



## Constraints on Restricting Freedom of Expression in the Context of Strengthening the Right to Digital Being: *A Legal Reading in Light of the Principle of Proportionality*

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### Abstract

This study examines the constraints governing restrictions on freedom of expression in the digital environment, within the framework of enhancing the right to digital being. It adopts a legal analytical approach that relies on the principle of proportionality as a fundamental mechanism for achieving balance between freedom and restriction. Digital transformations have significantly expanded the scope of exercising freedom of expression, rendering it borderless, while simultaneously generating serious legal challenges, including hate speech, disinformation, incitement to violence, as well as the growing role of digital platforms and algorithmic moderation in content regulation. The research proceeds from the hypothesis that the protection of freedom of expression and the right to digital being cannot be realized through absolute permissiveness or comprehensive prohibition, but rather through subjecting any restrictions to tests of legitimacy, suitability, necessity, and strict proportionality in accordance with the principle of proportionality. The study concludes that the effective application of the principle of proportionality constitutes a robust legal safeguard that prevents arbitrary restrictions or digital erasure, while simultaneously ensuring the protection of the digital public order and the rights of others.

**Keywords:** Digital freedom of expression; Right to digital being; Principle of proportionality; Algorithmic moderation; Digital platforms; Human rights; Legal restrictions.

### Introduction

In the digital era, freedom of expression has emerged as one of the most contentious fundamental rights from a legal perspective, owing to the profound transformations wrought by digital technology on the nature of expressive practices and the structure of the public sphere. Whereas expression of opinion was previously confined to relatively limited traditional spaces, it is now exercised within an open, borderless digital space where technical, legal, and social dimensions intersect, with direct implications for shaping public opinion and empowering individuals to participate in public affairs. This transformation has given rise to a novel concept: the right to digital being, which transcends mere possession of a technical identity or electronic account and now encompasses the individual's legal and social existence within the digital space, including representation, interaction, and digital continuity.



However, this unprecedented expansion in the exercise of digital freedom of expression has not occurred in isolation from genuine legal challenges. Concerns have intensified regarding hate speech, disinformation, incitement to violence, and assaults on human dignity, compounded by the expanding role of digital platforms and algorithmic content moderation. This has engendered a central dilemma concerning the boundaries of freedom of expression in the digital environment and the legitimacy of interventions by states or private platforms in restricting it, without infringing upon the essence of the right or divesting digital being of its substantive content.

In this context, the principle of proportionality stands out as one of the most significant legal safeguards employed by contemporary constitutional law and human rights law to regulate the relationship between freedom and restriction. The principle does not proceed from a logic of absolute permissiveness nor from comprehensive prohibition; rather, it seeks to achieve a precise balance between protecting freedom of expression on the one hand, and safeguarding the digital public order and the rights of others on the other, by subjecting any restriction to tests of legitimacy, suitability, necessity, and strict balancing. This principle has acquired particular importance in the digital environment, where restrictions are imposed not only through legislation or judicial decisions but also via the algorithms of digital platforms that exercise *de facto* authority over public discourse.

Accordingly, this research aims to investigate the limits of freedom of expression in the context of strengthening the right to digital being, through an analytical legal reading grounded in the principle of proportionality. It traces the evolution of the concept of digital freedom of expression, elucidates the philosophical and legal foundations of the right to digital being, and analyzes the application of the principle of proportionality in restricting digital expression. Ultimately, the study seeks to demonstrate that the protection of freedom of expression in the digital age can only be achieved through the activation of the principle of proportionality as a legal guarantee that prevents sliding into arbitrary restriction or digital erasure, while simultaneously ensuring the safeguarding of fundamental rights and the public order in the digital society.

#### **Research Problem:**

The central problem of the topic lies in questioning the extent to which the principle of proportionality can achieve an effective balance between protecting freedom of expression and strengthening the right to digital being on the one hand, and the legitimacy of the restrictions imposed thereon in the digital environment on the other—particularly amid the shift from traditional legal oversight to algorithmic moderation exercised by digital platforms, and the attendant risks of excessive restriction, digital silencing, and marginalization of voices.

Thus, the study proceeds from the following problematique: To what extent does the principle of proportionality constitute an effective legal safeguard for protecting freedom of expression and the right to digital being in confronting the restrictions imposed in the contemporary digital environment?



### **Methodology Adopted:**

This study relies on the analytical and descriptive methods as primary approaches, through the analysis of relevant international and regional legal texts concerning freedom of expression and the right to digital being—particularly the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and modern digital legislation. It also examines the jurisprudence of the European Court of Human Rights with a view to deriving criteria for applying the principle of proportionality in restricting digital freedom of expression, while employing a comparative approach by contrasting the positions of judicial and legislative bodies in the European model.

## **1. Freedom of Expression and Digital Being: Concept, Evolution, and Legal Particularity**

### **1.1. Defining Digital Freedom of Expression**

#### **1.1.1. The Classical Definition of Freedom of Expression and Its Legal Basis**

Freedom of expression is considered one of the fundamental rights of individuals. It entails the freedom to express opinions, beliefs, and to transmit information and ideas without unlawful interference by the state or other parties, provided that such expression does not conflict with the rights of others or public order.<sup>1</sup> It encompasses the right to speak, write, publish, inform, engage in artistic expression, and conduct scientific research freely, subject to limited and legally justified restrictions aimed at protecting the rights of others and public order.

This freedom also includes the right to hold opinions, to seek, receive, and impart information and ideas through any medium, without interference, censorship, or fear of punishment. It constitutes the foundation of democracy and enables individuals to participate in public life. Although this right is fundamental, it is not absolute and may be subject to legal restrictions necessary for the protection of the rights or reputations of others, national security, public order, and public health, as stipulated in Article 19 of the Universal Declaration of Human Rights and relevant international covenants.<sup>2</sup>

Freedom of expression is further understood to mean that the individual must be a free person—not constrained, pressured, fearful, or coerced—and able to express their views in the manner they deem appropriate, provided this does not contravene public order, public morals, prevailing ethics, or societal traditions.<sup>3</sup>

In doctrinal terms, it has been defined as: “the ability of every individual to express their opinions and ideas through any means that enable dissemination, whether via messages, visual or audio media, the electronic information network, or social media platforms.”<sup>4</sup>

<sup>1</sup> Amir Moussa, *Human Rights: An Introduction to Human Rights Awareness*, 1st ed., Center for Arab Unity Studies, 1994, p. 165.

