

# **Steering Committee on Media and Information Society (CDMSI)**



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## **FREEDOM OF EXPRESSION AND DEMOCRACY IN THE DIGITAL AGE Opportunities, Rights, Responsibilities**

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Media and Information Society  
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Background paper / contribution  
by the Secretariat

### **General framing**

Over the last two and a half decades, Council of Europe specialised Ministerial Conferences explored common concerns in the evolving media field. They identified policy responses intended to give effect to freedom of expression and the right to impart and receive information and ideas regardless of frontiers. Promoting and preserving the indispensable role of independent and pluralistic media in a diverse and democratic society has been at the core of their exploratory work and consequential Council of Europe standard-setting activity.

More recently, following the Kyiv (2005) and Reykjavik (2009) Ministerial Conferences, Council of Europe intergovernmental work explored measures to uphold and promote human rights in digital environments. The resulting instruments adopted by the Committee of Ministers, increasingly prepared through necessary multistakeholder dialogue, have been widely commended and have often shaped policies in member states and beyond. They also inspired other interstate and supranational organisations and have been supported by business and civil society.

There is growing consensus that media is no longer circumscribed to an old notion but extends to new forms of mass communication resulting from large-scale aggregation and broad access to private interactions in digital public spaces.

Most stakeholders now also agree that human rights must be at the forefront of Internet governance discussions, that the public service value of the Internet has to guide digital agendas, that the rights of users have to be effective, that cybercrime requires a globally harmonised approach and, in particular, that children's rights have to be protected in digital environments through prevention, protection and enforcement. Privacy rights outspread from the physical to the digital worlds, while threatened by profiling, unlawful access to personal data and surveillance.

The understanding that there are fundamental Internet governance principles is gaining support, as is the expectation that state and non-state actors firmly commit to doing no harm to the Internet.

Change will continue and its pace is unlikely to slow down. After the Internet revolutions on private and mass communication, now business, markets and whole economies are being affected. There is no doubt that broadband stimulates growth. Reports suggest that a 10% increase in broadband penetration can result in a rise of 1 to 1.5% in GDP. Access to knowledge and content has been widened to unprecedented levels challenged only by proprietary assumptions previously thought durable.

The Internet revolutions on education and culture –both as regards passive enjoyment and active participation and production– are still to come. Technology is also likely to transform democracy.

Technology brings about expanded capabilities and, with it, increased risks and greater responsibility. This consequence was clearly signalled by the European Court of Human Rights in its judgment in the case of *S and Marper v. UK*. Future policies should seize opportunities, maximise rights and ensure transparency and accountability for responsibilities.

**Freedom of expression** remains at the top of the agenda. According to our common understanding, this right is not absolute; it carries with it duties and responsibilities. Freedom without responsibility can degenerate into abuse; hate speech is but one example. Security and control without freedom or a participatory environment are tantamount to government –or corporate– despotism. Cybercrime is on the rise with criminal exploitation of new spaces and vulnerabilities. The rule of law, including strong protection of personal data, is there to help strike the necessary balance.

**Media's** hard fought independence and professionalism frequently fall victim to political tension or economic constraints or downturns. Both in certain parts of Europe and in other parts of the world, journalists continue to be intimidated, deprived of their liberty or even killed with impunity because of their opinions or investigative work. The process of media concentration continues, often with lack of transparency of ownership. Legacy media's persistent problems threaten their survival as well as their public watchdog function. The stress is also high for public service media.

**Democracy** and human rights stand to benefit from technology-enabled participation and collaborative mapping of issues and setting of priorities. This potential requires acceptance of new forms of engagement, representation and deliberation, as well as further efforts to close the remaining digital divide. According to Internet World Stats, based on end-June 2012 data, Internet penetration in Europe ranges from around 28.5% (Georgia) or 34% (Ukraine) to universal (Monaco) or almost universal access (e.g. Iceland). There is also a risk of technology being used to “kettle” users into information-impooverished spaces, limiting choice, diversity and pluralism.

**Governance** in the digital age can be greatly affected by a blurred regulatory ecosystem. Guided by their own interests, various actors seek to influence policy makers, legislators and regulators. In this setting, the transnational dimension has great significance. Confusion between the roles of different players, their objectives and perceptions increases even further because of a change in their respective or comparative power.

