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Freedom of expression on the Internet: european standarts

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INTRODUCTION

The advent of the Internet has led to the creation of numerous media platforms and given new opportunities for communication and public debate. It has enabled the emergence of citizen journalism and spaces for independent media.

However, as the recent UNESCO's report *World Trends in Freedom of Expression and Media Development*[1] shows the Internet is posing numerous challenges relating to

- the traditional economic and organisational structures in the news media,
- legal and regulatory frameworks,
- journalism practice,
- the media consumption and production habits.

Governments, businesses, media professionals and civil society organisations must find solutions to all challenges posed by the advent of the Internet.

This paper aims to present how the Internet affects the traditional media ecosystem and inform about solutions to the new challenges faced by mainstream media and journalists as well as bloggers[2], citizen

[1] UNESCO's report World Trends in Freedom of Expression and Media Development, 2014.

[2] Oxford Dictionary defines 'bloggers' as "individuals or legal entities (for example, non governmental organisation may be a blogger) who maintain by means of text, photos, audio or video 'blogs' – regularly updated website". Blogs allow anyoneto self-publish online without prior editing or commissioning by an intermediary such as newspaper editors. Bloggers use various styles and share their personal views on topics of public or personal interest.

journalists,[3] online journalists[4] and online media[5]. It looks into the issues from human rights perspective and in particular from freedom of expression's point of view. It rests on the understanding that all solutions should respect, protect and promote the right to freedom of expression as guaranteed by international law, in particular in Article 19 of both the international Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights as well as other human rights.

The emergence of the Internet has not changed the international law status of the right to freedom of expression. The UN Human Rights Council, which is the UN body responsible for the promotion and protection of all human rights around the globe, has affirmed that "the same rights that people have offline must be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights".[6]

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[3] 'Citizen journalists' are people who report about issues of public interest such as civil disturbances or war conflicts where conventional journalists have no access. They report of human rights violations or human suffering as a result of natural disasters or human conflicts.

[4] Online journalists' are traditional journalists who work for online news media platforms. They and journalists working for offline media observe the same ethical principle and are subjected to the same legal rules.

[5] Online media is media distributed over the Internet, including photos, video and music regardless of whether it is free of for a fee.

[6] Human Rights Council, The promotion and enjoyment of human rights on the Internet, 20th Session, 5 July 2012, UN Doc. A/HRC/20/8.

Despite the commitment to freedom of expression at international level, states tend to forget about the right to freedom of expression when seeking solutions to the challenges caused by the advent of the Internet. In some cases governments take advantage of the changed communication environment to restrict access or monitor the Internet use through sophisticated technologies and to criminalise certain forms of expression. It is also worrisome that global Internet-based companies can determine how we consume information and prioritise the Internet traffic. In effect they affect what we read or watch.

Focusing on the new media policy and law challenges from freedom of expression's point of view this paper aims to provide insights how to increase the potential for the exercise of the freedom of expression and to limit the restrictions of the freedom. A range of key questions are addressed: What is the scope of the right of freedom of expression online? What are the difference between bloggers and journalists? Is there a right to remain anonymous online? What kind of regulation of online media and bloggers is necessary? What are the rights and duties of bloggers? What are the limits of online expression? How to ensure protection for children? How to balance between the right to freedom of expression and other corresponding rights and responsibilities such as the right to privacy, reputation, and equality? Who must be held liable for violations caused by online content? Should bloggers and online media be held liable for comments made by third parties on their sites?
The paper targets online media and bloggers and everyone interested in the dilemmas faced by the media today. Court citations and references to legal rules have been purposefully kept to a minimum and endnotes have been preferred to footnotes, to make the paper readable by its target audience. To ease the comprehension of the key issues, the text is presented in questions-and-answers format.

This paper outlines the challenges for the realisation of the right to freedom of expression online and shows the legal and policy

considerations to be taken into account when searching for answers to the key questions regarding the extent and limits of the right freedom of expression online. The paper points to the international standards of online expression and illustrates how governments, media regulators, journalists and media outlets in Europe have protected the right to freedom of expression online.

Chapters 1 and 2 set the grounds of the understanding of the right to freedom of expression online. The first chapter outlines the main elements of the right in the online context, while the second focuses on the restrictions on the right of bloggers, citizen journalists and online media to freedom of expression. The principles of regulation of online expression relevant to the work of bloggers and online journalists are outlined in Chapter 3. Chapter 4 deals with the regulation of online media content both textual and audio-visual. Chapter 5 explains the specific restrictions on online expression: online defamation, online hate speech, protection of children online, protection of online privacy and protection against piracy. Chapter 5 focuses on other issues relevant to the work of online media, citizen journalists and bloggers such as internet access; licensing of bloggers and online media, regulation and seizure of domain names; monitoring, blocking and content removal; the liability for expression of online media and bloggers; and social media and freedom of expression.

CHAPTER 1

The right of bloggers, citizen journalists and online journalists to freedom of expression

What is the meaning of freedom of expression on the Internet?

Freedom of expression on the Internet is passed on international law. Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which guarantees the right to freedom of expression, reads as follows:

1) Everyone shall have the right to hold opinions without interference.

2) 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.

3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It 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.

Even though the Internet did not exist at the time of the preparation and adoption of the ICCPR the UN Special Rapporteur on Freedom of Opinion and Expression, who is an independent expert appointed by the UN to examine, monitor, advice and report on freedom of expression problems across the world, held that "the Covenant was drafted with foresight to include and to accommodate future technological

developments through which individuals can exercise their right to freedom of expression" and concluded that it is "equally applicable to new communication technologies such as the Internet."[7]

The UN Human Rights Committee, which has powers to interpret the ICCPR, outlined the elements of the right to freedom of expression in its General Comment No. 34[8] to which this paper refers below.

Who is entitled to the right to freedom of expression?

According to Article 19 of the ICCPR, everyone in entitled to the right to freedom of expression. Citizenship or professional or other status are irrelevant both for the possession and the exercise of the right to freedom of expression. Therefore, bloggers, citizen journalists and online journalists and online media are also entitled to the right to freedom of expression.

What is the scope of the right to freedom of expression?

According to Article 19 of the ICCPR, the right to freedom of expression covers any kind of information whether online or offline, scientific or artistic or ordinary, originating from the territory of the state or from abroad. It applies to any form of media whether print, broadcast or online.

[7] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Human Rights Council, Seventeenth session Agenda item 3, United Nations General Assembly, 16 May 2011

[8] General Comment No. 34 on Article 19 adopted by the UN Human Rights Committee on 12 September 2011

The right covers not only non-offensive expression but also expression that may be regarded as "deeply offensive"[9] and includes information or ideas which "offend, shock and disturb the state or any sector of population."[10]

What is the purpose of the right to freedom of expression?

The right to freedom of expression is recognised by international law to ensure protection of individuals from the state as well as from private persons such as media regulators, media owners, intermediaries, Internet service providers[11] (ISP) and the likes which should respect, protect and ensure freedom of expression.

Under international law states bear the main responsibility for the protection of the right to freedom of expression.[12]

What are the elements of the right to freedom of expression?

The right to freedom of expression consists of the following elements:
Freedom of opinion: The freedom of opinion differs from the right to freedom of expression as it does not include expression. The freedom to hold opinions cannot restricted.[13] Everyone is free to change their

[9] Ibid, para. 11

[10] Handyside v UK, application no. 5493/72, Judgement of 7 December 1976, para. 49.

[11] ISP is an organization that provides services for accessing, using, or participating in the Internet. The most common internet services include Internet access, Internet transit, domain name registration, web hosting.

[12] General comment No. 34, see above, para. 7.

[13] Ibid.

opinion whenever and for whatever reason a person so freely chooses. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature.

Freedom of information: This freedom includes the freedom to receive and impart information and ideas as well as the freedom of the public to be informed. Freedom of information have reached their widest scope through the Internet insofar as it is a truly global media for everyone who has access to it.
The creation of websites, the publication of information on the Internet and its receipt are an exercise the freedom of information.[14] Any restriction of the Internet access and flow of information by state bodies or private parties is an interference with the freedom of information.

Right to artistic expression: According to Article 19 of the ICCPR, right to freedom of expression includes expression "in the form of art" regardless of its quality and value. Artistic expression enjoys the same level of protection as other forms of expression. It is particularly relevant on the Internet as unlike mainstream art forums everyone is able to share their art on the Internet regardless of its quality and value.

Freedom of cultural expression: Cultural expression is part of the right to freedom of expression.[15] Diversity of languages on the Internet is one form of cultural expression. People should be ale to use different alphabets and characters for domain names and e-mail addresses in different languages.

[14] Yildirim v Turkey, application No. 3111/10, judgement of 18 December 2012, para. 49,

[15] The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression of 2005, Preamble, Articles 1 and 4.

Freedom of science: The right to freedom of expression covers teaching, research and publications and the expression of opinions about academic and scientific works. The Internet significantly increases the opportunities for access to scientific information and for exchange of opinions by researchers and academics.

Right to anonymity: Anonymous expression is part of the right to freedom of expression.[16] Imposing obligation for registration of people who use the Internet is therefore against their right to freedom of expression. Pseudonyms are important because many journalists and bloggers freely admit to self-censorship for various reasons.

Right to whistleblowing: Prohibition of whistle-blowing – reporting shortcomings in business or government – is an interference with the right to freedom of expression.[17] Many people reveal malpractices by publishing information on the Internet. Whether their action is protected or not depends on the whether the public interest in the release of the information outweighs the interest of keeping the information confidential and the availabilities of other means to protect the public without the release of confidential information.

Right to access to the Internet: Everyone should have the greatest possible access to Internet content, applications and services using the devices of their choice. No one should not be disconnected from the

[16] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Human Rights Council, Seventeenth session Agenda item 3, United Nations General Assembly, 16 May 2011, para. 84.

[17] Heinisch v Germany application no. 28274/08, Judgement of 21 July 2011, para. 93

Internet against their will, except when it is decided by a court as a measure of last resort.[18]

What are rights of media and journalists guaranteed under international law?

Free and critical media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other human rights. Free media is a cornerstone of a democratic society.[19] The media should be able to receive information on the basis of which it can carry out its function and comment on public issues without censorship or restraint and to inform public opinion.[20]

The right to freedom of expression ensures media freedom by setting obligations for the state to respect and protect journalistic activities, including online. These obligations include:

1. *Obligation to adopt a legal framework to effectively protect freedom of online expression for journalists*: Interpreting the right to freedom of expression the European Court of Human Rights (ECtHR) held in that without sufficient domestic rules on how to use information obtained from the Internet the press is unable to exercise its vital function as a public watchdog.[21]

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[18] Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users

[19] General comment No. 34, see above, para. 13.

[20] Ibid.

