Papeles el tiempo de los derechos

"THE REBSP AND THE RIGHT TO SEEK, RECEIVE AND IMPART INFORMATION: INTERRELATION AND INTERDEPENDENCE"

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THE REBSP AND THE RIGHT TO SEEK, RECEIVE AND IMPART INFORMATION: INTERRELATION AND INTERDEPENDENCE[*]

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We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country
Oliver Wendell Holmes, *Abrahams v. United States*, 250 US 630 (1919)

1. Introduction

The right to enjoy the benefits of scientific progress and its applications (REBSP) sets out the dilemma between *scientific progress* and *social stability*. This dilemma means wishing, on the one hand, improvement of scientific knowledge and new technological applications, and, on the other hand, stability in our moral and political representation of the society. Both ideas are desirable but sometimes cannot be confirmed at the same time. In this sense, the relationship between scientific progress and social stability is not always seen as peaceful because the first seeks change and the second seeks preservation. Knowledge improvement, scientific innovations and technological applications are not always evaluated as factors of social progress but they are sometimes seen as dangerous for social stability and social identity, subversive factors for the political, religious or economic order. From time to time, cases arise of societies with problems due to the increasing number of information channels. The advent of new technologies and the increasing demand for information have always given a great impetus to social advancement. For this reason,

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some governments suggest that people cannot have a right to seek, receive or impart a certain kind of information through a certain sort of channels.

In fact, the right to seek, receive or impart information can have both a positive and a negative impact on society because the seeked, received and imparted information is not only the information which serves a *public interest* but also the information related only to a *private interest*. If we have a look at the Internet, the increasing number of information channels affects political and educational issues, which contributes to economical development, a far-reaching democratic reform or an educational improvement. The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has asserted that the Internet will be «an increasingly important human rights education tool (...) the global reach and relative ease of use of the Internet makes it a unique and highly effective tool for the promotion of human rights, enabling an unprecedented audience previously unfamiliar with human rights education to gain access to valuable information» (2001, para. 13-14). But the Internet also affects the *less enlightened* issues and information, creating a new instrument for the violation of human rights because of intrusive collection of data, detection of tracking behaviour and promotion of false images and negative stereotypes of vulnerable individuals or groups, and because of the use of information for purposes contrary to respect for human rights, in particular the perpetration of violence against and exploitation and abuse of women and children and the dissemination of racist and xenophobic discourse or content. The Internet can have, furthermore, «a terrific impact on the quantity and quality of information at disposal of the most disadvantaged classes, especially the rural poor» (Report, 2005, para. 30).

In this paper, however, I am not going to show *the shadows* of the scientific progress related to the freedom of information but only *the lights*, underlining the utopian spirit of the idea of the full execution of the right to seek, receive and impart information due to the scientific progress and its technological applications, or, as William Schabas suggests, «an opportunity to propose and develop a content of the norm that is consistent with the realities of the human condition at the dawn of the twenty-first century».

The REBSP is enshrined in article 27 of the *Universal Declaration of Human Rights* (UDHR) and in article 15.1.b of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). This right is an important challenge for the general theory on human rights since it is necessary, first, to elucidate its normative nature and content; second, to discuss the interdependence and interrelation with others human rights (in my case, with the right to seek, receive and impart information which is recognized in article 19 UDHR and article 19.2 *International Covenant on Civil and Political Rights* (ICCPR); and, third, to establish a non-discriminatory implementation. Based on these issues, this paper is divided into three epigraphs. The first epigraph is devoted to set up the normative nature and content of the REBSP through the theory of the generations of human rights, and the second and the third epigraphs are devoted to the interdependence and interrelation with the right to seek, receive and impart information.

The right to seek, receive and impart information is being presented and analyzed in relation to the use of the internet, since it represents one of the most important means of communication, which has also affected the development and use of other means such as newspapers, television, radio etc.

2. The REBSP: what normative nature? What generation?

The history of human rights is usually divided into synchronic (?) generations through which it is possible to see how human rights have been the subject of a political debate and a legal recognition since the XVIII century bourgeoisie revolutions. The generations of human rights allow us to observe the ideological changes because this theory illustrates how the major categories of human rights emerged in political philosophy (Nowak, 2001, 252). It is a commonplace for most of the scholars to consider the movement from the XVIII and XIX centuries from liberal political thought to the turn-of-the-century transversal social movements as feminism or *deep ecology*, through the socialist and democratic thought. The generations do not only explain the transformation human rights have had since the rise of the liberal state until the consolidation of the welfare state but also the normative content. As María Eugenia

Rodríguez Palop suggests, talking about generations is useful when trying to study the rights explaining their connection with the context but also when trying to see the normative nature and the common features of the rights (2002, 72).

If we take into account both the normative structure of the rights and the ideological influences, the first generation is for the civil rights; the second generation, political rights; the third generation, economic, social and cultural rights; and the fourth is for a new category of rights of which the normative content and rightholders are *diffused*[1]. Each generation must be understood as a supplement for the previous one since, as J.M. Lavielle says, the appearance of new generations of rights does not mean that rights from previous generations are *old rights* which have to be marginalized but quite the opposite because generations of rights reinforce each other (1990, 221). Each new generation is influenced by the previous because it has been taken into consideration in order to complete and correct its deficiencies and mistakes (Pérez Luño, 1987, 56). In this sense, we can affirm that the different generations of human rights are interdependent, interrelated and indivisible (Eide & Rosas, 2001, 3)[2] and the theory of the generations does not, of course,

[1] The number of generations is contested. Some scholars stand at three (Vasak, 1982) and some scholars stand at four (Bobbio, 1991). In my opinion, according to Norberto Bobbio's thesis, civil and political rights cannot form a group because they implement a different kind of freedom. Civil rights implement *freedom as no interference* and political rights implement *freedom as participation* (1991, 70). It is true that in the first declarations of rights there are some references to the right to vote but the vindication of the political participation rights appeared in a different historical context. In this sense, it is necessary to distinguish between civil and political rights, since the political rights were accepted as human rights much later than some of the civil rights, in some countries even later than economic and social rights. Against the idea of generations it is said that «the history of the evolution of human rights at the national level does not make it possible to place the emergence of different human rights into clear-cut stages» (Eide & Rosas, 2001, 4). In the same sense, some participants on the seminar contested the usefulness of the distinction between generations because they argued that such a distinction might impede the implementation of some rights. In my opinion, the theory of the generations of the human rights and the interdependence among them are useful tools in order to set up the normative nature of the right to enjoy the benefits of scientific progress and its applications, though we have to realize that maybe the different generations of human rights are more useful in theory for explaining history, ideological influences, founding values and normative nature than in practice for the fulfilment of some rights.

[2] See *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/24 (1993), para. 5. Concerning the legal expression, the rights of the different generations have been recognised in the main legal texts. Limiting our scope to the universal system of protection for human rights, two texts can be highlighted: ICCPR and ICESCR. Although the UDHR is the standard of reference in the development of national and international human right norms because it comprises in one consolidated text nearly the entire range of what today are recognized as human rights and fundamental freedoms, ICCPR and ICESCR expand and define its terms and establish legal obligations to which States may bind themselves. As Matthew Craven says, «as

imply any hierarchy or a exhaustive list of rights because the history of human rights cannot be considered as completed since there will always be new vindications by politically excluded groups.