### **Preserving the essential role of media in the digital age**

In the course of its history, media as a whole benefitted from natural and constant growth. In addition to expansion due to an increase in the overall population, the progression in readership and audience was due, for example, to increased alphabetisation in society, economic growth and wellbeing. Industrialisation, technology, increased leisure time and, more recently, broad access to information and communication technology made it all possible. During this process, media broadened its offerings by adding to information and opinion, content and services related to education, culture and entertainment.

Interpreting Maslow's pyramid in a media context, these changes provoked large-scale societal moves up the hierarchy of needs. However, part of the legacy media focussed on the base of the pyramid, nurturing people's physiological needs and basic impulses –*panem et circenses*– instead of inspiring people's move up the hierarchy of needs. The increased economic returns and competitiveness of this approach led to many media adopting it. This is true for both the content offered by media and the values it promotes.

In recent years, alongside new opportunities, legacy media saw the arrival of new rivals, threatening media's sustainability or even its survival. With the sale of paper copies going down, the situation is becoming particularly critical for newspaper publishers. Looking for ways to obtain revenue from the Internet, some have adopted paywalls, a few have pulled their print versions altogether, others have gone out of business. There are calls for the redistribution of some Internet-generated revenue.

Independence and professionalism frequently fall victim to political stress or economic downturns. There is a trend to replace journalists, professionals of the information production process, by producers of content which is not processed according to desirable journalistic standards. The process of old-time media concentration continues, often with lack of transparency of ownership.

Early examples of disaggregation of media's services or components include: information, analysis and debate offered by light online structures; entertainment switching to on-demand; collaborative knowledge production and sharing, and online education; the watchdog function and political activism going digital by the hand of civil society organisations and inspired hackers. However, new arrangements have as yet neither secured trust nor ensured sustainability. Some predict that quality collaborative creation will replace the so-called copyright industry.

We are entering a new phase in digital convergence. Connected television may lead to control over content by new or different actors. This may bear on diversity of content and users' choice, or lead to fragmentation as a result of manufacturer's choice of technology. Connected television will also raise questions about distribution of revenue in the value and the protection of children.

Beside its contribution to the common good –embodied in an inclusive, democratic, accountable society– media and mass communication also played a role in various calamities: wars, large-scale abuse, economic crises, humanitarian disasters, miscarriages of justice, etc. The end of the 20<sup>th</sup> and beginning of the 21<sup>st</sup> Centuries had their share of such misfortunes. Media governance and management have been contributing factors.

By way of example, in May 2012, following the uncovering of the News of the World scandal and of related managerial decisions and practices in News International and News Corporation, a British parliamentary committee regarded Rupert Murdoch unfit to head a major international corporation. In September 2012, his son James was similarly slammed by the British regulator Ofcom for his ill-judgment and repeatedly falling short of what is to be expected from someone in his position.

Looking ahead, a major crisis or media meltdown would deprive people of media's essential role in a democratic society. With media's economic sustainability under threat and possible crises ahead, attention should be paid to the functioning of and developments in the media ecosystem with a view to preserving this role in the digital age.

Media's primary objectives have mostly been acknowledged to include the provision of balanced information, nurturing public debate, enhancing transparency and accountability in respect of public affairs and in respect of matters of public interest or concern – the media's so-called public watchdog function. These objectives, not others, justify media's privileges. Alongside editorial arrangements and competence, professional journalism has been essential for accomplishing them.

In September 2011, the Committee of Ministers embraced a new notion of media, acknowledging that media-related policy must take full account of recent and future developments. The focus was on providing criteria for identifying media and offering guidance for a graduated and differentiated response, in particular with reference to media privileges and prerogatives, pluralism and diversity, as well as duties and responsibilities in line with Council of Europe standards (including as regards respect of dignity and privacy, hate speech, etc.).

Building on the new notion of media, policy needs to consider the delivery of media's essential services in the digital age whether packaged as legacy media or split into different services. Some key areas of work are proposed in the following paragraphs.

