

## REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON FREEDOM OF THOUGHT AND EXPRESSION

### 1. ANTECEDENTS

Resolution AG/RES. 2515 (XXXIX-O/09) of the General Assembly of the OAS asked the Inter-American Juridical Committee to “conduct a study on the importance of guaranteeing the right of freedom of thought and expression of citizens, in light of the fact that free and independent media carry out their activities guided by ethical standards, which in no case can be imposed by the state, consistent with applicable principles of international law”.

Pursuant to this mandate, at its 75<sup>th</sup>, 76<sup>th</sup>, 77<sup>th</sup> and 78<sup>th</sup> regular sessions the Inter-American Juridical Committee has been analyzing the matter, gathering experiences and examining papers and documents from different organizations.

Particular attention has been paid to the pronouncements of the IACHR<sup>1</sup>, especially the reports of the Special Rapporteurship of the OAS for Freedom of Expression and the Jurisprudence contained in decisions of the Inter-American Court of Human Rights.

Also examined was the Inter-American Declaration of Principles on Freedom of Expression approved by the IACHR in 2000, as well as the work that the Committee on Human Rights of the Pact of Civil and Political Rights has been carrying out, plus the comments made on article 19 of the same Pact showing the debate now being held on the world level.

Likewise, the Committee has evaluated Resolution 1.003 on the Ethics of Thought of the Council of Europe of 1993; the practice in the European Union, the pronouncements of the European Court of Human Rights, and the Declaration approved by the General Conference of Unesco in 1983, one of the most important documents on the ethics of information.

The above-mentioned antecedents and the discussions held in their regard enable the Committee to formulate this report, not without first of all agreeing with the IACHR and the Court that the sense of the protection enshrined in article 13 of the American Convention on Human Rights is “to strengthen the functioning of the pluralist, deliberating democratic systems by protecting and fostering free circulation of information, ideas and expressions of all sorts” and that “the existence of a democratic society is based on the cornerstone of the right to freedom of expression”<sup>2</sup>.

The Committee, in resolution CJI/RES. 159 (LXXV-O/09) of 12 August 2009, stated that “the democratic regime is not depleted in the electoral processes, but is also expressed in the legitimate exercise of power within the framework of the Rule of Law, which includes respect for the elements and attributes of democracy...” defined in the Inter-American Democratic Charter.

Part of the debate has been on the need to bear in mind the problem of the new technologies in the Internet that facilitate spreading any news in real time, and which can affect the honor or reputation of individuals.

These platforms have an extraordinary summoning capacity to demand political or social changes, and they have proved themselves to be an efficacious instrument for claiming freedom and respect for human rights.

The big question that emerges from these new manifestations is how to determine the best way to protect the freedom of thought and expression without turning into a new form of direct or indirect censorship that restricts the true dimension of this right.

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<sup>1</sup> Inter-American Commission of Human Rights.

<sup>2</sup> 2009 Annual Report of the Special Rapporteurship for Freedom of Expression of the Inter-American Commission of Human Rights, p. 225.

In respect to the work of the Committee of the International Covenant on Civil and Political Rights, and in particular the comments on article 19, paragraph 45, it points out that any restriction to the use of websites, blogs and other means of electronic communication offered by the Internet service providers must be compatible with what is set down in paragraph 3 of article 19 of the Pact, which states that: “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<sup>3</sup>, but these shall only be such as are provided by law and are necessary:

1. For respect of the rights or reputations of others;
2. For the protection of national security or of public order (ordre public), or of public health or morals.”

It is added that general prohibitions in the operating or functioning of some of these systems are not compatible with paragraph 3. It is also incompatible to prohibit publishing material with the sole argument that it is critical of the government or the political regime in effect.

Recently a meeting was held in New York under the auspices of the Ford Foundation to bring together the leading figures of this digital age.

The core theme of the discussion revolved around how to tip the balance of the Internet in favor of social change. The answers generated considerable duality between the optimistic and imaginative spirit of those who grew up in front of a computer screen and those who formulated doubts concerning the threats of the democratizing potential of technology.

One conclusion is that the Internet plays a democratizing role if it is not controlled by companies or governments and when it functions as a decentralized system that allows equal access to everyone. When the system is controlled and centralized it can become a system at the service of oppression and/or authoritarian regimes. According to Bernes-Lee, the inventor of the Internet, the only way is “to make sure that when someone connects to the Internet they have the right to connect to any legal web page without anyone preventing them from entering on political or commercial grounds.” He added that “much has been said in the last few years about the need for people to download information on the net, for governments to share information through this medium, and that NGOs do the same, and companies and investigators too. In this way we shall all be able to understand better this world that we live in.”

And yet there are countries that have laws or practices that selectively impede virtual freedom. In the latter case there is not necessarily any ideological or political discrimination. This practice is becoming all the more frequent. Some conflict is sure to arise from the historical discussion about the validity of the reasons for national security to control or restrict the new forms of freedom of expression reflected in the latest technologies.

