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IS THERE A NEED FOR THE RIGHT TO COMMUNICATE IN CYBERSPACE?

Since cyberspace has invited millions of individuals to come and to communicate, a new dimension of the human right to freedom of expression has occurred in the history of international communication. The century-old traditional communication frontiers of time and space, which have been gradually reduced already in the last three decades, when satellites opened the door to the global village, have completely disappeared. In a couple of seconds, millions of bits can be moved around the globe, linking individuals and institutions into a global community. The loneliness of an isolated island disappears when the undersea fibre optic cable has reached its shores and offers the possibility to login, to down load and to talk to anybody anywhere at anytime.

Is this unprecedented opportunity an offer to everybody or will there be a gatekeeper who asks for an identity card, special permission and an entrance fee if somebody wants to cruises on the information highway? Is there free access or have only a limited number of info-drivers the right to participate in the global info-race? Is there an individual and collective human right to communicate in cyberspace? Or do new forms of censorship appear at the invisible horizon of the network of networks?

When history has reached a turning point, it is always useful to look back and to remember what has happened when the historical process had reached its last curve. The Internet is not the first technological tool that has challenged the established political and legal frameworks for interpersonal and international communication, although it represents the most radical change. Indeed, we can learn a lot from the past development of communication technology and its political, economic, social and cultural consequences. The history of the human right to freedom of expression, for example, clearly reflects the interrelationship between the development of communication technology and communication regulation.

Milton's call for the individual right to freedom of expression in his famous *Areopagitica* in the early 17th century was a reaction to the invention of the printing press by Johan Gutenberg.

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Gutenberg's printing press offered for the first time the possibility to duplicate and distribute written ideas and information on a mass basis within and between countries. The ruling elites — the Catholic Church and the feudal absolutists — followed this development not only with applause but also with a great deal of mistrust when they discovered that the new wave of information could challenge their absolute right to "posses the truth", and potentially undermine the stability of the societal power structure.

Their reaction was quite simple: They took over control of the means of information production and introduced a system of (legally justified) political censorship. Every printed book needed permission for its publication. Illegally printed books were put on the **Index Librorum Prohibitorum** established by the Catholic Church to control the public knowledge. The author, the producer and the reader of prohibited texts risked severe penalties.

John Milton challenged this system of "regulation". He argued that the right to freedom of expression is a natural human right of every human being. The publication of ideas with a new technological tool is, according to Milton, nothing else than a broader application of this right. And this right is not a gift by the government but a natural right of the individual.

However, Milton also acknowledged that the government has a special interest in this affair and that the freedom can also be misused. Therefore, some regulations should be accepted to guarantee the rights and freedoms are used responsibly, and the rights and freedoms of others are not destroyed. But he denied every form of (governmental) censorship, that means a system where one person (or institution) decides for others what is fit to print. According to Milton, the most stupid behaviour of a government is when it tries to stop the import of the most important resource, the truth, at his ports. But regardless of Milton's logical arguments, many governments since then were stupid enough to ignore his warning. And because they behaved so stupidly, they lost, eventually, the power they wanted to keep by suppressing the truth.

What Milton proposed was a compromise between individual and public interests. On the one hand, the individual right to freedom of expression was considered inviolable, but governments and democratically elected parliaments should have, on the other hand, the right to create a legal and political framework in the interest of all individuals and the society as a whole. Indeed, the interests of the individual and the interests of the government are not identical, and conflicts and tensions are natural. But conflicts and tensions should not destroy the balance between legitimate individual rights and legitimate public interests. Freedom and responsibility are two sides of one coin. If, on the one side, governments would have an omnipotent power to determine what is "responsible", what is good or bad in individual communication, a classical dictatorship would be the consequence. On the other hand, however, if rights and freedoms are used in a one-sided and ruthless manner, the "law of the jungle" would create another system of oppression.

Milton's call for the right to freedom of expression as a fundamental human right played a central role in the revolutions of the 18th century and was translated into legal language of the constitutional documents of the emerging democracies.

According to the First Amendment to the Constitution adopted in 1791, the U.S. Congress "shall make no law ... abridging the freedom of speech, or of the press." In the French Revolution of 1789, the call for the right to freedom of expression was reflected in Article 4 of the Human Rights Declaration. According to this declaration, individual rights and freedoms have their limits only there, where the rights and freedoms of others are concerned.

With the beginning of the industrial age, newspapers and journals became open marketplaces of ideas and information. It is interesting to recall that the young Karl Marx used freedom of the press to develop his theoretical ideas of socialism in articles published in the *Neue Rheinische Zeitung* and other newspapers. Marx was then an enthusiastic supporter of freedom of the press. In one of his early articles he qualified it as "the open eye of the spirit of the people" and as "the materialised confidence of the people in itself." But he also pointed out that, with the appearance of mass production of ideas and information, the economic dimension of mass communication became decisive, particularly the questions of who owned the means of production of printing plants and publishing houses. Marx argued that the owner of a printing press had certainly more possibilities to express himself freely than an individual who had no access to the mass media. An economic censorship, Marx argued, could have similar effects to political censorship.

