Internet: the law's response to virtual public space

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The Internet and information and communication technologies (ICTs) are one of the most relevant elements in human progress that have characterised the end of the 20th century. In the area of law, ICTs have created a new reality: electronic administrative law. Spanish regulations have been sensitive to the regulation of services in the society of information and e-commerce, e-administration and in storing data regarding communications. The universal nature of the Internet means that it is a platform for citizen participation, without the applicable legal rules needing to be different.

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1. The Internet: a new alphabet, a new legal reality

The Internet is one of the modalities of information and communication technologies (hereinafter ICTs) that has most revolutionised the information and communication space. The impact it has had as an instrument to access information, removing any kind of border, means it is surely one of the more relevant objective factors in human progress that has characterised the end of the 20th century.

Its desire to be universal has been and continues to be a decisive influence on the new forms that go to make up a state, whether or not democratic, on organising society and, therefore, on exercising and guaranteeing the rights and freedoms of citizens. Law, regulations, as a consubstantial part of the state, now the so-called state-network (Castells 1999, 361 and sub.) and e-administration, in spite of its slow adaptation to new social realities, have started to respond to the effect ICTs are having on citizens and how they organise and conduct themselves. Especially regarding what affects the promotion of education and culture by encouraging public powers and the guarantee of fundamental rights.

UNESCO has been intensely active in encouraging states concerning research into and developing the possibilities of ICTs in order to improve how administrations and public services function, thereby encouraging the use of remote media to facilitate better citizen participation in the decision-making processes in democratic institutions. In this respect, the international institution of culture recognises that ICTs are instruments that support decision-making and potentially enrich the forms of democratic participation, a good and incipient example of which is the incorporation by some states of electronic voting in their electoral legislation.

The progressive prevalence of ICTs in the sphere of public authority, private corporate and citizen organisation and action in general has led UNESCO itself to speak of a

revolution in the world of information and communication, which can be compared with the appearance of a new alphabet, given the universal nature of digital representation. And insofar as communication networks are a new way to access and communicate information, of equal or greater relevance than what is currently provided by conventional media, UNESCO has even suggested to the international community the need to take suitable measures to recognise and encourage the human right of access to communication networks as another way to broaden the scope of citizen participation in public affairs (González de la Garza 2004, 539).

This right to universal access to cyberspace must allow public powers to foment multilinguism and the diversity of cultures on world networks, as well as access under equal conditions to information of public interest. And it must also contribute to training people, provided, of course, that ICTs are understood as what they truly are, i.e. an instrument to develop prior conditions which public authorities must guarantee and without which (as we were reminded not so longer ago by Professor Castells)[1] the Internet and ICTs in general are pure fallacy. These prior conditions are, firstly, achieving a suitable level of education and afterwards facilitating access to work and professional training. Once established, the Internet and ICTs can also help decisively towards social integration and a greater degree of political participation.

It is evident that this recommendation by UNESCO cannot be seen as yet another example of the rhetoric that sometimes characterises international rights organisations. A good example of this is that offered by the ferocious resistance of the Chinese dictatorship to its citizens' access to certain western websites with content that is particularly critical of Beijing's regime. Or the example provided in another context by the controversial USA PATRIOT Act 2001 (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism), passed by the United States Congress after the attacks of 11 September, and declared partially unconstitutional by the Supreme Court five years later,[2] which focused a large part of its repressive arsenal on communication via Internet in order to combat terrorism, with a penal logic in which the struggle for security easily beat the always essential guarantee of freedoms, calling into doubt the essential bases of the rule of law.

The Internet and ICTs have led to a change in the organisation and functioning of public administration and in the regulation of the legal regime of information. In fact, we could even say that ICTs have created a new reality to the extent that, within the context of public rule, electronic administrative rule is already being talked about, connected not only to the classic principle of effectiveness in the organisation and functioning of public powers of section 1 of article 103 of the Spanish Constitution (CE) but especially to the democratic principle of section 1 of article 1 CE. This is because access to information is a basic component of the principle of publishing the acts of public powers and the Internet is an instrument that facilitates this to an extraordinary degree. A good example of the response given by current positive law to the appearance of the Internet, within the framework of the exclusive powers of the state in the area of telecommunications, among others, are the following acts of the Spanish parliament: Act 34/2002, 11 July on information society services and electronic commerce (LSSI); Act 32/2003, 3 November on telecommunications, subsequently revised in 2005 (LGT). And, more recently, Act 11/2007, 22 June, on the electronic access of citizens to public services and Act 25/2007, 18 October, on the conservation of data regarding electronic communications and public communications networks.