[21] Editorial Board of Pravoye Delo and Shtekel v Ukraine, Application no. 33014/05, Judgement of 5 May 2011, para. 64

2. *Limit the liability of journalists in the context of online journalism*: No one should be liable for content on the Internet of which they were not the author unless they had either adopted the content on their own or refused to obey to a court order to remove that content.[22]

3. *Protect journalists from violence*: States have obligation under international law to take affective measures to prevent attacks against journalists. This obligation include their duty to promptly investigate attacks, prosecute and punish the perpetrator and take preventive operational measures to protect journalists whose life are at risk from the criminal acts of other individuals.[23]

4. *Recognise and ensure the right of journalists not to reveal their journalistic sources*: Without protection, sources may be deterred form assisting the press informing the public on matters of public interest. As a result the press may not be able to play its vital public watchdog role.[24]

5. *Recognise and ensure the right of journalists to attend meetings of public bodies:* Journalists should be permitted to gain physical access of governmental building and attend meetings of parliament and other public bodies so that they can report accurately on political developments and perform their vital role of public watchdog. Any restriction of access of the media to meetings of public bodies is a restriction on the right of the media to freedom of expression. Refusals to provide

[22] 2005 Joint Declaration of the Special Rapporteurs on freedom of expression

[23] UN Human Rights Committee, General Comment No.34, para 11.

[24] Goodwin v. the United Kingdom, Judgement of 27 March 1996, Application No. 17488/90

accreditation should be based on criteria which is specific, fair and reasonable and the application should be transparent. The application of the criteria should be necessary and proportionate.[25]

6. *Ensure that journalists can practice their occupation without licensing:* Individuals who wish to work in the media should not be required to obtain official permission before commencing their activities or to join a professional organisation.[26]

Are bloggers, citizen journalists and online media journalists entitled to the same rights as journalists?

Bloggers, citizen journalists and online media journalists should be able to claim the same protection as journalists. National law should specify the circumstances and criteria when they are entitled to the protection given to journalists.

The Council of Europe recommends that states adopt a new notion of media to include bloggers, citizen journalists and other online media actors. The latter should be entitled to the same protection as journalist if their meet criteria thereof. The criteria should include the intent of bloggers, citizen journalist and online media journalists to act as media, the purpose of media, editorial control or professional standards, outreach and public expectations.[27]

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[25] Gauthier v Canada, 7 April 1999, Communication No. 633/1995, UN Doc. CCPR/C/65/D/633/1995, para. 13.6.

[26] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5.

[27] Council of Europe, Recommendation CM(2011)7 of the Committee of Ministers on a new notion of media Rec, adopted on 21 September 2011.

Other rights of bloggers, citizen journalists and online journalists

Bloggers, citizen journalists and online journalists are entitled also to the following human rights guaranteed by international human rights law:

1. *Right to assembly, association and participation*: it is guaranteed under Article 21, Article 22 and Article 25 of the International Covenant on Civil and Political Rights. Everyone has the freedom to choose any website, application or other service in order to form, join, mobilise and participate in social groups and assemblies and the right to protest peacefully online. Everyone has also the freedom to use available online tools to participate in local, national and global public policy debates, legislative initiatives and sign online petition.[28]

2. *Privacy and data protection***:** it is guaranteed under Article 17 of the International Covenant on Civil and Political Rights. The right to private and family life on the Internet includes the protection of individual's personal data and respect for the confidentiality of your correspondence and communications.[29]

3. *Right to education and literacy*: it is guaranteed under Article 13 of the International Covenant on Social, Economic and Cultural Rights. In the context of the Internet this right is interpreted to mean that everyone should have online access to education and to content of all types in official languages. Everyone should also

[28] Ibid.

[29] Ibid.

have access to digital education and knowledge in order to exercise their rights and freedoms on the Internet.[30]

4. *The right to effective remedies for violation of their rights and freedoms*: Under Article 2 of the International Covenant on Civil and Political Rights States have an obligation to provide effective remedies for violations of human rights. In the Internet context, this right means that Internet service providers should inform everyone of their rights and possible remedies and how to obtain them. Additional information and guidance should be made available from public authorities and national human rights institution. National authorities have an obligation to protect everyone from criminal activity or criminal offences committed on or using the Internet.[31]

[30] Ibid.

[31] Ibid.

CHAPTER 2

Restrictions on the right of bloggers, citizen journalists and online media journalists to freedom of expression

Restrictions on the right to freedom of expression

What are the legal restrictions on the right to freedom of expression?

Article 19, paragraph 3 of the ICCPR provides that the exercise of the right to freedom of expression may "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."

This provision implies that to be regarded as legal the restrictions on the right to freedom of expression must comply with the following requirements. They must:

- be provided by law which is clear, accessible and foreseeable (legality criteria)
- pursue one of the legitimate aims enumerated in Article 19(3)(a) and (b) of the ICCPR, namely (i) to protect the rights or reputations of others, or (ii) to protect national security or of public order, or of public health or morals (legitimacy criteria)
- be proven as necessary and the least restrictive means required to achieve the purported aim (necessity criteria).

Moreover, any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political,

commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.[32]

Finally, human rights protection as guaranteed by the International Covenant of Civil and Political Rights, do not give rights to anyone to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized by the ICCPR[33];

The case of *Ahmet Yilderim v Turkey*[34] decided by the European Court of Human Rights (ECHR) provides an example of the application of the international standards on restrictions on online expression. The case was initiated by a PhD student whose blog became inaccessible as a result of a court order for blocking Google Sites in Turkey. The court order was issued as a restriction on the expression of another person but had a collateral effect on the blog of the student. The ECHR found in favour of the latter noting that the court order had no basis in Turkish law (the legality criteria was not met). Further, the European judges held that the ban excessively affected the right to freedom of expression of 3rd parties such as the student (the necessity criteria was not met). The ECHR also noted that the Turkish authorities had not sought the least restrictive measure to deal with illegal content since they did not inform Google Site that they were hosting illegal content and did not ask the latter to remove it.

[32] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Human Rights Council, Seventeenth session Agenda item 3, United Nations General Assembly, 16 May 2011

[33] See General Comment 34, para. 21.

[34] Ahmet Yilderim v Turkey

What principles are applicable to restrictions on online expression?

"What applies offline, also applies online" - this principle was confirmed in 2012 by the Human Rights Council in its resolution on human rights on the Internet[35]. This implies that:

- Any restriction on online expression should be in conformity with paragraph 3 of Article 19 of the ICCPR (see above).
- The right to freedom of expression cannot be claimed by people who engage in online activities aimed at the destruction of any of the rights and freedoms recognized by the ICCPR (see above).

Which are the relevant factors for deciding whether restriction on online expression is necessary?

Four factors should be considered when deciding on the necessity of restrictions on online expression:

1. Type of expression

Under international law certain types of expression justify higher level of protection. Such are, for example, political expression, media freedom, information of public interest. States have limited margin of appreciation to decide whether to restrict this type of expression.

In the case of *Stoll v Switzerland*[36] which concerns the conviction of a journalist for the publication of a diplomatic document on strategy classified as confidential, the ECHR noted that states have limited

[35] UN Human Rights Council (5 July 2012), Resolution A/HRC/20/8 on the promotion, protection and enjoyment of human rights on the Internet.

[36] Stoll v Switzerland (10 December 2007), application No. 69698/01.

powers to interfere with the dissemination by journalists of information of public interest.

In contrast, harmful speech (in the interest of protection of minors) or commercial speech (for example, advertisement) is given protection. For this type of expression states have a wider discretion to decide whether or not to impose a restriction.

In the case of *Neij and Sunde Kolmisoppi v Sweden*[37], which concerns criminal convictions for copyright violations, the ECHR held that the state has a wide margin of appreciation to restrict the right to freedom in order to prevent crimes (copyrights infringements) and ensure protection of intellectual property rights

Likewise in the case of *Perrin v UK*[38], which concerned an imprisonment of an owner of a website with seriously obscene pictures whose preview webpage had no age check, the ECHR held that the state has a wide margin of appreciate to restrict freedom of expression for the protection of morals and health.

2. Content

Domestic law should specify what content is regarded as illegal. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with ICCPR. It is also inconsistent with paragraph 3 to prohibit a site from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.[39] When government agencies, regulators or domestic court examine the content of online publication they should consider how it specifically

[37] Neij and Sunde Kolmisoppi v Sweden (19 February 2013), application No. 40297/12, para. 10.

[38] Perrin v UK (18 October 2005), application No. 5446/03.

[39] General Comment 34, para. 43.

affects rights of others, national security, morals, public order or other legitimate interests. [40]

3. Context

The context of expression is relevant when evaluating the necessity for its restriction. For example, the protection of young persons warrants special attention as their vulnerability on the Internet is very high.

In the case of K.U. v Finland[41], which concerns a complaint of violation of privacy as a result of state failure to investigate and punish the author of an online message exposing a young person to sexual abuse, the ECHR held that the state has an obligation to provide online protection for children from paedophiles. In this case the ECHR observed that domestic law in Finland did not ensure the disclosure of the identity of the person who published the online message and as a result he/she was not published for the act.

4. Internet as an open forum

Although the Internet should be regarded as a specific context in terms of vulnerability of children and young people, states have an obligation to encourage the use of ICTs (including online forums, weblogs, political chats, instant messaging and other forms of citizen-to-citizen communication) by citizens, non-governmental organisations and political parties. [42] Any restriction on online expression should not have a chilling effect on debates on matters of public interest and public participation in them.

[40] General Comment 34, para. 35.

[41] K.U. v Finland (2 December 2008), application No. 2872/02.

[42] Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet

What are the particularities of the restrictions on online expression?

There are two particularities of restrictions on freedom of expression on the Internet:

1. Online expression is subject to a variety of national rules which are a product of different legal traditions and political government; hence it is difficult for states to pursue common value by restricting online expression.

2. Even if certain type of online expression is banned it is still possible to circumvent national laws or avoid liability by benefiting from protection of foreign laws which do not impose such limitations.

> French Yahoo! case[43] illustrate the two problems. This case concerned the sale by the giant Internet search engine and information portal, Yahoo, of Nazi memorabilia. Unlike in the USA the sale of such good is prohibited in France. As a result Yahoo was sued in France for allowing their online auction service to be used for the sale of memorabilia from the Nazi period. However, even though French courts found that Yahoo violated French law, the execution of the decision against Yahoo was rejected by US courts.

Should states regulate restriction on online expression separately from print and broadcast media?

[43] UEJF and Licra v. Yahoo! 20 November 2000, No. 00/05308 (Tribunal de Grande Instance de Paris)

The principle "What applies offline, also applies online" does not mean that bloggers, citizen journalists and online media should be treated as print or broadcast media. Many international experts and human rights bodies have pointed out that the legal framework regulating the mass media should take into account the differences between print and broadcast media and the Internet.[44] This observation does not however entail that states should adopt laws regulating the content of Internet expression. Such laws are not necessary since harmful content is already regulated both by other statutes and self regulation.[45]

Individual responsibilities with respect to the right to freedom of expression

What are the specific duties and responsibilities of media and journalists?

Article 19, paragraph 3 of the ICCPR provides that the exercise of the right to freedom of expression carries with it special duties and responsibilities. So far as journalists are concerned, the duties and responsibilities are for observance of journalism ethics, respect for the rights of others, providing information of the public, etc.

