

ACCESS TO INTERNET AS A FUNDAMENTAL RIGHT

Tommaso Edoardo Frosini*

Abstract.

Assuming that technology represents a development of freedoms, the article analyzes how in a constitutional and liberal State the Internet and the use of technologies in general is employed as a strategic tool to foster and enforce individuals freedoms. According to the author, the Internet constitutes an important instrument for increasing democracy, because it guarantees the transparency of the political acting, ensuring the pluralism of information. In this perspective, the legal horizon of the Internet includes not only the right to privacy, but it can also be extended to the freedom of expression. The informatic freedom is qualified as a new right, resulted from the evolution of technological society, which shows a new aspect of the well-established idea of personal liberty. This particular right has become a claim of liberty in the active sense, perceived as the freedom to make use of computer in order to provide and obtain information of any kind or as the right to join the digital society and communicate to whoever. Therefore, the author amounts to the right to access to the Internet as a social right, or better, as an individual claim to a state's performance (like services such as education, health and welfare) and through comparative references shows how some countries have recognized the access to the Internet as a fundamental right of individuals, considered as a universal service that they must guarantee to their citizens by investments of public resources and social or educational policies.

* Full Professor of Comparative Law, University of Naples "Suor Orsola Benincasa".

1. Technologies have represented and still represent a development of freedoms; more in details, freedoms have significantly extended their scope to new frontiers of human acting by virtue of the recent technological developments¹. Indeed, technologies do not only produce freedom: it would be better to say that technologies can be employed by good and bad individuals, as well as by either an open-minded government or a despotic one. In a constitutional and liberal state, however, public policy should always be aimed at fostering and extending individuals' freedoms, and the use of technologies must be one of the strategic tools to this end. Let's think about the Internet and its typical cross-border nature, which goes across national borders, overcomes customs boundaries and removes cultural differences between various people².

Also, with respect to the Internet, it is still a problem to distinguish the different freedoms in order to achieve a holistic model of freedom: whoever has access to the Internet, in fact, expresses himself/herself, joins communities, communicates, in the manners that he/she prefers. Different freedoms are therefore enforced by the same medium, i.e. the Internet, at the same time or at very closed times. Of course, there is another point in return: virtual barriers are raised instead of real barriers. In fact, there are some countries (illiberal, of course) that have built electronic barriers in order to avoid the access to part of their global network, by the removal of words, names, and keywords from search engines or by violating personal data of individuals. New information barriers have been raised in part of the world, where videos or blogs are the *samizdat* of the present days. These factors, however, confirm the liberal spirit of the Internet, and the fear by which non-tolerant countries approach technologies, because they feel the Internet as a threat to their absolute power. The Internet can be – as it was, for example, in the so called “Arab spring” – an important tool for increasing democracy, also because it guarantees the transparency of the political acting by a pluralism of news and information which circulate over the Internet, allowing citizens to see-know-share.

¹ See T.E. Frosini, *Nuevas tecnologías y constitucionalismo*, 124 Rev. Est. Pol. 129 (2004). Recently, P. Costanzo, *Il fattore tecnologico e le sue conseguenze*, 4 Rass. Parl. 232 (2012).

² V. Frosini, *L'orizzonte giuridico dell'Internet*, 2 Dir. inf. 271 (2000).

2. It has to be pointed out that the problems brought along by technological developments are not limited to the protection of the right to privacy anymore, even if this problem has been and continues to be analyzed from the constitutional point of view, by both scholars and courts (including data protection authorities). The “legal horizon of the Internet” includes the right to privacy, of course, but such background extends also to the freedom of expression, which is a constitutional right to be rethought in light of its new implications from a legal point of view.

In order to examine the most critical issues concerning the coming of the Internet and its legal implications, I believe that some points have to be made with respect to the “informatic freedom”. This theory was developed in 1981 and found its grounds in the concept of a new liberal age, characterized by the new achievements permitted by the technological “revolution”. Such doctrine was based on the rise of a new dimension of the personal liberty in the age when computer were used for the first time³.

The informatic freedom is therefore a new right resulted from the evolution of technological society, and shows a new aspect of the well-established idea of personal liberty and constitutes the advancement of a new frontier of human freedom to the society of the future to be placed in the construction of the contemporary constitutionalism.

The informatic freedom qualifies as a new form of the traditional right of personal liberty, as the right to exercise the control over personal information, or a right to “habeas data”. Over the time, case law has recognized and affirmed this new freedom in terms of preservation of the individual, as a claim against the holders of the computer power, by private persons and public authorities. By the new legislation on the protection of individuals with regard to the processing of personal data, fostered by a European standard, the notion of the right to informatic freedom has been recognized in positive law. The freedom to preserve their confidentiality when using computer has become also the freedom to communicate to others the information transmitted by electronic means to exercise that

³ See V. Frosini, *Law and Liberty in the Computer Age* (1995).

freedom of expression of one's personality making use of new communication systems.