These regulations reveal the degree of intervention by public powers to regulate this new way to express oneself, communicate and receive information. The state and, before this, the European Union (insofar as most are acts trans-

1 *Domingo*. In: *El País*, 6 January 2008, p. 10

2 548 US 557 (2006), Supreme Court of the United States, 29 June 2006 (case HAMDAN v. RUMSFELD Secretary for the Defence, et al.) <http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf>
<http://supremecourtus.gov/opinions/casefinder/casefinder_1984-present.html>
<http://en.wikipedia.org/wiki/Hamdan_v._Rumsfeld>

posing European legislation) have not been indifferent to ICTs. But the question presented here is whether the technological singularity of the Internet compared with traditional media means that it should be treated differently in legal terms, both with regard to the technical framework that supports these media as well as the content broadcast. And the answer cannot admit any doubt: because beyond any specificity offered by the regulation of the legal regime of communication via the Internet and its relation with the different social actors, the legal rules regarding the form and content of messages emitted via the web have a suitable framework of application in current regulations, and especially in the jurisprudence of the Spanish Constitutional Court (TC) concerning the conflict between the fundamental rights of articles 20 (expression and information) and 18 (rights of person, inviolability of communication and protection from the illegal use of information), without there being sufficient reason for it to be treated differently. Nonetheless, from an analysis of some of the aforementioned provisions, the conclusion arrived at, as we will see, is not the same, given that in some cases, such as article 12 of the LSSI, it has a more restrictive legal treatment that raises serious doubts regarding its constitutionality. Neither do we reach the same conclusion with regard to the right to the inviolability of communications since, insofar as this is a formal guarantee of the right not to endure any intromission in the message, it includes not only immunity regarding content but the guarantee of confidentiality must particularly cover any data that allow the subjects to be identified who are involved in the transfer of the communication, irrespective of the message's content.

In another context of the rights of freedom and participation of citizens, the Internet is already a platform of social participation for citizens in matters of individual and general interest. In a not-so distant future, its role as a platform of political participation in representative institutions may also become more widespread in order to establish a context of deliberative democracy that, as such, does not remain restricted within representative institutions but also reaches other levels of social participation. This is because the Internet can enable collective debate and reasoning, both private and public, without the obligatory intermediation of actors (parties, associations, etc.) which can mediatise discourses, and it places citizens more centre stage, considered as individuals, therefore providing the debate of general interest with a reasoning more in line with his or her private beliefs.

Regarding the contributions offered by ICTs within the context of communication and political participation, electronic voting is, today, already a reality in some states and particularly in private corporations. In the public sphere, in spite of being a minority practice, e-voting is nothing new in comparative electoral law, as shown by some states in the United States, Belgium, Brazil, the Philippines, Colombia and Venezuela. Moreover, in others it has already been applied experimentally, albeit not valid legally, as is the case in Argentina, Chile, Spain, France, the United Kingdom, Holland, Japan, Australia, etc. (Carrillo 2007, 85). In all cases, the challenge of legally regulating this form of exercising our right to suffrage via computer is no other than that resulting from the constitutional mandate, according to which voting must continue to be universal, fair, free, direct and secret (section 1 of articles 68 and 69 EC, and section 1 of article 56 of the Statute of Autonomy of Catalonia).

2. Information and communication technologies in Spanish regulations

The new ICTs have led to intense debate about their effect on legal institutions, to the extent that various sectors of the doctrine openly claim that ICTs constitute a new reality to which public rule must adapt itself (Bernadí Gil 2006, 359). As well as introducing the idea that their degree of influence has encouraged people to talk clearly about electronic administrative law, it is stressed that the inclusion of ICTs in public administration, already announced prematurely in 1992 by article 45 of Act 30/92 on the legal regime of public administrations and common administrative procedure, should be linked to the principle of administrative effectiveness and especially, given their universal nature, to the democratic principle itself, insofar as they must permit the widespread access of citizens to greater and better knowledge of public matters. Although we must state that access to administrative information cannot be understood as a prolongation of the fundamental right to receive information from point *d* of section 1 of article 20 CE, but rather as an expression of the constitutional principle of point *b* of article 105 CE, which confirms a principle of the functioning of

public administration that recognises citizen access to administrative files and records, with exceptions regarding the guarantee of state security and defence, as well as investigating offences and the guarantee of privacy.

From the point of view of authority, it's evident that the claims held by the state regarding those powers belonging to autonomous communities (CA) to regulate this area are more numerous and more incisive in their effect (legislation in civil, penal and mercantile areas, as well as culture, technological research and development and telecommunications) but the CA are nonetheless not excluded a *radice* from legislative involvement in aspects regarding civil law and culture.