**Professional journalism:** People should have access to balanced, impartial information from a variety of sources. There should be choice between diverse opinions and trends, guaranteeing political pluralism. This requires editorial independence and high professional standards coupled with the highest protection of freedom of expression. In parallel to a reflection on whether a major media-related crisis or meltdown is possible, the Council of Europe might:

- a) *explore means of promoting and preserving professional journalism –understood as extending to new modalities and actors in the digital age– in a possibly disgregated media environment;*

- b) *propose measures to preserve and promote the watchdog function by creating a legal environment propitious for vigorous investigative journalism and critical scrutiny of all matters of public interest;*
- c) *consider the opportunity of promoting editorial or journalists clusters with a critical mass ensuring professionalism, independence, sustainability and access to adequate resources and distribution channels (like “must carry”).*

**Public service media:** Current difficulties in the media sector offer a new and unexpected justification for well-funded, sustainable, independent, ethical, highly professional public service media, capable of vigorous scrutiny and criticism subject to the highest journalistic professional standards. Having regard to the Committee of Ministers’ Recommendation on public service media governance, the Council of Europe might provide guidance on:

- a) *new arrangements for public sector delivery of essential media or information services in the digital environment;*
- b) *the possibility and modalities for public service media channelling support to disgregated independent professional journalism during a transition period;*
- c) *whether, awaiting the emergence of new business models, these arrangements might offer free quality journalistic content to carriers, disseminators and aggregators (like “must offer”);*
- d) *whether public service media should benefit from constitutional protection.*

**Safety of journalists:** Journalists continue to be intimidated, deprived of their liberty or even killed with impunity because of their opinions or investigative work. Remedies for interference with media and journalistic freedoms are sometimes ineffective and often slow. The risk of facing defamation or libel charges lurks in many countries. Judicial or administrative harassment often take the form of bogus criminal, tax or other investigations or accusations, or the discriminatory application of laws. In some countries, these pervasive trends also blight digital environments.

Some advance that crimes against journalists and media should be considered crimes against humanity. Statements to this end have been made among others by senior officials from UN agencies. Having regard to the welcome foreign policy priority of some member states and the work conducted by other organisations including under UN inter-agency leadership, the Council of Europe might:

- a) *consider whether crimes against journalists and freedom of expression merit being considered crimes against society’s collective rights and values and the consequences that should derive from this categorisation;*
- b) *set out in clear terms states’ positive obligations as regards the safety of journalists (and other human rights defenders) and identify concrete ways to increase effectiveness (e.g. protection measures or programmes);*
- c) *reconsider offering guidance on the legal and human rights exigencies in respect of defamation and on the question of its decriminalisation.*

**Rights and responsibilities:** Freedom of expression has to be guaranteed in the digital environments in accordance with Article 10 of the European Convention on Human Rights and related case law. The Council of Europe might:

- a) *explore the legal and human rights implications of politically motivated, discriminatory, asymmetric or opportunistic application of laws so as to impinge on freedom of expression;*
- b) *provide further guidance on the legal and human rights treatment and differentiated responsibilities for hate speech in private, public or political speech and advice on how to address the threats of escalation of hate speech to incite violence because of the speed and scope of digital dissemination;*

c) *examine the question of digital convergence and connected television.*

### **Participation and democracy in the digital age**

There is no single or fixed notion of democracy. It can range from peoples' participation in majority decision-making to arrangements for people to choose leaders or representatives among competing candidates on the basis of programme, ideology or trust. Representative democracy is regarded as a practical alternative to direct democracy, which is more difficult to administer.

For the individual, participation and democracy acquire new meaning in digital environments, with new ways of political engagement, representation and deliberation. There is better access to information and enhanced means for public expression. Technology serves to amplify messages and provides new spaces for association with varying degrees of anonymity, which facilitate free expression.

Participation and democracy in the digital age have a cross-cutting dimension. Online communities, with permanently changing and sometimes overlapping sizeable membership, have the ability to quickly shape political initiatives and translate them into action. These are new notions such as "liquid politics" and "agile movements".

Concrete examples of the impact of these forms of participation include shifts in public opinion, major changes in policy direction, increased awareness, whistleblowing and disclosure of information of common interest or concern, widespread expression of discontent, protest and social movements both in digital and physical settings, and successful incursions into institutional democracy.

These developments are not changing institutional democracy or replacing representative democracy. Nonetheless, some movements gain support and the collective intelligence has to be taken into account. They can also enriching governance by delegation to the extent that it requires transparency, responsiveness and accountability. Community, local and hyperlocal media and communication become all the more relevant.

