DUE CENSORSHIP

DEBIDA CENSURA

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Abstract: Freedom of expression is the primary source for the exchange of ideas and public debate in a liberal democracy. Censorship has operated and served as an instrument to limit freedom of expression because it is considered to have caused or may cause damage. But there are occasions where censorship is necessary to safeguard public order, state security, or the public interest. This paper presents the arguments for censorship and some cases in which due censorship has been validated as an instrument for the control of public information.

Keywords: Democracy, freedom of expression, censorship, limits to rights.

Resumen: La libertad de expresión es la principal fuente de intercambio de ideas en el debate público dentro de una democracia liberal. La censura ha operado y servido como un instrumento de límite a la libertad de expresión debido a que se considera que ésta causa o puede causar daños. Pero, hay ocasiones en las que la censura es necesaria para salvaguardar el orden público, la seguridad del Estado o los intereses públicos. Este artículo presenta argumentos a favor de la censura y algunos casos en los que la debida censura ha sido validada como un instrumento de control a la información pública.

Palabras clave: Democracia, libertad de expresión, censura, límites a los derechos.

Summary: I. Introduction; II. Legal censorship/restrictions on freedom of expression; III. Conclusions; IV. References.

I. Introduction

Freedom of expression is a fundamental right that allows people to make known what they think, do and/or feel. However, its exercise should be limited by the protection of the rights of third parties, the preservation of public order, and the protection of national security and/or social interest.

In the case of censorship for reasons of national security, let us imagine a person who wants to edit a guerrilla manual, and wants to distribute it freely. The point of banning certain literature is its impact and ensuring that it is not permitted to go against a certain morality or, in this case, that people cannot acquire knowledge that could cause harm against citizens, security agents, and or the State itself.

In the matter of censorship due to social interest, it could be exemplified when cigarette advertising is prohibited in mass media, such as television, or even forbidding the display of tobacco products, as a means to avoiding consumption, purchase or even self-justification, for health reasons.

So, censorship in these cases is justified as protection, but it is no less true that the control of information must be founded on and motivated by the construction of the collective good. To exercise censorship without a legal argument becomes a dictatorial act that imposes the will or the materialization of a militant ideology. For example, when the Nazis came to power in 1933, the German constitution guaranteed freedom of expression and freedom of the press. However, through decrees and laws, the Nazis abolished these civil rights and destroyed democracy. From 1934, it became illegal to criticize the Nazi government. Even telling a joke about Hitler was considered treason. In Nazi Germany, people could not say or write what they wanted.[1] These are some examples of Nazi censorship:

- Close or take control of anti-Nazi newspapers.
- Control news appearing in newspapers, radio and film news.
- Ban and burn books that the Nazis classified as anti-German.
- Control what soldiers wrote home during World War II.

[1] Enciclopedia del Holocausto, "Propaganda y la censura nazi" [en línea], <https://encyclopedia.ushmm.org/content/es/article/nazi-propaganda-and-censorship>.

Our work is divided in two sections. In the first scenario, the nature, objective and functions of the bases of censorship will be described, and we discuss which normativity is the means for its implementation and execution. The next item to be discussed is the question of when censorship must be absolute and forbid certain kind of information completely, for example, pedophilia. Finally, a set of conclusions and proposals will be presented that will reflect the most important ideas and those which deserve special attention.

This research does not attempt to make an apology for censorship, but to observe its teleological value when it is deployed as an administrative act that seeks the protection of an individual, society, or the State, for it must be understood that freedom of expression is not absolute, nor must all information be public. For this reason, its limits must be protected and pointed out, along with the liability in the exercise of guarantees and for any damage that could be caused through the misuse, illegal, illicit, or inappropriate, of these fundamental rights.

II. Legal censorship/restrictions on freedom of expression

Censorship is an administrative act that empowers the authority to suspend or deny a right of a third party that has caused or may cause harm to public order.

The concept of public policy has changed over time, since, although the term continues to be used as a guarantee of public security, its content has evolved from warning citizens to comply with a rule, to a guarantee of their quality of life indicating what is right or wrong. In this way, it is not a concept that can be invoked arbitrarily by the administration; but rather is subject to constitutional limits, which are designed to prevent a certain discretion from becoming arbitrary.