The interdependence and interrelation among the different generations of human rights is a suitable instrument for the maximum level of protection of human dignity (Alston, 1993). In this sense, we should abandon two ideas: first, economic, social and cultural rights and fourth generation rights are not justiciable because among their protection clauses the direct demand on court and the individual petition with respect to violations are excluded; second, these rights are expensive and welfare states have financial problems to put them into practice. Although we have to be aware of both the existence of different system for protection and of the welfare state's crisis, it is not possible to disregard any of the human rights generations. Apart from the utilitarian approach that sees the third and fourth human rights generations as essential conditions for the full enjoyment of civil and political rights, there is a more comprehensive form of justification that views them «as inherently valuable considerations irrespective of what they contribute to the enjoyment of civil and political rights (...) such rights may be considered universal human rights in so far as they relate to fundamental elements of the individual's physical nature, whether that be physical needs or their ability to enjoy social goods» (Craven, 1995, 13). On the other hand, the fact that certain rights are contingent for their implementation upon the existence of sufficient resources, is not a categorical argument because it would be wrong to suggest that civil and political rights themselves are entirely free of cost.

The normative nature of the REBSP is one of the main problems we have to face. Is the REBSP and its applications a *true right*? This is a preliminary question and the answer is quite important because it might be possible that the

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the Covenants have gained broader acceptance in the international community and as their respective acceptance supervisory systems have been developed, they have begun to figure more largely in the international protection of human rights» (1995, 7). The duality civil-political rights vs. social-economic-cultural rights is being overcome step by step because in more recent global instruments, the sets of rights have been integrated in some common text. However, although within the UN there is now almost universal acceptance of the theoretical 'indivisible and interdependent' nature of the sets of rights, the reality in practice is that economic, social, and cultural rights and fourth generation of rights remain largely ignored (Craven, 1995, 9).

scientific progress was only a qualifying instrument for the fulfilment of other rights, including the right to seek, receive and impart information.

The first option, when shaping the normative nature of the REBSP, is to consider it as a *droit quotidien* (daily right). This kind of rights, according to María Eugenia Rodríguez Palop, are identified with a sort of powers that citizens have for the realization of their rights (2002, 29). Daily rights are linked to the appearance of new instruments for fulfilling old necessities. So, the right to seek, receive and impart information is the old necessity which would benefit from the appearance and development of the Internet. This option defended by François Luchaire (1987) means that the REBSP is not a right but only an instrument. Although the main purpose and last consequence will be the enlargement of the democratic horizon, daily rights cannot be considered as 'new rights' emerging from a mutation both of the social circumstances and the axiological system. They have to be seen as effective instruments for the exercise of legally recognized rights and freedoms (Rodríguez Palop, 2002, 30).

In my opinion, the REBSP is not one of these daily rights because the Internet cannot be seen as a simple instrument for improving the right to seek, receive and impart information. The Internet has caused a radical transformation of the social context both in Northern and Southern countries. Some social movements have emerged playing a global role and denouncing the deficiencies of the political and economic system both at the local and global level, demanding a fair distribution of the benefits of scientific progress and technological application in order to get a better society. In the XXI century, the *information society* is the fruit of the global development of communication technologies, especially the Internet, and in this new social structure the elements of the equation (information, knowledge and wealth) are equivalent, widening the gap between Northern and Southern countries.

The second option is to consider it as a third generation right. In my opinion, despite the fact that the REBSP is recognized in ICESCR, it is not an economic, social and cultural right for three main reasons: (i) the exercise is not allotted to specific people, (ii) it does not develop the material sense equality and (iii) the

rightholders do not have a different legal status. The specification of the rightholders means that though all economic, social and cultural rights are universal, in the sense that they apply (at least potentially) to everyone, the exercise of those rights is related to the particular circumstances in which individuals find themselves. Economic, social and cultural rights are not allotted to abstract human beings because the human condition is not good enough to exercise them, as is the case with civil and political rights. Economic, social and cultural rights should only be enjoyed by the most disadvantaged people to be competitive and to be able to live in society (Peces-Barba, 1999, 64). The development of the material sense of equality or *equality as differentiation* is linked to the specification of the rightholder since economic, social and cultural rights start from a *de facto* discrimination in life (Peces-Barba, 1999, 64). Economic, social and cultural rights do not implement *commutative justice* but *distributive justice* because they start from the existing differences in society. They give an unequal treatment to unequal human beings according to the diversity of personal situations (Bobbio, 1994, 20-21). Economic, social and cultural rights show us that some groups are more vulnerable than others or have traditionally been discriminated or excluded (women, children, migrant workers, sexual minorities, indigenous peoples...) and they may require special protection of their rights, sometimes through the adoption of a different legal status such as *affirmative action* or other special measures.

The third option is to consider it as a *diffuse right*, that is, as a fourth generation right. As I will explain, this is the option I prefer. Fourth generation rights come up from the generated exigencies by the technological development. They try to protect some collective interests and they are based on the value of solidarity (*fraternité*) between Northern and Southern countries. The REBSP is a fourth generation right because the full implementation will make the democratic structure of the society more dynamic, thus helping the participation of the citizens in the management and resolution of social problems and redistributing the political power. The REBSP will cause a radical change in the political and economic order both at the local and global level. The vindication of the REBSP questions the way in which the states have been answering the new challenges and problems that the welfare of the citizens sets. This right claims an

enlargement of the democratic horizon; a higher level of participation and political and economic decentralization; a change in the international politics based on a comprehensive plan of decolonization and peaceful and equitable political relation among the states; a social and environmental responsible and peaceful use of science and technologies; and the securing of a sustainable and fair development.

If we try to answer *who* is the subject and *what* is the object of the REBSP, it is necessary to realize there is a slow academic and legal process in clarifying these issues and their corresponding obligations. In my opinion, the rightholder is a universal and abstract subject who cannot be specified as in economic, social and cultural rights, though it has to be said that the exercise of the right is collective because we are protecting communal interests. So, when we refer to these rights a collective approach is often called, since they can only be enjoyed by individuals in community. That is, there is an individual rightholder but the right is implemented by a collective effort. This kind of rightholding is demanding the reinforcement of the responsibility of the international community and the presence of individual subjects at the international level, and an increment and expansion of citizens' participation at the local level (Rodríguez Palop, 2002, 141).

The objects of protection are collective interests since through this vindication we are trying to articulate a way to enjoy some collective goods (Rodríguez Palop, 2002, 130). After that, one of the main issues we have to resolve is the definition of such collective interests within pluralistic and multicultural societies. This definition process, certainly, drives us to an *ideal community of dialogue* in which a rational consensus is set up and the specific context of the individuals is surpassed. This process means that we need a new *public sphere*. This new public sphere is a deliberative space where the common-wealth is articulated and the differences are discussed. It will cause a renovation of the political culture in the long term, a reformulation of our social responsibility and of the democratic *praxis* (Innerarity, 2006, 14-15). Such rational consensus and public sphere will be only possible if people are capable, first, to interact leaving aside their individual and strategic interests; second, to denounce those actions that

put life on earth in danger or promote exclusion, exploitation and marginalization of millions of human beings; and, third, to articulate a new and wider dimension of the moral and legal responsibilities (Rodríguez Palop, 2002, 146).

