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## **New Challenges in Defining Rights and Liberties in the Age of Social Media**

(Pierre Trudel, *Droits, Libertés et risques des médias*, Presses de l'Université Laval, Québec, 2022)

The latest advances in information and communication technology were accompanied by an unprecedented wave of transformations that has changed not only the way in which we communicate and relate to one another, but has also affected our social, political and economic systems. And, consequently, the investigation of these profound transformations has become the focus of many social and political scholars. However, these developments, and especially that of social media, also represent a challenge for the authors concerned with the ethical and juridical difficulties and dilemmas associated with it.

A recent and remarkable scientific contribution along these lines is the book *Droits, libertés et risques des médias*, authored by professor Pierre Trudel from the *Centre de recherche en droit public (CRDP)* of the University of Montreal. The book was published in 2022 by the Presses de l'Université Laval. The argumentation of the book is divided in two different parts, preceded by an *Introduction* and followed by a comprehensive section dedicated to the *Conclusions*: the first part is dedicated to *The Rights, Liberties and Other Principles* and the second part to *The Risks of the Journalistic Activity*.

As the author acknowledges in the *Avant-propos* section, the main objective of the book is to present the main rights and liberties but also the risks and the limits associated with the media. And he believes that, despite the numerous and radical technological transformation which affected the activity of contemporary journalists (digitalization, the development of social media, big data and so on), the aforementioned rights and freedoms should always be restricted by four various types of

constrains: by law, by the configuration of the technology itself, by the media market and by the social (and especially ethical) norms. Hence the legislative process must take into consideration all these types of normative constrains, and also the technological, social and economic mutations that influence the juridical mechanisms themselves and the way in which the state and other agents are involved in the process of establishing the social order (pp. XIII-XV). And, although the book is primarily concerned with the laws applicable in the Quebec region of Canada, the main principles, which are the focus of his analysis, are the same with those which regulate the activity of the media in any democratic society.

In the *Introduction*, Pierre Trudel affirms that the reason for educating journalists regarding the normative dimension of their activity is related to the special conditions that must be met in order to make this media activity correspond to the public interest. Hence, they should not feel intimidated in the exercise of their rights and freedoms. However, they must also avoid using them in a manner that would conflict with the rights and liberties of others. Therefore, the optimal solution would be to „occupy all the space of freedom” (p. 1), which is at their disposal in a democratic society, but without affecting the rights of others. But how are we to define the journalistic activity in the context of the various online and offline practises that are associated with it. In Trudel’s opinion, “a journalistic activity consists essentially in collecting information, verifying it, analysing its importance for its target audience and disseminating it” (p. 2).

In the next section he resumes the discussion regarding the difference between the moral and the juridical responsibility. In his view, morality is characterized by a set of rules of conduct perceived as adequate from the perspective of the dominant public opinion in a given society and which are variable from a time and a place to the other. Moreover, he states that morals, in this sense, are to be understood as a synonym for manners of conduct or habits. And, he adds that it is not very difficult to judge if a person’s behaviour is morally wrong, once we have taken into consideration the moral system he adheres to. Furthermore, he affirms that, when it comes to the moral judgement, contrary to what happens in the juridical appraisal of responsibility, we wouldn’t have to examine any proofs or to evaluate the solidity of the information which constitutes the base for our judgement (pp. 5-6). In my opinion, these statements demonstrate that his investigation of morality is not very comprehensive and profound. The domain of morality does not coincide

with the social representation regarding the adequate set of rules which describe what is right and what is wrong. It also has to do with moral philosophy and the theories developed by many great thinkers in order to provide a strong foundation for the moral judgement. Pierre Trudel hasn't paid much attention to significance of moral philosophy and to the refined differences in meaning between terms like *morals*, *ethics* and *deontology*<sup>1</sup>.

Next, Pierre Trudel is concerned with clarifying the relation between deontological and juridical norms. He believes that deontology should be characterised as the "science of what is convenient to do" or as "the set of duties imposed on the individual by his profession" (p. 7). And he acknowledges the importance of the deontological norms: although they lack the normative force of the laws, the decisions of deontological organisations (like the Council of the Press) are frequently taken into consideration by the courts. Nevertheless, he thinks that this fact could generate the tendency to misinterpret the deontological recommendations as legal obligations, which would have an inhibitory effect on the journalistic activity and create the tendency of editors to abstain from publishing the materials perceived as contrary to media deontology. Additionally, it could be the source of confounding the deontological and the civil fault (p. 10).