Public order was born by the abuses of Absolute Monarchy as a general clause enabling administrative action that restricted the rights of subjects, in such a way that the invocation of public order became a permit for intervention under which the administrative authority could limit or restrict the private sphere of citizens, on the pretext of preserving tranquility, and social peace. Public order appears on the scene, as well as an administrative right to exercise police activity, on the understanding that the concept can be broken down into three dimensions: public safety, public health, and tranquility.

In the contemporary constitutional state, the notion of public order has lost its connotation initially linked to the defense of an indeterminate social peace. It has been directly related to the protection of the free exercise of funda-

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mental rights and public freedoms recognized in the Constitution. On the other hand, public policy has also lost its potential as a generic entitlement to intervention, so all administrative actions likely to result in the restriction of the rights of the persons concerned must be subject to the principle of legality, which a generic invocation of public policy cannot bypass.

The fact that "Public Order" is now conceived of as a relatively undetermined legal principle would not be a problem if we were not talking about an element that plays a clear leading role in the activity of any modern democratic administration. This legal and social paradigm makes it impossible to close the ongoing debate on the coincidence between the ultimate aims of the State and the welfare of the community.

In this way, the main issue to be addressed is focused on what any ordinary citizen understands by "Public Order", what is its essential content or component, and how this figure can legitimately influence the development and enjoyment of the rights conferred on it by the Constitution.

We must take into account that the origin of the principle of strict law occurs in a positivist system and at a given historical moment, under the rule of a formalistic legal system where a precise and technical argumentation is required for the plaintiff in the elaboration of grievances and violations of the writ of habeas corpus.

Similarly, the origin already mentioned should be noted, as much as its inclusion in the Mexican legal system is concerned, as a procedural obstacle to the relief of judicial delay, a legal limitation that involves the judge in establishing an analysis, with the experience of his expertise and legal knowledge, whereby the individual is protected in case of any violation or grievance being observed that was not provided for conveniently in the writ of habeas corpus, or which is absent from it.[2]

The principle of strict law is that the authority must be made concrete to examine the constitutionality of the act in the light of the arguments expressed in the "concepts of violation". If it is a question of resolving an appeal lodged against the decision rendered, the reviewer confines himself to assessing that decision on the sole ground of "grievances".[3]

For these principles to have intrinsic value and weight they must be incorporated in the Constitution, because otherwise they would only be mere moral principles and the need for weighting would not be a legal postulate.

The principle of constitutionality consists of:

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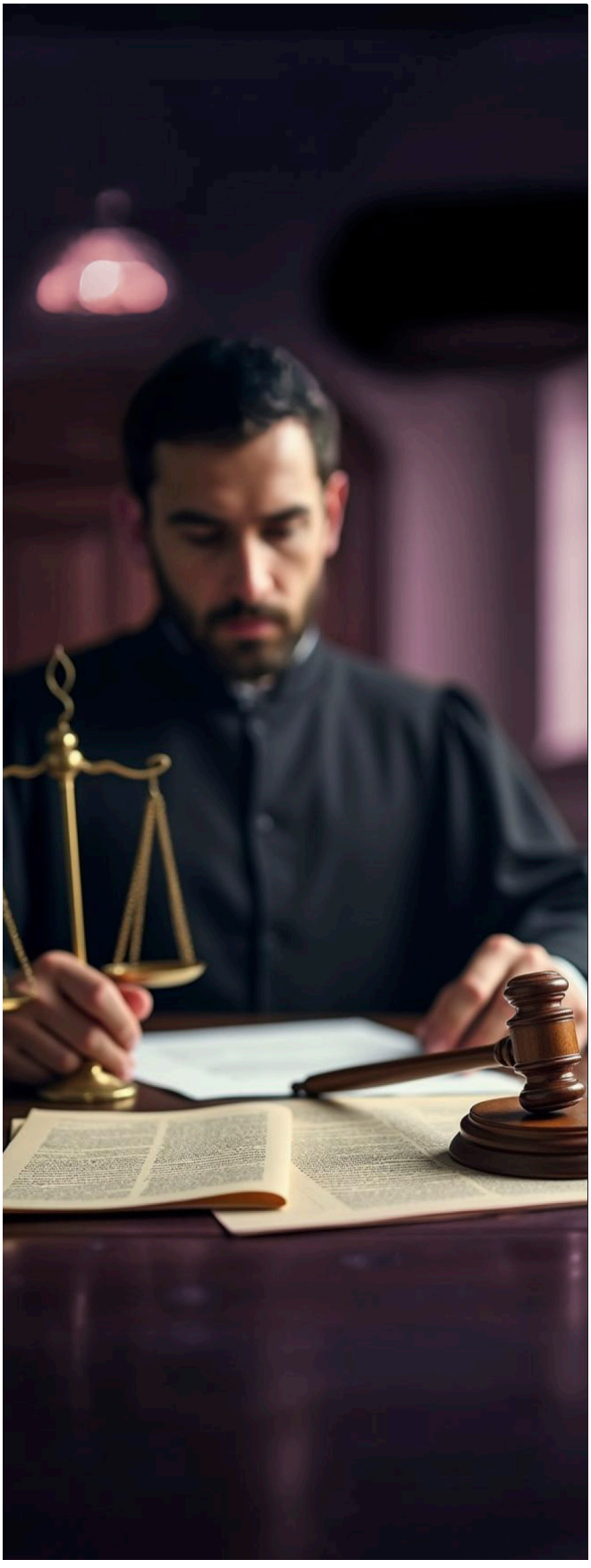
[2] Azuela Güitrón, Mariano y Eber Omar Betanzos Torres, "El principio de estricto derecho en el juicio de amparo. Alcance y consecuencias del mismo conforme a la legislación, la doctrina y la jurisprudencia", en Alfonso Pérez Daza, coord., *El principio de estricto derecho*, México, Instituto de la Judicatura Federal, Consejo de la Judicatura Federal, Escuela Judicial, 2017.