Regarding the duties of the State in recognizing, protecting and developing the REBSP, one notes that this right is related to goals, policies and programmes. So, we have to admit it is necessary to set up systems of legal protection much more ductile and flexible. However, as Asbjørn Eide and Allan Rosas have said, «it [is] essential that the concept of right is included in such goals and programmes» because «fundamental needs should not be at the mercy of changing governmental policies and programmes, but should be defined as entitlements» (2001, 6), which ensure an adequate standard of living and judicial protection in order to be invoked in courts of law and applied by judges. Rights require the existence of some duty-holders, and the primary responsibility for the realization of human rights rests within the State. Under international law, duties for human rights (respect, contribute, assist, provide, achieve, protect, fulfil, facilitate, provide) are primarily held by States though, subsidiary, some people and public institutions can be obliged and, in some cases, the obligation could even be universal because, when it comes to know what resources are available to the State in order to fulfil the rights, «the question is not what resources are in the hands of the government as compared to privately owned resources but on the total resources of the country as a whole» (Eide, 2001, 27).

3. The REBSP as interrelated and interdependent with the freedom to seek, receive and impart information through the Internet.

Regarding the interdependence and interrelation between the REBSP and the right to seek, receive and impart information, it is a good idea to pose such relation from the point of view of a political theory that concedes a preponderant role to dialogue, democracy and political participation rights as cornerstones of the social system. In my opinion, the right to seek, receive and impart information because of the technological advances, mainly the Internet, may have a substantial contribution in the attainment of a free society protecting

information pluralism and free access to information and ideas[3]. The exercise of the right to freedom of expression, particularly by the media, including through information and communication technologies such as the Internet, can have a positive contribution while fighting against racism, racial discrimination, xenophobia and related intolerance, and preventing human rights abuses. The free flow of information also allows us to hear the voices of the excluded whose rights have been traditionally violated (Report, 2001, para. 6). We could say that if the freedom of information through the Internet is protected and promoted by the states, we might be able to reverse the current social situation (Castells, 1998). This interrelation between the REBSP and the freedom of information will shape a more dynamic democratic structure of the society, thus helping the participation of the citizens in the management and resolution of social problems, redistributing the political power and expanding the democratic horizon.

The freedom to seek, receive and impart information through the Internet, from a subjective point of view, protects autonomy because it is one of the rights human beings have in order to face groups of power, public or private, that might manipulate, monopolize and censure information or limit the access to information. This presupposes a political liberation for people, unchaining them from uncritical adherence to theories or ideologies and allowing them to use whatever information or opinion are available from a variety of sources. From an objective point of view, this right is «a fundamental and inalienable right that contributes to the consolidation and the development of democracy, in addition to creating bridges between different peoples and civilizations» (Report, 2005, para. 49). The exercise of the right to freedom of opinion and expression is one of the foundations of any democratic society; it is enabled by a democratic environment which, *inter alia*, offers guarantees for its protection; it is essential to the full and effective participation in a free and democratic society; it is instrumental to the development and strengthening of effective democratic systems; and it is an important indicator of the level of protection of other

[3] Mobile phones, in particular, and the global communications network, broadly speaking, have brought benefits in this topic as we have been able to see when Myanmar's monks marched in defiance of the military junta. The information was spread all around the world sending photographs and videos using mobile phones.

human rights and freedoms. In this sense, freedom of expression is not only a limit for protecting citizens from the interferences of the state but also a fundamental principle in any democratic society (Ryssdal, 1997, 60)[4].

This essential role of the freedom of expression justifies both an abstentionist and promotional attitude by the state. Democratic institutions offer guarantees for its protection as well as an enabling environment for its exercise and promotion. In this sense, the UN Special Rapporteur encouraged governments «to ensure that the exercise of the freedom of opinion and expression through the media is open and accessible to various actors of the civil society, local communities and minorities, vulnerable groups, in addition to economic and political groups» (Report, 2004, para. 85). So, we have to overcome the traditional thesis on the abstentionist attitude of the state with the civil and political rights because these rights also need a promotional attitude in order to create the conditions for people to benefit from the freedom of expression and the exchange of information and ideas (Cohen-Jonathan, 1989, 459)[5].

The freedom to seek, receive and impart information is included in article 19.2 of the International Covenant on Civil and Political Rights (ICCPR) as a content of the right to freedom of expression. We can read there that «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

[4] ECHR, *Handyside*, 1976, para. 49, declares that freedom of expression is one of the cornerstones of any democratic society and a necessary condition in order to achieve human and social progress. States must protect those controversial ideas and information within society. UN Special Rapporteur on Freedom of Expression and Information has stated that «several governments, with the active support of some transnational corporations working in this field, have closely been monitoring the web in order to identify and stop various forms of opposition and criticism. Ordinary citizens have been arrested or harassed by authorities only because they dared express their opinion through an e-mail or through the reading of a website» (Report, 2007, para. 11). See ECHR, *Karakoç*, 2002, para. 43: «La Cour ne sous-estime pas les difficultés liées à la lutte contre le terrorisme. Toutefois, elle observe que les requérants s'exprimaient en leur qualité de dirigeants syndicaux et de représentant de la presse, dans le cadre de leur rôle d'acteur de la vie politique turque, n'incitant ni à l'usage de la violence ni à la résistance armée ni au soulèvement (...) Au contraire, ils assumaient leur rôle important d'alerte de l'opinion publique concernant des actes concrets pouvant porter atteinte aux droits fondamentaux». See also *in senso contrario*, ECHR, *Zana*, 1997, para. 53-54; *Sürek I*, 1999, para. 62-65; *Sürek III*, 1999, para. 40-42.

[5] ECHR, *Informationsverein Lentia*, 1993, para. 38, declares that States are guarantors of the freedom of information and must promote the creation of media.

of his choice»[6]. Freedom of expression is then a plural freedom because it includes freedom of information and freedom of opinion. The difference between them is what is transmitted (the message): facts or opinions[7]. Both freedoms share the right to communicate and receive but only the freedom of information includes the right to research (Català, 2001, 97-98). However, it is necessary to notice that it is very difficult to find a pure exposition because facts and opinions are usually mixed[8].

Limiting the scope to the freedom of information, it covers the right to impart facts, news and information which must be truthful[9]. This requirement makes freedom of information closely related to the right of research. As Alexandre Català says, if the freedom of research is not covered by the freedom of

[6] ICCPR article is more extensive than UDHR article since it includes the right to seek and receive information.

[7] ECHR, *Lingens*, 1986, para. 46, states the difference between freedom of opinion and freedom of information: «In the Court's view, a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof». Opinions, then, are not bound by truthfulness criteria. In this sense, ECHR, *Monnat*, 2006, para. 56-57: «the report was not presenting an indisputable truth but rather one possible interpretation of relations between Switzerland and Germany. The Court reiterates that it is an integral part of freedom of expression to seek historical truth, but considers that it is not called upon to settle the issue of the role actually played by Switzerland in the Second World War, which is part of an ongoing debate among historians».

