

## **Round table 2 : Freedom of expression : a right with responsibilities. The ethical issues regarding the creation and dissemination of Internet content and communications**

Introduction by Dr Karol Jakubowicz, Moderator

Good morning and welcome to Round table 2: “Freedom of expression : a right with responsibilities. The ethical issues regarding the creation and dissemination of Internet content and communications”.

A book on “Ethical Implications of Emerging Technologies: A Survey”, published this year by UNESCO’s Information for All Programme, has this to say on the subject of our conference:

The first infoethics goal, derived from the Universal Declaration of Human Rights, establishes the fundamental priority of putting technology in the service of human rights. Stemming from that goal are three others that aim to promote the public domain, diversity of content, and access to information and the means of communication – with these three based on the premise that all people should be able to share in the benefits of ICTs.

When we consider this, we might do well to recall the play by Luigi Pirandello “Six characters in search of an author”. That was in the good old analogue days. Today, in the digital era, we have to do not just with six characters, but with millions of Internet users and content creators in search of rules by which to operate. As you may know, a Blogger's Code of Conduct has been proposed. One of the rules, paraphrased, is: “When you write your blog, imagine you are talking to your own mother. That way, you will never use unacceptable language, or say things on the Internet that you wouldn’t say in person”.

The proposal has, however, met with a mixed reaction: some people have objected, saying “Here comes the blogging police” and vowing never to sign the code.

This goes to the heart of the debate on freedom of expression on the Internet. A previous conference on “Freedom of Expression in the Information Society”, organized by the French National Commission for UNESCO, in partnership with UNESCO, in 2002, identified two basic approaches:

- First, that freedom of expression on the internet must be absolute, without exception, and it cannot be limited even by reason of the damage which may be caused to society;
- Second, that freedom of expression and information carries with it "duties and responsibilities", as stated in article 10 of the European Convention on Human Rights. Therefore it can be legitimate, and even desirable, for States to take measures to prevent the diffusion on Internet of illegal content such as child pornography or racist or xenophobic material. Beyond illegal content, it is also legitimate for States to take measures to restrict access to certain harmful types of content.

The conference report identifies the first view as, broadly speaking, reflecting the American approach and the second as reflecting the European approach. However, if you look at the Joint Declaration of the OSCE Representative on Freedom of the Media and Reporters Sans Frontieres on Guaranteeing Media Freedom on the Internet, issued in 2005, you will find a view similar to the American one: “Any law about the flow of information online must be

anchored in the right to freedom of expression as defined in Article 19 of the Universal Declaration of Human Rights. In a democratic and open society it is up to the citizens to decide what they wish to access and view on the Internet. Filtering or rating of online content by governments is unacceptable. Filters should only be installed by Internet users themselves. Any policy of filtering, be it at a national or local level, conflicts with the principle of free flow of information.”

On the other hand, also in 2005, the European Internet Coregulation Network, broadly representing the industry itself, said in a policy statement on Internet governance: "Internet is a social space which needs regulation in all its aspects according to common social values. Internet cannot evolve in the future if the social dimension of this space is not recognized. Most of the human activities are now transferred on the internet and it implies new responsibilities for all the actors, public and private".

So, the first question we are facing is: should there be regulation of freedom of speech on the Internet, or should there not?

This is immediately followed by a second question: if there is to be any regulation of the freedom of speech on the Internet, should the general legal framework be applied, or should there also be Internet-specific regulations?

In 2001, the special UN, OSCE and OAS representatives or rapporteurs on freedom of expression or the media said in a joint declaration that “States should not adopt separate rules limiting Internet content”. In its 2003 “Declaration on freedom of communication on the Internet”, the Council of Europe Committee of Ministers said something similar: “Member States should not subject content on the Internet to restrictions which go further than those applied to other means of content delivery”. The OSCE said in its 2003 “Amsterdam Recommendations. Freedom of the Media and the Internet” that “Any means of censorship that are unacceptable within the 'classic media' must not be used for online media. New forms of censorship must not be developed”.

The answer would therefore seem to be clear. However, there is still the question whether the ICTs do not create special forms of violation of human rights that require special treatment that might not be applicable in other circumstances.

Moreover, there is also the question of which rules should apply where. The already mentioned Joint Declaration of the OSCE Representative on Freedom of the Media and Reporters Sans Frontieres says that “All Internet content should be subject to the legislation of the country of its origin ("upload rule") and not to the legislation of the country where it is downloaded.” Is this view universally shared? How should problems of jurisdiction be handled?

I am hoping our panel will throw light on these issues.

Then, there is the third question: how can the regulation be applied and enforced? It is easy to teach six characters their lines and what to do on the stage, but how do you teach millions of Internet users and content creators and providers what they should do? Much is made in this context of self- and co-regulation. However, is there agreement on whom the responsibility for this falls? For example, the Joint Declaration of the OSCE Representative on Freedom of the Media and Reporters Sans Frontieres says that “A technical service provider must not be held responsible for the mere conduit or hosting of content unless the hosting provider refuses to obey a court ruling. A decision on whether a website is legal or illegal can only be taken by a judge, not by a service provider.” Should we therefore absolve service providers of all responsibility? And if not, what responsibilities remain?

And, finally, how do you reach the millions of Internet users with information on their rights and responsibilities and how do you get them to take their responsibilities seriously, if many consider the Internet as an area of unfettered freedom and reject any constraints on that freedom?