As was mentioned above, the first part of the book is dedicated to the principles that govern the production and dissemination of information in accordance with the laws of Quebec. As in any other democratic society, the first and the most important principle is the freedom of expression of the press and of the other media. It also guarantees the liberty to criticize the actions of the government, of the elected representatives and of others who are in the public service and secures the liberty of the debates regarding public policies and issues of public interest. It was stated in declarations and bills of rights like the French *Déclaration des Droits de l'Homme et du Citoyen* (1789), the First Amendment (1791) to the *American Constitution*, the *European Convention on Human Rights* (1950), and also at a global level in the *Universal Declaration of Human Rights* (1948). Trudel mentions that in Canada the freedom of expression has a constitutional status being stated in the article 2b) of *The Canadian Charter of Rights and Freedoms* (1982) which protects this principle from any legislative modifications

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<sup>1</sup> For a much more detailed argumentation along these lines you should read the article of Gilles Gauthier published in this issue of the journal *Argumentum*.

which would aim at limiting this freedom, except for those limitations that would be reasonable in a democratic society (p. 21).

He argues that the Canadian law guarantees an extensive domain of protection for the freedom of expression. From an *a priori* point of view all types of discourses are included in this domain. No restriction is imposed on the form or on the significance of the message. Moreover, even if the principle does not provide protection for acts of violence, Trudel believes that violent messages are benefiting from the aforementioned *a priori* protection (p. 23). In my opinion, this statement would need further clarification. Because there are numerous forms of expression, like the political protests, which may involve some acts of violence without having significant consequences that would justify a legal punishment, while there are many kinds of messages that have a very violent content, and can have severe implications regarding the rights of others.

An interesting affirmation is that the conformity with the truth is not in itself a condition for the liberty of expression (p. 24). But, obviously a deliberate lie could be punished by taking into consideration its consequences. The principle also presupposes other types of rights and freedoms, like the right to remain silent, the right to search for information, the editorial autonomy of the media (the right to decide if they want to publish or not a specific piece of information and to choose the opinion they wish to express and the specific style of expressing it).

Another important principle correlated with the activity of the media is the one that guarantees the right to reputation, which is prescribed by the *Quebec Civil Code* in the articles 3 and 35 and by the *Quebec Charter of Human Rights and Freedoms* in article 4. The reputation consists in what other people think about a person, and might be considered as an attribute of that person's dignity and it functions as a guaranty for his interactions with others. That is why it includes the right to oppose the dissemination of false information about his person and to demand the penalization of any attempt of this sort (pp. 33-34). And, in certain contexts, this action could be considered as a *defamatory libel* mentioned in article 298 of the Criminal Code of Canada which is punishable by imprisonment for a term of not more than two years. Evidently, the act of defamation could also be penalized on the base of the civil responsibility mentioned in the article 1457 of the Civil Code, which is based on the obligation to repair the damage that was caused to others.

The next important principle is related to the protection of the fundamental and extra-patrimonial right to a private life, established by

the article 5 of the *Quebec Charter of Human Rights and Freedoms* and by the article 35 of the *Quebec Civil Code*. In the article 36 of the latter mentioned legal document are enumerated the acts of invasion of the private life: entering or taking anything in his dwelling; intentionally intercepting or using his private communications; appropriating or using his image or voice while he is in private premises; keeping his private life under observation by any means; using his name, image, likeness or voice for a purpose other than the legitimate information of the public; using his correspondence, manuscripts or other personal documents. It is a right to self-determination and autonomy, to solitude and anonymity. This right can be restricted for the purpose of protecting the public order and securing the legitimate rights of others to know certain types of information that are usually associated with private life (pp. 44-47). The Canadian author also refers to the challenges raised by the development of Internet and social media in relation to the distinction between public and private life. However, I believe that the investigation of this issue should have been more in depth, taking into consideration that it generates some of the most difficult problems for legislators and for moral thinkers.

His analysis continues with the presentation of the right to protect one's image. The most recent technological developments made this right even more important because, as Trudel argues, contemporary information cannot be envisioned without image: "to rapport and to explain the actuality implies to show, to illustrate" (p. 51). In his view, it is intimately related to the right to private life which includes the exclusive prerogative to oppose the reproduction of one's image without authorisation (p. 52). He mentions the fact that it is a right linked to the personality of an individual and is often explained in relation with the right of property. However, I believe that Trudel could have been provided a more comprehensive description of the complexities associated with the juridical protection of this right in the age of social media, because it is difficult to say which are its reasonable limits giving that, very often, the individual himself chooses to share his photos and video files on platforms with public access from which they can be downloaded, modified, reposted and so on.