[3] DiccionarioJurídico.mx, "Principio de estricto derecho" [en línea], <http://diccionariojuridico.mx/definicion/principio-de-estricto-derecho/>.



> […] recognizing the existence of a rule of law, a state in which the acts of public authority are always and necessarily subject to the Constitution; it also requires the existence of a democratic system from which the legitimacy of the decisions taken, are democratically based; it requires full respect for fundamental rights; it requires the existence of various methods or possibilities of granting material benefits to individuals, and an understanding that the Constitution must govern with respect to the totality of the accusations against the public power.[4]

When considering the principle of legality, it logically entails its material manifestation, the so-called rule of law.[5]

The principle of legality limits the action of the authorities in a constitutional government and, at the same time, should serve as a foundation for the entire structure of the State.[6]

The concept of law proper to the rule of law, which transforms the rule of law, requires that the government be the one who is subject to the law, before the law is submitted by the government.[7] Legality will be the crux for all activity of the public power and, therefore, its action must be founded and motivated in the legal system.

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[4] Cossío Díaz, José Ramón, "Problemas de la justicia constitucional electoral", en J. Jesús Orozco Henríquez, coord., *Sistemas de justicia electoral: evaluación y perspectivas*, México, Instituto Federal Electoral (IFE)/ONU, Programa de las Naciones Unidas para el Desarrollo (PNUD)/UNAM, Instituto de Investigaciones Jurídicas/Tribunal Electoral del Poder Judicial de la Federación (TEPJF), 2001, p. 397. Author's translation.

[5] For Carl Schmitt, the rule of law is a feature of every State that unconditionally respects current objective law and the subjective rights that may exist. *Vid*. Schmitt, Carl, *Teoría de la Constitución*, México, Ed. Nacional, 1966, p.150.

[6] Madison, Alexander *et al.*, *El federalista*, trad. y prólogo de Gustavo R. Velasco, México, FCE, 2006, p. 22.

[7] Wade, Henry W.R., *Derecho administrativo*, Madrid, Instituto de Estudios Políticos, 1971, p. 18.

In this form, legality is based on the fact that the authority is only empowered to act as prescribed by the legal norm and to comply fully with the laws. Legality implies that:

> [...] any act of authority must be motivated by and based on a norm in the material sense, that is, general, abstract and impersonal, issued prior to the facts subject to study. In this regard, in order to exercise the powers and perform the functions entrusted to the authorities, the constitutional mandate that defines them must be scrupulously observed, as well as international treaties applicable to the subject matter and the legal provisions regulating them.[8]

The basis of this principle requires that "public service should abide by the constitutional and legal regulations governing its organization, powers, functioning and competence".[9]

Legality implies that, at all times and in all circumstances, in the exercise of its powers and the performance of the functions entrusted by any public authority, the constitutional and legal mandate that defines them and the normative provisions that regulate them must be scrupulously observed.[10]

