The Transformative Effect of Social Media: Preliminary Lessons from the Supreme Court Argument in *Packingham v. North Carolina*

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Title: L'effetto trasformatore dei *social media*: lezioni preliminary della Corte Suprema in *Packingham v. North Carolina*

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1. – This note focuses on preliminary analysis of the oral argument held on 27 February 2017 in Case 15-1194 *Packingham v. North Carolina* before the Supreme Court of the United States. At the time of writing, the US Supreme Court did not release its opinion (on 19 June 2017, while this issue was being finalised, the US Supreme Court issued its ruling, unanimously determining the impugned law to be unconstitutional; the author of the present publication intends to analyse this decision in the near future). The positions of the justices expressed in the course of the argument may somewhat lift the curtain to show the way how the US Supreme Court currently sees the Internet and its role in society. It is not the purpose of this note to explore the doctrinal choices of the US Supreme Court in the case under consideration or to take sides in the debate over the level of scrutiny the Court should apply in its analysis – after all, any conclusions regarding this matter would be premature – rather, the purpose is to draw readers' attention to the particular weight the Court ascribes to the value of online communication in modern life.

2. – The First Amendment to the United States Constitution forbids Congress and, following case-law developments, the states (*Stromberg v. California*, 283 U.S. 359, 368 (1931); *Gitlow v. New York*, 268 U.S. 652, 666 (1925)) to abridge «the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances». American researchers point out that probably no other provision of the Constitution has given rise to so many divergent views with respect to its proper interpretive framework, as has the guarantee of freedom of expression (J.H. Killian et al. eds., *The Constitution of the United States of America: Analysis and Interpretation*, Washington, 2004, 1025).

While the First Amendment protects and fosters individual self-expression, it also affords the public access to discussion, debate, and the dissemination of information and ideas (Killian *op.cit.*, 1028). In this regard, the legal framework of the First Amendment is similar to that of Article 10 of the European Convention on Human Rights, which similarly protects the public's right to receive information and the right of access to information (Council of Europe, *Freedom of Expression in Europe*, Strasbourg, 2007, 75). Article 10 of the Convention also applies to the various forms and means in which it is transmitted and received, since any restriction imposed on the means necessarily interferes with the right to receive and impart

information (European Court of Human Rights, *Internet: Case-Law of the European Court of Human Rights*, Strasbourg, 2015, 40).

At the same time, the prohibition on abridgment of the freedom of speech is not absolute: certain types of speech may be prohibited outright; some types of speech may get more constrained than others; furthermore, speech may be regulated depending upon the location at which it takes place. In 1919, the United States Supreme Court delivered its first opinion concerning the freedom of expression (*Schenck v. United States*, 249 U.S. 47, 52 (1919)). Over the last 100 years, within the context of the United States First Amendment jurisprudence, courts have constructed a powerful body of procedural law which defines the manner in which free speech claims must be evaluated and resolved (D.C. Nunziato, *The Beginning of the End of Internet Freedom*, in 45 *Geo. J. Int'l L.*, 2014, 398).

3. – The invention of the Internet offered an opportunity to access an unprecedented corpus of information, alongside with the benefits of electronic communication, to millions of users. In 1997, *Reno v. American Civil Liberties Union* (521 U.S. 844 (1997)) was the first major United States Supreme Court case that dealt with regulation of the Internet, but certainly not the last – recently the body of case-law dealing with the Internet regulation has rapidly grown, both in the US and in Europe (Nunziato, *op. cit.*). The so-called Web 2.0 then marked a shift towards mass participation in content creation and social networking, fostering novel means of knowledge exchange (D. Kilburn and J. Earley, *Disqus Website-Based Commenting as an E-research Method: Engaging Doctoral and Early-Career Academic Learners in Educational Research*, 38 *Int. J. Res. & Met. Education*, 2015, 288) and posing new dilemmas before the judges.

4. – In 2008, the North Carolina General Assembly enacted N.C.G.S. §14-202.5, which banned the use of commercial social networking Web sites by registered sex offenders. This law makes it a felony for any person on the State's registry of former sex offenders to "access" a wide array of Web sites — including Facebook and YouTube — that enable communication, expression, and the exchange of information among their users, if the site is known to allow minors to have accounts. The relevant provision defines a «commercial social networking Web site» as the one that meets all of the following requirements:

(1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.
(2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.
(3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.
(4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

Excluded are the Web sites that either:

(1) Provide only one of the following discrete services: photo sharing, electronic mail, instant messenger, or chat room or message board platform; or
(2) Have as their primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

The law covers people who have completed all criminal justice supervision and applies automatically, that is, it does not require the State to prove that the accused had contact with (or gathered information about) a minor, or intended to do so, or accessed a Web site for any

illicit or improper purpose. It should be noted that North Carolina is not the only state that passed the law banning access of social media for certain categories of sex offenders – similar statutory provisions can be found in Indiana, Louisiana and Nebraska (J. Hitz, *Removing Disfavored Faces from Facebook: The Freedom of Speech Implications of Banning Sex Offenders from Social Media*, 89 *Ind. L.J.*, 2014, 1239).