Next, he refers to the right of individuals to benefit from in the publicity of political and judicial debates stipulated by the articles 11 d) and 2 d) of the *Canadian Charter of Rights and Freedoms* and it is a basic condition for assuring the transparency and integrity in the activity on those democratic institutions. Both the public and the press can benefit

from this right if their access to the debates does not obstruct the judicial procedure itself (p. 58). A right that it is closely related to the aforementioned one, is the public's right to have access to information, established by article 44 of the *Quebec Charter of Human Rights and Freedoms*, a prerogative which exists virtually without any intervention of the State, but, in fact, requires financial and administrative efforts in order to make it an effective right (p. 63).

In the eighth section the Canadian author synthesizes some of his most interesting arguments concerning other rights and liberties of journalistic activity by explaining notions like the journalistic fault, the standard of journalistic reasonability or public interest. However, the most remarkable part is the one dedicated to the online media. After presenting the features of electronic media, Trudel discusses the juridical challenges created by the development of Internet, online platforms, and big data. He argues that the valorisation of big data is essentially linked to the activities of the online platforms which collect huge quantities of information in order to identify a more efficient mode of captivating the attention of the users and to use it in the advertising world. And, he adds that big data constitutes a resource which has a collective dimension because they correspond to a collective interest. That is why he states that it is reasonable to impose some types of financial obligations to those that use this collective resource (pp. 84-86). In the same time, because the attention of the users has become a significant resource, it should be accessible for the new creators of content and value.

Another complex issue generated by the creation of big data concerns the problem of sovereignty. While there are some data that are directly associated with a specific individual and they can be governed by the regulations concerning private life, there are data which are "massified" and lose their connection to any specific individual. And, in this latter case, the Canadian author believes that big data should become an object of state sovereignty and surveillance (p. 91). Here again, although I find his argument compelling, I believe he should have provided a more comprehensive investigation of this complex issue regarding the extent of state surveillance that could be perceived as reasonable in a democratic society.

The next challenge that is analysed is related to the characteristics of online media and online journalism. The Internet technology has changed the media environment completely. Citing Peter Dahlgreen, he affirms that the main features of this new environment are interactivity, customisation of content, hypertextuality and multimediality (p. 92). This

is why the role of the users has become much more important. While there are online sites controlled by their creator, there are many platforms on which the content is produced by the users themselves. And this makes the issue of legal responsibility even more complex. He explains this problem in the terms of risk management: the different actors are in the position to increase or to diminish the risks for them and for the others. Therefore, the resulting normativity combines the contributions of the state legislators, the creators of the technologies and of the users themselves (p. 93-94). However, I believe that Trudel doesn't address in a comprehensive manner the problem of conflicting regulations and spheres of normativity. These different contributions are not always in agreement: there are many conflicts that occur between the rules that are established by the state, by the developers of technology and by the users themselves. Moreover, these regulations do not have the same normative force: while some are mandatory laws, others are merely conditions of use or simple recommendations.

The second part of the book is dedicated to the risks associated with the journalistic activity in every one of its main three stages: in the process of collecting the information, in the diffusion of the information and after the information was disseminated. Regarding the first of these stages, he mentions the regulations that govern the access to documents issued by public organisations and institutions, the access to public and private places and the rules that guarantee the confidentiality of media sources and the protection of journalist against surveillance. In Quebec they adopted a special law which was meant to regulate the access to public documents named the *Act respecting access to documents held by public bodies and the protection of personal information*, which in article 9 establishes the general principle of free access to documents issued by a public organisation. There are documents that must be published proactively, and there are documents that cannot be published at all or without some significant risk, and documents for which the publication is conditioned by the discretion of the beneficiary or by the consent of a third party (p. 110). As was mentioned before, the media also has access to judicial courts if it does not obstruct their activity or does not affect the rights and liberties of others (victims, witnesses, children and so on). Concerning the access to public places, there is a similar general principle stipulating the freedom of admission. But, there are also specific regulation regarding the access to certain places. For example, there are some rules that regulate the conditions of admission and the conduct that should be exhibited by journalists in the courts of justice (pp. 136-138).

By contrast, when it comes to the private places, the access of the media is generally restricted.

The confidentiality of the media sources is established by the *Journalistic sources protection act*, which allows journalists to oppose the pressures exerted by courts, organisations or persons that are trying to get access to any information or documents which can be used in order to identify a journalistic source (p. 146). A court could impose the disclosing of the information or the document only if it was necessary in order to solve a specific case and with the condition of being considered the single available option and only when the public interest of administering justice would be more important than the public interest of maintaining the confidentiality of the source (p.148). A related matter is the one concerning the protection of the media against surveillance. In a democratic country, like Canada, a journalist cannot be put under observation by an authority except when it would be justified by clear reasons and only with the permission granted by a judge. And this permission could be granted only if the two aforementioned conditions would be met (p. 154).