Within this context of authority, over the last few years Spain has passed a series of legal provisions that highlight the importance of ICTs in the world of law.

a. *Act 34/2002 of 11 July on information society services and electronic commerce (LSSI).*

   The aim of this Act was to incorporate into Spanish law Directive 2000/31/EC of the European Parliament and of the Council of 8 June on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. It also partially incorporated Directive 98/27/EC of the European parliament and of the Council of 19 May on injunctions for the protection of consumers' interests. Among the aims of the Act, in its statement of reasons, it establishes that "it is only permitted to restrict the free provision of information society services in Spain from other countries belonging to the European Economic Space [...] that entail a danger or hazard to certain fundamental values such as public order, public health or the protection of minors [...]". As a result of this objective, article 12 of the Act introduced measures regarding the duty to retain electronic communication transit data, measures which clearly penalise information transmitted via the Internet, because of the renowned ambiguity, disproportion and lack of legal certainty that do not befit a rule restricting a fundamental right. In effect, section 1 of this article establishes that "operators of electronic communication networks and services, suppliers of access to telecommunication networks and providers of data hosting services must retain the data of connection and traffic generated by the communications established while providing an information society service for a maximum period of twelve months [...]". The retaining of these data, says section 4 of the same precept, will be carried out "for their use within the context of a criminal investigation or to safeguard public security and national defence, be placed at the disposal of the judges or courts or the Fiscal Ministry that so demands". Previously, section 2 reminds us that "in no case shall the obligation to retain data affect the secrecy of the communications".

   This article is a specific transferral to Spain of the North American anti-terrorist legislation included in the USA PATRIOT Act 2001 (which was highly questioned and finally declared unconstitutional), and violates the fundamental right regarding the inviolability of communications (section 3 of article 18 CE). Because, although it warns that it will not be affected, what it is actually introducing is an exceptional regime, as the intervention of judicial bodies is established *a posteriori* of the data being retained, when the CE only establishes this circumstance in individualised cases (section 2 of article 55 CE). Likewise, the CE formally guarantees the inviolability of communications, irrespective of the communication's content, which means that, above all else, such inviolability includes the identity of the subjects involved in the communication traffic. Moreover, from a formal point of view, article 12 of the LSSI also presents problems of constitutionality, as fundamental rights can only be regulated by organic laws, a status the Act does not have.

   On the other hand, the proportionality of the measure restricting the right is more than questionable, if the content is taken in relation to the jurisprudence of the European Court of Human Rights (ECHR). For example, this was established in the cases of Klass et al. v. Germany (1978) and Rotaru v. Romania (2000), in which the ECHR reflects on the existence of suitable and sufficient guarantees against abuse, and where it states that a secret system of vigilance aimed at protecting national security supposes the risk of destroying democracy. In the case of the LSSI, moreover, it is not a secret system but a public one, which begs even more the question as to whether a measure for retaining data without specifying the people affected, for a maximum period of 12

months and with judicial control *a posteriori* is proportional to a democratic system.

Certainly, as a result of these rational indications of unconstitutionality, article 12 of Act 34/2002 (LSSI) has been repealed by the new provision on this area, Act 25/2007 of 18 October on conserving data related to electronic communications and to public communication networks.

b. *Act 25/2007 of 18 October on conserving data related to electronic communications and to public communication networks.*

This new Act stresses that the neutral nature of technological advances in telephony and electronic communications does not prevent undesired or even punishable effects from occurring through their use. In order to avoid such consequences, Directive 2006/24/EC of the European Parliament and of the Council of 15 March on the retention of data generated or processed in connection with the provision of publicly available electronic communication services has amended Directive 2002/24/EC and has also led to the aforementioned LSSI in Spanish law being amended in one of its most restrictive aspects.

The aim of the law is therefore to regulate the obligation of operators to retain data generated or processed in connection with the provision of electronic communication services or public communications networks, as well as the duty to pass on these data to empowered agents, provided this is required by means of the corresponding judicial authorisation in order to detect, investigate or pass judgment on the serious offences established in the Spanish Penal Code or in the special penal laws (article 1). With this prior judicial control, Act 25/2007 avoids the flagrant problems of unconstitutionality that used to result from article 12 of Act the LSSI, which has now been explicitly repealed.

Notwithstanding this, the degree of public intervention in data that must be retained by operators is intense. The data are those required to investigate and identify the origin of the communication; to identify the end purpose of a communication; to determine the date, time and duration of the communication; to identify the type of communication; to identify the users' communication equipment or what might be considered the communication equipment and the data required to identify the location of mobile communication equipment (article 3).