These are only the most obvious questions that we are looking for answers to in this panel. We have a number of distinguished speakers whom I will introduce as I invite them to speak. We also have a rapporteur, Professor Dirk Voorhoof of Ghent University in Belgium, and also of Copenhagen University in Denmark, who in addition to what the speakers say can draw on his own extensive expertise to provide an input to the report he will deliver tomorrow.

I will ask the speakers to deliver 5-minute highlights of their presentations (which will be available in their entirety on the conference website), then I will ask them to develop some of the main ideas, and after that I will open the floor for questions and comments.

To conclude this introduction, let me say that before any speaker has said anything, this panel has already made a signal contribution to this meeting. Without this panel, it could not be described as a “European regional meeting”, but only as a “Western European sub-regional meeting”. If you look at the list of participants, you will understand why.

And now, for our first speaker ...

#### IV- What principles? Freedom, responsibility, authority

The discussion forum set up to prepare this symposium made it possible to identify certain positions of principle. Concerning the abuse of freedom of expression, two fundamentally opposing positions emerge. The first of these defends the idea that the concept of abuse of freedom of expression is irrelevant, since regulation is effected by the debate of ideas. This is the position of the United States, for example. Other countries maintain that there is no freedom without responsibility; this is the European position, notably shared by France.

##### 1. Total freedom?

This fundamental principle is an ultimate objective towards which we must strive. The first amendment of the Constitution of the United States perfectly illustrated the legislator's will to impose an ethical horizon on political decision-makers. However, the internet is still far from being a space of freedom, and constant vigilance against threats to freedom of expression remains a necessity. Even in the United States, freedom is threatened. The scope of Article 19 of the Universal Declaration of Human Rights, which stands as the reference, is also limited by a number of exceptions. Each State is tempted to have its own legislation applied: the Yahoo case is an example of this. Moral stakes should not override rational ones: expression, not conduct, is the question here, and it is fundamental to freedom and human dignity. Expression must be protected from all the attempts to restrict it, which alas also form part of its own history.

In the absence of a consensus on this fundamental principle, an alternative comprising four complementary principles can be envisaged:

- First principle: freedom on public order questions must without exception be absolute. The right to criticize the government is essential.
- Second principle: the expression of ideas, whatever they are, must be protected absolutely.

- Third principle: freedom of expression • Fourth principle: the experience of the first three principles should show that any exception to these first principles must be sanctioned. The spread of fear and prohibition should not be allowed, as it would act against freedom of expression.

## 2. Should freedom of expression be constrained?

Some speakers underlined the need to constrain freedom of expression, provided that such constraint would not cause simply marginal or awkward ideas to disappear.

They stressed how far the role of public authorities seemed to them to be impossible to circumvent. Thus, those who consider that freedom of expression and information carries with it "duties and responsibilities", as stated in article 10 of the European Convention on Human Rights, consider that States may legitimately restrict freedom of expression and information on the internet, since the exercise of those freedoms may be subject to certain restrictions.

Thus, these speakers maintain that it can be legitimate, and even desirable, for States to take measures to prevent the diffusion on Internet of illegal content such as child pornography or racist or xenophobic material. Beyond illegal content, it is also legitimate for States to take measures to restrict access to certain harmful types of content such as violence, in the interests of protecting minors, since it can be legitimate to limit freedom of expression on the internet to protect areas of public interest such as national security, territorial integrity or public health, or for maintaining the authority and impartiality of the judiciary.

However, the European countries which are signatories to the European Convention on Human Rights do not enjoy an unlimited margin of action in this matter. Their action remains subject to the control of the European judicial authority, i.e. the European Court of Human Rights, since any restriction must respect the three conditions imposed by the Court: 1. it must be prescribed by law, 2. it must correspond to one of the legitimate reasons for restriction stated in paragraph 2 of article 10, and 3. It must be "necessary in a democratic society", i.e., according to the time-honoured formula used by the Court, it must meet a "pressing social need " and be strictly proportionate to the objective pursued.

Some speakers also mentioned the need to seek a point of balance between freedoms and conflicting interests, pointing out that the reciprocal interpenetration of legal cultures could make possible the setting up of a form of "international public order".

## V- Means of regulation

### 1. Standards

Cyberspace is not a space outside the law. On the contrary, it is governed by a whole set of prescriptive systems, which are complementary but compete with each other.

- The legal systems of States naturally play a part here, although in practice they encounter limits of application related to the borderless character of the internet. States can also set up normative systems which transcend borders, as is the case at the European level for example.

- There is also being developed a "lex electronica", which constitutes an obligatory, non-national corpus of law. This law of cyberspace emanates from new communities which transcend national frontiers and create standards intended to govern their activities in their field. The locus of legitimacy is moving increasingly from States towards these communities.
- The third type of normative system is technical. The architecture of the internet, its software and technical standards define a framework of norms which determine conditions of access to and use of the internet.

- Mr Vittorio Bertola, Engineer, co-founder of Dynamic Fun, representative of the global internet users in the ICANN board,(Italy)
- Mr. David Butt, Member of the Board of Directors of ECPAT International (Canada)
- Mrs Hanne Sophie Greve, Justice, Norway, Former judge of the European Court of Human Rights (Norway),
- Mr Tomislav Medak, Creatives Commons International Croatia List, Multimedia Institute (mi2) (Croatia),
- Mr Thomas Schneider, International Affairs Service, Federal Office of Communication, Chairperson of the Council of Europe Group of specialists on human rights and information society, (Switzerland).

Open discussions

Rapporteur : Mr Dirk Voorhoof, Professor, Ghent University-Belgium/Copenhagen University-Denmark (Belgium)

European regional meeting on the “ethical dimensions of the information society”