Another significant consensus in this meeting in New York was to agree that digital tools do not replace but rather complement the means of communication and traditional political strategies. Virtual political activism operates, as has been made evident in recent months, only if it is backed up by street mobilization, where the risks and challenges are no different from what they used to be. People who use virtual networks for political convocation are not only persecuted by government hackers but also by military and police agents attached to the regime in power.

Finally, Juliana Rotich, who set up *Ushahidi*, the Internet platform that allowed the electoral violence in Kenya to be accompanied via text messages, affirmed in respect to what is happening in North Africa that “the first lesson is that there are risks and challenges. When the Egyptian government managed to delete the Internet, how did the information continue to appear? Many people around the world are working on technical solutions for this type of problem. But what happened reminds us that one cannot assume that the Internet infrastructure is always available, because it can easily be removed from us. The other lesson with regard to the social networks is that the young people are very familiar with the technology and use it to organize and protest. So the genie is out of the magic lamp and there is no way of bottling it up again. When we have free access to information and to the rest of the world, authoritarianism has its days counted.”

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<sup>3</sup> In the United States, for instance, the first amendment to the Constitution contains more protection than what is provided here.

In conclusion, since the right of access to information is a vital component of the freedom of expression and a critical tool for democratic participation, guaranteeing it is a necessary condition to prevent authoritarian systems taking root. That is why the Internet has grown into a challenge for democracy.

It is in this framework that the Inter-American Juridical Committee presents its report.

## 2. FREEDOM OF EXPRESSION

Freedom of thought and expression is a fundamental human right that is important because of the close relation it has with democracy, a relation qualified by the Inter-American system as indissoluble and essential.

So there is some coincidence between the different regional systems for protection of human rights and the universal system as far as **the essential role of freedom of expression in consolidating and making democratic society dynamic** is concerned. Without effective freedom of expression, materialized in all its terms, democracy grows weak, pluralism and tolerance begin to crumble, the mechanisms of citizen control and denunciation prove useless, and the field is made fertile for authoritarian systems to take root in society.

The IACHR in turn has explained that a functional democracy is the maximum guarantee of public order and that the existence of a democratic society is based on the cornerstone of the right to freedom of expression<sup>4</sup>. The guarantee of free circulation of information, opinions and ideas, as well as access to same, prevents society from growing paralytic and prepares it to endure the tensions that lead to the destruction of civilizations. So it will be feasible to speak of a free society when it allows “openly holding a public, rigorous debate on itself”<sup>5</sup>.

The Inter-American Court, in its consultative opinion OC-5/85, also mentioned the relation between democracy and freedom of thought and expression when it claims that:

[...] the freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free<sup>6</sup>.

Similarly, the European Court of Human Rights pointed out that:

[...] the freedom of expression constitutes one of the essential pillars of a democratic society and a fundamental condition for its progress and the personal development of each individual. Such freedom must be guaranteed not only with regard to diffusion of information or ideas that are received favorably or considered as harmless or indifferent, but also as regards information that offends, hurts or disturbs the State or any sector of the population. Such are the demands of pluralism, tolerance and open spirit without which a democratic society does not exist. [...] This means that [...] any formality, condition, restriction or sanction imposed on the matter must be in keeping with the desired legitimate end<sup>7</sup>.

<sup>4</sup> 2009 Annual Report of the Special Rapporteurship for Freedom of Expression of the Inter-American Commission of Human Rights, p. 249.

<sup>5</sup> Ibid. p. 226.

<sup>6</sup> Cfr. La Colegiación Obligatoria de Periodistas, see No. 85 above, paragraph 70.

<sup>7</sup> Cfr. Case of Ivcher Bronstein, supra nota 85, párr. 152; Case of “La Última Tentación de Cristo” (Olmedo Bustos y otros), supra nota 85, párr. 69; Eur. Court H.R., Case of Scharsach and News Verlagsgesellschaft v. Austria, Judgment of 13 February, 2004, para. 29; Eur. Court H. R., Case of Perna v. Italy, Judgment of 6 May, 2003, para. 39; Eur. Court H.R., Case of Dichand and others v. Austria, Judgment of 26 February, 2002, para. 37; Eur. Court. H.R., Case of Lehideux and Isorni v. France, Judgment of 23 September, 1998, para. 55; Eur. Court H.R., Case of Otto-Preminger-Institut v. Austria, Judgment of 20 September, 1994, Series A no. 295-A, para. 49; Eur. Court H. R. Case of Castells v Spain, Judgment of 23 April, 1992, Serie A. No. 236, para. 42; Eur. Court H. R. Case of Oberschlick v. Austria, Judgment of 25 April, 1991, para. 57; Eur. Court H. R., Case of Müller and Others v. Switzerland, Judgment of 24 May, 1988, Series A no. 133, para. 33; Eur. Court H. R., Case of Lingens v. Austria, Judgment of 8 July, 1986, Series A no. 103, para. 41; Eur. Court H.R., Case of Barthold v.