In relation to the second stage of the media activity, the distribution of the information, Trudel begins by mentioning the risks associated with people's right to reputation. In exercising their liberty of expression, journalists could be accused of affecting this right. Therefore, their liberty to choose the information they want to disseminate is limited by the prerogative of others to oppose the damaging of their reputation. But the right could be exercised only by the persons which are targeted by the journalistic material and only if they can prove that damage has been committed against them in a liable manner (p. 160). And he argues that the demonstration of the liability is a complex matter, and it is relative to the specificity of the media material: a description of the facts, a presentation of the opinion of a third party, a commentary or a satire. He continues by presenting the risks associated with the conflict between the freedom of expression and other people's right to a private life: when journalists would be tempted to capture and utilize the image or voice of a person in a private place or to use private documents and so on. However, there are cases in which people do consent to the disclosure or, as was mentioned before, there is a public interest or the right of the others to know the private information. All these cases would represent various limitations imposed on the right to a private life.

A parallel analysis is provided for the restrictions generated by the conflict between the liberty of expression and the right to one's image. In



this case, there could be a liable damaging of the right only if the person would be recognizable as the main subject in the photo or in the video (pp. 195-197). And, once again, the consent of the person or the existence of a public interest could act as limitations of the right to one's image.

Other constraints on the media activity have to do with the regulations that govern the administration of justice. The courts can issue non-publication orders if they are necessary for the good administration of justice and their beneficial effects are more important than the prejudicial ones that affect the freedom of the media (p. 208). Similar restrictions could be imposed on the publication of information regarding the search mandate or concerning pieces of evidence, witnesses, children or methods of enquiry, but also of the information that would be interpreted as contempt of the court. Another set of risks that affect the media activity are related to specific media outlets like the electronic media (radio and television): the interdiction to disseminate programs which are offensive and discriminatory, the exigencies regarding the equilibrium of the different points of view, the rules about the reasonable controversies, and so on.

When it comes to the risks associated with online media, Trudel begins his presentation by noting that the new technologies have changed the media environment in relation with the stages of collection and diffusion of the information. The rules about the liability associated with the online communication are established by the *Quebec Civil Code* and by the *Act to establish a legal framework for information technology*. An important distinction made in these legal documents is that between the responsibility of those who decide to post information online and the responsibility of the intermediaries. The Canadian author states that when someone decides to post information online, he assumes an editorial function, and he must respond for his illicit behaviour (pp. 247-248). A similar responsibility corresponds to the activity of those who moderate the distribution of the information, especially when ordinary users have the privilege of anonymity. The intermediaries could be those who provide services of technological document conservation, web hosts, search engines, providers of different services on social networks and so on. When the intermediaries play only a passive role, they are generally exonerated of responsibility. In accordance with the article 27 of the aforementioned law they are not obligated to exert an active surveillance in order to identify the illicit activities. However, they must cooperate with the authorities when it is requested, and they could be held responsible if it could be demonstrated that they obstructed the activity of

the authorities or that they knew the illicit character of the information that was hosted (p. 255).

The third and final stage of the media activity concerns the measures that must be taken after the dissemination of information. This phase is also associated with specific risks and responsibilities because the journalist must correct the possible errors and minimize the negative consequences of his activity. And, in order to accomplish these objectives, the main instruments that that can be used are: the retraction, the right to reply and the appeal to a court of justice in order to penalize the illicit activity of the media and to get financial compensation (pp. 261-263).

In the *Conclusions* section of his work Pierre Trudel expresses the wish that his book will prove to be a useful instrument for the people that are actively involved in the media (p. 281). I strongly believe that this wish has a very good chance to be fulfilled. He provides extensive investigations regarding the juridical challenges raised by the recent transformations which affected the media environment. However, I believe that, in his investigation, he demonstrated a tendency to address mainly those legal issues that can be explained in a clear and relatively unproblematic manner. Moreover, he underestimated the importance of ethical and deontological normativity for contemporary journalism. Consequently, he did not provide extensive investigations for the relation between ethical, deontological, and legal normativity or for some difficult issues related with online media. Nevertheless, leaving these critical observations aside, I think that the book will prove to be a valuable guide for the specialists and the students who have interests concerning the latest developments in the field of media and communication law.