The emergence of the telegraph in 1837 was the next turning point in the history of international communication. The telegraph created new possibilities for international communication among nations, but communication beyond national frontiers could become a reality only if the technical standards for telegraphy would be the same in all countries. Twenty-five years after the invention of the telegraph, diplomatic negotiations created a special legislation for the transborder flow of messages. On May 17, 1865, the International Telegraph Convention granted "everybody the right to correspond by means of telegraphs" and obliged the participating states to use the same technical standards. At the same time, however, the "High Contracting Parties" reserved the right "to prevent private telegrams from being transmitted if they threaten state security or violate the laws of the country, public order or morals." The states did not react differently to the development of wireless telegraphy at the beginning of the 20th century. The International Radio Telegraph Convention, adopted in 1906 in Berlin, followed the structure of the telegraph convention from 1865.

Was this "twin concept" a "balanced compromise" in the spirit of John Milton's *Areopagitica*? Or was it a disguised attempt by governments to keep control over (and, under certain circumstances, to censor) the flow of information?

In the opening speech at the Berlin Radio Telegraphy Conference in 1906, the German State Secretary for Postal Affairs, Mr. Kraetke, declared that the "spreading of electrical waves for news transmission by radiotelegraphy will not be stopped by state borders. Any electrical wave transmitted with necessary energy transgress these borders, be the place of destination within or beyond them." And he added: "Therefore radiotelegraphy, more than any other means of news transmission, has an international character right from the beginning, which doubtlessly requires an international order." What was Kraetke's and the German government's understanding of an "international communication order" in 1906: a democratic

guarantee for the right to freedom of expression or a disguised legitimisation for governmental censorship? As history has shown, this “twin concept” has been used in the 20th century for both: stimulating free communication and justifying control over the media.

During the 1920s and 1930s, international short wave broadcasting spread very fast and again opened broader possibilities for international communication. In 1936, the negotiations in the League of Nations successfully ended with the adoption of the Geneva Convention Concerning the Use of Broadcasting in the Cause of Peace. On the one hand, the Convention guaranteed the right to free radio broadcasting across national borders, but on the other hand, it codified the right of the state to stop all transmissions that can be seen as dangerous for international peace. The convention was seen (and justified) as a political and legal instrument against the most massive misuse of the freedom of information in the history of humankind, achieved by the German nazi racial and war propaganda. The fact that mechanisms for the implementation of the convention were too complicated, unclear and even confusing was not the only reason for the failure of the regulation. Nazism and fascism were beaten by “instruments” other than a legally binding convention.

When the first communication satellites were launched into orbital positions in the early 1960s, global negotiations started immediately to create a legal framework for the use of this new means of communication. In the Outer Space Committee of the United Nations (COPUOS) and later in UNESCO the topic became an issue of controversial political discussion. Satellite television broadcasting was seen by dictators as a challenge to their power, by the underdeveloped nations as an attack against their cultural identity, by transnational media corporations as an opportunity for new markets, and by democratic forces as a chance to broaden and to deepen the individual right to freedom of expression.

When the late Jean d’Arcy wrote his famous article about developments of satellite television (DBS) in 1969, he based his ideas in the tradition of the French revolution and its call for the right of individuals to freedom of expression. But he went beyond this individual approach and developed the concept of a **right to communicate** as a new human right. D’Arcy saw the danger of a deep division of the society into active producers and passive receivers of information because of the development of communication technology. His alternative proposal, the concept of the right to communicate, was an invitation to use new communication technologies for interactive communication among free citizens and free nations.

The discussion on DBS and the right to communicate later became a hostage of the ideological debate around the new world information and communication order (NWICO), which overshadowed human rights discussions in the 1970s and 1980s. A compromise was never reached. All agreements and regulations concerning international communication during these two decades — from the UNESCO Mass Media Declaration in 1978 to the UN DBS Resolution in 1982 — were based on the general “twin concept” that internationally semi-legalised both the suppression of information and the misuse of media freedoms.

This “twin concept” that was laid down in Article 19 of the Universal Declaration of Human Rights in 1948 (and later in the International Covenant of Civil and Political

Rights adopted by the United Nations in 1966), referred to the individual right to freedom of expression and to the right of governments to restrict this individual right in the interest of national security, public order, public health and public morals, or to protect the rights, interests and reputations of others. Although this "compromise" became the subject of bitter political struggle during the cold war, both sides could live with this "twin concept" in theory. It gave the "freedom fighters" a right to call for the free flow of information, and it gave the "peace fighters" a justification to stop the free flow of information in the interest of the "maintenance of peace". But in practice the effectiveness of the means of control was reduced permanently. Every new step in the development of communication technology made the control of the transborder information flow more difficult. Jamming of "dangerous" radio short wave broadcasts was manageable in the 1950s, but jamming of satellite broadcasts was only theoretically possible, because it far exceeded the economic capacities of governments. The justification of this "limited and justified censorship" did not work politically either. The control of the information flow back fired. Not only did governments damage their international reputation; in spite of all regulations aimed at the protection of "national security" and "public order" against "dangerous information", suppressors of free communication could not keep up with the development of communication technology. Information flow seeped through the walls. Stupid governments, which prevented, in the Miltonian sense, the free flow of truth, eventually lost their power.