It can be seen that when resolved according to the norm, one is relieved of any internal or external pressure. This allows in motivating and establishing authority, to freely express one's conceptions and preferences, and to resolve cases knowing that one's work, like one's source of work, is stable, which allows one to act and pass sentences according to previously established laws. And at the same time, the rule limits one's independence, being able to resolve only according to law, and not based on arbitrary or illegal acts.[11]

The public character of acts of the State is determined by the role of such acts. "In the case of acts carried out exclusively as a result of the existence and functions of the State or whose immediate cause is the satisfaction of a particular collective interest, such acts are public".[12]

Antonio de Cabo distinguishes two different types of advertising: "1. which links it to the State (everything that is directly or indirectly of the State is public, that is, advertising in the organic sense) and 2. Here, the public, as the ultimate reason for the public nature of the act and activity of the State is to satisfy the collective interests of the people".[13]

In this way, the public is conceived of as an interrelation between the public of society and the public of the State, with society being responsible for specifying the national interest and transferring it to the State sphere.[14]

Now let us look at some cases where censorship has operated as an act that has tended to protect a public good, and for the benefit of society. The first to be discussed is so-called "hate speech".

In common language, the term "hate speech" refers to offensive speech directed to a group or individual and based on inherent characteristics (such as race, religion or gender) and which may endanger social peace. To provide a unified United Nations framework to address this

[8] Canto Presuel, Jesús, *Diccionario electoral*, México, Tribunal Electoral de Quintana Roo/Doxa, 2001, p. 57. Author's translation.

[9] Cienfuegos Salgado, David, *Justicia y democracia*, México, Universidad Autónoma de Chiapas, Centro de Estudios de Derecho Estatal y Municipal/El Colegio de Guerrero, 2008, p. 101. Author's translation. *Vid*. Galván Rivera, Flavio, *Derecho procesal electoral*, México, Porrúa, 2006, pp. 90-91.

[10] Tribunal Electoral del Poder Judicial de la Federación (TEPJF), *El sistema mexicano de justicia electoral. Proceso electoral federal 2002-2003*, México, TEPJF, 2003, p. 14.

[11] *Vid*. MacCormick, Neil, *Legal reasoning and legal theory*, USA, Clarendon Press, 1978.

[12] Carpizo, Jorge, *Concepto de democracia y sistema de gobierno en América Latina*, México, UNAM, 2007, p. 107. Author's translation.

[13] Cabo de la Vega, Antonio, *Lo público como supuesto constitucional*, México, UNAM, Instituto de Investigaciones Jurídicas, 1997 (Estudios Doctrinales, 186), pp. 159-161. Author's translation.

[14] *Ibidem*, p. 199.

problem at the global level, the UN Strategy and Plan of Action for Combating Hate Speech defines hate speech as "any kind of communication, whether oral or written, or also behaviour, which attacks or uses pejorative or discriminatory language in reference to a person or group depending on what they are, in other words, based on their religion, ethnicity, nationality, race, colour, ancestry, gender or other forms of identity".[15]

In several public statements, jurists and experts on extremism have expressed divergent views. Some argue that the ultra-rightists might even feel backed by the allegations and that a blanket ban would threaten a crime of opinion. Others consider Nazi symbols to be a danger to peaceful democratic coexistence, which is intolerable in a State based on the rule of law.[16]

The Church of Satan has been such a focus of conspiracy theories that there is still high speculation about their beliefs, practices and rites. From sex with animals, orgies and baby sacrifices, to plots to annihilate entire populations, Satanism affiliated with the Church of Satan radiates a "hidden" mystery (in pedantic moments, but always exclusive and hierarchical in its "revelation") that can turn into myth, hatred and chilling fear for some. Although Satanism has had a long history and a linear history cannot be imposed, much of it is based on pagan cults to antagonistic figures such as Moloch, Ba'al, Baphomet, Astaroth, Leviathan, Loki, etc.

With the coup of the military regime headed by Augusto Pinochet in September 1973, a dictatorship was installed that remained in power for 17 years.[17] It was not until 1980 that the political participation of the citizenry was again taken into account.[18]

Democracy has as one of its bases in free competition between political parties and with the "legal" prohibition of the Communist Party in Chile using *ad hoc* laws in 1948, their electoral participation and the possibility for voters to select their authorities from this public entity were excluded. It was rehabilitated in 1958 but subsequently declared illegal again in 1973, when all Marxist or Marxist-inspired parties were excluded from electoral competition, based on decree number 77. So, anything inspired by Karl Marx was prohibited in Chile, it was against the government.