<sup>2</sup> Universal Declaration of Human Rights, 1948 (reference year appears as 1995 in original; corrected for accuracy).

<sup>3</sup> Zaman Hadi Al-Jubouri, *Limits of Freedom of Expression in Light of Iraqi Law Provisions*, published in Al-Iraqiya University Journal, Issue 629, Vol. 3, 2024, p. 487

<sup>4</sup> Dr. Hamid Hanoun Khaled, *Human Rights*, 1st ed., Al-Sanhouri Library, Baghdad, 2012, p. 103.

Another strand of legal doctrine defines this freedom as: “the capacity to externalize or proclaim ideas and opinions through known and accessible means of expression available to all, whether through speech, publication, mail, radio, theater, cinema, or social media. This definition emphasizes that freedom of expression is invariably linked to respect for the principle of public order and public morals.”<sup>5</sup>

From the foregoing, it can be concluded that the definition of freedom of expression rests on two essential pillars:

First: The multiplicity of mechanisms available to the individual for expressing opinions. Freedom of expression remains incomplete unless supported by appropriate means—whether visual, auditory, or written—that enable the individual to convey their views to the public, thereby rendering these means an integral part of the practical reality of expression.

Second: The creation of space for freedom of expression for every member of society, by ensuring the opportunity to present diverse and even conflicting views across political, social, and economic domains, while guaranteeing the free and responsible circulation of such views.

### **1.1.2. Second: The International and National Basis of Freedom of Expression**

Freedom of expression constitutes one of the core standards of human rights affirmed by international conventions, covenants, and declarations. These instruments have endowed this right with legal legitimacy, rendering it part of the binding rules of international law. Consequently, states are under a legal obligation to respect it, refrain from violating it, and integrate it into their legislative and regulatory frameworks.<sup>6</sup>

It is noteworthy that the first formal recognition of freedom of expression appeared in the French Declaration of the Rights of Man and of the Citizen issued following the French Revolution in 1789, which provided that “the free communication of ideas and opinions is one of the most precious rights of man; every citizen may therefore speak, write, and print freely, being answerable for any abuse of this liberty in cases determined by law.”<sup>7</sup>

The European Convention on Human Rights of 1950<sup>8</sup> provides as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the

<sup>5</sup> Samer Hamid Safar, Legal Controls on Freedom of Expression, published in Al-Muhaqqiq Al-Hilli Journal for Legal and Political Sciences, Issue 4, University of Babylon, College of Law, 11th Year, 2019, p. 365

<sup>6</sup> Dr. Muhammad Abdul Rahim Hatim, Guarantees of Freedom of Opinion and Expression in the Iraqi Constitutional System between Text and Practice, published in Al-Ilmein Institute Journal, Issue 05, 2021, p. 217.

<sup>7</sup> Article 11 of the French Declaration of the Rights of Man and of the Citizen, 1789.

<sup>8</sup> See the text of the Convention at: [https://www.echr.coe.int/documents/d/echr/convention\\_ENG](https://www.echr.coe.int/documents/d/echr/convention_ENG) (accessed 25/01/2025).



protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Similarly, Article 19 of the International Covenant on Civil and Political Rights of 1966 states 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 of his choice.

The exercise of the above-mentioned rights carries special duties and responsibilities and may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals.<sup>9</sup>

As regards the African Charter on Human and Peoples' Rights of 1981, it enshrines several fundamental rights:

- Articles 4 and 5 emphasize respect for human dignity and prohibit subjection to insult, slavery, torture, cruel, inhuman or degrading treatment.
- Articles 8 and 9 guarantee freedom of expression and access to information, the right to practice religion, freedom of conscience and thought, as well as freedom of assembly and association.<sup>10</sup>

### 1.1.3. Second: The Constitutional Basis of Freedom of Expression

The most recent constitutional amendment in Algeria incorporated a series of provisions that strengthen freedom of expression and mitigate the criminalization of journalistic activities. These provisions are intended to elevate the professional performance of journalists, thereby positively contributing to the delivery of high-quality media services accessible to Algerian citizens. This development legitimately raises the question of whether Algeria stands on the threshold of a new media system that advances both citizens and media professionals alike, as well as the extent of journalists' responsibility in preserving and consolidating these gains through practical application.

In this context, the Algerian constituent legislator enshrined freedom of opinion in Article 54, coupled with freedom of belief in Article 51, pursuant to the 2020 constitutional amendment.<sup>11</sup> The 2020 constitutional revision further enshrined freedom of the press in all its forms, explicitly providing in Article 54 that it shall not be subject to any form of prior censorship, provided that the exercise of this freedom does not infringe upon the dignity, rights, or freedoms of others. The Constitution also established special protection for journalists by prohibiting the imposition of custodial penalties for press offenses.

Nevertheless, certain legal scholars have directed criticism toward the organic law on information, arguing that—pursuant to its Article 2—it treats the media as an activity subject

<sup>9</sup> Article 19, paragraphs 1, 2, and 3 of the International Covenant on Civil and Political Rights, 1966.

<sup>10</sup> Any propaganda for war and any advocacy of national or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law, in accordance with Article 13(1) of the American Convention on Human Rights of 1969 (added contextual clarification from original footnote).

