

Round table 2: Freedom of expression: a right with responsibilities

The ethical issues regarding the creation and dissemination of Internet content and communications

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The aim of the European regional conference on “Ethics and Human Rights in the Information Society”, organised by UNESCO and the Council of Europe on 13-14 September 2007, was announced as creating an opportunity and a platform to “*present and discuss concrete experiences and existing regulation in order to highlight, analyse and better understand the positive and negative effects of ICT use and the tensions between rights, freedoms and values*”.

The invitation to this meeting reflected a clear voluntary approach and requested a dynamic commitment by the speakers in the round tables, in order to focus, to report and to open a discussion on practical tools or instruments being developed over the last months or years in Europe in the domain of ethics in the information society. The speakers and participants were invited to present examples of ‘**good practices**’, to give information about initiatives and how to proceed for realizing as much possible freedom of expression on the internet, and at the same time work out guarantees reflecting the responsibilities involved for those who provide, communicate, transfer and receive content or information on the Internet.

This conference also aimed to contribute to the further development of a UNESCO project on elaborating a “Code of Ethics for the Information Society”.

The Round table 2 focussed specifically on some aspects of how to realize **a more ethical oriented Internet environment regarding the use of freedom of expression.**

The moderator of the round table, Karol Jacubowicz, has given the good example himself being concrete and practical, by referring to a draft Blogger's Code of Conduct that has been proposed. A basic rule of this Blogger's Code of Conduct would imply that “*when you write your blog, imagine you are talking to your own mother*”. If this rule would be applied, no unacceptable language would be used and no one would write or say things on the Internet that one wouldn't say in person...

Being aware that this simple rule would (unfortunately) not suffice, the second round table of the Conference, under the title “***Freedom of Expression : a right with responsibilities***” explored more extensively different aspects related to the ethical dimensions of (free) speech and communication on the Internet.

In essence, the moderator raised five questions, inviting the speakers to formulate ideas and to refer to possible solutions to help to clarify the following issues.

1. As in Europe, under the Human Rights Convention, the regulation of freedom of speech is linked to duties and responsibilities in a democratic society (Article 10 § 2 ECHR), the question is not IF, but HOW **should that regulation look like**? Is the option that the existing rules are to be merely applied in the digital world, that the general legal framework is

applicable on the internet, or should we also or should we rather have some *Internet-specific regulations*?

The question seems to raise some doubts on the first principle of the COE 2003 Declaration on freedom of communication on the Internet, where it is said that Member states should not subject content on the Internet to restrictions which go further than those applied to other means of content delivery. Is it that simple that what is illegal off line, is also illegal online, what is unethical in the physical world, is also unethical in the online world? Or does internet create some specific characteristics of freedom of expression or special treats or duties that also demands for *specific regulatory answers*? Or should we tolerate and learn to accept some forms of on line behaviour and Internet-speech that we, until now, were not ready to accept in the off line world?

2. The second aspect Karol invited the speakers to focus concerned the **jurisdiction problem**. Should the state of origin-principle or upload-rule be the guiding principle or rather the law and jurisdiction of the country where the content is made available, downloaded or received. What law should or could be applicable on content that is transferred and accessible in many countries at the same time. In other words, should we apply the liberal principle enshrined in EU-law, as formulated in the E-commerce Directive and the Television directive, establishing the state of origin-principle? Or should internet content also be in conformity with the regulation of the receiving state? To this question can be added another question whether it would make a difference if some content put on the Internet in country A is specifically intended to be received in country B. Would that be a sufficient reason not to apply in that case the state of origin-principle? And one more question what difference does it make if the content is uploaded in country A but targeted specifically to country B, with the aim of circumventing the laws or regulations in country A. *The moderator raised the question how problems of jurisdiction should be handled.*

3. The next question the speakers in the round table were invited to reflect on was “**Who’s responsible for illegal, illicit, harmful or unethical content on the Internet?** This question more specifically referred to the responsibility of the different categories of ISP’s. Under what conditions can an ISP be held liable for (merely) transporting illegal, harmful or unethical content over his network. Do we need updated regulation in this field or can we refer to what has been achieved already in e.g. EU-law and national legislation, that derogates in principle the ISP’s from liability and has installed formats of “notice and take down”-procedures? *Or could ethical codes reflect another approach?*

4. Very much linked to the former, is the question **how regulation can be effectively applied and enforced?**

This is maybe the most important question on the agenda, and the question has indeed be formulated not in terms only of enforcement but also in terms of application. Because it is not as much by monitoring, controlling, blocking, removing or even sanctioning, excluding or punishing those who disrespect the rules and norms, it is not as much by this kind of enforcement tools that we will succeed to realize a more ethical digital environment. It is rather by creating education models, by developing tools and platforms where the basic values behind ethics and regulation are educated, internalised and reflected on that we can better succeed to make ethics become a real guideline for attitudes and behaviour on the Internet. The crucial question is how to create (or reinstall) a more value oriented, a more social oriented behaviour of individuals in their interactions in society. A cross reference can be

made to Round table 1, by referring to some of the ideas developed by Divina Frau-Meigs, arguing the need of a *paradigm shift*, away from market orientated democracies with the emphasis on “market”. She referred to the need of the recognition of other values and goods than economic goods, such as relational goods, experience goods, sustainable development and ethical behaviour as a value as such. Looking at the challenge from this perspective the question of enforcement of regulation, is rather a question of *what values a society should take into consideration to promote, develop, stimulate and internalize*. And this is a general debate in our society of which the internet society is only part of.