Possibilities for participation extend to other areas of human activity. Participative knowledge production and collaborative artistic and cultural creation have growing importance, including in economic terms. These new forms of active participation should be nurtured. Policy should seek to unleash creativity and innovation, underpinned by research and development, and free from unnecessary constraints. Education policy should be adjusted accordingly.

**Democracy and human rights** stand to benefit from technology-enabled participation and collaborative mapping of issues and setting of priorities. The basic conditions must be there for free media and communication in the digital age. There are also new opportunities for community, local and hyperlocal media. Access is a condition for participation as the digital divide may amount in itself to exclusion from certain democratic or participatory processes in the digital age. The Council of Europe might:

- a) *actively promote policies based on the Committee of Ministers recommendation on the public service value of the Internet, in particular as regards access;*
- b) *explore the extent to which the right to association and expression of discontent, including peaceful albeit disruptive, legitimate protest are respected in digital environments and, if appropriate, offer further guidance;*
- c) *consider means of ensuring that representatives of all communities can take an active role in the public debate, in particular by identifying ways of rendering them media savvy so their voices heard and they can represent themselves and project a positive image of their community.*

**Freedom of expression, privacy and security** are conditions, facilitators and guarantee for the exercise of other rights, including freedom of thought, association and assembly in the digital age. If these rights are ineffective or weakened, democratic rights will be undermined and participation in

matters of public interest can be compromised. They must therefore be underpinned by the respect of the rule of law. In order to maximise this potential, the Council of Europe might:

- a) *offer guidance on the concrete meaning and extent of Internet freedom from a human rights perspective, and assess whether or the extent to which freedom of expression is actually respected in the digital age and identify further action needed;*
- b) *elaborate further on the indication contained in the Committee of Ministers recommendation on a new notion of media that regulation affecting freedom of expression is in itself a form of interference and should therefore be subject to the tests of Article 10;*
- c) *work on online privacy, in particular by exploring the rules and conditions for legitimate, human rights compliant access to personal data –both transit and content– and for interception and surveillance;*
- d) *initiate a reflection on human rights aspects of encryption in digital communication, and the conditions for its responsible exercise, as well as the limits and modalities for legitimate interference;*
- e) *explore whether technology is being used to “kettle” users into information-impooverished spaces, limiting choice, diversity and pluralism.*

**Creativity and innovation** have been the engine of cultural, technical and social –including democratic– development in Europe over the centuries. This trend has been challenged by assumptions, stereotypes and dogmas. For Europe, it is imperative to be revitalise creativity and innovation in the digital age. Intellectual property law was designed for a past reality and was subsequently entrapped in specific business models that are not necessarily creativity and innovation friendly. To this end, the Council of Europe might:

- a) *review education curricula as well as the approach to education itself; the objective should be to provide the skills future adults really need, with a premium on provoking the appetite for the creativity Europe needs to be sustainable and competitive;*
- b) *make a cost-benefit analysis of releasing all forms of content into the public domain, including digitalised public service archives, on which new waves of creators can build;*
- c) *make a cost-benefit analysis of freeing content from copyright constraints and explore new ways of rewarding creators, innovators and producers of (new) culture products, goods and services and of promoting their work.*

**Good governance** is a prerequisite for realising the full potential in the digital age, to uphold rights and to ensure human rights compliant accountability for responsibilities. The Council of Europe supports multistakeholder dialogue as a necessary condition for policy-making in the digital age. Gender equality mainstreaming is a must for sound governance.

The Parliamentary Assembly has reflected on extra-institutional actors and lobbying and their influence in democratic processes. In a call for transparency, it adopted Resolution 1744 (2010)<sup>1</sup> on extra-institutional actors in the democratic system, and Recommendation 1908 (2010)<sup>1</sup> on lobbying in a democratic society (European code of good conduct on lobbying). In an entirely different area, the National Rifle Association in the United States offer an example of the pernicious influence of private interests on policy making and its nefarious consequences. The Council of Europe might:

- a) *propose anti-corruption auditing of media, having regard to fundamental Council of Europe principles about its functioning and editorial independence from economic or political interests;*
- b) *map out the digital regulatory landscape (or landscapes) having regard to the different interests served or objectives pursued by the persons or entities inspiring or shaping media and mass communication public policy;*

- c) *adapt its agenda and working methods, including methods for debate and interlocutors, speed of delivery and nature of outputs, to these new realities to ensure that human rights, democracy and rule of law considerations remain at the centre of regulatory processes.*