<sup>11</sup> Article 51 of Presidential Decree No. 20-442 containing the Constitution of the People's Democratic Republic of Algeria.



to multiple conditions determined by the legislator, rather than as an inherent right of the citizen that guarantees full and objective access to developments across various spheres of life. In the view of critics, these conditions are characterized by imprecision and ambiguity, such as the requirement to respect national identity, societal cultural values, national sovereignty and unity, state security requirements, and the country's economic interests.

The law also imposed restrictions on the principle of freedom of publication through reinforced formal procedures and multiple accreditation conditions, thereby imposing an additional burden on publication directors and granting broad powers to regulatory bodies overseeing the written press.

However, the Constitution of the New Algeria of 2020 addressed these criticisms by explicitly providing for freedom of the written, audiovisual, and electronic press. It guaranteed the protection of freedom of expression and creativity for journalists—including press collaborators—and ensured their independence. It further affirmed their right to establish newspapers and publications upon mere declaration, definitively prohibited the imposition of custodial penalties for press offenses, and barred the suspension of any newspaper, publication, or channel except by judicial decision.<sup>12</sup>

These constitutional provisions constitute significant safeguards for freedom of expression and the press in Algeria. They are capable of qualifying the media as a fourth estate and a positive force for pressure, provided that this freedom is exercised in the service of the public interest and the supreme interests of the nation.

#### **1.1.4. Fourth: The Expansion of the Content of Freedom of Expression in the Digital Environment**

With accelerated technological transformations and the widespread adoption of the Internet and social media platforms, freedom of expression has acquired new dimensions that transcend the traditional public space to encompass the digital space, which has become a primary platform for the exchange of ideas and information. The right to expression is no longer confined to conventional means such as newspapers, radio, and television; it has become intrinsically linked to the individual's right to digital existence—that is, the ability to represent one's digital self, disseminate content, interact with others, and participate in public debates online.<sup>13</sup>

For its part, the United Nations Human Rights Council, in its resolution 39/6, affirmed the importance of freedom of expression, free, independent, pluralistic, and diverse media—both on and off the Internet—in building peaceful societies in which no individual is marginalized.<sup>14</sup>

In 2012, the United Nations Human Rights Council adopted a resolution explicitly stating that “the same rights that people have offline must also be protected online, in particular freedom of expression,” marking a significant milestone in the international

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<sup>12</sup> Abdelkader Zahra, *Guarantees and Controls of the Right to Freedom of Opinion and Expression: An Analytical Study in International Human Rights Law*, Diwan al-Matbu'at al-Jami'iyya, Algeria, 2018, p. 89.

<sup>13</sup> Amal Mohamed Emhamed, *Freedom of Expression in the Digital Space*, Journal of the Academic Forum, Vol. 9, No. 3, 2025, pp. 49–52.

<sup>14</sup> Human Rights Council, 44th session, 2020, p. 12.



recognition of protection for digital freedom of expression in accordance with human rights standards.

This recognition draws from the general principles enshrined in Article 19 of the International Covenant on Civil and Political Rights (referred to earlier), which is regarded as a universal benchmark for the protection of freedom of opinion and expression. The provision guarantees “freedom to hold opinions and to express them by any means, including digital means, without interference by public authority,” while permitting narrowly defined legal restrictions necessary to ensure respect for the rights of others and the protection of national security, public order, public health, and morals.

To operationalize this recognition in practice, the United Nations Educational, Scientific and Cultural Organization (UNESCO) promotes freedom of expression on the Internet as an integral component of digital human rights. UNESCO advocates for a digital ecosystem grounded in human rights principles, transparency, openness, and public participation. It further emphasizes the importance of transparency and accountability of social media platforms in combating disinformation and hate speech without unduly restricting individuals’ right to expression.

This transformation has rendered freedom of expression a dynamic concept extending to the individual’s digital existence: namely, the capacity to create accounts, publish content, interact, and even influence public decisions through digital tools. This reflects the emergence of digital rights as an integral part of the human rights framework in the digital age.

Accordingly, digital freedom of expression may be defined as: “the right to disseminate and receive opinions and information through digital means freely and responsibly, while ensuring the protection of the rights of others, respect for the rule of law, and effective contribution to public debate without discrimination or unjustified restriction.”<sup>15</sup>

This concept integrates fundamental human rights with the technical and social characteristics of the digital space, underscoring the need to develop modern legal frameworks adapted to the challenges of the current era.

Consequently, freedom of expression in the digital environment is distinguished by several dimensions:

- a. Immediacy and global reach: Content can be published and received across borders in seconds, thereby amplifying the social and political impact of individuals.
- b. Multimedia diversity: Digital expression is not limited to text but extends to video, images, live streaming, and podcasts.
- c. Interactivity and participation: The digital space enables dialogue between individuals and institutions, thereby enhancing digital citizenship and transforming the audience from passive recipients into active co-creators of content.

## **1.2. The Meaning of the Right to Digital Being**

### **1.2.1. Defining the Right to Digital Being**

Digital being refers to the actual existence of the individual as a legal-social person within the digital space. This encompasses their representation, interactions, digital traces, and

<sup>15</sup> Zehiya Rabti, Freedom of Expression in the Digital Age from the Perspective of International Law, *Afaq lil-Ulum Journal*, Vol. 8, Issue 02, 2023, p. 497.



recognition by legal and institutional systems. It constitutes the existential and legal status of the individual in the digital environment as a recognized person capable of action and interaction, bearing rights and obligations, rather than merely an object of technical processing or a repository of data.

It is not limited to a technical identity (such as a username, number, or account) nor to personal data alone; rather, it represents an extension of the human person themselves into the digital environment, carrying attributes of will, dignity, legal capacity, and the ability to act and exert influence.