Empowered agents, those being provided with this information, are members of the criminal investigation department, officials from the Assistant Department for Customs Surveillance when carrying out the functions of the criminal investigation department and personnel from the National Intelligence Centre (section 2 of article 6).

c. *Act 11/2007 of 22 June on the electronic access of citizens to public services*

This provision highlights the efforts made to adapt the state to the challenges thrown up by ICTs in terms of structuring new, more direct ways to relate citizens to public authority. In this respect, the Act's statement of reasons establishes that, in order to provide a service to a citizen, the administration is obliged to become an electronic administration as a result of the principle of effectiveness established in section 1 of article 103 of the CE. The introduction of electronic methods to manage public affairs is a kind of decentralisation insofar as it establishes new bases to bring public administration closer to citizens, because ICTs make it possible to get closer to the administration in citizens' living rooms and in the offices of firms and professionals.

Act 30/1992 was the first stage in the public administration's commitment to ICTs. More recently, Act 4/2001 of 27 December has led to a more direct adaptation as it allows the establishment of remote records to receive or issue applications, documents and communications via remote means. The amendments made to the general taxation Act of 2003 are in a similar vein, as they also allow remote notifications and automated administrative action, as well as the electronic imaging of documents.

With regard to administrative obligations in the area of e-administration, the new Act aims to go a step further insofar as all public powers must be ready to change from the traditional normative phase of they "may" to reach that of they "must" attend citizens via ICTs. However, the use of electronic media must obviously not lead to any reduction in the right of citizens interested in accessing a file and, in general, to be attended via traditional means, if they so wish.

On the other hand, the inclusion of ICTs in the organisation and functioning of public administrations is not conceived as a simply technical issue. In December 2005, the Committee of Ministers of the Council of Europe adopted a recommendation by which electronic administration is not merely a technical matter but also one of democratic governance.

3. The internet and the media: Bill Gates versus Gutenberg

But where the impact of ICTs and particularly the Internet has been particularly decisive in changing how public powers and business corporations are organised, as well as personal and collective behaviour and attitudes, has been in the exercising of the fundamental rights of free speech and the right to receive and communicate information.

The world wide web is becoming increasingly more aggressive in providing citizens with data. The attraction or seduction created by the virtual public space and offered by Internet operators has relegated conventional media to second place, especially the press. The recurring question might be as follows: can Bill Gates really annihilate Gutenberg?

Beyond predictions for the future, which are not within the scope of this article, it is evident that information via the Internet has encouraged the diversification of subjects that can emit information. The right to information is not the monopoly of journalists and it does not make any distinctions in terms of entitlement, although professionals have been the object of special judicial treatment by means of rights that only correspond to them, such as the clauses concerning conscience or professional secrecy. But the desire for universality that runs through the Internet means that it is a platform accessible by most citizens for them to express themselves and, if necessary, also inform. In this case, the rules of law established by legislation and jurisprudence cannot be any different when the subject emitting this information is not a professional, but must be the same and, therefore, must be subject to the same criteria of legal liability.

The attacks on 11 September in the United States were an exceptional opportunity for the Internet to exercise an opportune complementary and sometimes alternative informative function to the conventional media. For example, it was used in order to follow the effects of the attacks on the Twin Towers, in the statements of those affected and the drawing up of lists of those who had disappeared, in addition to providing, in the initial moments, data that had not been available due to the censorship carried out by the high instances of political power.

The Internet has also served as an outlet for political expression repressed under dictatorship or authoritarian political regimes. In spite of all the difficulties imposed by public powers to stop it, the Internet has served and serves as a platform to denounce the violation of human rights and of public freedoms. This has been the case of the situation in China where, notwithstanding this, access to the western websites of certain NGOs is prevented by the Chinese government through their own software, operating as a kind of virtual wall to prevent global knowledge of their own disgraces. Something similar can be said of Cuba or, more recently, the cruel repression carried out by the military Junta governing Myanmar (formally Burma) with an iron fist.

The Internet has also encouraged people to publish their own information which, in many cases, is of public interest. Blogs, the personal web-logs that are starting to be a popular instrument of communication of public relevance, are a complementary or we might even say alternative means to the traditional media, allowing their owners to express themselves without any formal or editorial restrictions about issues they consider to be of interest to a potential audience. This audience does not exclude even the media themselves (press, radio and television), which can find a permanent source of opinion and information on these personal sites. From a legal point of view, there can be no doubt that emitting opinions or the providing information via a personal blog are subject to the same legal rules governing, for example, the guarantee of the accuracy of information, understood in terms of diligence in obtaining and protecting, if necessary, the rights of honour, privacy and self image of those affected, plus the blog owner's right to free speech and to communicate information who, if necessary, is liable for what he or she has said.