What are the special duties and responsibilities of bloggers, citizen journalists and online journalists?

Unlike journalists bloggers are not obliged to follow journalism standards and ethical codes. However if they wish they may decide to

[44] UN Human Rights Committee, General Comment No.34, para 39.

[45] International Mechanisms for Promoting Freedom of Expression Joint Declaration on Freedom of Expression and the Internet, June 2011.

adopt ethical codes and follow professional standards of their own or of traditional media. If they do so they are acting like professional journalists.

Even if bloggers have not signed up to ethical codes the following duties and responsibilities of journalists and media could apply to bloggers:

Individual responsibility of journalists: Professional journalists may write private blogs or act as citizen journalists. Even in such cases, they should observe their professional responsibilities as journalists.

The ECHR held in the case of *Fatulayev v Azerbaijan* [46], which concerns defamatory statements made in publicly accessible Internet forum, that the specific responsibilities for journalists relating to exercising their freedom of expression also apply if they publish information on the Internet.

Responsibility of media relating to their Internet archives: Media is responsible to their online archive as the latter have an educational and research value. The same responsibility may apply to bloggers too.

In the case of *Times Newspaper Limited v UK*[47], which concerns a sanction of a newspaper for defamation of a businessman, the ECHR accepted as necessary and proportionate a requirement for media to publish appropriate qualification to an article contained in Internet archive that it was subject to a claim in defamation in order to avoid being sued for it one year later. The justification of such responsibility is based on the consideration that online archives have educational and research values and their content therefore should be correct.

[46] Fatulayev v Azerbaijan, Judgement of 22 April 2010, Application No. 40984/07.

[47] Times Newspaper Limited v UK, Judgement of 10 March 2009, application Nos. 3002/03 and 23676/03.

Should bloggers and online media be subject to the same duties as traditional media?

Bloggers and online media should not be forced to abide by the ethical codes of professional journalists. If they have agreed to adhere to the journalistic standards or have developed professional standards similar to the ones of traditional media, they should be treated similarly in terms of privileges.

As a matter of principle, the scope of duties and responsibilities of journalists depends of the particular situation and technical means a person uses.[48] This principle should apply to bloggers and entail that the resources and technical means of bloggers should be taken into account when determining their "duties and responsibilities" especially as regards fact checking.

[48] Handyside v. the United Kingdom, 7 December 1976, § 49

CHAPTER 3

Principles of Regulation of Online Expression

General Principles

Human rights and the Internet regulation are closely linked. A number of Internet-specific principles have been recognised by international bodies. These principles should determine domestic laws and policies and their enforcement and implementation.

1. Online human rights enjoy the same protection as offline human rights. Internet governance arrangements must ensure the protection of all fundamental rights and freedoms and affirm their universality, indivisibility, interdependence and interrelation in accordance with international human rights law.[49]

2. Restrictions on online content should not go further than restriction on content delivered by other means.[50]

3. No prior control of information.[51]

4. The regulation of the Internet should be carried out in an open, transparent and accountable manner and ensure the full participation of governments, the private sector, civil society, the

[49] Council of Europe's Declaration by the Committee of Ministers on Internet governance principles, 21 September 2011

[50] Council of Europe's Declaration of the Committee of Ministers on freedom of communication on the Internet, adopted on 28 May 2003.

[51] Ibid.

technical community and users, taking into account their specific roles and responsibilities.[52]

5. Internet-related laws and policies should not adversely affect the unimpeded flow of trans-boundary Internet traffic. [53]

6. Internet-related laws and policies should preserve cultural and linguistic diversity and fostering the development of local content, regardless of language or script. [54]

7. States should uphold the rule of law on the Internet and protect society and individuals against crimes on the Internet.[55]

Specific Principles

Specific principles related to bloggers, citizen journalists and online journalists

1. The development in the media ecosystem by the digital media and new actors require a new notion of the media with a graduated and differentiated approach. Who can be categorised as a new kind of media depends on the circumstances of communication. The criteria and indicators for categorisation of new media should be defined by domestic law. The criteria should include the intent to act as media, the purpose of media, editorial control or professional standards, outreach and public

[52] Council of Europe's Declaration by the Committee of Ministers on Internet governance principles, 21 September 2011

[53] Ibid.

[54] Ibid.

[55] Council of Europe's Declaration of the Committee of Ministers on ICANN, human rights and the rule of law, 3 June 2015.

expectation. The new notion of media is necessary to ensure that digital media (online media and bloggers) can benefit from the media-specific rights (such as the right to protection of confidentiality of journalistic sources) if they meet the identified criteria.[56]

2. Denial of service is attack against independent media websites.[57]

3. Like traditional media, bloggers, internet platforms who facilitate debates on issues of public interest play a role of social watchdog.[58]

Specific principles related to business service providers

- Business service providers (such as ISP) should adopt guidelines for filters and blocking. [59]

- Business service providers should retain their leading role in technical and operational matters while ensuring transparency and being accountable to the global community for those actions which have an impact on public policy.[60]

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[56] Council of Europe, Recommendation CM(2011)7 of the Committee of Ministers on a new notion of media Rec, adopted on 21 September 2011.

[57] Council of Europe's Committee of Ministers (14 March 2012), Council of Europe,Strategy 2012-2015 on Internet Governance

[58] Council of Europe's Declaration on the protection of freedom of expression and freedom of assembly and association with regard to privately operated Internet platforms and online service providers, adopted on 7 December 2011.

[59] Council of Europe's Declaration by the Committee of Ministers on Internet governance principles, 21 September 2011

[60] Ibid.

Specific principle relating to Internet users

1. Users should be afforded specific Internet rights, including the right to participate in Internet governance arrangements and be able to exercise their rights without being subjected to unlawful, unnecessary or disproportionate interference and to seek effective protection of their rights by governmental agencies and private bodies.[61]

2. Users should have the greatest possible access to Internet-based content, applications and services of their choice, whether or not they are offered free of charge, using suitable devices of their choice.[62]

3. Users should be free to choose their Internet sites' names. Expressions contained in names of internet sites such as domain names and name-strings should not be excluded a priory form the application of legal standards of freedom of expression. This right should prevail over the general terms and conditions of service of private-sector Internet companies.[63]

[61] Ibid.

[62] Ibid.

[63] Council of Europe's Declaration of the Committee of Ministers on ICANN, human rights and the rule of law, 3 Jun 2015.

CHAPTER 4

Media Convergence and Online Content Regulation

What is media convergence?

Digital technology means that sound and picture are converted into digital bits and then reconverted by receivers into the final service of consumers. Digital technology made it possible for the media to deliver its content on various platforms – for example, newspapers can offer their content online, and their websites can include video, and interactive features enabling news consumers to interact with news providers or other news consumers via online forums. Likewise broadcasters can have text-based websites competing with those of print media.

Digital technology also entails more services. What was provided in the past by one medium can be provided now in several different physical ways– for example, people can follow the latest news on their mobile phones or via PCs, laptops or tablets. Moreover, they can now determine what and when they would like to watch and also generate their own content.

The use of digital technology and the popularization of the Internet resulted in a process known as 'media convergence'. This process marks the interconnection of information and communication technologies and media content and blurring of the lines between media and between media and telecommunications (telephone, satellite, internet).

Is it necessary to regulate online media?

Like the regulation of traditional media the regulation of the Internet is necessary to protect rights such as privacy and reputation or copyright

and legitimate interests such as national security or protection of children. At the same time the regulation of the Internet may be justified if it helps facilitate democratic expression by not allowing influential websites and search engines to determine the success of online expression or to put barriers on speech.

What challenges do media convergence pose on media regulation?

The media convergence raises fundamental questions to the existing model of media regulation. While in the past media used one platform (newspapers, magazines, TV, radio) and was subject to different levels of regulation depending on whether they delivered in public or received in private or whether children can access them as well as their impact on the audience, convergence has made it possible for media to use different platforms to distribution of their content, as well as to create online text and video and audio. Moreover to-day everyone can only to easily access online content but also to produce such content. The boundaries between journalists and non-journalists became blurred.

The regulatory issues in converged media environment are as follows:

- Who should control mass communication: develop content standards and oversee their observance?
- What content standards should be applied to different media in the future? Can the standards for print and broadcast media be relayed and combined over the Internet? Do people expect higher protection for TV programmes than for Internet content? Where is the line to be drawn?
- Who is a journalist and is not journalist (citizen journalism) in the online field? What rights should be guaranteed for online journalists?
- Do we need convergence among regulators?

- How to secure healthy and competitive digital media which contribute to the public interest?
- How to ensure net neutrality – who should adopt standards for the intermediaries and monitor their observance? Should intermediaries pay for the media content creation so far as they use it to attach customers for their services?
- What are the state duties toward the media in converged medial environment? Should states intervene to assist traditional media in the transitional phase? Should they assist the development of new media?

How should media be regulated in converged media environment?

The idea of the Internet as a law free zone does not exist. There is a wide agreement that controls are necessary, for example, over dissemination by Internet of incitement to terrorism, child pornography, and some extreme obscenity. At the same time states have not reached agreement on the application of defamation law with respect to internet, liability of ISP and other facilitations of communication (no liability in the US).

At the moment no universal approach with respect to the model of regulation of media convergence exists. Some believe that a sweeping response is required and call for changes to the rules and regulation; some remain satisfied with the status quo for the time being, while others propose self-regulation and co-regulation.

Whatever the regulatory responses to media convergence are fashioned they should be proportionate and ensure the right to freedom of expression and media freedom and media pluralism.

In the case of *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, which concerns sanctions for journalistic use of unverified internet sources, the ECHR acknowledged that the right to freedom of expression

had to be interpreted as imposing on States a positive obligation to create an appropriate regulatory framework to ensure effective protection of journalists' freedom of expression on the Internet.[64]

The Ukrainain newspaper, Pravoye Delo, published an anonymous letter posted on a website accusing local officials of crimes. Although the newspaper indicated that the letter was published online and that it was not verified, the Ukrainian courts found that it defamed the officials. The local courts noted that the Ukrainain legislation exempted journalists from civil liability for referencing materials that have already been published by another media. However this protection was not granted in cases when the material has been obtained from online media which had not been duly registered.

The ECHR held that the Ukrainian law was not clear on the use of information received from the Internet, and as a result the newspaper could not have foreseen that it did not apply to their case. The ECHR found that that the right to freedom of expression had to be interpreted as imposing on States a positive obligation to create an appropriate regulatory framework to ensure effective protection of journalists' freedom of expression on the Internet.[65]

Who should control mass communication?

New media technologies provide interactive connections. The communication structure is global, decentralised and non-hierarchical. It seems that no entity controls or runs the Internet as it functions as a result of the fact that billions of separate operators of computers and computer networks independently decide how to exchange communication.

[64] Editorial Board of Pravoye Delo and Shtekel v. Ukraine, Judgement of 5 May 2011, Application No. 33014/05.

[65] Ibid.