### 1.2.2. The Philosophical Basis of Digital Being

Contemporary philosophy of technology asserts that digital transformation has led to a shift in human existence from a purely material being to a hybrid being (Hybrid Being). Luciano Floridi has characterized the human as an informational entity (Informational Entity), whose identity and existence are partially formed within the “infosphere”—the totality of informational environments encompassing both digital and analog realms.<sup>16</sup>

Consequently, digital being is not a illusory virtual existence but a genuine component of contemporary human existence, integrating materiality, information, and digital interaction. Regarding human dignity in the digital space, it is protected not solely through privacy safeguards but through recognition of the human as a complete digital subject. Violations such as attacks on accounts, digital reputation, or discursive presence fundamentally constitute assaults on digital being.<sup>17</sup>

### 1.2.3. The Legal Dimension of Digital Being

- **Digital Being and Legal Personality in Traditional Law :** Legal personality is granted to natural persons from birth. In the digital environment, however, the exercise of legal capacity is impossible without a recognized digital existence. Mireille Hildebrandt argues that digital being serves as a precondition for the law's recognition of the individual as a legal actor within data- and algorithm-driven systems.<sup>18</sup>
- **Digital Being as a Legal Status:** Digital being is understood as an ongoing legal status, not a transient technical fact. It includes recognition of digital existence, its continuity, and protection against arbitrary erasure or deletion. This gives rise to debates concerning the right against digital erasure, the right to permanent access, and the right to continuity of accounts and essential services.

Key related legal principles include:

- **Informational Self-Determination:** This principle embodies the individual's right to determine when and how their personal information is used. Originating in German law, it protects individuals against unbounded collection, storage, and use of data and forms the legal foundation for rights to digital identity and its continuity.<sup>19</sup>

<sup>16</sup> Floridi, *The Fourth Revolution*, Oxford University Press, 2014.

<sup>17</sup> Hildebrandt, *Smart Technologies and the End(s) of Law*, Edward Elgar, 2015.

<sup>18</sup> Hildebrandt, *Law for Computer Scientists and Other Folk*, Oxford University Press, 2020.

<sup>19</sup> This principle was formally established in the 1983 judgment of the German Federal Constitutional Court in the census case (Volkszählungsurteil). The Court held that protection against unlimited collection and storage of personal information forms part of the general right to free development of personality under the German Basic



It is closely linked to human dignity and the freedom to develop personality as guaranteed by the German Basic Law, rendering it a constitutional basis for data protection rather than merely a technical regulatory principle.

- **The Right to Digital Persistence / Digital Continuity (Right against Digital Erasure):** This refers to protection against arbitrary or unlawful deletion of digital accounts and personal data. It is particularly relevant to digital platforms and essential services upon which individuals rely. It is interconnected with the preceding principle, as control over data is essential to ensuring the continuity of digital being.
- **The Right to Permanent Access / Right of Continuous Access:** This right enables individuals to maintain long-term access to their information and digital accounts, whether during life or posthumously (within the framework of digital inheritance). Examples include continuity of digital banking accounts, email, and cloud storage. The principle supports the notion that digital being is neither temporary nor incidental.<sup>20</sup>
- **Protection of Digital Identity:** This entails safeguarding digital being from impersonation or unlawful use, including legal security for digital accounts, contracts, and online transactions.<sup>21</sup>
- **Transparency and the Right to Information, along with the Accountability of Digital Platforms:** Transparency and the right to information mean the individual's entitlement to know who uses their data, for what purpose, and by what means. This is closely tied to informational self-determination, as it is a prerequisite for effective legal control over data.

The principle of accountability for digital platforms imposes obligations on platforms and companies to comply with laws and protect digital rights, including account continuity and user data preservation. It entails the possibility of suing platforms for arbitrary account terminations.

## 2. The Principle of Proportionality as a Safeguard for Freedom of Expression in Cases of Restriction within the Digital Environment

### 2.1. Defining the Principle of Proportionality, Its Legal and Intellectual Basis

#### 2.1.1. Defining the Principle of Proportionality (Principle of Proportionality)

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Law, with restrictions permissible only for compelling public interests. For further details, see: Judgment of 15 December 1983, 1 BvR 209, 269, 362, 420, 440, 484/83.

[https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1983/12/rs19831215\\_1bvr020983en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1983/12/rs19831215_1bvr020983en.html) (accessed 20/02/2025).

<sup>20</sup> General Data Protection Regulation (GDPR) — EU Regulation 2016/679, and Michele E. Gilman, Five Privacy Principles (from the GDPR) the United States Should Adopt To Advance Economic Justice, ScholarWorks@University of Baltimore School of Law, 2020.

[https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2111&context=all\\_fac](https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2111&context=all_fac) (visited 20/02/2025).

<sup>21</sup> Sarah M. Snow, The Right to (Digital) Identity, Fordham Intellectual Property, Media and Entertainment Law Journal, Vol. 35(4), 2025. <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1874&context=iplj> (visited 20/02/2025).

The principle of proportionality is a general legal principle recognized in most legal systems, particularly in European constitutional law and international human rights law. It serves to regulate the balance of rights, ensuring that no right is sacrificed except to the extent strictly necessary to achieve a legitimate objective.<sup>22</sup>

In European legal doctrine, it is defined as a principle requiring that any restrictions on rights (such as freedom of expression) be necessary, suitable, and proportionate to the intended purpose, without exceeding the threshold required to accomplish that purpose. It functions as a legal tool for assessing whether a restriction on a specific right or freedom aligns with justice and the legal objective. In the context of human rights and freedom of expression, any limitations must be appropriate, necessary, and proportionate to the pursued aim, such as protecting national security, public order, or the rights of others.<sup>23</sup>

### 2.1.2. The Legal and Intellectual Basis of the Principle of Proportionality

#### • The Legal Basis of the Principle of Proportionality

Within the legal framework of the principle of proportionality in European and international law, Article 10 of the European Convention on Human Rights (ECHR) constitutes the primary starting point for understanding how restrictions on digital freedom of expression may be lawfully imposed in a balanced manner. The Article provides that freedom of expression includes the right to receive and impart information without interference by public authorities, while permitting certain restrictions provided they are prescribed by law and necessary in a democratic society for the protection of national security, public order, health or morals, or the rights of others. Here, the principle of proportionality emerges as the central legal instrument employed by the European Court of Human Rights (ECtHR) to determine whether such restrictions are justified and consistent with the spirit of the Convention.