The Internet has also pierced the heart of the most traditional media. The press have set up electronic versions of their editions. This has led to a plurality of information and

editions, as the press no longer waits until the first edition is out on the street to publish certain news items. Because the Internet allows information to be provided in real time, the printed and Internet editions therefore produce a duality in the newspaper's edition and the informative value of the newspaper now depends on both editions.

Not all the information on the Internet can be evaluated positively, however. Perverse effects are always present (Lepage 2002, 67 and sub.). So a pessimistic view of the information society might lead to the conclusion that, beyond the advantages provided by the Internet for democratic life (transparency, citizen participation, administrative effectiveness, etc.), there is always the feeling that the necessary confidentiality linked to the guarantee of certain fundamental rights might be lost. Among the least desirable effects of the Internet are, as pointed out by Lepage (2002, 67), the problem of identifying the information; its reliability and the perverse effect of an abundance of information that is not always synonymous with relevant information of objective interest.

Identifying information on the Internet means differentiating between information *stricto sensu* and what is published, given that there are many operators that use the Internet to communicate information to their clients about their commercial activity, which means that information is often mixed with simple advertising.

Another aspect of the Internet as a support for information of all kinds is the reliability of content, as it is well known that the universal nature of its access means that it is very easy for the virtual network to become a field sown with rumours and speculations that alter the duty to inform diligently that should preside whenever disseminating facts of general interest. There is also another facet to the problem of reliability of the information appearing on a website: the falsification of information carried out by hackers who manipulate the information for various purposes. And not always to destroy but also to highlight the negligence of those in charge of certain websites that (repeatedly) contain incorrect information, as in the case of the Yahoo News website "victim". Finally, a particularly frequent perverse effect on the Internet is the excess of information provided, since it is not always easy to discriminate between what is superficial and what is really of interest.

Without doubt, one of the legal problems of particular relevance presented by exercising the right to information on the Internet is determining authorship and establishing liability. An example that is quite illustrative regarding this issue is that offered recently by the website for the online encyclopaedia, Wikipedia, owned by the Wikimedia Foundation, a non-profit organisation based in Florida. This organisation was sued before the Court of First Instance in Paris (Tribunal de Grande Instance, TGI) for references to the sexual options of the appellants included in an article in this virtual encyclopaedia. The TGI ruled that the American foundation was exempt from any liability because, given that the organisation did not exercise any control over the content of articles, it did not have to bear any liability of an editorial nature. Regarding this particular fact, and according to French legislation (Act of 21 June 2004 on the digital eco-nomy or 'Loi pour la confiance dans l'économie numérique'), the owner of a website is not a priori obliged to supervise or control all the content it contains, apart from the obligation to notify any manifestly illicit content (with a registered letter with proof of receipt sent to the author), a circumstance that occurs in the case of child pornography, openly racist or revisionist content, when the website owner must suppress such content without delay.[3]

On the Internet, as mentioned before, the common rules established by law and jurisprudence are applied to tackle conflicts that may occur between the right to inform and the rights of person. In this respect, the starting point that must serve for the legal treatment of a controversy concerning legally protected rights is to take into account the fact that the Internet is, per se, an autonomous publication. Irrespective of whether, as often happens, the information involved in the controversy has already been disseminated via another medium. From the logic of law, the infraction that may have been committed is new because so is the information platform from which the infraction has been committed. Therefore, prior authorisation is always required from the person that is the object of the information in images on the Internet. The exemption of this prior autho-

3 *Le Monde*, 3 November 2007, p. 3

risation may be permitted in those cases of information where, due to its up-to-date nature, require the immediate dissemination of images of a person. But once this up-to-date aspect has lapsed, there is no guarantee that another reproduction of the image of a person on a website will still be exempt from liability for those who have disseminated it via the Internet. It seems evident that, if this is an anonymous person, he or she will be in a position to safeguard their right to their self image, when the up-to-date issue based on a previous reason of the new item's "public interest" is no longer valid.

Finally, we should also note that the interest paid by states and various international organisations (e.g. the Council of Europe) to protect the rights of especially vulnerable sectors in society, such as children and young people, has been developed thorough penal and civil legislation. However, sometimes the criminal policy pursued, especially in the case of paedophilia, has clashed with the due protection required by the freedom of expression and artistic creation. A good example was provided in the nineties by the ruling given by the Supreme Court of the United States on 26 June 1997 (case Reno *v.* American Civil Liberties Union), that declared the Communications Decency Act of 8 February 1996 to be unconstitutional as it violated the first amendment because of the general and abstract nature of the infractions established by the Act to combat pornography on the Internet.

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