[8] ECHR, *Oberschilck*, 1991, para. 63, ECHR, *De Haes*, 1997, para. 47, ECHR, *Jerusalem*, 2001, para. 43, ECHR, *Brasilier*, 2006, para. 36, state that in some cases it is necessary to make a preponderant judgment between facts and opinions: «La Cour rappelle également que, même lorsqu'une déclaration équivaut à un jugement de valeur, la proportionnalité de l'ingérence dépend de l'existence d'une base factuelle pour la déclaration incriminée puisque même un jugement de valeur totalement dépourvu de base factuelle peut se révéler excessif». (In French only)

[9] The truthfulness principle demands a strong inquiry of the facts (Català, 2001, 107). See ECHR, *Goodwin*, 1996, para. 39; ECHR, *Fressoz et Roire*, 1999, para. 54 and ECHR, *Monnat*, 2006, para. 67. In the latest case is stated: «the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the provision that they are acting in good faith and provide reliable and precise information in accordance with the ethics of journalism». Truthfulness is a *exceptio veritatis* when freedom of information collides with right to honour but not when collides with right to privacy (ECHR, *Markt Intern Verlag GmbH et Klaus Bermann*, 1989, para. 35; ECHR, *Castells*, 1992, para. 48; ECHR, *Mamère*, 2006, para. 23). In this sense, the UN Special Rapporteur has said that no one should be penalized for statements which are true (Report, 2001, para. 12). In ECHR, *Mamère*, 2006, para. 24, is said that French government stated that *exceptio veritatis*, according to art. 35 Press Act, can only be used when facts date back to 10 years. In this case we can read: «The Government argued that the principle was justified by the need for the law to ensure that the reality of past events could not be challenged without any limit in time (...) In general terms it does see the logic behind a time bar of this nature, in so far as the older the events to which allegations refer, the more difficult it is to establish the truth of those allegations. However, where historical or scientific events are concerned new facts may emerge over the years that enrich the debate and improve people's understanding of what actually happened. ».

information, it will not be possible to demand truthfulness because it would be impossible to check and prove the facts (2001, 138). The right of research covers the right of citizens and journalist to seek facts and news; to access and to consult publics archives; to interview persons, important figures, politicians and public servants... This right also covers the freedom of movement since sometimes researching will need some travels through the country[10]. In this sense, Gérard Cohen-Jonathan asserts that the right of research is basic for journalists and foreign press correspondents (1989, 451). They will make a more frequent use of this right because they will be broadcasting news by traditional mass media (radio, TV, journals, newspapers) or by the new channels based on the Internet. Notwithstanding the importance of this right for journalists, it is not possible to reject citizens as holders of this right because they are also playing an important role in imparting information through the Internet.[11]

The UN Special Rapporteur has stated that «the new technologies and, in particular, the Internet are inherently democratic, provide the public and individuals with access to information sources and enable all to participate actively in the communication process» (Report, 2002, para. 67). This is only partly true because, as Saskia Sassen suggests, electronic space is characterised by both power concentration and by openness and decentralization. Although we tend to view electronic space as characterized by the distribution of power and the absence of hierarchy, the Internet is also making other forms of power possible because the three properties of electronic networks (speed, simultaneity, and interconnectivity) are enjoyed by just a few in concentrated places: «the new information technologies have not only reconfigured centrality and its spatial correlates, they have also created new spaces for centrality» (1998, 177-178, 181)[12]. The widely accepted notion that location or agglomeration has become obsolete, now that global

[10] See ECHR, *Piermont*, 1995.
[11] ECHR, *Sunday Times*, 1976, para. 65.
[12] The UN Special Rapporteur observed that in the final phase of the World Summit of the Information Society, held in Tunis from 16 to 18 November 2005, there was much emphasis and focus on purely technical and business matters while the link between new technologies and human rights was almost completely neglected (Report, 2006, para. 31). In this sense, we should ensure that the Internet serves not only commercial interests and that commercial initiatives coexist with social and cultural projects.

telecommunication advances are allowing for maximum dispersal, is only partly correct because the territorial dispersal facilitated by telecommunications advances has redefined the concept of agglomeration. In this sense, it is necessary to facilitate equal participation in, access to and use of information and communications technology such as the Internet, and to encourage international cooperation aimed at the development of media and information and communication facilities in all countries.

Nevertheless, the Internet has substantially changed the right to seek, receive and impart information since the frontiers have literally *gone with the wind* and this phenomenon has caused a delocation of the information. Delocation means that the person who broadcasts and the person who receives, and even the information message, are not located or agglomerated in a geographical or spatial point, as they were when freedom of information was exercised by traditional means of communication such as journals, newspapers, radio stations or TV channels. The Internet has had an amazing impact on changing the roles played by the ones who receive and who impart the information. Traditionally, the roles were clearly distributed but in the current situation everybody without discrimination whether they are journalists[13], scientific researchers[14], artists[15], politicians[16], members of trade unions[17], citizens or foreigners[18] has a potential capacity to impart information. Therefore every individual can be deemed to hold a right to seek, receive and impart information and ideas through a medium like the Internet about any topic, subject or issue and discuss any problem relating to it freely, through any media of his or her choice and on his or her responsibility[19].

[13] ECHR *Sunday Times*,1976; ECHR, *Sunday Times*, 1979; ECHR, *Lingens*, 1986; ECHR, *Observer et Guardian*, 1991; ECHR, *Jersild*, 1994; and ECHR, *Monnat*, 2006, *inter alia*, have stated that freedom of information and freedom of opinion have a special relevance when practicing for journalists and politicians.
[14] ECHR, *Hertel*, 1998, para. 50; ECHR, *Baskaya et Okçuoglu*, 1999; ECHR, *Erdogdu et Ince*, 1999.
[15] ECHR, *Yasar*, 2003.
[16] ECHR, *Brasilier*, 2006; ECHR, *Alinak*, 2006.
[17] ECHR, *Karakoç*, 2003.
[18] ECHR, *Salvation Army*, 2001, para. 82.
[19] HRC, *Hertzberg et al. vs. Finland* (61/79).

Although it could be seen as redundant because there is not a true communication without reception, freedom of information has an active feature (research and impart) and a passive feature (receive) when implementing public opinion. The relevance of the freedom of information is reinforced by the right to receive information, especially when general interest issues are disseminated[20]. It means that the state has also the duties to respect and promote the right to receive any information without public or private interferences[21]; to inform in some cases, for instance, danger for life, physical integrity or public health[22]; to promote the transmission of some kind of information, for instance, prevention and treatment of HIV/AIDS[23].

Imparting truthful information sets out the right to establish mass media. This right is contrary to the state monopoly in the media sector, which is present in many countries even today. It is true that there were technical conditions that could limit the establishment of mass media, but nowadays such conditions are gone because of the scientific progress and new technologies based on the Internet. Could states subject the establishment of new mass media based on the Internet to a licence? In general, formalities should be kept to a minimum and the prohibition of mass broadcasting without a licence may be justified as a measure to prevent confusion of signals and blockage of the airwaves. But due to technical progress, such conditions cannot be justified in numbers of frequencies and available channels[24]. Nowadays, because of the Internet, we have thousands of journals, radio stations, TV channels and blogs which do not consume any paper lot or frequency band. Therefore, it is not possible to admit in a democratic society a system of licence for limiting the mass media based on the Internet because the states have the duty to facilitate the access to information and to promote a pluralistic approach to information. They must encourage a diversity of ownership of media through, *inter alia*, transparent licensing systems and effective regulations on undue concentration of

[20] ECHR, *Lingens*, 1986; ECHR, *Jersild*, 1986; ECHR, *Sunday Times*, 1989; ECHR, *Guardian et Observer*, 1991; ECHR, *Oberchlick*, 1991; ECHR, *Fressoz et Roire*, 1999.
[21] ECHR, *Gaskin*, 1989, para. 74.
[22] ECHR, *Guerra*, 1998, para. 52.
[23] Report, 2004, para. 66.
[24] ECHR, *Informationsverein Lentia*, 1993, para. 39.

ownership of the media in the private sector (Català, 2001, 157)[25] because «media directly run by private business corporations tend to be less impartial and professional than media run by an independent body such as a media authority or a blind trust» (Report, 2005, para. 55).