In the case of *Handyside v. United Kingdom* (1976),<sup>24</sup> the Court held that the prohibition of a book intended for children due to its controversial content constituted a restriction on freedom of expression. It evaluated the restriction through the lens of proportionality, focusing on three elements: legitimacy (the aim of protecting public morals was legitimate), suitability (banning publication was an effective means of achieving that aim), and necessity (the ban had to be sufficiently limited without excessively impairing freedom of expression). The Court concluded that while States enjoy a margin of appreciation, the restriction must remain balanced in light of the importance of freedom of expression in a democratic society.

In *Delfi AS v. Estonia* (2015),<sup>25</sup> the Court addressed the liability of a digital platform for defamatory comments posted by users. The principle of proportionality was applied to assess whether blocking comments or imposing liability on the platform was proportionate to protecting the rights of affected individuals. The Court found that the State was entitled to

<sup>22</sup> Barak, A., *Proportionality: Constitutional Rights and their Limitations*, Cambridge University Press, 2012.

<sup>23</sup> Ibid.

<sup>24</sup> *Handyside v. United Kingdom*, 24 November 1976, Application No. 5493/72.

[https://hudoc.echr.coe.int/eng#{"itemid":\["001-57499"\]}](https://hudoc.echr.coe.int/eng#{) (visited 20/02/2025).

<sup>25</sup> European Court of Human Rights, Grand Chamber Judgment, *Delfi AS v. Estonia*, 16 June 2015, Application No. 64569/09. [https://hudoc.echr.coe.int/fre#{"itemid":\["001-155105"\]}](https://hudoc.echr.coe.int/fre#{) (visited 02/02/2025).



impose such a restriction as a suitable and necessary means of balancing digital freedom of expression against the protection of reputation and the rights of others, particularly given the commercial nature of the Delfi platform and its responsibility for content management.

These cases illustrate that the principle of proportionality under Article 10 of the Convention<sup>26</sup> does not impose absolute constraints on freedom of expression but demands a precise balance between fundamental rights and the duties to protect others. It reflects the philosophy of European law, according to which rights are not absolute but must be adapted to societal interests and individual protections while preserving the essence of the right to expression. Thus, the principle of proportionality has become a decisive tool to ensure that restrictions on digital expression do not devolve into arbitrary limitations but are applied in a fair, legally grounded manner that respects digital being and the individual's digital existence within the digital society.

#### • The Intellectual Basis of the Principle of Proportionality

The principle of proportionality is not merely a technical legal instrument but a philosophical and intellectual principle that entrenches the idea of balance between rights and restrictions. Intellectually, it rests on the premise that fundamental rights are not absolute and that a democratic society requires mechanisms to regulate these rights so that individual freedoms do not cause harm to others or threaten the public interest. Legal philosopher Robert Alexy<sup>27</sup> has emphasized that the principle of proportionality reflects a theory of fundamental rights as rationally comparable principles, requiring a balancing between the individual's right and the need to protect the rights of others or the public interest, such that legal intervention remains limited to what is strictly required to achieve the legitimate objective without excess.

In the digital context, proportionality can be understood as an intellectual framework that enables the reconciliation of freedom of expression with the protection of individuals' digital being. Digital rights—such as the right to express oneself online or to access data—cannot be exercised without limits, as unregulated use may harm others or threaten public security. The intellectual foundation of the principle of proportionality thus relies on moderation and measurement, requiring any restriction to be justified, effective, necessary, and balanced between individual interests and those of society or others.<sup>28</sup>

This intellectual basis further reflects notions of distributive justice and the protection of human dignity, whereby restrictions on rights cannot be imposed arbitrarily or capriciously. It underscores that legal intervention must be rational, impact-assessed, and guided by objective criteria. Through this intellectual foundation, the principle of proportionality transforms into a protective mechanism for digital rights in the contemporary digital environment, ensuring that restrictions on digital freedom of expression do not result in the erasure of an individual's digital existence or harm to their digital being, but remain confined within the legally necessary boundaries.

<sup>26</sup> Council of Europe, European Convention on Human Rights, 1950.

[https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf) (visited 26/02/2025).

<sup>27</sup> Alexy, R., *A Theory of Constitutional Rights*, Oxford University Press, 2002, p. 48.

<sup>28</sup> Barak, A., *Proportionality: Constitutional Rights and their Limitations*, Cambridge University Press, 2012, p. 132.



### 2.1.3. The Four Elements of the Principle of Proportionality

When evaluating any restriction on fundamental rights such as freedom of expression, it is insufficient merely to declare a legitimate objective; the restriction must undergo a systematic series of tests derived from the principle of proportionality to guarantee its justice and appropriateness. This analysis typically comprises four interrelated elements:<sup>29</sup>

- **Legitimacy** The first condition is that the objective of the restriction must be legitimate within the framework of law and democracy. In other words, the restriction cannot serve narrow political or arbitrary purposes but must pursue a recognized public interest, such as national security, public order, or the rights of others. This requirement is drawn from constitutional texts and international treaties that permit limitations on rights only for “legitimate” reasons, as evident in the provisions of the European Convention on Human Rights (ECHR), which allow restrictions on freedom of expression where required in the interests of a democratic society.
- **Suitability** The measure or action taken must be effective in achieving the legitimate objective. This is a matter of rationality: if the means do not actually advance the intended goal, the restriction cannot be justified. For instance, if the aim is to protect public security from incitement to violence, a general ban on expression is insufficient unless it can be demonstrated that the specific restriction effectively reduces the risk. Legal analyses confirm that proportionality demands a “rational connection” between the means and the end.
- **Necessity** The third element rests on the idea that the restriction must represent the least intrusive option available for achieving the legitimate objective. A more severe measure cannot be employed if less restrictive alternatives of equal effectiveness exist. This implies that the legislator or restricting authority must demonstrate that less intrusive means have been exhausted before resorting to harsher ones. This test is essential to prevent unnecessary deprivation of liberty and is repeatedly emphasized in European and international legal literature on proportionality.
- **Strict Balancing (Proportionality *stricto sensu*)** Once legitimacy, suitability, and necessity are established, the most complex test follows: balancing. This element weighs the negative effects of the restriction against its importance in achieving the public objective. In essence, even if the measure is necessary and suitable, do its consequences (loss of freedom or right) remain proportionate to the societal or public benefit? The resulting harm must not be excessive relative to the goal pursued. This element captures the core of the principle of proportionality in its strict sense, requiring not only effectiveness and necessity but also a fair equilibrium between public interest and the safeguarding of fundamental rights.