Hence the right to informatic freedom acquires an additional significance nowadays as a result of the coming of the Internet, and this proves its relevance even today. In fact, in the age of the Internet, the right to informatic freedom 'has become a claim of freedom in the active sense, not a freedom "from" but freedom "of", which is the freedom to make use of computer to provide and obtain information of any kind.

And it is a right to participate in the virtual society, which has been created by the coming of computer in the digital age: it is a society characterized by movable parts and dynamic relationships, where each participant is sovereign over his/her decisions'.

It is, then, the right to join the digital society that has been created. We are approaching, without doubts, a new form of freedom, i.e. the right to communicate to whoever, including the right to circulate personal opinions, thoughts and materials, as well as the right to receive the same.

Therefore, freedom of communication qualifies as a right to circulate and receive. This is not only the individual freedom of expression anymore, rather the right to establish relationships, circulate and request information, and therefore exercise the new power of knowledge based on the information technology: in a nutshell, the right to exercise the informatic freedom. Moving from the acknowledgement of such a freedom it could be possible to establish some grounds for an *Internet Bill of Rights*.

3. Then we come to the right to access to the Internet. It is worth quoting Rifkin, first of all: «In a world more and more based on economic and social electronic networks, the right not to be excluded – the right to access – acquires an increasing importance. Concepts like "inclusion" and "access" have today replaced those (corresponding) of autonomy and possession, which characterized the notion of property in a traditional sense: in the new economy, the concept of property does not refer to a power of excluding others from enjoying personal goods

anymore, rather it qualifies as a right to not be excluded from the society's resources»⁴.

The right to access to the Internet has therefore to be considered as a social right, or better as an *individual claim to a state's performance*, like services such as education, health and welfare. It is a universal service that state's bodies must guarantee to their citizens by investments of public resources, social and educational policies. In fact, more and more the access to the Internet and the conduct of business via the Internet constitute the means by which individuals enter into relations with state's powers, i.e. exercise their citizenship's rights⁵.

Today, citizenship is a digital concept. It is interesting, in this respect, to look at the provisions contained in the Italian Code of Digital Administration (CAD) - Legislative Decree No. 82/2005, which establishes "a statute of the digital citizen" (including natural and legal persons), by requiring public offices, agencies and bodies to interact in a digital manner, thus to arrange appropriate means from the technical and organizational point of view to meet citizens' requests. It is clear that such a new way of qualifying the relationship between individuals and public administration in terms of a new digital citizenship demands a process of digital literacy, as a social right that the state must guarantee, along with the right to education and to the digital cultural development, that the Italian Constitutional Court (by decision n. 307, 2004) has found to be «corresponding to a general interest, specifically the development of culture -by the use of digital tools-, that Italy must pursue at any levels (art. 9)». In this respect, it is worth mentioning the European Parliament resolution of 10 April 2008, requiring Member States to «to recognize that the Internet is a vast platform for cultural expression, access to knowledge, and democratic participation in European creativity, bringing generations together through the information society; calls on the Commission and the Member States, to avoid adopting measures conflicting with civil liberties and human rights and with the principles of proportionality, effectiveness and dissuasiveness, such as the interruption of

⁴ So, J. Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where All of Life is Paid-For Experience* (2000).

⁵ A. Lepage, *Libertés et droits fondamentaux à l'épreuve de l'internet* (2002).

Internet access». Also in the European Parliament recommendation of 26 March 2009 to the Council on strengthening security and fundamental freedoms on the Internet it is stressed that the Internet is «a key instrument at world level for exercising freedom of expression» protected under the Charter of fundamental rights of the European Union and « can be an extraordinary opportunity to enhance active citizenship».

Yet, in terms of (digital) active citizenship, it is worth quoting the Italian Law No. 4/2004 (so called “Stanca Law”), establishing provisions for favouring the access of disabled people to computer systems. This law recognizes and protects the right of any persons to access any sources of information and the related services, including those provided by computer systems. In particular, art. 1 refers to art. 3 of the Italian Constitution when setting the right to access to the Internet, by qualifying such right as instrumental for the achievement of equality among citizens. Therefore, denying access to the Internet would result in the violation of fundamental human rights such as freedom of expression, freedom of information, education, development and equality⁶. Then, the right to access to the Internet amounts to a fundamental right the exercise of which is instrumental to the enjoyment of other constitutional rights and freedoms: not only the freedom of expression, protected by art. 21 of the Italian Constitution, but also the right to an “appropriate development of the human being” and to an “effective participation to the political, economic and social life of the State” protected under art. 3 of the Constitution, as well as the freedom of conduct business contained in art. 41. Today, against the background of the information society (or the “age of the access”) being deprived of access to the Internet results in being prevented from exercising large part of the citizenship rights.