What kind of information can be seeked, imparted and received? What kind of content can the messages have? The information covered under article 19.2 ICCPR is not only the political information but also every form of subjective ideas and opinions capable of transmission to others, such as commercial news and information, advertisement, works of art[26]. Nevertheless, we can distinguish the information with *public interest* from the information with *private interest*. The former is more related to the freedom of information and freedom of expression than the latter (Català, 2001, 164). In this sense Gerard Cohen-Jonathan has suggested that the European Court of Human Rights (ECHR) jurisprudence has established a hierarchy and on the top is the information concerning the common-wealth (1993,70). Such public interest is not focused on politics but on any matter that could have an influence on public opinion[27]. In this sense, States are, then, obliged to respect the freedom of individuals to seek, receive and impart information about scientific progress, «which includes not only natural and biological sciences, but also progress in the social sciences and the humanities»; to respect the application made as a result of new scientific insight and the right to enjoy the benefit of such progress; and «should actively promote the interplay of ideas and information among scientific researchers throughout the world» (Eide, 2001, 295, 298). In my opinion, the concept “human rights” is included among the progress in the social sciences and citizens have the right to seek, receive and impart information about human rights, NGO’s activities related to human rights, and the States are obliged to respect and promote this right. However, we must admit that it is difficult to say *a priori* what matters have a public interest. As we have seen, they will be identified through a free discussion between different stances.

[25] ECHR, *Groppera Radio*, 1990; ECHR, *Informationsverein Lentia*, 1993.
[26] HRC, *Ballantyne et al. vs. Canada* (359, 385/89); ECHR, *Groppera*, 1990, para. 55.
[27] ECHR, *Thorgeir Thorgeirson*, 1992; ECHR, *Karhuvaara*, 2004, para. 44-45; ECHR, *Baskaya et Okçuoglu*, 1999, para. 62.

Artistic messages, which are also covered by the freedom of expression, deserve special attention because offense can be caused by what is said as well as by the manner in which the opinion is expressed. Information and opinion can be expressed by word, symbolic language, photographs, paints, stills, plays, drawing and caricatures (Report, 2007, para. 22-37)[28]. Those who create, play, propagate or exhibit any work of art contribute to the essential exchange of ideas and opinions within a democratic society. From which it can be deduced that states have an obligation to no encroach unduly upon freedom of expression[29]. Artists and promoters certainly have special duties, responsibilities and limits. In this sense, it is interesting to remember the case of the Danish cartoons depicting the Prophet Muhammad having horns, wearing a headdress in the shape of a bomb and proclaiming that suicide bombers had depleted the supply of virgins used to reward martyrs, and how the Internet extended the offence around the world, making the cartoons accessible to all Muslims. This case has been analysed by the UN Special Rapporteur in his 2007 Report and concluded that «The exercise of freedom of expression by media professionals demands good judgement, rationality and a sense of responsibility. Insulting religions, deep-rooted beliefs and ethnic identities through the use of stereotypes and labelling is not conducive to creating an enabling environment for a constructive and peaceful dialogue among different communities. Polarization based on distorted arguments can spread ethnic and religious hatred thus endangering delicate social and cultural balances, which are the results of relentless efforts to consolidate a harmonious multicultural society» (para. 69). In my opinion, the scope of freedom of information will also depend on the medium used and any democratic society can support legal interventions if they are undertaken, in order to protect religious and political sensibilities from outrage by a public act. In this sense, we could admit the legal interventions and the punishment of the offender through a balancing test in which the *seriousness* of the offense must be weighed against the *reasonableness* of the offending conduct (Feinberg, 1985, 35-44). It is not possible to argue for the good of such cartoons by drawing on the importance of

[28] ECHR, *Müller*, 1988, para. 27.
[29] ECHR, *Müller*, 1988, para. 33.

free expression because when we balance the seriousness and the reasonableness, we find that the result is profoundly offensive.

Regarding the medium in which the message is spread, there is not any restriction and all forms of the media, including the print media, radio, television and the Internet are important in the exercise, promotion and protection of the right to freedom of opinion and expression[30]. It is interesting to observe that some media have more impact than others. The potential impact of the medium concerned is an important factor and this can have some effect on the limits of the freedom of information[31]. We could express, however, little reluctance when freedom of expression is exercised through a non-conventional medium as pamphlets or libellous. In this sense, we could ask if the Internet is one of them. Once and for all, the answer is negative[32]. Although article 19.2 ICCPR does not make any reference to the Internet, it is an article with an open normative clause by saying that information and ideas can be seeked, received and imparted through any media. This kind of clause is the most suitable when we have to deal with scientific progress. From such a clause we can assert that the Internet is included in article 19.2 ICCPR. The global development caused by the Internet, on the other hand, proves that the "regardless frontiers" mention is real. Moreover, the interplay of ideas and information among scientific researchers throughout the world is now possible and «vital to the healthy development of science and technology» (Eide, 2001, 298).

The promotion of the right to seek, receive and impart information through the Internet is costly for States, first, because of the infrastructure requirements, as Sassen suggested, which need an enormous amount of money. The levels of technical development depend on public and privates economic resources and for this reason «we are seeing a spatialization of inequality evident both in the geography of the communications infrastructure and in the emergent geographies in electronic space itself» (Sassen, 1998, 182). Second, the interrelation and interdependence of human rights are illustrated by the

[30] ECHR, *Jersild*, 1986, para. 31.
[31] See ECHR, *Pedersen et Baadsgaard*, 2004, para. 79.
[32] We should discuss if some informations on *pirates websites* and opinions on *no modulate blogs* are covered by the freedom of expression.

connection between high rates of illiteracy, especially among women, and unequal access to education for girls and boys, women and men, and the full enjoyment of the right to freedom of opinion and expression. Moreover, the promotion of this right must include, among others, a gender perspective because sometimes we forget that women are the fifty percent of the world population and promoting women's rights is of utmost significance. The aim is to facilitate equal participation in, access to and use of, information and communications technology such as the Internet. The increasing international focus on human rights has contributed to raising awareness in regard to some specific human right problems faced by women. Despite the legal rules enshrining the principle of equality, women's rights have had a marginal role within the human right discourse and there is incapacity or unwillingness to pay suitable attention to gender specific topics in the actual application of human rights (Byrnes, 1992; Gallagher, 1997). In this sense, the principle of equality as differentiation and the principle of non-discrimination should be guaranteed through legal rules and policies in order to face both direct discrimination and indirect discrimination. Katarina Frostell and Martin Scheinin suggest that both kinds of discrimination can play a crucial role in order to develop a gender sensitive interpretation of the human rights issues (2001, 335-336) and they propose the adoption of the *indirect discrimination* principle in order to cover all the «unreasonable differential treatment based on gender neutral ground which affects, proportionately, more women than men» (2001, 337).