The decentralised structure of the Internet means that media can avoid state restrictions by operating from abroad. However, states can still control the Internet by imposing requirement to Internet gatekeepers such as Internet service providers to enforce standards or censor content. Moreover, states can control Internet by its architecture or software codes as at the national level the Internet structure can be centralised.

The closing down of the entire Egyptian Internet in 2011 provides an example of state control of the Internet: In January 2011 the Internet in Egypt was disconnected by the authorities who feared that the Internet poses a threat to their interest in view of the wide use of it during the civil protest at the time. The disconnection was possible because the authorities have set up a national firewall consisting of an extra layer of Internet services that intermediate all the traffic in and out of the country through servers.

On the other hand, private Internet gatekeepers such as Internet service providers can of their own volition control the flow of information on the Internet. Despite its democratic nature Internet retains a risk of anti-competitive behaviour by private actors or private constraints on speech. The massive reliance on the Internet makes the impact of such censorship scaring.

What rules should apply to online textual content?

There is a common understanding that from freedom of expression point of view print media content should not be regulated by special laws. Instead it should be subject to general laws on defamation, privacy, national security protection, etc. or self regulation. In democratic countries the content rules for print media are in code of ethics adopted by the media themselves. The rules focus on protecting third parties from damaging reports (defamation, hate speech, unfair investigative techniques) or social concerns (payment to witnesses and criminals or receipt of money or gifts by third parties in connection reporting).

Partisan online textual content serves democratic needs in the same way the partisan press does. Therefore online textual content should not be regulated by special laws. Instead online media content should be subject to self regulation or to general law relating to content regulation such as defamation or privacy.

On the other hand it may be argued that the regulations to promote impartiality, balance, accuracy and quality content may be justified in some cases. For example, a situation in which all online media support only the government or the opposition is against the idea of media diversity and should not be tolerated. Also, public broadcasters could be required to observe their impartiality, balance and accuracy when posting information on their websites.

What rules should apply to audiovisual content?

In contrast to print media the regulation of broadcasting content has been justified with the need to ensure diversity of content or impartiality in view of the original small number of players on broadcasting market due to the expensive creation and operation of broadcasters in the past. Content-related rules for broadcasters are included in broadcastering codes ensuring the protection of the audience (in particular, minors) or third parties (rules against invasive or unfair investigative techniques and inaccurate reporting) or imposing wider social and political objectives (requirements for accuracy and impartiality of news and current affair programmes).

The European Union and Council of Europe have adopted specific rules relating broadcasting content.

The EU Audio-visual Directive

Broadcast content was regulated by the Audio-visual Directive[66] which promotes the free movement of broadcasting services within the European Union. The Directive includes rules for protection of minors, commercial communication, promotion and distribution of European works and bans on incitement to hatred. The rules are regarded as common minimum standards; EU states can impose stricter rules on broadcast content.

The Directive includes rules for protection of minor and incitement to hatred which apply to both linear and on-demand broadcast services. The latter covers video-on-demand services where the viewer is selecting for a catalogue of programmes offered by the media service providers.
The Directive imposed on every EU state the obligation to require broadcasters not to transmit material that incite hatred based on race, sex, religion or nationality.[67]
The Directive also adopts a system of graduated regulation for protection of minors whereas the less control a viewer has and the more harmful a specific content could be the more restrictions apply. The rules regarding linear and online services differ.

Regulation of linear TV services

Programmes which "might seriously impair" the development of minors in particular pornography or gratuitous violence are prohibited.

Programmes which might simply be "harmful" to minors can only be transmitted when it is ensured that minors will not normally hear or see them by selecting the time of the broadcast or by any technical measure (e.g. encryption). In addition to that, all non-encrypted programmes must

[66] Council Directive 2007/65/EC of 11 December 1987

[67] Article 3b.

be preceded by an acoustic warning or made clearly identifiable throughout their duration by means of a visual symbol.

Regulation of on-demand services

Unlike linear TV services programmes which "might seriously impair" the development of minors are allowed in on-demand services, but they may only be made available in such a way that minors will not normally hear or see them. This could be done by the use of PIN codes or other, more sophisticated age verification systems.

There are no restrictions for on-demand service for programmes which might simply be "harmful".

Definitions for both “seriously impair the development” and “likely” to impair are not included in the Directive which means that states can adopt their own definitions. The reference in Article 27, para. 1 to pornographic content and gratuitous violence means that they are covered by the first term. It is also worth noting that the example of unacceptable content applying to television are non-exhaustive. Similarly the Directive does not define “minor” but leaves this to be done by the EU member states.[68]
The Directive sets out that the obligations for protection of minors and against incitement to hatred should be balanced against the right to freedom of expression.

The EU Directive on combating the sexual abuse and sexual exploitation of children and child pornography

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According to Article 1 of the UN Convention on the Rights of the Child the age of majority in most cases is 18.

The EU Directive on combating the sexual abuse and sexual exploitation of children and child pornography[69] establishes minimum rules concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes. Article 5 requires from states to criminalise the distribution, dissemination or transmission of child pornography making it punishable by a maximum term of imprisonment of at least 2 years. Child pornography[70] is defined as

> (i) any material that visually depicts a child engaged in real or simulated sexually explicit conduct;
>
> (ii) any depiction of the sexual organs of a child for primarily sexual purposes;
>
> (iii) any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes; or
>
> (iv) realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes.[71]

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69 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography

70 Article 2 of the EU Directive on combating the sexual abuse and sexual exploitation of children and child pornography

71 Under Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse Council of Europe members states are also obliged to criminalise distribution and transmission of child pornography. Article 20, paragraph 2 of the Convention defines "child pornography" shall mean any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes.

Council of Europe Convention on Transfrontier Television

The European Convention on Transfrontier Television[72] which is designed for members states of the Council of Europe (at the moment they are 47, including all 28 EU states) also regulates broadcast content. Article 7 sets out responsibilities of the broadcasters including that all items of programme services, as concerns their presentation and content, shall respect the dignity of the human being and the fundamental rights of others. In particular, they shall not:

a) be indecent and in particular contain pornography ("pornography" has not been defined in the Convention);

b) give undue prominence to violence or be likely to incite to racial hatred.

With respect the protection of minors the Convention sets out that all items of programme services which are likely to impair the physical, mental or moral development of children and adolescents shall not be scheduled when, because of the time of transmission and reception, they are likely to watch them.

Broadcasters are also obliged to ensure that news fairly presents facts and events and encourages the free formation of opinions.

There are no broadcast content standards adopted by other international and regional bodies. The international mandates on freedom of expression have made only one statement on the issue opining that the duplication of content restrictions already provided for in law is unnecessary and may lead to abuse.[73]

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Adopted on 5 May 1989

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How should international audio-visual standards apply to online audio-visual content?

There are different approaches to the regulation of online audio-visual media content. Some states reject the position that broadcast content rules should apply to online audio-visual content. Others are for a graduated approach.

The US Supreme Court rejected the arguments that Internet content must be regulated like broadcasting.

In the case of Reno v. American Civil Liberties Union, the Supreme Court justices examined the constitutionality of provisions of the Communications Decency Act of 1996 which penalised the communication over the Internet of 'indecent' or 'patently offensive' material to persons under the age of 18. The US government made an argument that the Internet is similar to broadcasting for which similar ban on indecent materials exist. The Supreme Court justices disagreed that the Internet resembles broadcasting pointing to the lack of scarcity of resources and the less invasive nature of Internet and concluded that there is no justification for government supervision and regulation. However, in this case the SC noted that 'almost all sexually explicit images (in the US) are preceded by warnings as to the content' and that 'odds are slim' that a user could come across a sexually explicit sight 'by accident'.

In Europe – more specifically the EU states - traditional rules for TV services apply to online media content only if the online media meet the

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See Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, adopted on 18 December 2003

definition of "media service providers". Although the European Audio-visual Service Directive provides for minimum harmonization of broadcast content regulation, retaining the powers of states to monitor and sanction broadcast media content, it sets out criteria for identification of media service providers and recognizes that common public interests such as restriction on hatred, accessibility for people with disabilities, access to major events, protection of minors, customer protection and commercial communication justify adoption of harmonized content rules to be applied throughout the EU.

If the online media meet the seven cumulative criteria for "media service providers" under the Audiovisual Directive, their content is subject to the rules of the Directive. The rules are:

1. The media should have commercial purpose and provide content for remuneration. Italy has set a threshold of 100.000 EURO revenue. In contrast, in the Netherlands it is relevant whether the content contains advertising, sponsoring, or promotes a brand, product or services, even in case of non-profit organizations. If bloggers or NGOs have not income from blogging they do not meet this criterion;
2. Is the media content under prior editorial control? The editorial control should be prior; therefore You Tube or Facebook which exercise a posteriori control do not meet this criterion;
3. What is the primary purpose of the providers? The Audiovisual Directive requires that the primary purpose be the provision of programmes in order to inform, entertain and educate the general public. If the video has ancillary purpose such as videos on electornic versions of newspapers or on business websites, the video content is not subject to the content rule set out by the Audiovisual Directive.
4. Is it a case of provision of programmes? The meet the criterion the moving images or sound should be in a schedule or

catalogue. Electronic version of newspapers obviously cannot not meet this criterion because their content is not issued in a schedule. For this reason the Audiovisual Directive has explicitly stated the electronic versions of newspapers and magazines are not covered by the scope of the Directive.

5. Is the purpose of the content to inform, entertain and educate? For example, webcams purpose is to record information, and websites with webcams are not covered by the Directive.
6. Does the content target the general public? Private correspondence or narrowcasting (transmission of content, or otherwise disseminate information, to a comparatively localized or specialist audience such as content accessible by subscription are outside the scope of the Directive.
7. Is the content distributed via electronic communication networks? Obviously all online media meet this requirement.

The EU member states should ensure that their domestic law is in line with the Audiovisual Directive and all online media who meet the 7 criteria must comply with the content requirements. In other words if online media meet the criteria they must be subjected to the rules for traditional media.

In particular, online media should be governed by graduated regulation for protection of minors whereas the less control a viewer has and the more harmful a specific content is the more restrictions apply.

Online linear services

Online TV linear programmes (TV streamed over the Internet) which "might seriously impair" the development of minors in particular pornography or gratuitous violence are prohibited.

Programmes which might simply be "harmful" to minors can only be transmitted when it is ensured that minors will not normally hear or see them by selecting the time of the broadcast or by any technical measure

(e.g. encryption). In addition to that, all non-encrypted programmes must be preceded by an acoustic warning or made clearly identifiable throughout their duration by means of a visual symbol.

Online on-demand services

The online media which meet the criteria for media service providers under the Audio-visual Directive should provide on-demand content in compliance with the Directive rules for on-demand content. In particular, programmes which “might serious impair” the development of minors are allowed in on-demand services, but they may only be made available in such a way that minors will not normally hear or see them. This could be done by the use of PIN codes or other, more sophisticated age verification systems.

There are no restrictions for on-demand service for programmes which might simply be "harmful".