The 1980s produced the next tool for global communication — the Internet. In the middle 1990s, about twenty-five million individuals are linked in a global network that does not know any frontiers of time and space. Furthermore, this new tool does not know the traditional category of sovereignty. There is no international legislation, apart from technical standards for interconnectivity and interoperability. No government can keep control over the Internet, there is no single owner, and no "political qualification" is needed to enter cyberspace. As a caricature in *The New York Times*, with two dogs in front of a PC, put it with irony: "In the Internet, nobody knows that you are a dog".

But does this mean that traditional attitudes of governments towards the emergence of new communication technologies will disappear as well? Will governments not try to get the new tool under control and to put it into a regulatory framework, which reserves to them the right to interfere when their interests are challenged? Is there no need anymore to call for an individual right to communicate because the technology of the Internet *per se* is a guarantor of this right?

These questions are difficult to answer a decade after the Internet escaped from a pilot project of the Pentagon (to make the US military communication system invulnerable against Russian nuclear attacks) into the academic world, where it was used for "peaceful" intellectual debates. On the one hand, the Internet seems to be not only a new step in an endless chain of improvements of international communication, but a totally new "mechanism" that goes far beyond traditional communication improvements. The decentralised Internet is to a certain degree the most organised chaos in the history of humankind. It is unmanageable and uncontrollable. It is a new dimension, a new culture, a new way of communication. For the first time in history,

everybody gets (theoretically at least) the opportunity “to seek, receive and impart information and ideas of all kinds regardless of frontiers”, to use the language of the Article 19 of the Universal Declaration of Human Rights.

On the other hand, there are numerous efforts to get the Internet politically and economically under control. Governments are interested to know what is on the information highway. The idea of a clipper chip, which would allow third parties to check individual communications, has not yet disappeared. Pricing is another possibility to limit the use of new communication technologies. “Toll-stations” can channel the flow of information into the “wanted directions” and prevent participation of “everybody”.

There are no global negotiations to regulate the Internet so far. The traditional legal system is not prepared to handle the new challenges. The application of old norms to the new phenomena will not work. The GATT agreement, reached after eight years of complicated negotiations in December 1993, includes also regulations for trade in communication services. It supported the principle of free trade in this field, but it also included some exceptional clauses, which reserved to governments the right to protect national cultural identity. The protection of intellectual property rights was another key issue of the GATT agreement, relevant to the information highway. But does cyberspace know “property rights”, and if it does, how they can be implemented?

The World Intellectual Property Organisation (WIPO) and the International Telecommunication Union (ITU) are also trying to create a new legal framework for global communication in the 21st century. The leading industrial powers of the G 7, which have opposed all kinds of regulation in this field within UN and UNESCO in the 1970s and the 1980s, have in the 1990s rediscovered the need for “adequate legislation” for international communication. In numerous initiatives — from the US based National Information Infrastructure (NII), the EU based Bangemann Report and the Asian Pacific Information Initiative (APII) through the Global Information Infrastructure Initiative (GII) proposed by US Vice President Al Gore at the ITU World Telecommunication Development Conference (Buenos Aires, March 1994) and launched by the G 7 Summit in Brussels in February 1995 — the legal issues are playing a major role.

However, new regulations are very weak and it remains unclear, how they will affect the right to communicate in cyberspace. What will happen if these regulations remain without any effect in “protecting” fundamental political and economic interests? Will the argument of a “misuse of the Internet” justify the need of the elaboration of new norms to protect national security and public order? Will a new “International Network Convention” give governments the right to interfere into an unwanted flow of communication? How will real criminal activities be dealt with on “the Net”? Is the existing system of data protection stable enough to protect privacy? When a legally binding quota system (with the aim of protecting national and cultural identity) is introduced for “video on demand”, will this affect the freedom of choice and the right to communicate? Is a “Cyberpolice” beyond the thinkable? Does the right to communicate include individual and collective access and participatory rights for the information highway, too? Or, when the entrance fee to the information highway and the tariffs are far beyond the budget of ordinary citizens, does the right to

communicate remain an empty concept, with economically poor people condemned to become information-poor as well?

At the moment, it seems impossible to bring unlimited cyberspace under limited governmental control already for technological reasons. But history tells us that new communication tools have been always transformed by political or economic mechanisms to instruments of power or profit, ignoring individual human rights. Will the Internet have a different destiny? If so, then the jump into the information age is a genuine revolution.