5. The last question relates to education and creating awareness on regulation and ethics by all actors communicating in the digital world and especially **how to inform the users of the regulatory framework, both of their rights and the restrictions on their freedom?**

That was the agenda, the setting and the framework in which round table 2 was organized.

As all of the participants were in the possibility to take part in all four round tables, I will not summarize what the speakers have said or what questions and observations have been formulated by the members of the audience. I'll briefly focus on some aspects of particular importance or practical relevance. I'll also refer to some fresh or controversial ideas that have been formulated and I will try indicate some traces to proceed on.

Themes

a- The idea of a **driving licence** was suggested, with some hesitation indeed the idea of a kind of driving licence for those who are circulating on the ‘information super highway’. However, pedestrians do not need a license to walk in public areas (and surely not in private places) and persons who ride a bicycle are not under an obligation to have a driving licence either. But car drivers do, and especially for truck drivers who are creating more risks to harm others we have stricter rules and regulations. One of the speakers observed that you don't need a licence to live, and communicating over the internet has become a way of life, may be a way of ‘second life’ – a second way of life. Over and above freedom of information, both in terms of freedom of expression and the right to seek and receive information are basic human rights in a democracy that should not be made subject of requiring a licence or authorisation of any third person of any state body. *Freedom of expression, off line and on line, is a basic alienable right of citizens, just like the right to vote* fundamental rights which cannot be made dependent on passing a test or acquiring a licence.

b- The round table reflected on the gap between **high level principles** in Conventions, Treaties, national regulation, codes of conduct, etc.. and the Internet reality which is rather a reality of jungle law. It was emphasized that there is need for clear and more precise rules and guidelines the internet users could work with and apply in practice. By way of a paradox, the need was also emphasized to develop a dynamic and *especially a flexible international instrument of Internet Code of Ethics, with open concepts in order not to suffocate future developments and innovative formats*.

At the same time there seems to be a need for clear and precise, even rigorous and detailed regulation and a need for an open and flexible instrument to be applied in very many different contexts in the global and innovative reality of the internet.

Also in Europe, within the framework of the European Convention of Human Rights, there is a permanent search to combine these two concerns. Reference can be made to some recent judgments of the ECtHR, judgments which reveal that not even all judges, who share the common framework of the ECHR and the jurisprudence by the ECtHR, can agree whether or not a painting in an exposition or a picture in a magazine were infringing the rights of others, the right of privacy and/or the right to human dignity to an extent that could justify an interference by public authorities. I refer to the case *Vereinigung Bildender Künstler v. Austria* and *Paris-Match Hachette Filipacchi Assoc. v. France*, both cases of 2007, that illustrate how much the context in which the expression is to be situated is important to decide whether or not priority should be given to freedom of expression “to shock, offend and disturb”. It seems that we expect things to happen and to be solved in the online world which we never have succeed to solve in the off line world. We might need to reduce our expectations regarding regulating and controlling the internet on the basis of detailed and very precise rules and regulations. We can better learn to live with some factor of risk, only focussing on what is blatantly and manifestly illegal and seriously harmful to individuals or groups or minorities in society. Let us rather develop *the powers of freedom of expression itself* to protest, to react, to discuss, to make clear that we disagree with some practices and content on the internet. A democracy and an open and learning information society should rather focus on more speech, in stead of prohibiting, filtering or sanctioning flows of information.

c- Also the **role of intermediaries**, especially search engines, was discussed. These new gatekeepers have an enormous power how can they be monitored? Who is Google and other search engines accountable to? What guarantees do we have that these companies act ethical? What are ISP’s precisely doing and controlling, what are they blocking, on who’s demand (a judge, a public prosecutor, the police, a private company, a neighbour)?. There is an enormous lack of transparency in this regard, including the ISP’s role in the whole process of access and filtering. *More transparency* and probably more guarantees are needed here.

d- Intellectual property and access to information, the need for public domain content was discussed, sometimes in a vivid way. Shouldn’t **intellectual property** be disqualified as a “property right” as one of the speaker argued? Others disagreed with this approach as copyright for instance is also to be considered as a human right, stimulating the production of creative or original works, guaranteeing an income, a kind of a salary for the artist, the author, the journalist. A more fruitful and creative approach lays in not disqualifying the assumptions of IP, but by bringing into the debate more arguments from the freedom of expression perspective. The new concept is that freedom of expression is the starting principle while copyright can justify some restrictions regarding the reproduction or public communication of copyright protected works. This implies invoking copyright has to be justified as necessary in a democratic society. *Freedom of expression should be the ocean we are swimming in and copyright protected information in that perspective is only to be situated on some islands. Not vice versa.*