Definitions for both “seriously impair the development” and “likely” to impair are not included in the Directive which means that states can adopt their own definitions.

In online on-demand environment audiences can be empowered to take more responsibility for their consumption. However individuals must have access to meaningful information about available content and effective control devices such as filters.

CHAPTER 5

Internet Content Restrictions

Although child pornography is criminalised in all 56 OSCE member states, states differ in their approaches to other categories of online expression. What is regarded as offensive, unwanted or undesirable but not against the law in some states is considered as a crime in others. The difference in the treatment of expression is due to the fact that many states tolerate more expression including one that might offend, shock or disturb. According to the European Court of Human Rights the characteristics of "democratic society" include pluralism, tolerance and broadmindedness[74]. Democratic states are therefore more tolerant to harmful expression that non-democratic ones.

Because of their different attitudes towards expression states cannot harmonize the laws at international level. However, as the UN Special Rapproteur on Freedom of Expression has pointed out the legitimate types of expression which may be restricted under international law include:

- Child pornography (to protect the rights of children)
- Hate speech (to protect the rights of others)
- Defamation (to protect the rights and reputation of others against unwarranted attacks),
- Direct and public incitement to commit genocide (to protect the rights of others),and

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Handyside v. the United Kingdom, Judgement of 7 December 1976, Application 5493/72 para. 49.

- advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (to protect the rights of others, such as the right to life) [75]

Restrictions on racist content and hate speech

What are the international standards regarding hate speech?

The European states are required to criminalise the following acts

1. the dissemination through computer system of
    a. racist and xenophobic material
    b. racist and xenophobic motivated threats,
    c. racist and xenophobic-motivated insults and
    d. the denial, gross minimisation, approval or justification of genocide or crimes against humanity.[76]
2. incitement to hatred and violence.[77]

At UN level, all states are obliged to condemn all propaganda and all organisations which are based on ideas or theories of superiority of one

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Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Human Rights Council, Seventeenth session Agenda item 3, United Nations General Assembly, 16 May 2011

[76] The Additional Protocol to the Cybercrime Convention, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, CETS No.:189

[77] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating racism and xenophobia by means of criminal law.

race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form[78]

All OSCE states have specific legal provisions outlawing racist content and xenophobia. Half of the states have provisions outlawing the denial, gross minimisation, approval or justification of genocide or crimes against humanity.[79]

What is hate speech?

The term, hate speech, is neither enshrined nor defined in international law. According to Council of Europe Recommendation 97(20), hate speech is taken to cover:

> all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.[80]

Should hate speech be restricted?

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[78] International Convention on the Elimitation of All Forms of Racial Discrimination, Article 4.

[79] Akdeniz, Y. Freedom of Expression on the Internet: A Study of Legal Provisions and Practices Related to Freedom of Expression, the Free Flow of Information and Media Pluralism on the Internet in OSCE Participating States (Vienna: OSCE Representative on Freedom of the Media, 2012)

[80] Recommendation 97(20) of the Committee of Ministers of the Council of Europe to Member States on "hate speech", 30 October 1997.

As the right to "freedom of expression extends not only to ideas and information generally regarded as inoffensive but even to those that might offend, shock or disturb"[81] the state intervention with respect to offensive speech depends on the circumstances. It means that some forms of hate speech may be tolerated.

According to the European Court of Human Rights states have wide discretion to decide whether it is necessary to sanction all forms of expression which spread, incite, promote or justify hatred based on intolerance or only some forms.[82]

How do states sanction online hate speech?

Some states have specifically incriminated online hate speech. For example, in Albania the distribution of racial or xenophobic content through the Internet is criminalized as well as insults based on racial or xenophobic motives distributed through the Internet. Racist and xenophobic threats through the Internet are also criminalised.[83]

In contrast, in Austria there is no specific crime of online hate speech. Moreover not all forms of hate speech are criminalised. The Criminal Code defines as offence only the public racist incitement to commit hostile acts against specific religious communities, churches or groups

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[81] *Handyside v. UK* (1976), App. No. 5493/72, Ser A vol. 24

[82] *Gündüz v. Turkey,* Application No. 35071/97 judgment of 4 December 2003, § 40

[83] Akdeniz, Y. Freedom of Expression on the Internet: A Study of Legal Provisions and Practices Related to Freedom of Expression, the Free Flow of Information and Media Pluralism on the Internet in OSCE Participating States (Vienna: OSCE Representative on Freedom of the Media, 2012), p. 82.

determined by race, people, tribe or state, if the nature of the incitement is suited for endangering the public order.[84]

What factors are relevant for proving the necessity of sanctioning hate speech?

As it was noted before, courts and other adjudicating bodies examining complaints of hate speech should consider whether the sanction is necessary. To do so they should looks at various factors taking into account the specific circumstances of the case such as the intention of the speaker, the harm caused, the manner and context of expression. Judges must provide relevant and sufficient reasons to justify the restriction on expression.

Should the media be liable for reporting on hate speech?

When restricting hate speech states should not hamper the role of the media of informing of issues of public interest such as racism and hate speech and raising issues in connection to them.

National law and practice should distinguish "between the responsibility of the author of expressions of hate speech on the one hand and any responsibility of the media and media professionals contributing to their dissemination as part of their mission to communicate information and ideas on matters of public interest on the other hand". [85]

How to determine the responsibility of the media for the distribution of hate speech?

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[84] Ibid, p. 82

[85] Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech", 30 October 1997.

When examining the responsibility of the media for the distribution of hate speech, the adjudicating bodies must be cognizant of the following:

- reporting on racism, xenophobia, anti-Semitism, or other forms of intolerance is fully protected by international law;
- the necessity of sanctioning the media should be proven in view of the circumstances of each case and consideration must be afforded to "the manner, contents, context and purpose of the reporting";
- "respect for journalistic freedoms also implies that it is not for the courts or the public authorities to impose their views on the media as to the types of reporting techniques to be adopted by journalists".[86]

Restrictions on incitement to terrorism

The Internet is used to encourage terrorist activities. In certain countries the distribution of content related to terrorism is criminalized. In others those who download such content and possession terrorist materials can be charged under terrorism laws.

What kind of expression should be outlawed to prevent terrorism?

In Europe states are obliged to prevent terrorism and counter the following acts in particular:

- Public provocation to commit terrorist offences

[86] Principle 7 of Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech"

- Recruitment and training for terrorism.[87]

These acts should be criminalized also when they are committed through the Internet.

How should terrorism laws treat online media and bloggers?

The terrorism legislation should not be applied in contradiction of fundamental principles relating to freedom of expression, in particular freedom of the press.

When examining charges of provocation to terrorism against media or bloggers courts should take into account their intent and whether the particular statements is likely to cause harm.[88] The nexus between the statements and the harm should be clear and close. The statements must not be looked in isolation but in view of all circumstance of the case and of the whole publication and expression.[89]

How to regulate incitement to terrorism?

State differ in terms of criminalization of incitement to terrorism, terrorist propaganda and/or terrorist use of the Internet.

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[87] The Council of Europe Convention on the Prevention of Terrorism (CETS No. 196, which entered into force in June 2007. Brussels Ministerial Council, Decision No. 7/06: Countering the use of the Internet for terrorist purposes, 2006.

[88] Sener v Turkey, 18 July 2000, Application No. 26680/95 European Court of Human Rights, para. 45-46.

[89] Zana v Turkey, 25 November 1997, Application No. 18954/91. European Court of Human Rights, para. 59-60.

For example, in Finland although incitement to terrorism is criminalized in the Criminal Code, the possession of materials encouraging terrorism is not criminalised. In contrast, in Albania possession of content involving terrorist propaganda materials is criminalised.[90]

Some countries – for example, Slovenia, UK and France, criminalise public glorification of terrorist activities.

Restrictions on child pornography

What are the international standards regarding child pornography?

The Council of Europe's Cybercrime Convention require states to criminalise:

- The production, distribution, dissemination or transmission of child pornography
- Supplying or making available of, and acquisition or possession of child pornography.[91]
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Child pornography is defined as pornographic material that visually depicts:

[90] Akdeniz, Y. Freedom of Expression on the Internet: A Study of Legal Provisions and Practices Related to Freedom of Expression, the Free Flow of Information and Media Pluralism on the Internet in OSCE Participating States (Vienna: OSCE Representative on Freedom of the Media, 2012), p. 106 and p. 110.

[91] EU's Framework Decision on combating the sexual exploitation of children and child pornography, Council of Europe's Cybercrime Convention 2001, Council of Europe's more recent Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, the United Nations' Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

(a) a minor engaged in sexually explicit conduct;
(b) a person appearing to be a minor engaged in sexually explicit conduct;
(c) realistic images representing a minor engaged in sexually explicit conduct. [92]

How do states deal with child pornography?

Despite the differences in the approaches adopted to regulate other content on the Internet, all states agree that child pornography should be criminalised.

Almost all OSCE participating states have specific legislation criminalising child pornography.[93] It is a crime to produce, distribute, advertise, import, sell or publicise pornographic materials of minors. States treat differently virtual child pornography with unrealistic characters (drawings, paintings, cartoons, etc): some states like Austria and UK have criminalised the production of such images but not the possession of images for personal usage. No such provisions exist in Albania, Bulgaria, Belarus and other states.

Restrictions on obscene and sexual explicit content

What are the international standards regarding obscene and sexually explicit content?

[92] Council of Europe's Cybercrime Convention 2001, Article 9 (2).

[93] Akdeniz, Y. Freedom of Expression on the Internet: A Study of Legal Provisions and Practices Related to Freedom of Expression, the Free Flow of Information and Media Pluralism on the Internet in OSCE Participating States (Vienna: OSCE Representative on Freedom of the Media, 2012), p. 124

Although the right to freedom of expression expands to information and ideas which "shock, offend or disturb", international law recognises the right of States to limit freedom of expression in the interest of public morals, subject always to the three-part test set out in Article 19 paragraph 3 of the ICCPR for legality of restrictions on expression.

What is obscene and sexually explicit content?

International bodies have admitted that it is difficult to adopt a universal concept of obscenity as well as to formulate it with absolute precision. They take a fairly broad view and recognise that questions of morality are closely tied to national and local cultures and traditions.[94]

State differ in terms of approaches to and definitions of obscenity.

In most European countries obscenity is not outlawed unless it has passed a threshold to become gross or extreme. Such is for example content including sexual acts with animals or sexual acts showing violence.

All European states subject freedom of expression to more stringent limits when the speech could come in contact with children. In the case of Perrin v UK[95], which concerned a complaint of an owner of a pornographic website who was convicted for obscenity, the ECHR found no violation of the right to freedom of expression since the website owner had failed to avoid exposing minors to the obscene pictures through age checks, for example. Bloggers can be held responsible for the similar failures too.

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[94] Handyside v United Kingdom, 7 December 1976, Application No. 5493/72, para. 48.

[95] Perrin v the United Kingdom, Judgment of 18 October 2005, application No. 5446/03.

Are states obliged to protect persons from anonymous sex predators?