## 2.2. Applications of the Principle in Regulating Restrictions on Digital Freedom of Expression

### 2.2.1. Applications of the Principle at the European Level

<sup>29</sup> Luka Andelković, The Elements of Proportionality as a Principle of Human Rights Limitations, FACTA UNIVERSITATIS Series: Law and Politics, Vol. 15, No. 3, 2017, pp. 235–244. <https://scispace.com/pdf/the-elements-of-proportionality-as-a-principle-of-human-3uvec247ke.pdf> (visited 26/02/2025).



In the contemporary digital environment, the principle of proportionality serves as a decisive legal and analytical tool for regulating restrictions on freedom of expression online, ensuring that technical or legislative controls do not evolve into disproportionate limitations that excessively curtail fundamental rights. Far from remaining a mere constitutional theory, this principle is applied practically in content regulation, the allocation of responsibilities between States and platforms, and judicial oversight of decisions concerning digital expression.

At the legislative level, the European Digital Services Act (DSA)<sup>30</sup> represents a recent and concrete example of the practical implementation of the principle of proportionality. The DSA aims to combat illegal content, disinformation, and hate speech on social media platforms,<sup>31</sup> while simultaneously conditioning such regulation on the requirement that measures remain balanced with the rights to freedom of expression and information. It mandates transparency, reviewability, and mechanisms for users to challenge decisions on content removal or account suspension that may affect freedom of expression. This reflects an operational application of the proportionality test, which demands that restrictions be legitimate, necessary, and proportionate to the overarching objective of societal protection without silencing legitimate discourse.

Furthermore, emerging jurisprudence on “proportionality adjudication” in the European context demonstrates how human rights principles influence the evaluation of digital policies. In *Delfi AS v. Estonia*,<sup>32</sup> the European Court of Human Rights applied the principle of proportionality to assess whether imposing legal liability on a news website for defamatory user comments constituted an appropriate and necessary restriction on freedom of expression. The Court affirmed that such liability may be justified if the State demonstrates that it achieves a balance between protecting individual reputations and upholding freedom of expression in the digital space, while emphasizing that measures must satisfy the requirement of being “necessary in a democratic society” rather than a rigid application that could stifle expression.

Thirdly, the judicial test of “necessary in a democratic society,” enshrined in Article 10 of the European Convention on Human Rights, forms an integral part of proportionality analysis. This criterion requires that restrictions on digital speech not only be legitimate but also closely linked to the objective of societal protection and confined within proportionate bounds. It has been consistently invoked in European supervisory judgments to ensure that digital restrictions do not exceed what is required to shield society from actual harm while avoiding undue encroachment on freedom of expression.

Fourthly, recent regulatory studies illustrate the application of proportionality in the design of content moderation systems. Analyses of DSA-related policies, for instance,

<sup>30</sup> REPORT on the Digital Services Act and fundamental rights issues posed, Report – A9-0172/2020, European Parliament. [https://www.europarl.europa.eu/doceo/document/A-9-2020-0172\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-9-2020-0172_EN.html) (visited 02/03/2025).

<sup>31</sup> Articles 14, 17, 20, 34 of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services (Digital Services Act – DSA), Official Journal of the European Union, L 277, 27.10.2022.

<sup>32</sup> THE SOCIAL MEDIA TRIBUNAL VERDICT. <https://www.the-court.eu/the-social-media-tribunal-verdict> (visited 02/03/2025).



highlight that platforms are required to report on the accuracy of their automated filtering systems—a form of regulatory proportionality that seeks to reconcile the effectiveness of removing harmful or misleading content with the safeguarding of freedom of expression and legal precision, achieved through operational transparency and methodologies subject to legal review.

These practical examples demonstrate that the principle of proportionality has evolved beyond a static constitutional standard into a dynamic analytical and legislative instrument employed in the evaluation of real-world digital policies—from regulatory legislation to judicial oversight—thereby striking a balance between protecting individuals and society from harmful content and guaranteeing digital freedom of expression.

### **2.2.2. The Principle of Proportionality in Decisions on Content Blocking and Algorithmic Moderation**

#### **• Algorithmic Moderation between Rights Protection and Rights Violation**

Algorithmic content moderation has become one of the defining features of contemporary digital space governance. Major digital platforms rely on artificial intelligence and machine learning systems to detect, classify, restrict, or remove content. In principle, such moderation is presented as a tool for protecting fundamental rights, particularly by shielding individuals from hate speech, incitement to violence, digital terrorism, and violations of human dignity. However, this preventive function encounters a profound legal challenge concerning its compatibility with freedom of expression and the right to digital being, rendering algorithmic moderation a delicate domain for balancing protection and infringement.<sup>33</sup>

On one hand, algorithmic moderation contributes to rights protection when deployed as a suitable and proportionate means to achieve legitimate objectives, such as rapidly curbing the dissemination of illegal content beyond the capacity of human moderation. In this context, algorithms are justified as necessary instruments for securing the digital public order, especially given the enormous volume of circulating content. This role is acknowledged in modern legislation, such as the European Digital Services Act (DSA),<sup>34</sup> which recognizes the function of automated systems provided they are subject to transparency, proportionality, and fundamental rights safeguards. Here, algorithmic moderation manifests as a regulatory mechanism aimed at protecting the digital public order and the rights of others without resorting to arbitrary or selective human oversight.