It was also suggested to look for other *incentives to stimulate creativity* and inventions in stead over accentuating IP-right as they have extended as monopoly-rights the last 20 years. The fact that copyright is applicable until 70 years after the dead of the author is indeed not really an incentive for his or her creativity one could assume. This is not a argument for abolishing copyright, but an argument *to harmonize copyright claims in a better way with the interest of the information society as a whole*, and not to focus exclusively on the economic interests of the cultural industries.

e- Reference was also made to the fact the **European Convention on Human Rights (ECHR)** is an important instrument of ethics, as the Convention reflects basic values the legal provisions are build on. It was emphasized that the ECHR for the moment is already guaranteeing the rights of more than 800 million people actually in 47 member states, from Greenland (Denmark) to Azerbaijan, from Russia to Portugal, Belarus being the only spot in Europe not guaranteeing these rights and freedoms to its citizens. It has been indicated that both Art. 8 (right to privacy) and Art. 10 (freedom of expression and information) have been applied by the ECtHR in cases where internet was involved. Also other important characteristics of the ECHR and Court's case law have been highlighted, such as the **horizontal effect** of the rights and freedoms of the Convention, which means that not only the state but also individuals and private companies have to respect the rights and freedoms of others. And secondly there is the recognition of **the positive obligations of the state** itself to develop policies, create an environment and guarantee in practice and effectively that the individuals can indeed have access and apply the human rights and freedoms enshrined in the convention. Horizontal effect and the positive obligations by the state are two concepts in constitutional an international law, that are creating added value in terms of a broader respect for human rights including freedom of expression. The application of this approach is also important with regard to the prohibition of inhuman or degrading treatment, a right guaranteed under Article 3 of the Convention. The concepts of horizontal effect and positive state obligations are important stimuli for action against trafficking of human beings and child abuse. I come back later on the issue of child abuse and the internet.

f- **Self regulation and co regulation was another issue that was introduced and debated.** It has been argued that the establishment and development of systems of self-regulation are preferable, as otherwise state authorities would take over and regulate and monitor the internet. Apart from this somewhat defensive or corporative approach, self-regulations an co-regulation can also be considered as interesting mechanisms and platforms to build confidentiality, to strengthen and promote awareness on ethical aspects and to commit and connect civil society in the regulatory process. As an example of good practice reference was made to a form of **self-regulation by individuals and communities**, like Wikipedia (editing, fact checking, monitoring). May be this is not functioning perfect yet, but let's study and be inspired by this kind of examples and give them the opportunity to develop. Also the need to create structures to assess what is quality, how to select relevant information was underscored.

g- The round table has also been briefly focussing on the problem of **law enforcement, while it was also observed that law is too much punishing and sanctioning.** This approach clearly lacks efficiency and it makes often things worse, especially toward young people. In stead of imposing values by punishment, other tools for internalising in this area we are the challenge more effectively to **internalise norms** and values with a diversity of tools.

There is the importance of positive **role models** (as parents, as teachers, as politicians, as civil servants, as policemen, as experts in real life and as users of the internet in our communication with others). More specifically with regard the internet the practice of **quality labels** can be extended, where users can have confidence in the quality of the product or the service or feel comfortable in their digital environment. **Product information** is another important tool a example of good practice is the classification system of computer games in Europe, Pegi, the Pan European Games Information. These are all clear suggestions or examples of what has been called "**ethics of action and innovation**", as a trace to proceed on.

h- It has been argued that we need **different regulatory frameworks for different platforms**, referring also the approach of the EU regarding the Audiovisual Media Services Directive (linear and non-linear). Traditional print media, radio and television, public service broadcasting also have different levels and characteristics of regulation. *Different levels and models of self-regulation and co-regulation* should also be given a chance to be installed and to be developed, step by step, learning from its own experiences and learning from good practices in other models and applications.

i- Finally we looked at the **phenomenon of actions against child abuse on the internet**, as a practical example where achievements have been clearly identified to protect the lives and well being of children and young people. It was explained how law enforcement and state action is one important level. The multiple sectors involvement has shown to attain positive results in this field. It was also underlined that there is a general agreement that child abuse is condemned, this being a universal consensus within a cross-cultural spectre. There are however differences in the approach how to respond, how to act against child abuse. But this is not preventing a global approach for pro-active action in order to protect children and to create a more safe and secure digital environment. The notion *“plasticity” of human rights* was brought into practice here.

The round table **ended up** by stopping the debate with the audience by a final intervention by the moderator as time was up. This was a clear illustration how freedom of expression in a round table necessitates a moderator who stops at the certain moment the debate. That was not a form of censorship, but a justified interference in respect of the right of the participants to have access to the reception offered by the COE in the evening of 13 September.

I would like to thank Karol, Vittorio, Hanne Sophie, Tomislav, Thomas and David for their valuable presentations and input in the discussion. Karol, I assume I could tell my mother, without being ashamed, what I have been saying here at this platform.