The latest issue of this epigraph is who rules over the Internet. Here we have two options. The first one is a libertarian solution based on a private non-profit corporation, the Internet Corporation for Assignated Names and Numbers (ICANN), that has so far allocated Internet domain names on a purely technical basis and that has no control over the content. The second one, supported by the current UN Special Rapporteur, is to establish «an intergovernmental organization on Internet governance» in order to deal with «the proliferation, through worldwide availability of Internet resources, of websites that could increase the phenomena of child pornography and prostitution, the sexual exploitation of women, racial discrimination, xenophobia, hat speech and similar human rights violations» (Report, 2006, para. 38). In January 2007 the UN

Special Rapporteur underlined with his statement that: «The creation of an international organization, which would govern Internet with a firm human rights approach, is a priority for the United Nations (...) Such an organization will develop and apply, through the joint work of relevant national agencies, the private sector and civil society, shared principles, norms, rules, which will shape the evolution and the use of the Internet» (Report, 2007, para. 38).

4. Limits to the right to seek, receive and impart information through the Internet.

If we do not want to have a *naïve* discourse when dealing with human rights, we have to be aware of their limits. Limitation means that certain actions are excluded from the protection circle each human right provides to the rightholder. In our case, for instance, access to some kind of information is not included in the right to seek, receive and impart information through the Internet (child pornography or spreading hate information). Nevertheless, the existence of human rights limits cannot be seen as a *carte blanche* in the hands of the State because the limits are, at the same time, limited since it is not possible to subject human right to such restrictions that jeopardize its exercise or protection. As stated in the *Siracusa Principle*s, «the scope of a limitation (...) shall not be interpreted so as to jeopardize the essence of the right concerned» (2)[33]. The limits of the freedom of expression and freedom of information are not the rule but the exceptions, which are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom[34]. So, the form of censorship and surveillance some governments are adopting in order to block access to aspects of the Internet and to monitor email traffic is not justified because it jeopardizes the essence of the freedom of information.

Moreover, sometimes we are not talking about limitation but delimitation. Delimitation basically means interpretation. Delimitation is an internal limit posed by the Constitution or derived from the interdependence of human rights;

[33] *Siracusa Principles on the Limitations and Derogation of Provisions in the International Covenant on Civil and Political Rights* were adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Economic and Social Council, United Nations) in 1984 (UN Doc E/CN.4/1984/4).
[34] ECHR, *Church of Scientiology Moscow*, 2007, para. 86.

on the contrary, limitation is an external limit posed by one normative authority with legal competence, according to the Constitution, and it means to enumerate the actions not covered by the human right[35].

How can the freedom of access to information on the Internet be limited? Generally speaking, it can be said that there was an aspiration to set up a rigorous system of restrictions because we are dealing with a right that can be subject to only a few restrictions but such aspiration is attenuated for the diversity of objectives which allow to limit the freedom of information and for the HRC and ECHR *margin of discretion* and *margin of appreciation* jurisprudence (Lezertua, 1993, 368). These margins can only be accepted with an *iuris tantum* presumption on the decency of the states, which, as we know, has a variable geometry.

The system of limits is composed of two general principles (prescribed by law, and necessary in a democratic society) and four specific objectives (harm to others, offence to others, national security and public morals). However, in any case, no person can be subject to prior censorship[36].

5.1. General Principles

5.1.1. Prescribed by Law

The first general principle is the *rule of law*. It means that the limit is to be established in a legal rule which must be in force at the time the limitation is applied[37] . The legal rule has a material meaning so the limits can be established in an act, a subordinated rule or a judicial decision[38]. The administration internal rules are excluded, except if they can be known by the

[35] ECHR, *Çetin*, 2003, para. 60-61: «Il n'est pas possible de concilier cette disposition [qui prévoit l'impossibilité de procéder à un contrôle juridictionnel des actes émanant du préfet de la région soumise à l'état d'urgence] avec le principe de l'état de droit [...]. Le régime de l'état d'urgence ne constitue pas un régime arbitraire échappant à tout contrôle juridictionnel. On ne peut pas douter que les actes individuels et réglementaires faits par les autorités compétentes sous l'état d'urgence doivent être soumis à un contrôle juridictionnel. Le non-respect de ce principe n'est pas envisageable dans des pays dirigés par un régime démocratique et fondés sur la liberté. Toutefois, la disposition litigieuse figure dans un décret-loi qui ne peut faire l'objet d'un contrôle constitutionnel (…)».

[36] ECHR, *Lingens*, 1986, para. 44.

[37] ECHR, *Kruslin*, 1990, para. 29.

[38] ECHR, *Huvig*, 1990, para. 28; ECHR, *Kruslin*, 1990, para. 29; ECHR, *Cantoni*, 1996, para. 29; ECHR, *Baskaya y Okçuoglu*, 1999, para. 36.

citizens. The legal rule can be written or can be part of a non-written legal system, so the Common Law and traditional rules are included[39]. Obviously, the rule of law principle tries to seek foreseeability and accessibility because citizens have to be able to adapt their behaviour and to foresee the consequences of their actions[40]. The scope of the notion of foreseeability depends on the text, the issue and the persons addressed[41]. The rule of law combats arbitrariness not discretionality[42]. Last, the rules have to be understandable, avoiding generic or vague legal formulations[43] and broadly worded justifications[44]. This requirement must be maximized when dealing with criminal laws[45]. In this sense, the *nullum crimen, nulla poena sine lege praevia* principle demands the crime will be defined clearly by the Law. It means that

[39] ECHR, *Sunday Times*, 1979.

[40] ECHR, *Silver*, 1983; ECHR, *Çetin*, 2003, para. 38; ECHR, *Baskaya y Okçuoglu*, 1999, para. 77-78, state it is necessary an effective system of judicial and administrative appeals for protecting human rights and Courts independence and impartiality must be guaranteed. ECHR, *Church of Scientiology Moscow*, 2007, para. 91-92, demands a period of time within administrative appeals for rectifying mistakes: «(...) that approach deprive the applicant of an opportunity to remedy the supposed defects of the applications (…)», and the demanded requirements should be affordable, «(…) the Court considers that the requirement to enclose originals with each application would have been excessively burdensome, or even impossible, to fulfil in the instant case. The Justice Department was under no legal obligation to return the documents enclosed with applications it had refused to process and it appears that it habitually kept them in the registration file. As there exists only a limited number of original documents, the requirement to submit originals with each application could have the effect of making impossible re-submission of rectified applications for re-registration because no more originals were available. This would have rendered the applicant's right to apply for re-registration as merely theoretical rather than practical and effective as required by the Convention».

[41] ECHR, *Canton*, 1996, para. 35; ECHR, *K.A. y A.D.*, 2005, para. 54.

[42] ECHR, *Kruslin*, 1990, para. 30.

[43] ECHR, *Müller*, 1998, para. 29, quoting *Barthold*, 1985 para. 47 and *Olsson*, 1988, para. 61, emphasised the impossibility of attaining absolute precision in the framing of laws, particularly in fields in which the situation changes according to the prevailing views of society. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. Criminal-law provisions on obscenity fall within this category.

[44] ECHR, *Çetin*, 2003, para. 63: «While it is certainly possible that the articles that led to the seizure of the newspapers would have exacerbated an already tense situation, the decision to impose the ban contained no reasons and made no reference to the seizure warrants issued by the judges in Istanbul. In addition, the ban was not a preventive measure taken as a result of the seizures to which the Government refer, since the seizure of a publication as a preventive measure may only be ordered by a judge in criminal proceedings of a different kind to those which were brought in the present case. Accordingly, in the absence of detailed reasoning accompanied by proper judicial scrutiny, the decision to implement such a measure lays itself open to various interpretations». ECHR, *Hadjianastassiou*, 1992, para. 33: «The Contracting States enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6 (art. 6). The national courts must, however, indicate with sufficient clarity the grounds on which they based their decision. It is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him».