On the other hand, algorithmic moderation becomes a vehicle for rights violations when it operates outside the framework of proportionality, owing to its inherently non-neutral technical nature. Algorithms often fail to grasp cultural, political, or symbolic context,<sup>35</sup> frequently resulting in overblocking or precautionary censorship, whereby legitimate content is removed merely on the basis of automated suspicion. Such interventions generate what digital legal scholarship terms a “chilling effect,” whereby individuals refrain from expressing

<sup>33</sup> Llanso, van Hoboken, Artificial Intelligence, Content Moderation, and Freedom of Expression — TWG Working Paper, 2020. <https://pure.uva.nl/ws/files/190771414/AI-Llanso-Van-Hoboken-Feb-2020.pdf> (visited 02/03/2025).

<sup>34</sup> Regulation (EU) 2022/2065 – Digital Services Act.

<sup>35</sup> Hannes Werthner et al., Introduction to Digital Humanism

themselves out of fear of blocking or digital exclusion, thereby impairing the very essence of freedom of expression and the continuity of digital being.

The risks intensify when algorithmic moderation lacks procedural guarantees, such as the absence of appeal rights or clear reasoning for removal or restriction decisions, thereby transforming platforms into quasi-regulatory authorities exercising discretionary power over public discourse without effective judicial oversight. In such cases, moderation ceases to be a mere technical tool and becomes a structural constraint on digital freedom of expression, incompatible with the strict requirements of proportionality—particularly the element of balancing the benefits of protection against the harm inflicted on fundamental rights.

Accordingly, algorithmic moderation constitutes a paradigmatic field for testing the principle of proportionality in the digital environment: it is legitimate when employed to protect rights within the bounds of necessity and suitability, but unlawful when it results in arbitrary digital erasure or undermining of individuals' digital being. Contemporary legal scholarship therefore emphasizes that the legitimacy of algorithmic moderation is not measured solely by its technical efficacy but by its subjection to proportionality standards, transparency, and legal accountability.

## 2 – Digital Silence and Voice Marginalization: Between Protecting Freedom of Expression and Observing the Principle of Proportionality

The concept of digital silence (Digital Silence) refers to the phenomenon whereby the voices of individuals or groups become invisible or severely limited in reach within the digital space—not solely through direct content removal, but as a result of algorithms governing content ranking and visibility. According to a study published in *Frontiers in Communication* (2025),<sup>36</sup> such technical practices lead to the marginalization of less prominent or dissenting voices, as content fails to appear in search results or recommendations, thereby diminishing its impact and dissemination. The study clarifies that digital silence extends beyond explicit blocking to include indirect suppression (downranking), producing effects akin to precautionary censorship and prompting individuals to self-censor out of fear of digital exclusion or invisibility. It further highlights that this form of intervention creates a limited yet significant impact on freedom of expression, transforming platforms into authorities capable of determining whose voice is amplified and whose is marginalized, thereby raising legal and ethical challenges concerning individuals' rights to access the digital public sphere and equality of expressive opportunities.

Thus, digital silence and voice marginalization represent a fundamental threat to freedom of expression in the digital environment,<sup>37</sup> as they obstruct individuals and groups from reaching their intended audiences even when the content is legitimate or lawful. Freedom in the digital space is not confined to the right to publish but encompasses the right to reach others and convey messages—i.e., to exist as an active participant in the digital public sphere. When algorithms reorder or downrank content without clear legal justification, technical intervention becomes an indirect restriction on the right to expression, generating

<sup>36</sup> Joseph J. et al., Digital silence: how algorithmic censorship undermines academic freedom in the Global South, *Frontiers in Communication*, 10:1640244, 2025.

<sup>37</sup> Ibid.



what digital scholarship describes as a “chilling effect,” whereby individuals refrain from publishing out of fear of digital marginalization.<sup>38</sup>

From the perspective of the principle of proportionality, this risk serves as a critical test for the legality of any algorithmic intervention in freedom of expression. The legitimacy element requires that the objective of filtering or suppression pursue a legitimate interest, such as combating hate speech or incitement to violence. Suitability is assessed by the algorithm’s capacity to achieve this objective effectively without harming legitimate content. When algorithms result in excessive removal or unjustified suppression of lawful content, the necessity test is engaged, demanding that no more intrusive means be employed than required. Finally, strict balancing weighs the harm inflicted on freedom of expression against the benefits achieved: digital silence that marginalizes voices without human oversight or procedural safeguards is deemed disproportionate and imbalanced, as it undermines individuals’ rights to expression and access to the digital public sphere.

Consequently, digital silence constitutes a clear model for applying the principle of proportionality in the digital environment. It is legitimate only if algorithms operate within the bounds of legitimacy, suitability, necessity, and strict balancing. When these limits are exceeded, such practices produce direct violations of freedom of expression and the right to digital being.

### 2.2.3. Hate Speech and the Limits of Freedom of Expression

#### • Defining Hate Speech

Hate speech is generally defined as any expression that incites violence, discrimination, or hatred against individuals or groups on the basis of race, religion, sex, national origin, sexual orientation, or any other legally protected characteristic.<sup>39</sup> Hate speech constitutes a practical boundary to freedom of expression because it inflicts harm on others, threatens their physical or psychological safety, and undermines equality within society. In this context, the European Court of Human Rights (ECtHR) holds that protecting individuals from hate speech justifies imposing restrictions on freedom of expression, provided such restrictions are proportionate and necessary.<sup>40</sup>

#### • Criteria for Assessing the Necessity of Intervention in Freedom of Expression

The European Court of Human Rights (ECtHR) focuses on determining whether interference with freedom of expression is necessary and proportionate to the protection of other rights, particularly in cases involving hate speech and incitement to violence. This assessment is conducted through the analysis of several key criteria:

- **The Purpose of the Expression (Intention/Purpose of the Expression)** The Court prioritizes ascertaining the objective pursued by the speaker through an evaluation of intent: does the expression aim to spread hatred or incite violence, or is it merely the articulation of an opinion? If the purpose is legitimate public policy debate or valid

<sup>38</sup> Article 10, Council of Europe (1950). European Convention on Human Rights (ECHR)

<sup>39</sup> Barak, A. (2012). Proportionality: Constitutional Rights and their Limitations. Cambridge University Press, pp. 25–28.