The ECHR held that states need to enforce protection framework for children against sex predators or sharing of their personal information on the internet. In the case of K. U. v Finland, which concerns the failure of authorities to identify an unknown person who published personal details of a 12-year-old on a dating website, putting the child in danger of sex predators, the ECHR pointed to the lack of legal powers for the police to ask Internet providers to reveal the identity of the person who had published the profile. Therefore states should ensure that domestic legislation provide for disclosing of identify of anonymous persons in the most serious cases in order to protect children. Although this specific case related to the protection of a child, the same protection is necessary for adults too.

Restrictions on Internet piracy

How does copyright affect online media and bloggers?

Copyright is a form of protection granted by international and national law for original work of authorship fixed in a tangible media of expression. Authors are copyright owners and as such possess the following rights:

- Making copies of the work
- Creating new works based on the original
- Distribute the work by sale, transfer of ownership, rental, lease or lending.

Copyright holders may allow people to use their work. Without their permission the use infringes their copyright.

Media publications and broadcasting may infringe copyright by means of:

- Unauthorised reproduction of other's original work such as articles, photographs, music or video;
- Unauthorised transmission of recordings and shows of literary, scientific or artistic work in public such as art exhibitions or fashion shows;
- Unauthorised reproduction of TV schedule information.

How do states protect copyright?

Sanctions for copyright infringements are provided in the form of administrative, civil and criminal liability.

A particularity of copyright law is the existence of graduated response ("three-strikes") mechanisms introduced in some states (France, UK) to deal with copyright infringements on the Internet. These mechanisms result in the restriction or cutting off a user's access to the Internet after the user has allegedly committed three intellectual property infringements, and received two warnings. Upon receiving a complaint by copyright owners for an infringement of their rights, the ISP should notify the subscriber that IP addresses with which they are associated are alleged to have been used in the illegal downloading of copyrighted material. If the warning has been ignored the ISP can serve a second warning. A court or an independent body may suspend the alleged offender's subscription for a period of time. These actions against offenders do not exclude criminal, civil or administrative liability.

What are the international standards in examining copyright cases?

Copyright protection is part of the right of property, guaranteed by international law as well as national law. International and national courts have already established that copyright protection affects the right to freedom of expression and have established the following principle:

- Copyright is not absolute and can therefore be subject to limitations
- The limitations have to be determined in case-by-case basis
- When adjudicating on copyright cases court must balance between the right to property and the right to freedom of expression and follow the criteria established by international law for assessment of legality of restrictions on the right to freedom of expression (the three-part test set out by Article 19, paragraph 3 of ICCPR)
- States have a wide margin of appreciation how decide in copyright cases. This discretion is widest in cases of commercial speech or advertising. However if the copyright infringement contributes to an issue of public debate or a debate of general interest for the society, states must exercise a strict scrutiny. This is especially so in cases relating to prior restraints such as requests for blocking of websites or removals of online content.
- Finally, not only the interference for the protection of copyright but also the sanction should comply with the guarantees for freedom of expression (three-part test set out by Article 19, paragraph 3 of ICCPR)[96].

Restrictions on libel and insult on the Internet

What is defamation?

[96] Ashby Donald and others v France, Application Nr. 36769/08, Judgment of 10 January 2013

Defamation is the act for making a false statement of fact which harms the reputation of another person.

What are the international standards for defamation?

Defamation affects one's reputation which is part of their private life and is guaranteed by international human rights law. The UN Human Rights Committee has set out key guidelines how to ensure that defamation laws balance between freedom of expression and reputation and comply with Article 19 of the ICCPR:

- State Parties should consider the decriminalization of defamation; in any case, the application of the criminal law should be limited to the most serious cases and imprisonment is never an appropriate penalties;
- once a person has been indicted for criminal defamation, State Parties should ensure that trial is commenced expeditiously, as otherwise there may be a chilling effect unduly restricting the freedom of expression of that person and others;
- all defamation laws, and in particular criminal defamation laws, should include the defence of truth and should not be applied to those forms of expression which are not, of their nature, subject to verification;
- State Parties should not penalize or otherwise render unlawful untrue statements which have been published in error but without malice, especially with regard to comments about public figures; In other words, the law should recognise that the public interest of freedom of expression may prevail over reputation and that the nature of information collection and distribution may lead to errors. These errors, which normally happen because journalists cannot wait until they are completely sure that every fact made available to them is correct before publishing the story, should be ignored if author has not acted with malice. In cases of journalism, journalists can demonstrate that they have acted

without malice by proving that in the preparation of their materials they have observed the professional standards and code of ethics. Judges should examine the whole text of the material to determine whether journalists acted with malice;

- in any event, a public interest in the subject matter of the criticism should be recognized as a defence; and
- State Parties should avoid excessively punitive measures and penalties and should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party.[97]
- However due to the unique characteristics of the Internet, regulations or restrictions which may be deemed legitimate and proportionate for traditional media are often not so with regard to the Internet. For example, in cases of defamation of individuals' reputation, given the ability of the individual concerned to exercise his/her right of reply instantly to restore the harm caused, the types of sanctions that are applied to offline defamation may be unnecessary or disproportionate.[98]

How do international courts balance between the right to freedom of expression and reputation?

Like any other limitation on the freedom of expression restriction aiming at protection of reputation should be:

- Prescribed by law
- Necessary and proportionate to the protection of reputation.

[97] General Comment No. 34, see ibid. para. 47.

[98] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, A/HRC/17/27.

When examining the questions of necessity and proportionality, the European Court of Human Rights balances between the right to private life and the right to freedom of expression applying the following criteria to determine if there the limitation was justified by a pressing social need:

- Did the expression contribute to a debate of general interest?
- How well known is the person concerned and what is the subject of the report?
- Prior conduct of the person concerned
- Content, form and consequences of the publication
- Circumstances in which the information were taken[99].

How has the advent of the Internet affected defamation?

The internet gives any user opportunity to publish his/her views. It has increased the public participation in debates whilst at the same has increased the number of defamatory statements. Concerned that the increased internet-related defamation cases may affect the freedom of expression, some states have already adopted special rules for online defamation.
For example, the 2013 UK Defamation Act introduced the following amendments to the existing defamation legislation in the country in connection with the Internet.

Single publication rule: The law set out a one-year limitation period for defamation claims. The new rule prevents a claimant from bringing an action in relation to an online publication if he/she has seen it for first time after the limitation period has expired.

[99] Ristamäki and Korvola v. Finland, Judgment of 29 October 2013, Application No. 66456/09

Requirement to show serious harm. A claimant bringing an action for defamation must prove that the statement caused, or is likely to cause, "*serious harm*". The reputation of a business or other body that trades for profit is not seriously harmed unless the statement has caused "*serious financial loss*".

Specific defence for website operators. Operators of websites – including online media portals – are given a legal defence against defamation arising from statements of third parties. This defence is defeated, if the operator acts with malice, or, if the claimant gives the operator notice of complaint in relation to a defamatory statement (where the third party has been anonymous) and the operator fails to respond adequately.

Where to sue for online defamation?

The global nature of the Internet and the different standards regarding defamation in particular the awards for harms of reputation lead to what is called "forum shopping" or "libel tourism" when a complainant files a complaint with the court thought most likely to provide a favourable judgment . . . and where it is easy to sue."[100] The forum shopping allows powerful claimants (right businessmen or companies with large legal departments) to sue media abroad claiming that their reputation has been affected there as a result of the universal availability of the allegedly defamatory online publication.

[100] Council of Europe, Committee of Ministers (4 July 2012), Declaration on the desirability of international standards dealing with forum shopping in respect of defamation, "libel tourism", to ensure freedom of expression.

The Joint Declaration on Freedom of Expression and the Internet[101] of the four international mandates on the right to freedom of expression stated:

> Jurisdiction in legal cases relating to Internet content should be restricted to States to which those cases have a real and substantial connection, normally because the author is established there, the content is uploaded there and/or the content is specifically directed at that State. Private parties should only be able to bring a case in a given jurisdiction where they can establish that they have suffered substantial harm in that jurisdiction (rule against 'libel tourism').

Restrictions on freedom of expression for protection of privacy

Freedom of expression can be restricted if it is necessary for the protection of privacy. Therefore bloggers and online media should exercise their right to freedom of expression with special duties and responsibilities with respect the privacy.

Innovations in technologies increase the opportunities for State surveillance and interventions into invididuals' private communications and life. Journalists and bloggers are vulnerable to becoming targets of surveillance because of their reliance on online communication. For them the surveillance of their communications can have catastrophic consequences.[102]

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[101] International Mechanisms for Promoting Freedom of Expression, Joint Declaration on Freedom of Expression and the Internet, 1 June 2011.

[102] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, adopted on 17 April 2013, A/HRC/23/40

At the same time they themselves can take advantage of new technologies and violate individuals' right to privacy. For example, sensationalist media seek private photographs or stories to satisfy public appetite for news about celebrities' life.

What are the international standards related to the right to privacy?

According to Article 17 of the ICCPR, which protect the right to privacy, no one should be subjected to arbitrary or unlawful interference with his privacy, home and correspondence, or unlawful attacks on his honour and reputation.

The UN Human Rights Committee has set out standards regarding the right to privacy[103]:

- The right to privacy is required to be guaranteed against all interferences and attacks whether they emanate from State authorities or from natural or legal persons.

- The State is required to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as the protection of the right. Surveillance, whether electronic or otherwise, interceptions of telephonic and other forms of communications, wire-tapping and recording of conversations should be prohibited.

- The relevant legislation must specify in detail the precise circumstances in which such interference may be permitted.

[103] General Comment No. 16: Article 17 (Right to Privacy): The pright to respect of privacy, family, home and correspondence, and protection of honour and reputation, adopted in 1988, para. 8

- A decision to make use of authorized interference must be made only by the authority designated under the law and on a case-by-case basis.

- Any interference with the right should be proportionate to the end sought and necessary in the circumstances of any given case.

In 2013 the UN General Assembly adopted a resolution entitled The Right to privacy in the digital age" which affirmed that "the same rights that people have offline must also be protected online, including the right to privacy".[104]

Finally, the encryption and anonymity online is an expression of the right to privacy and enable the free exercise of the right to freedom of opinion. As such they should not be prohibited or obstructed and may only be subject to restriction in strict compliance with the three-part test under human rights law.[105]

How to balance the right to freedom of expression and the right to privacy in cases of publications of photos

The European Court of Human Rights [ECHR] considers that

- the right to freedom of expression and the right to privacy deserve equal respect;

- public figures are entitled to protection of their private life, except in those cases where their private life may have an effect

[104] Resolution 68/167. The right to privacy in the digital age. Adopted by the General Assembly on 18 December 2013

[105] International Mechanisms for Promoting Freedom of Expression, Joint Declaration on Freedom of Expression and Responses to Conflict Situations of 4 May 2015.

on their public life. Public figures are persons holding public office and/or use public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy the arts, the social sphere, sports or in any other domain

- in some case of general interest the right to privacy may be restricted to protect general interest. The latter is not confined to political issues or crimes but it extends to facts involving performing artists or other reknown people as long as the fact reported are "capable of contributing to a debate in a democratic society".[106]

Any restriction of publication of photographs should be based on law and be necessary and proportionate for the protection of the right to privacy.

