion.

The shape of EU rules governing the digital services market is currently under discussion. In the course of the work on the DSA<sup>12</sup>, it will be desirable to clarify how to ensure the consistent application of different regulations to the same entities. Indeed, there are already some sectoral legislations in

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<sup>12</sup> At this stage of its work, the European Commission (hereinafter “the EC”) on 15 December 2020 presented a proposal for a Regulation of the European Parliament and of the Council on the digital single market for services and amending Directive 2000/31/EC (COM(2020) 825 final).



EU law that regulate online service providers. There also appears to be the need for notice and take-action systems, differentiated according to the content concerned, which simultaneously allows stakeholders, users and other entities to effectively notify intermediaries of illegal content or of legal but socially undesirable content, and also to assert their rights if their content has been removed in violation of the rules. Such a system should provide for adequate timeframes to enable aggrieved persons to exercise their right to a court and other fundamental rights. The mere blocking or removal of digital content would require an appeals procedure against platform operators' decisions to remove content, with a court route adapted to deal with such cases.

Increasingly, what seemed impossible in the modern world, such as the blocking of information, especially via digital media, is now becoming a reality, justified by legal regulations relating to the above-mentioned states of necessity, such as ensuring security or public order, or the protection of individual rights and freedoms.

The new legal framework that will address the functionality of new digital content exchange techniques, as well as any kind of restriction on freedom of speech, must be clearly defined and justified by democratic control. In times of the crisis of values such as truth, the integrity of reporting, or respect for human dignity – the most important constitutional value – this conflict seems permanent.

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