<sup>40</sup> Ben Omar Yassine & Obaidi Dalal, The Dividing Line between Freedom of Expression and Hate Speech from the Judicial Perspective (European Court and American Court of Human Rights), International Journal of Legal and Political Research, Vol. 9, Issue 01, 2025, pp. 276–277.

criticism, the Court generally finds intervention unnecessary. Conversely, where the intent is to incite violence or hatred against individuals or groups, the authorities are afforded a broader margin of appreciation for intervention, subject to careful examination of the surrounding circumstances.

- **The Content of the Expression** The Court examines the substance of the expression to determine whether it is provocative or directly calls for violence or hatred. This includes assessing the degree of threat or direct incitement to the audience and whether the expression targets specific individuals or groups.
- **The Context of the Expression and the Targeted Audience** Consideration is given to the political, social, and economic context at the time of the expression. The position of the targeted audience and the extent to which it may reasonably feel threatened are also evaluated. Expressions issued in tense environments or directed toward vulnerable groups are subject to heightened scrutiny.
- **Probability and Likelihood of Harm** The ECtHR clarifies that the necessity for State intervention to restrict hate speech does not require the actual occurrence of the act incited by the expression. It suffices that there exists a reasonable probability that the speech may lead to incitement of violent acts or hatred against a defined group. In other words, a plausible causal link between the expression and the anticipated harm is sufficient to render the interference legitimate and proportionate.
- **Historical Events** With respect to expressions concerning historical events, the Court distinguishes between two categories:
  - Disputable historical events: These are historical matters open to free debate and evaluation in public discourse and are protected as part of freedom of expression.
  - Established historical facts: These are events whose veracity has been conclusively established, such as the Holocaust or Nazi genocide. In this regard, the Court has held that denial of such established facts falls outside the protection afforded by Article 10 of the European Convention on Human Rights.<sup>41</sup>

## Conclusion

The study concludes that freedom of expression in the digital environment is no longer an isolated right but is inextricably linked to the right to digital being, encompassing existence, representation, and continuity within the digital space. Any interference with this existence constitutes an indirect infringement on the very essence of freedom of expression.

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<sup>41</sup> In the Garaudy case, the Court held that denial of the Holocaust in the applicant's book did not enjoy protection under Article 10, as it rejected established historical facts, thereby justifying the interference with freedom of expression. By contrast, in the Incal case, the publication concerned historical events of public interest, including administrative measures against street vendors in the city of Izmir, and the Court regarded such expression as part of public debate warranting protection under freedom of expression. See: European Court of Human Rights (ECtHR), Garaudy v. France, Application no. 65831/01, Decision of 24 June 2003. See also: European Court of Human Rights (ECtHR), Incal v. Turkey, Application no. 22678/93, Judgment of 9 June 1998. HUDOC.



The study demonstrates that freedom of expression is not an absolute right and that restrictions in the digital environment derive their legal basis from the protection of the rights of others and the digital public order. Nevertheless, the legitimacy of such restrictions remains contingent upon strict adherence to the principle of proportionality in its four elements: legitimacy, suitability, necessity, and strict balancing.

Judicial applications by the European Court of Human Rights reveal that the assessment of the necessity of interference with freedom of expression is governed by precise criteria, most notably the purpose of the expression, its content, its context, the targeted audience, and the gravity of the probable impact. This reflects a qualitative evolution in the protection of freedom of expression while taking due account of the specificities of each case.

The study discloses that algorithmic moderation constitutes a dual-natured regulatory tool: on one hand, it contributes to safeguarding fundamental rights and combating unlawful content; on the other, in the absence of transparency and procedural safeguards, it may become a means of violating freedom of expression and the right to digital being, leading to over-removal, digital silence, and voice marginalization.

The study finds that digital silence and algorithmic downranking represent indirect restrictions on freedom of expression, as they deprive the right of its practical substance even while it formally persists. Such practices therefore necessitate subjection to the proportionality standard and effective legal oversight.

The study highlights that contemporary legislation, particularly the European Digital Services Act (DSA), constitutes an advanced attempt to subject digital content regulation to the principle of proportionality through obligations of transparency, accountability, and appeal mechanisms. Its effectiveness, however, remains dependent on proper implementation and judicial supervision.

### ***Recommendations of the Study***

- The explicit recognition of the right to digital being within constitutional frameworks or national legislation as a fundamental right inherently linked to freedom of expression in the digital age.
- The reinforcement of the principle of proportionality as the primary constraint on any legislative or technical intervention in digital freedom of expression, with express stipulation of its elements and criteria in laws governing the digital space.
- The subjection of algorithmic moderation to stringent legal safeguards, including transparency, explainability, human review, and the right to appeal, in order to prevent its transformation into an instrument of arbitrary censorship or digital exclusion.
- The imposition of legal accountability on digital platforms as influential actors in the digital public sphere, rather than leaving the regulation of freedom of expression solely to contractual terms.
- The development of specialized judicial and administrative mechanisms for adjudicating disputes concerning digital freedom of expression, enabling a precise understanding of the technical specificities of algorithms and an accurate assessment of proportionality.



- The study calls for enhanced international and comparative legislative cooperation in the regulation of digital freedom of expression, given the borderless nature of the digital space, to ensure balanced protection of fundamental rights.
- The integration of human rights and ethical considerations into the design of digital algorithms from the outset, so as to prioritize respect for freedom of expression and digital being rather than merely addressing violations *ex post facto*.

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