In Finland, a law that came into force on 1st July 2010 has defined as “a legal right” the access to the Internet for over five millions of citizens. The Finnish Minister of Communication said that «a high-quality broadband Internet connection at a reasonable price is an essential right». Therefore, all the 26 providers operating in Finland, that are qualified as “provider of a universal service”, shall be able to connect any facilities with a *download*

⁶ See, recently, O.D. Pulvirenti, *Derechos Humanos e Internet* (2013).

speed of 1 *megabit* per second. Also Switzerland and Spain are looking at this initiative, and may act in the next future in order to grant access to the Internet as a condition for the enjoyment of other rights.

4. Some countries have recognized the access to the Internet as a fundamental right of individuals in the relevant legal systems, even if at different levels: some in the constitutions, like Estonia, Greece and Ecuador; some by laws, like Finland and Peru; some by the case law of the respective domestic courts, like France, Costa Rica and –even before– the United States, where the Supreme Court, in a decision delivered in 1997, said that «The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship»⁷.

With regard to the decision of the French *Conseil Constitutionnel* (no. 2009-580 DC of 10 June 2009), it has to be stressed that the court referred to the access to the Internet in terms of a fundamental right. In fact, due to the large-scale diffusion of the Internet, the freedom of communication and expression necessarily requires a free access to online communication services. The *Conseil* moves from an express reference to art. 11 of the Declaration of the Rights of Man and of the Citizen of 1789: «The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law». This definition provides a clear and specific view of the freedom of information and still proves to be valid. Then, the *Conseil*, by the application of the proportionality test, found that the freedom of communication, including the right to access

⁷ See, *American Civil Liberties Union vs. Reno* [E.D. pa 1996]; again, Supreme Court 521 US 844 (1997).

to communication services, has a valuable importance and therefore any restriction of the same imposed by the competent authorities must be specifically defined⁸.

Also, some international (also non-binding) documents concern the right to access to the Internet. It is worth quoting, for example, a May 2011 report issued by the General Assembly of the United Nations where it is highlighted that «given that the Internet has become an indispensable tool for realizing a range of human rights, combating inequality, and accelerating development and human progress, ensuring universal access to the Internet should be a priority for all States».

5. In the 21st Century the «legal horizon of the Internet» is clear and visible. And this constitutes also the new horizon of contemporary constitutionalism, as the aforesaid important decisions of the US Supreme Court first and of the French *Conseil Constitutionnel* then, have proven (without forgetting the decisions, already mentioned, of the *Sala Constitucional* of Costa Rica). It is interesting to observe, in two countries where the constitutionalism was born, even though by following different paths at the very beginning, the interpretation given by courts to two dated provisions – the First Amendment to the US Constitution and art. 11 of the 1789 Declaration-, provisions which were written and adopted more than two centuries ago to protect and enforce the freedom of information: that's the case to say, the freedom of yesterday, today and tomorrow. In fact, it is from these provisions –defining clear horizons of the constitutionalism- that today a legal ground is sought in order to recognize and protect the new forms of expressions of electronic communications, with respect in particular to the Internet. Thanks to an appropriate interpretation and enforcement of the relevant parameters, a very *constitutional right to access to the Internet* is emerging nowadays⁹. And this is because, against the extensive diffusion of the Internet, the freedom of communication and expression requires first the freedom to access to those online communication services. It is for

⁸ L. Marino, *Le droit d'accès à internet, nouveau droit fondamental*, 30 Rec. dal. 2045 (2009).

⁹ See, T.E. Frosini, *La lotta per i diritti. Le ragioni del costituzionalismo* (2011).

states to remove barriers and obstacles that prevent citizens from enjoying this universal service that must be guaranteed to all citizens by public investments, social and educational policies, by public expenses. As pointed out, the right to access to the Internet constitutes in fact the way by which individuals approach state's powers. Denying the access to the Internet, or making it costly, excluding part of citizens from its enjoyment would make it impossible to exercise a large part of the citizenship rights.

Finally: the constitutional freedom of expression consists of what art. 19 of the Declaration of the Rights of Man and of the Citizen of indicated in the right: «to seek, receive and impart information and ideas through any media and regardless of frontiers», even when- like in the recent “WikiLeaks” case - the information circulating via the Internet may disappoint national governments, put at risk diplomatic relationship between states or reveal *arcana imperii*. One could not like it, and also reduce the scope of protection and the effects or deny the legal validity, but in any cases the act of “seeking, receiving and imparting information” demonstrates the crucial role of the right to know and the freedom of information, that also show a new model of separation of powers in light of a modern constitutional view.

In the past, it was the government to control citizens by the control over information; today, it has become harder and harder to control what a citizen reads-sees-hears, seeks-receives-imparts. The technology provides thus to individuals the ability to become a power that is in the condition to control the other powers: *le pouvoir arrête le pouvoir*.