When examining the necessity and proportionality of restrictions on publications of images it has adopted the following criteria:

- Whether the image contributes to a debate of general interest
- How well known the subject of the image is (ie whether he or she is a "public figure")
- Any prior conduct of the person concerned;
- The content form and consequences of the publication'
- The circumstances in which the photos were taken

[106] Von Hannover v Germany (No.2) Applications nos. 40660/08 and 60641/08, 7 February 2012, European Court of Human Rights

- The gravity of the sanctions imposed.[107]

In the case Von Hannover v Germany (2nd) before the ECHR the applicant, daughter of the late Pince Rainier III of Monaco and her husband requested the German courts to obtain an order to prevent the publication of photographs of their private life in the press. The photographs were taken without their consent during skiing holidays and had already appeared in two German magazine. The domestic courts granted an injunction in respect of two of the photographs finding that they did not contribute to a debate of general interest. However, it refused an injunction in respect of the third photograph, which showed the applicants taking a walk during a skiing holiday in St Moritz and was accompanied by an article reporting on, among other issues, Prince Rainier's poor health. With respect to this photo the domestic courts held that the reigning prince's poor health was a subject of general interest and that the photograph had a sufficiently close link with the event described in the article was constitutionally unobjectionable.

The ECHR found that the domestic courts' characterisation of Prince Rainier's illness as an event of contemporary society could not be considered unreasonable and it was able to accept that the photograph, considered in the light of the article, did at least to some degree contribute to a debate of general interest.

Furthermore, it accepted that the applicants were public figures. As to the circumstances in which the photographs had been taken, this had been taken into account by the domestic courts, which found that the applicants had not adduced any evidence to show that the photographs had been taken in secret or in otherwise unfavourable conditions. The ECHR concluded that the domestic courts had carefully balanced the publishing companies' right to freedom of expression against the

[107] Ibid and Couderc and Hachette Flipacchi v France.

applicants' right to respect for their private life and did not find a violation of the right to privacy of the applicants.

The test applied in the cases of restriction of publications of photographs apply in other cases related to media infringements to privacy such as reporting on pending criminal proceedings, publication of criminal judgements, information obtained through phone interception.

How can state protect the right to privacy?

States should adopt laws to guarantee effective protection of the right to privacy and ensure that courts balance between this right and the right to freedom of expression.

The Council of Europe's Parliamentary Assembly recommended to states to put emphasis in their laws on the civil nature of the sanctions against journalists.[108]

[108] Resolution 1165 (1998) of the Council of Europe Parliamentary Assembly

CHAPTER 6

Other guarantees for online journalists and bloggers

Internet Access: the right of media and bloggers to access to Internet

What is net neutrality?

Network neutrality or 'net neutrality' is defined as the principle that all Internet data traffic should be treated equally based on an end-to-end principle. In practice, this means that network operators or Internet access providers treat data packets equally, regardless of origin, content type or destination, so that the Internet users have the greatest possible access to Internet-based content. Users should be able to use any applications or access any services of their choice without the traffic related to the services they use being managed, prioritized or discriminated by the network operators. This general principle should apply irrespectively of the infrastructure, the network or the device used for Internet connectivity.

How can the principle of net neutrality be affected?

Net neutrality can be affected in different ways:

- To protect intellectual property or economic interest network operators of traffic may limit speed or block services. By doing so they obstruct sharing of video files.

A 2011 survey conducted by the Body of European Regulators for Electronic Communications (BEREC) established that providers in France, Greece, Hungary, Lithuania, Poland and the UK imposed limits on the speed of peer-to-peer file-sharing or video streaming.

- Network operators of services and traffic can offer premium service, including faster traffic need for data-heavy services such as Voice-over-IP or video-streaming services, to content providers who are ready to pay higher fees. They justify the different treatment with the need to upgrade their technical systems and be able to compete on the market. If individuals and companies are to pay for faster traffic Internet is subject those who cannot pay the fees will be prevented to reach their audiences. This can affect, for example, the media of less numerous ethnic groups or marginalized groups. As a result, the end of net neutrality will affect also media pluralism and diversity of opinions.

What are the international standards on net neutrality?

The standard-setting bodies of both the European Union and Council of Europe have declared their commitment to the principle of net neutrality.[109]

States must:

1. Address net neutrality from the perspective of the right to freedom of expression
2. Are required through their national regulatory authorities to:
    - set minimum quality of service requirements on public electronic communications network providers and
    - require operators to

[109] See Directive 2002/22/EC on universal service and users' rights relating to electronic communications network and services, commonly referred as EU Universal Service Directive and Council of Europe Declaration of the Committee of Ministers on Network Neutrality, adopted on 29 September 2010 at the 1094th meeting of the Ministers' Deputies.

- be transparent on their quality service levels
- ensure that the network management measures they employ are proportionate, appropriate and avoid unjustified discrimination
- inform consumers about
    - certain issues when subscribing to a service including conditions under which a EU member state may limit access to and use of a services and applications,
    - the procedures put in place by the provider in order to measure and shape traffic and how these measures may impact on service quality.

3. Consumers should be able to

- challenge network management decisions and seek redress and
- switch service providers.

Under the Finnish Communications Market Act, all Finnish citizens have a legal right to access a one megabit per second broadband connection, reportedly making Finland the first country to accord such a right.

In Norway network neutrality is guaranteed by the guidelines developed jointly by the Norwegian Post and Telecom Authority (NPT) and the Norwegian Internet service providers, content providers, industry associations and consumer authorities. The guidelines provide that:

Internet users are entitled to an Internet connection with a predefined capacity and quality.

Internet users are entitled to an Internet connection that enables them to

- send and receive content of their choice
- use services and run applications of their choice
- connect hardware and use software of their choice that does not harm the network

Internet users are entitled to an Internet connection that is free of discrimination with regard to type of application, service or content or based on sender or receiver address.

In 2010 Chile became the first country in the world to provide for network neutrality in law. ISP must "ensure access to all types of content, services or applications available on the network and offer a service that does not distinguish content, applications or services, based on the source of it or their property."

Licensing of online media and bloggers

What are the international standards relating to licensing of media?

Licensing is the primary method by which the initial establishment of media outlets can be regulated. However as licensing amounts to

regulation of the right to freedom of expression it should be necessary in line with Article 19, para. 3 of the ICCPR.

The UN Human Rights Committee has held that mandatory licensing schemes for print media constitute a violation of the right to freedom of expression.[110]

The licensing of broadcast media has been regarded as necessary as the authorities have to regulate the allocation of radio frequencies which are public property to broadcasters and ensure that media pluralism is secured.

Is licensing of online media necessary and bloggers necessary?

Some states oblige online media and bloggers to register. For example, Singapore's Broadcasting Act requires the registration of any online news website that receives, over a two-month period, an average of at least 50,000 unique visits per month from Singapore Internet addresses and is involved in "the propagation, promotion or discussion of political or religious issues related to Singapore." In Russia bloggers are obliged to register if their sites are visited by more than 3,000 users daily. Similar schemes exists in Iran, Saudi Arabia and Sri Lanka.

The UN Special Rapporteur on Freedom of Expression has held that unlike the broadcasting sector, for which registration or licensing has been necessary to allow States to distribute limited frequencies, such requirements cannot be justified in the case of the Internet, as it can accommodate an unlimited number of points of entry and an essentially

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HR Committee, Concluding observations on Lesotho, 08/04/1999, UNDoc. No. CCPR/C/79/Add.106, para 23.

unlimited number of users.[111]
However, online media and bloggers may be required to register with a domain name authority for purely technical reasons or rules of general application which apply without distinction to any kind of commercial operation.[112]

Regulation and seizures of domain names

What are domain names?

Domain names are used to identify one or more IP addresses. Domain names are used in URLs to identify particular Web pages.

Who maintains domain names?

Domain names ending .com, .org and .net although operated from abroad are managed by US-based domain-name registries under US jurisdiction. Any country has it own registries with domain extension specifying the country.

Why do domain names affect freedom of expression?

Domain names are used to identify or describe content hosted in websites or to disseminate a particular point of view or to create space for virtual assembly and association.

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[111] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, A/HRC/17/27, para. 30.

[112] Ibid.

In some cases domain names are form of advertisement as they provide information about the content hosted in website. In other cases they could contain a political message and a form of political expression (votejohnsmith.com). There are also domain names affecting other's possessions (trademarks).

How can the management of the domain name affect bloggers or online media?

States adopt law restricting the choice of domain names. For example, domain names that use trademarks registered by others (for example, Nike or Coca Cola) or domain names inciting to hatred or discrimination against a particular group.

Courts may seize domain names used for criminal activity. For example, every year thousand of domain names of fraudulent websites are seized and taken down in the UK.

Although normally domain name seizures are undertaken to protect consumers from counterfeit products and frauds, the domain name of bloggers and online media may also be seized. For example, in 2010 EveryDNS, Wikileaks' domain name service provider, cut off the service to the whistle-blower platform.

What are the international standards relating to domain names?

- Council of Europe's standards concerning domain names provide that Both the regulation and the seizure of domain names affect freedom of expression. Therefore expressions contained in domain names protected by the right to freedom of expression. Any restriction on domain names should be based on a legal

process to be compliant with the safeguards of the right to freedom of expression. They should be

- Set out in a law, which accessible, clear and reasonably foreseeable
- Pursue a legitimate aim
- Be limited to what is proportionate and necessary and user should be informed of the reason for the restriction. [113]

- Moreover any form of arbitrariness of discrimination should be excluded. Content providers and users must be informed of the possibility to appeal and to whom to appeal under a judicial redress procedure.[114]

States have different powers in regulating domains (margin of appreciation). These powers are larger when domain names are a form of advertisement or affect trademarks[115] and limited when they are links to media or are a form of political expression. In any case decisions regarding domain names are subject to supervision of international courts examining complaints for violations of the right to freedom of expression.

[113] Council of Europe's Declaration of Committee of Ministers on the protection of freedom of expression and information and freedom of assembly and association with regard to Internet domain names and name strings, adopted on 21 September 2011.

[114] Directive of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, PE-CO S51/11, Brussels, 4 November 2011.

[115] In the case of Parffgen GmbH v Germany the ECHR declared that non-physical goods are covered by the European Convention protection of the right to property. Application No. 25379/04.

Monitoring, Blocking and Content Removal

How does monitoring affect the right to freedom of expression?