5. – In April 2010 the local police started an investigation to detect those sex offenders who were illegally accessing commercial social networking Web sites. As a result, the police identified Mr Packingham, who, despite being aware of the prohibition, was making use of his Facebook account at the time of the investigation. The defendant was subsequently indicted for violating N.C.G.S § 14-202.5. The North Carolina Supreme Court (368 N.C. 380 (2015)) sustained his conviction and upheld the constitutionality of the disputed provision on the grounds that the state had a sufficient interest in «forestalling the illicit lurking and contact» of registered sex offenders and their potential future victims, facilitating «the legitimate and important aim of the protection of minors».

6. – The dispute eventually reached the US Supreme Court posing the following question: «whether, under this Court's First Amendment precedents, such a law is permissible, both on its face and as applied to petitioner — who was convicted based on a Facebook "post" in which he celebrated dismissal of a traffic ticket». In the author's view, what is so special with regard to the oral argument in Packingham is the proportion of time the justices spent discussing the technological aspects of commercial social media and the availability of viable communication alternatives to commercial social media for a person that wishes to function normally in today's world.

7. – Firstly, it was acknowledged by Justice Roberts that in terms of the black law there is not "a lot of history" to draw upon concerning access to Web sites in general and those Web sites, which provide broad access to minors, in particular (Supreme Court of the United States, *Packingham v. North Carolina Proceedings*, available at: <www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-1194_0861.pdf>, visited on 5 May 2017, 6).

Secondly, Justice Kennedy contemplated whether there could be other technological means to preclude registered sex-offenders from communicating with minors online with the help of specifically tailored software monitoring the latter's cyber equipment and "disclose" the instances of communication with minors to the law enforcement (*ibid.*, 11-12). Justice Kennedy took this argument further by pondering over the point of the State's capacity to monitor online behaviors and to check «message-by-message or click-by-click» what a person is doing.

Thirdly, quite a while was spent discussing the differences between traditional social media and dating sites. In the course of this discussion an interesting concept relating to «core social networking sites» surfaced, which embraced such sites as Facebook and Google Plus (*ibid.*, 17-19). Moreover, a role of LinkedIn and Facebook for commercial and professional communication was also touched upon – in particular, Justice Sotomayor acknowledged that "many people in our society today" look for jobs on LinkedIn and "many businesses" use Facebook for commercial advertising (*ibid.*, 20). In this regard, the question of verifiability of end-user's age on the Internet was also mentioned (*ibid.*, 23).

Fourthly, Justice Kagan pointed out that a person banned from social media would not be able to "go onto the President's Twitter account to find out what the President is saying today" (*ibid.*, 27). He elaborated his line of thinking by drawing attention that «in fact, everybody uses Twitter. All 50 governors, all 100 senators, every member of the House has a Twitter account. So this has become a crucial – crucially important – channel of political communication» (*ibid.*, 28).

Justice Kennedy supported this point of view, asserting that the extent of the utility and extent of coverage are «greater than the communication you could ever have, even in the paradigm of public square» (*ibid.*, 28). Furthering this thought, Justice Kagan contended that, increasingly, interactions on social media are the way people, especially those under 35 years of age, «structure their civic community life» (*ibid.*, 46). Justice Alito humorously noted that «there are people who think that life is not possible without Twitter and Facebook and [...] that 2003 was the Dark Ages» (*ibid.*, 54-55).

Finally, Justice Sotomayor went as far as printing out a page from nytimes.com to demonstrate that even "traditional" media Web pages now feature social networking component in their comment sections and that it might be hard to draw the line between social networks and other Web sites (*ibid.*, 47).

Taking into account these discussion points made by the Supreme Court justices, it is clear that the final decision in *Packingham* would be quite detailed on particularities of online communication and the value society places on this mode of interaction (this is indeed true after having a glance at the decision, which was delivered on 19 June 2017).

8. – For obvious reasons, any conclusion with regard to this case note can only be tentative. At the same time, the range of arguments pursued by the Justices makes it clear that we are stepping into a new era – the era in which the judiciary is aware of the crucial function of social media in a contemporary society. Indeed, «the role of the judge in the twenty-first century cannot be understood without due consideration of the place of science and technology» (D.L. Faigman, *Judges as "Amateur Scientists"*, 86 *B.U.L. Rev.*, 2006, 1207).

Back in 2010 a study showed that in the United States «judges at all levels of technical knowledge appear to recognize that they need additional training in computer and Internet technology» (G.C. Kessler, *Judges' Awareness, Understanding, and Application of Digital Evidence* (Doctoral dissertation), 2010, available at: <www.garykessler.net/library/kessler_judges&de.pdf>, visited on 5 May 2017), thereby acknowledging gaps in their knowledge of the subject. Given the eagerness of the US Supreme Court judges to discuss repercussions of cutting the person from the social networks and the depth of the arguments presented, one can conclude that the modern judiciary is finally catching up with online communication.