[45] ECHR, *Open Door and Dublin Well Woman*, 1992, para. 58.

any person, with or without legal assistance, has to be able to know from the text of the law the actions and omissions which are forbidden[46]. The principle demands that the criminal law can not be imposed by analogy but, no matter how clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation[47].

5.1.2. Necessary in a democratic society.

The second general principle means that because of the relevance of freedom of information in a democratic society, the necessity of the limit must be proved by the state. We can say that the limitation of any human right is necessary in a democratic society if it responds to an urgent social need for pursuing a legitimate aim and it is in proportion[48]. Such necessity can be stated proving there were not alternative measures with lower intensity and similar effects[49]. The word "necessary" imports an element of proportionality because the law must be appropriated and adapted to achieve one of the ends enumerated (Joseph, Schultz & Castan, 2004, 525). However, it is necessary to review the States limiting decisions because, though we might presuppose that the States exercise their discretion reasonably, carefully and in good faith, we must look at the interference in the light of a particular case as a whole and determine whether it was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it are relevant and sufficient. In so doing, we are checking whether the national authorities are applying standards which are in conformity with the basic principles embodied in ICCPR and in ICESCR (International Covenant on Economic Social and Cultural Rights) and, moreover, that their decisions are based on an acceptable

[46] ECHR, *Kokkinakis*, 1993, para 52; ECHR, *Cantoni*, 1996, para. 29.
[47] ECHR, *Baskaya y Okçuoglu*, 1999, para. 36 and 39: «The Court recalls that, according to its case-law, Article 7 embodies, *inter alia*, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (...) However clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances».
[48] ECHR, *Smith y Grady*, 1996, para. 87; ECHR, *Norris*, 1988, para. 41.
[49] ECHR, Castells, 1992, para. 46; ECHR, *Raichinov*, 2006, para. 51: «the Court reiterates that the dominant position which those in power occupy makes it necessary for them to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified criticisms of their adversaries». ECHR, *Baskaya y Okçuoglu*, 1999, para. 66 warns against severe fines as deterrence instrument.

assessment of the relevant facts[50]. As said in the *Siracusa Principles*, "necessary" implies that the limitation responds to a pressing public or social need, pursues a legitimate aim and is proportionate to that aim (9). Moreover, «the expression "in a democratic society" shall be interpreted as imposing a further restriction on the limitation clauses it qualifies» (19) and «the burden is upon a state imposing limitations so qualified to demonstrate that the limitations do not impair the democratic functioning of the society» (20)[51].

5.2. Specific Objectives

Art. 19.3 ICCPR allows limitations to the freedom to seek, receive and impart information and ideas. The exercise of this freedom comes with special duties and responsibilities and for this reason certain restrictions are permitted. The limits may relate either to the interest of other persons of the community as a whole. In paragraph 3 we can read that the restrictions must be provided by law and must be necessary for (i) the respect of the rights and reputations of other, and (ii) for the protection of national security, public order, public health or public morals.

5.2.1. Harm to Others.

Harming others by seeking and imparting information through the Internet is an important limit of the freedom of expression. An act of harming is one which causes *harm* to people. The word "harm", as Joel Feinberg states, «is both vague and ambiguous, so if we are to use the harm principle to good effect, we must specify more clearly how harm is to be understood» (1984, 31-32). In this sense, Feinberg suggests a normative sense «which the term must bear in any plausible formulation of the harm principle. To say that *A* has harmed *B* in this sense is to say much the same thing as that *A* has wronged *B*, or treated him unjustly. One person wrongs another when his indefensible (unjustifiable and inexcusable) conduct violates the other's right» (1984, 32).

5.2.2. Offence to Others.

[50] ECHR, *Church of Scientiology Moscow*, 2007, para. 87.
[51] The freedom of expression can be limited to public servants, judges, police force or military. See ECHR, *Observer et Guardian*, 1991; ECHR, *Sunday Times*, 1991; ECHR, *Rekvenyi*, 1999; ECHR, *Hadjianastassiou*, 1992; ECHR, *Grigoriades*, 1997.

It is necessary to distinguish “harm to others” and “offence to others” because offence is surely a less serious thing than harm (Feinberg, 1985, 2, 25)[52]. The word ‘offence’ also has a normative sense that includes those states only when caused by the wrongful or right violating conduct of others. It is necessary to determinate who are the victims with genuine grievances and attribute to them a right to complain against identified wrongdoers about the way in which they have been treated. In this sense, defamation is an intentional false communication that injures another person’s reputation without consent[53]. Slander and libel are two forms of defamation. The first one is a defamatory statement expressed in oral form, while libel is written. In order to to regain balance, it will be necessary to weight the seriousness of the offence. Joel Feinberg suggests the following standards: (i) *the magnitude of the offence*, which is a function of its intensity, duration and extent; (ii) *the reasonable avoidability*; (iii) *the* volenti *maxim*; (iv) *the discounting of abnormal susceptibilities* (Feinberg, 1985, 35).

Notwithstanding the necessity to address this issue, there are abundant reasons for being extremely cautious in applying the offence principle because there are at least six different classes of offended states that can be caused by the blameable conduct of others and some of them are not a good reason to support a human right limitation (affronts to senses; disgust and revulsion; shock to moral, religious or patriotic sensibilities; shame, embarrassment (including vicarious embarrassment) and anxiety; annoyance, boredom and frustration; fear, resentment, humiliation and anger) (Feinberg, 1985, 10-14).

5.2.3. Public order and national security

Concerning public order and national security, they may be defined, according to the *Siracusa Principles*, as «the sum of rules which ensure the peaceful and effective functioning of society or the set of fundamental principles on which society is founded» (22). Public order and national security limits on article 19

[52] Against this position see Schauer, 1993.

[53] ECHR, *Brasilier*, 2006, para. 41: «les limites de la critique admissible sont plus larges à l’égard d’un homme politique, visé en cette qualité, que d’un simple particulier : à la différence du second, le premier s’expose inévitablement et consciemment à un contrôle attentif de ses faits et gestes tant par les journalistes que par la masse des citoyens ; il doit, par conséquent, montrer une plus grande tolérance».

ICCPR rights include prohibitions on seek, receive and impart information which may incite crime, violence or mass panic (Joseph, Schultz & Castan, 2004, 530) and are also taken «to protect the existence of the nation or its territorial integrity or political independence against force or threat of force»[54]. It is a must to prove that the information is a serious and real threat to national security or causes a damage to the order necessary to national survival[55]. Moreover, the State must specify the precise nature of the threat. In this sense, the country's political context is just an indirect justification of the restriction of rights included in art. 19 ICCPR[56]. Although it is often argued that some nations, by virtue of their cultural or political difference, should be permitted to 'postpone' or 'redefine' their obligations to respect certain political rights, this theory must be denied because there is no cultural or political exception that could justify human rights restrictions. In this sense, we must be reluctant to allow restrictions on freedom of expression and access to information for the purpose of national security and public order, at least in the absence of detailed justifications[57].