On the subject of filmography, censorship has served to prohibit the exhibition or marketing of several films. For example, films that have been banned include *The Passion of Christ*, *The Life of Brian*, *The Triumph of the Will*, *The Birth of a Nation*, *Pink Flamingos*, *The Empire of the Senses*, *The 120 Days of Sodom*, *The Texas Chainsaw Massacre*, *The Last Temptation of Christ*, *Nightmares of a Sick Mind*, *Cannibal Holocaust*, and *The Clockwork Orange*.

In Mexico, film law authorizes films to be shown to the public. Article 17 of the Act states that distributors may not condition or restrict the supply of films to exhibitors and marketers, without justified cause, nor may they condition them on the acquisition, sale, lease or any other form of exploitation, of one or other films of the same distributor or licensee; so censorship operates as a legal instrument, to authorize the material to be displayed, and ensures that it does not go against public morals.

[15] Organización de las Naciones Unidas (ONU), "Entender el discurso de odio. ¿Qué es el discurso de odio?" [en línea], <https://www.un.org/es/hate-speech/understanding-hate-speech/what-is-hate-speech>. Author's translation.

[16] Swissinfo.ch, "Prohibir los símbolos nazis: una demanda creciente", 22 de julio, 2022 [en línea], <https://www.swissinfo.ch/spa/politica/prohibir-los-s%C3%ADmbolos-nazis--una-demanda-creciente/47748740>.

[17] Drake, Paul e Iván Jaksic, "Transformation and transition in Chile, 1982-1990", en Paul W. Drake e Iván Jaksic, eds., *The struggle for democracy in Chile*, USA, University of Nebraska Press, 1995, p.1.

[18] Angell, Alan, "Las campañas electorales en Latinoamérica", en Roderic Ai Camp, comp., *La democracia en América Latina. Modelos y ciclos*, México, Siglo XXI Editores, 1997, p. 260.

Another scenario in which censorship occurs is in electoral propaganda, for which Mexican legislation observes the following:

> Electoral propaganda means all the writings, publications, images, recordings, projections and expressions produced and disseminated during the electoral campaign by political parties, registered candidates and their supporters, in order to present registered applications to the public. Both the electoral propaganda and the campaign activities referred to in this article shall encourage the presentation, development and discussion before the electorate of the programs and actions established by the political parties in their basic documents and in particular, on the electoral platform which they registered for the election in question.[19]

An analysis of the above suggests the promotion of a behavior for candidates and political parties, in which ideas and concepts are subject to certain principles that contribute to the democratic debate.

We conclude this section with the control of the advertising of pornographic material, in which companies are asked to cover their covers, which demonstrates an editorial censorship of their product.

This has demonstrated the State's power to censor certain acts on the grounds of public order, health, or social interest. There are cases in which censorship has been questioned, such as the Pentagon Papers, when the media were accused of disseminating material classified as secret and national security.

Some issues undoubtedly must always be censored: material that undoubtedly affects or may affect the social conglomerate, for example, guerrilla manuals explaining how to build a pipe bomb, pedophilia, zoophilia or electronic pages dedicated to human trafficking, the purchase of drugs, or anyone who might commit a crime.

[19] Ley General de Partidos Políticos (México), artículo 228.

III. Conclusions

- No freedom is an absolute right nor a blank cheque, but the issue of responsibility and the impact on the use of its prerogatives must be considered.
- Note that the divisions between "good" and "evil" are related to cultural context, which is intertwined with religion and therefore with history. The borders that divide good and evil manifest to the extent that they become a paradigm of social regulation, whether a law or a moral protocol. The moral filter is always susceptible to change according to the cultural and particular context of each person.
- The issue of public order is susceptible to the subjectivity of State operators who may allow themselves to use personal elements for their determinations or judgments, for this reason, whether such censored material violates the Constitution, and society itself, should be reviewed impartially by the judicial authority.
- The means of constitutional control must be directed by a new unified integral block, that is, by taking into account the normative framework that protects the governed to a greater extent and by interpreting its provisions with the broadest protection for the rights of the same, in accordance with the law. The expanded and directed criteria must be seen in accordance with the new principles that are most reflected in instruments that ensure the fundamental rights of the governed, such as constitutional protection.

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