Today both state and private actors can monitor and collect information about individuals' communications and activities on the Internet. The UN Special Rapporteur observed that

> A number of States are also introducing laws or modifying existing laws to increase their power to monitor Internet users' activities and content of communication without providing sufficient guarantees against abuse. In addition, several States have established a real-name identification system before users can post comments or upload content online, which can compromise their ability to express themselves anonymously, particularly in countries where human rights are frequently violated. Furthermore, steps are also being taken in many countries to reduce the ability of Internet users to protect themselves from arbitrary surveillance, such as limiting the use of encryption technologies.[116]

Monitoring can constitute a violation of the Internet users' right to privacy and undermine people's confidence and security on the Internet, and impede the free flow of information and ideas online.[117]

What are the international standards on monitoring of online content?

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[116] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, A/HRC/17/27, para. 55.

[117] Ibid.

The Parliamentary Assembly of Council of Europe called for

- Collection and analysis of personal data without consent only following "a court order granted on the basis of reasonable suspicion"

- Courts and parliaments should exert control of intelligence services

- Whistle-blowers exposing unlawful surveillance should be protected.

- Further development of user-friendly (automatic) data protection techniques capable of countering mass surveillance and any other threats to Internet security

- Refraining from exporting advanced surveillance technologies to authoritarian regimes.[118]

What is blocking?

Blocking refers to measures taken to prevent certain content from reaching an end- user. This includes preventing users from accessing specific websites, Internet Protocol (IP) addresses, domain name extensions, the taking down of websites from the web server where they are hosted, or using filtering technologies to exclude pages containing keywords or other specific content from appearing.

For example, You Tube is often blocked in some states like Turkey or China.

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Parliamentary Assembly of Council of Europe's Resolution 2045 (2015), adopted on 21 April 2015.

What are the common problems with blocking measures from freedom of expression point of view?

The overview of blocking practices across the world shows that blocking measures are not always provided by law or a provided by law which is overbroad and vague. Another problem is the lack of due process safeguards against arbitrariness. For example, orders for blocking are given by prosecutors or government bodies rather than independent courts. There is also no transparency about blocking policies as well as public accountability of the bodies in charge of them. Also, even where justification is provided, blocking measures constitute an unnecessary or disproportionate means to achieve the purported aim, as they are often not sufficiently targeted and render a wide range of content inaccessible beyond that which has been deemed illegal. Lastly, content is frequently blocked without the intervention of or possibility for review by a judicial or independent body.

What are the international standards regarding blocking?

In Europe blocking of access has been considered with respect to dissemination of terrorist propaganda and combating of child pornography. In both cases however it has been acknowledged that blocking policies are ineffective as in most cases blocked websites reappear under another name outside the jurisdiction of the state or the European Union.

Despite the lack of regional rules, states can adopt national rules on blocking and some have already done so. As the adopted of such rules implies a restriction of human rights, in particular the right to freedom of expression, they can be imposed only subject to the international

safeguards of the right. Article 19 para. 3 of the ICCPR sets out that the restriction should be:

- Set out in a law, which accessible, clear and reasonably foreseable
- Pursue a legitimate aim
- Be limited to what is proportionate and necessary and user should be informed of the reason for the restriction.

Moreover any form of arbitrariness of discrimination should be excluded. Content providers and users must be informed of the possibility to appeal and to whom to appeal under a judicial redress procedure.[119]
The Special Rapporteur notes that child pornography is one clear exception where blocking measures can be justified, provided that the national law is sufficiently precise and there are effective safeguards against abuse or misuse, including oversight and review by an independent and impartial tribunal or regulatory body.[120]

The case of Yıldırım v. Turkey[121] illustrates how the European Court applied the above mentioned standard in a case on restriction to Internet access. The Court held that a Turkish court decision to block access to the Google Sites Internet domain, which, among other, hosted the

119 See Directive of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, PE-CO S51/11, Brussels, 4 November 2011

120 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, A/HRC/17/27, para. 55.

121 Ahmet Yıldırım v. Turkey (application no. 3111/10), ECHR 458 (2012), decision of 18 December 2012.

applicant's site was not prescribed by law as it was not reasonably foreseeable in accordance with the rule of law. The European Court further found that the Turkish court had failed to apply the necessity test when deciding on the blocking.

What are the international standards regarding removal of content?

Orders for removal of content are appropriate when the content is hosted within the jurisdiction of the state.

Although states in Europe are not obliged to take measures to block access to webpages they are required to do promptly remove webpages containing or disseminating child pornography hosted in their territory or to endeavour to obtain removal of such pages hosted outside of their territory.[122]

As orders for removal of content affect the right to freedom of expression they should comply with the safeguards for this right. Therefore any order should be:

- Based on law, which accessible, clear and reasonably foreseable
- Pursue a legitimate aim
- Be limited to what is proportionate and necessary and user should be informed of the reason for the restriction.

Legal Liability of online media and bloggers

Several States may claim jurisdiction over the same information and services on the Internet, which may leave individuals subject to

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Directive of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, PE-CO S51/11, Brussels, 4 November 2011

inconsistent or conflicting rules. The variety and diversity of national laws on illegal content and services, as well as the application of competing and conflicting national laws, create a complex legal environment which can make it difficult for users to claim the protection to which they are entitled under international and domestic law. The growth of services that store and process data in remote locations (cloud services) rather than in locations close to the information owner or recipient increase challenges.

What is the scope of liability of online media?

Online media are legally liable for their online content. The question about the liability for carrying third-party content is less clearly set.

In Europe, the EU Directive on Electronic Commerce[123] provides for limited and notice-based liability and takedown procedures. According to the EU Directive information service providers (including ISPs, hosting companies, Web 2.0 based social platforms and search engines) are liable if they have knowledge and control over the information which they store.[124] Therefore the service providers are liable unless they act

[123] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Official Journal of the European Communities, vol. 43, OJ L 178 17 July 2000 p. 1.

[124] Article 14 (1) of the e-Commerce Directive imposes on states to

"ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

expeditiously "upon obtaining actual knowledge" of illegal activity or content and expeditiously remove or disable access to the information concerned. In addition, the EU Directive provides that EU member states are prevented from imposing a general monitoring obligation on service providers.

Are online media or bloggers liable for third party comments?

The EU Directive on Electronic Commerce does not specify whether online media fall within its scope and therefore it is unclear if their liability for third party comments on their websites is limited or strict.

There is no consensus among states as to online media's liability for third party comments.
On the one hand, some states consider that online media are liable for third party's comments only if they have been notified about illegal content and have failed to act in response to them.

The 2013 UK Defamation Act provides:
(1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.
(2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.
(3) The defence is defeated if the claimant shows that—
(a) it was not possible for the claimant to identify the person who posted the statement,
(b) the claimant gave the operator a notice of complaint in relation to the

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information."

statement, and
(c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.

On the other hand, there are states which consider that online media are always liable for third party's comments.

The national courts in Estonia set out that a popular Internet news portal is liable for failing to remove third party's defamatory comments on its own initiative. In the case of Delfi v. Estonia, the European Court of Human Rights agreed with the holding of the Estonian courts in the case pointing out that "the case concerns the "duties and responsibilities" of Internet news portals. . . engage in clearly unlawful speech, which infringes the personality rights of others and amounts to hate speech and incitement to violence against them."
For ECHR found that the establishment of the unlawful nature of the remark in question did not require any linguistic or legal analysis since they were on their face manifestly unlawful.
The Court emphasised that the case related to a large professionally managed Internet news portal run on a commercial basis which published news articles of its own and invited its readers to comment on them. There was a known public concern about the controversial nature of the comments it attracted.
The decision is critised because it risks making media monitor all comments and engage in censorship. Do to so the media should cover the cost for hiring additional staff.

What is best practice with respect to the liability of online media for third party's comments?

States should set out notice and takedown procedures by law setting out that online media are liable for third party's comments only they have actual knowledge of illegal content and have not expeditiously removed it. The law should be formulated in a high level of detail and require observance with the principle of freedom of expression. The notice should have sufficient information about the complaint, the location of content and should convincingly demonstrate the illegality. The third party's should have the possibility to object. Takedown should be expeditious.

Should anonymity to third parties' commenting on the Internet be allowed?

It is important to allow anonymity to those who might not be able to speak freely under their real names. The right to freedom of expression does not hang on real names.

Freedom of Expression in Social Media

What is social media?

Social media are Internet sites that allow the creation and exchange of user-generated content. For example, Facebook and Twitter are social media.

Why are social media important from freedom of expression's point of view?

From freedom of expression's point of view social media are important because they are discussion forum. Their users exercise both their right to freedom of expression and the right to assembly as social media can

be used for expression of views and for creation and participation in virtual communities (for example, Facebook groups). People also rely on social media to organise events and join forces in the political and other campaigns. In this respect social media are linked to the right to public participation.

What freedom of expression issues arise from the operation of social media?

Social media operation may be problematic from freedom of expression point of view if their terms of service (or their enforcement):

- are insensitive to human rights: for example, they may provide inadequate protection of children and young persons against harmful content or may lack of respect for other rights
- lack of legal and procedural safeguards in cases of exclusion of users
- lack of transparency about the purpose for which personal data.

What can one share on social media?

The legality of any expression on social media depends on the internal rules of the social media and the domestic law of social media users.

Facebook's rules are included in the Facebook Principles, Facebook Statement of Rights and Responsibilities and Facebook Community Standards. Facebook is in charge to ensure that its users observe its own rules. National authorities control whether expression on Facebook comply with domestic laws. There are many situation when one's expression may be perfectly in line with Facebook rules but illegal under domestic law and vice versus.

The differences in the rules of social media and domestic laws may arise because social media have an international character. The private social

media owners are not subject to international obligations. While states must ensure that human rights and the right to freedom of expression are used as a reference point in the domestic legislation, social media may not do so.

What issues may arise from the social media' rules?

As social media are profit-driven in order to operate in a specific country they may succumbed to its laws which allow for more restrictions on expression than provided by international law. For example, Facebook does not allow publication of Kurdistan maps in order to secure operation in Turkey, although such maps are legitimate expression under international law.

Also social media may restrict expression which is acceptable under domestic law. For example, Facebook nudity rules are more restrictive than the liberal rule in many European countries.

What are the international standards concerning social media?

- Social media should use human rights as a reference point in their rules.
- Social media rules should comply with international law standards on freedom of expression, in particular their exceptions must comply with the three-part test in Article 19, paragraph 3 of the ICCPR.
- Social media users should be informed against what standards their postings on social media are measured and what review procedures exist. [125]

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- Social media should protect the children and young persons against harmful content and against cyber-bullying and cyber-grooming. [126]
- Social media should refrain from illegitimate processing of personal data. [127]

Should domestic law regulate social media?

Social media create a private sphere of communication. There is no need of state statute on social media as long as social media operate in line with international law standards of human rights protection.

Although social media should continue to self-regulate States should in consultation with private sector actors and civil society, develop and promote coherent strategies to protect and promote respect for human rights with regard to social networking.[128] They must ensure that the procedural safeguards for users foreseen in self regulatory mechanisms include a right of users to be heard and to review or appeal against decisions of social media providers. Such measures could be part of state laws.

Recommendation CM/Rec(2012)4 of the Committee of Ministers to member States on the protection of human rights with regard to social networking services

[126] Ibid.

[127] Ibid.

[128] Ibid.