National security and public order are perhaps the limitations which are most often abused; they are often invoked to protect the elite position of the government of the day, rather than to truly protect the rights of a State's population (Joseph, Schultz & Castan, 2004, 540). In this sense, searching information about human rights or NGO activities is not a danger for national security, public order and public morality[58]. "Human rights" *per se* cannot be included in the banned content because it would mean to distort the whole human rights philosophy[59]. In this sense, we can read in the *Siracusa*

[54] *Siracusa Principles*, 29; In ECHR, *Stoll*, 2006, para. 49-52 is discussed the public interest certain information classified as "confidential" may have for public opinion.
[55] HRC, *Kim v Republic of Korea* (574/94), para. 12.4; ECHR, *Hadjianastassiou*, 1992, para. 44-47. In this case is stated that due to the special conditions attaching to military life and the specific "duties" and "responsibilities" incumbent on the members of the armed forces, they are bound by an obligation of discretion in relation to anything concerning the performance of his duties.
[56] HCR, *Mukong vs. Cameroon* (458/91).
[57] HRC, *Sohn v Republic of Korea*, 518/92: «The state party has failed to specify the precise nature of the threat».
[58] *Siracusa Principles*, 22.
[59] HRC, *Kivenmaa vs Finland*, 412/90: «The right of an individual to express his political opinions, including obviously his opinions on the question of human rights, forms part of the freedom of expression guaranteed by article 19 of the Covenant». HRC, *Kim vs. Republic of*

Principles, «the systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violations shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population» (32).

Special attention deserves to be given in the cases in which we argue over the limits to the freedom of information when ideologies or undemocratic ideas such as Nazism, Stalinism, racism, terrorism[60] or religious fundamentalism are the content of the information[61]. In this particular case, we have to take into account the letter and spirit of article 20.2 ICCPR: «Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law». It is crucial that the dissemination of authoritarian

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Korea, 574/94, no State may submit that it is illegal to produce, distribute or receive information that praise and promote human rights. HRC, *Mukong vs Cameroon*, 458/91: «The legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights».

[60] In the case of terrorism, after September 11th 2001, some governments have adopted national security legislation to limit freedom of information on the ground that the work of the media will support, either directly or indirectly, terrorist activities (Report, 2006, para. 71). When some ideas or values such as terrorism communicado are imparted, it is necessary to adopt precautions for dispelling any ambiguity and not becoming apologist. In this sense, it is necessary to examine with precaution the publication of opinions by leaders of organizations that resort to force against the state (ECHR, *Jersild*, 1986, para. 31-34; ECHR, *Zana*, 1997, para. 58; ECHR, *Erdogdu et Ince*, 1999, para. 54; ECHR, *Küçük*, 2002, para. 38-41). In *Jersild* ECHR states: «Taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought - by means of an interview - to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern (...) Both the TV presenter's introduction and the applicant's conduct during the interviews clearly dissociated him from the persons interviewed, for example by describing them as members of "a group of extremist youths" who supported the Ku Klux Klan and by referring to the criminal records of some of them. The applicant also rebutted some of the racist statements for instance by recalling that there were black people who had important jobs. It should finally not be forgotten that, taken as a whole, the filmed portrait surely conveyed the meaning that the racist statements were part of a generally anti-social attitude of the Greenjackets. Admittedly, the item did not explicitly recall the immorality, dangers and unlawfulness of the promotion of racial hatred and of ideas of superiority of one race. However, in view of the above-mentioned counterbalancing elements and the natural limitations on spelling out such elements in a short item within a longer programme as well as the journalist's discretion as to the form of expression used, the Court does not consider the absence of such precautionary reminders to be relevant». In *Erdogdu et Ince*, Judge Bonello says: «I believe that punishment by the national authorities of those encouraging violence would be justifiable in a democratic society only if the incitement were such as to create "a clear and present danger". When the invitation to the use of force is intellectualised, abstract, and removed in time and space from the foci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail.».

[61] On that list can be included any no democratic political ideology.

ideologies and fundamentalist ideas is to be proscribed for the sake of democracy. In this sense, article 5 ICCPR is quite clear because it prohibits interpretation of the ICCPR in such a way so as to grant rights for people to engage in activities aimed at the destruction or limitation of the ICCPR rights (Joseph, Schultz & Castan, 2004, 534)[62].

5.2.4. Public Morals.

The purpose of the prohibition of some information based on public morals tries to reflect and enforce the prevailing moral conceptions within the State as interpreted by the Parliament and by large groups of population[63]. When we are dealing with public morality, we have to take into account it is an ambiguous and vague concept which Courts have tried to outline through their sentences but with no satisfactory results. The ICCPR is generally enunciated in a universal language but it caters for some cultural differences because of the existence of public morals as a limit to certain rights. As Sarah Joseph, Jenny Schultz and Melissa Castan state, «the uncertainty entailed in ICCPR limitations introduces flexibility to human rights interpretation, and generates ideological and cultural debate over the content of human rights guarantees» (2004, 43). So, the ICCPR could be interpreted in a relativist way because public morals differ widely in space and time, and there is no universally applicable common standard. One indication that ICCPR can be interpreted in a relativist way is that the Human Rights Commission (HRC) and the ECHR said that a certain *margin of discretion* or *margin of appreciation* must be accorded to the responsible national authorities: «The Court considers it quite natural that the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole, should enjoy a wide margin of appreciation when they are asked to make rulings on such matters. By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions»[64]. In this sense, it is stated in the *Siracusa Principles* that the States, «while enjoying a certain

[62] See also art. 4 *Declaration on the Elimination of All Forms of Racial Discrimination, and the International Convention on the Elimination of All Forms of Racial Discrimination*.
[63] HRC, *Hertzberg et al. V Finland* (61/79), para. 6.1.
[64] ECHR, Fretté, 1997, para. 41; HRC, *Hertzberg et al. V Finland* (61/79), para. 10.3.;

margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect to fundamental values of the community» (27).

In my opinion, if we accept the theory of the margin of discretion, we are opening the door to an unacceptable restriction on human rights. The margin of discretion means that public morals can be seen as an acceptable limit on human rights and we will be accepting moral relativism because we are not defending a true morality but we are defending a particular social morality as an instrument for society self-protection (Ramiro Avilés, 2006). If we want to know what morality is, we must not ask the rational man but the *reasonable man*. So, we are not really caring about moral content or principles of justice but only for social cohesion what, in my opinion, may be a real danger for human rights because such a doctrine dilutes human rights protection. However, «since the *Toonen* decision in 1994, the HRC has clearly exhibited its disapproval of the culturally relativist argument» (Joseph, Schultz & Castan, 2004, 43)[65]. Stressing the diversity of cultural or moral value runs counter to the major thrust of human rights thinking in the world today, which holds the universality of human rights to be the basic underpinning of the international human rights building (Stavenhagen, 2001, 93). Those theories and legal text which admit social morality as a valid limit for human rights are not taking them seriously and are distorting the sense and meaning of human rights. It is true that societies have different moral values but this fact cannot be used to justify the limitation of human rights but only to describe how society is.

Conclusion

Protecting and promoting freedom of opinion and expression on the Internet, and other communications media, is a central challenge for the future. The realization of a non-discriminatory global information society may represent a leap forward for humankind, opening new paths for human and economic development. If the information society misses the opportunity to make

[65] The margin of appreciation has been rejected in relation to other ICCPR rights in HRC, *Länsman v Finland* (511/92), para. 9.4. See also EHCR, *Open Door and Dublin Well Woman*, 1992, para. 68.

technologies available globally, the social and economic gap between Northern and Southern countries will become deeper than in the past.

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