Freedom of the press offers public opinion one of the best ways to know and judge the ideas and attitudes of political leaders. In more general terms, freedom of political controversies belongs to the very heart of the concept of democratic society<sup>8</sup>.

In short, “jurisprudence has emphasized that the democratic function of freedom of expression makes it a necessary condition to prevent the appearance of authoritarian systems, facilitate personal and collective self-determination, and make the mechanisms of citizen control and denunciation effective”<sup>9</sup>.

### 3. CHARACTERISTICS

In accordance with the provision of Article 13 of the American Convention, the freedom of thought and expression is a right that must be assured to everybody, under equal and non-discriminatory conditions, regardless of any further consideration; it “includes freedom to seek, receive, and impart information and ideas of all kinds...”. That is to say, whoever has the protection of the Convention has not only the right and liberty to express their own thoughts, but also the right and freedom to seek, receive and disseminate all kinds of information and ideas. In this order of ideas, by illegally restricting the freedom of thought and expression of an individual, not only the right of that same individual is being infringed, but also the rights of all the others to “receive” information and ideas, and this unveils both dimensions, i.e. the individual and the collective, that the law protects.

In this regard, the Inter-American Court has repeatedly decided that in its **individual dimension**, freedom of thought and expression is not limited to the recognition of the abstract right to free speech or writing, but that it also inseparably comprises the right to disseminate speeches through the means chosen to communicate them, so that they may reach the largest possible audience<sup>10</sup>. The Convention, by proclaiming that the freedom of thought and expression, includes the right to disseminate information and ideas “through any ...procedure”, is underlining that the expression and dissemination of thoughts and information are indivisible, and therefore a restriction on the possibilities to disseminate or disclose them represents a direct limitation to the right of free expression. In this regard, the States are in charge of protecting the enforcement of the right to free speech or writing, as well as preventing limitations on their dissemination through disproportionate regulations or prohibitions.

In its **social dimension**, freedom of expression is a means for the exchange of ideas and information and for mass communication among human beings. While it comprises the right of each person to try to communicate to others his/her own viewpoints, it also implies the right of everybody to know opinions and news. For the common citizen, the knowledge of others’ opinions or of the information which others possess is as important as the right he/she has to disseminate his/her own.<sup>11</sup>

Taking into consideration that the two dimensions mentioned on freedom of expression are inseparable and therefore must be simultaneously assured, it would not be possible, in the name of protecting the right of the society to be truthfully informed, to eliminate pieces of information deemed false by the censor, because by doing so, a regime of “previous censorship” would be implemented, which is something that the IACHR views as a limitation incompatible with the American Convention<sup>12</sup>. Neither would it be admissible, on the grounds of the right to disseminate information and ideas, to set up public or private monopolies on the communication media in an attempt to mold public opinion according to a single viewpoint.

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Germany, Judgment of 25 March, 1985, Series A no. 90, para. 58; Eur. Court H. R., Case of The Sunday Times v. United Kingdom, Judgment of 29 March, 1979, Series A no. 30, para. 65; y Eur. Court H. R., Case of Handyside v. United Kingdom, Judgment of 7 December, 1976, Series A No. 24, para. 49.

Cfr. African Commission on Human and Peoples' Rights, Media Rights, Agenda and Constitutional Rights Project v. Nigeria, Communication Nos. 105/93, 128/94, 130/94 and 152/96, Decision of 31 October, 1998, para 54.

<sup>8</sup> Case of Lingens v. Austria, supra note 91, para. 42.

<sup>9</sup> 2009 Annual Report of the Special Rapporteurship on Freedom of Expression of the Inter-American Commission on Human Rights, p. 225. [Spanish version]

<sup>10</sup> Ibid. p. 230.

<sup>11</sup> Ibid. p. 227.

<sup>12</sup> Ibid. p. 251.

#### 4. LIMITATIONS TO THE RIGHT

Freedom of thought and expression – unlike the freedom of opinion – is not an absolute right. In this sense, the International Covenant on Civil and Political Rights and the American Convention on Human Rights have both regulated situations in which the enforcement of the rights is restricted, in Articles 19.3 y 13.2, respectively. On one hand, the International Covenant establishes that the limitations to this freedom must be “expressly determined by law and be necessary to ... ensure the respect the rights or reputation of others” or for “the protection of national security, public order or public health or morals”. On the other hand, Article 13.2 bans previous censorship, the sole exception being censorship in the case of public shows which are inadequate for minors, and paragraph 3 of Article 13, which prohibits any restriction on this freedom through “indirect ways and means”.

In order to be able to monitor legitimacy of the other responsibilities, these have to comply with three requirements, i.e.: 1) they should be precisely and clearly defined through formal and material legislation; 2) their purpose should be to protect either the rights or reputation of others, or the protection of national security, the public or the public health or morals (these being urgent purposes authorized by the American Convention); and 3) they should be necessary in a democratic society, being strictly proportional to the purposes sought and suitable enough to achieve the desired goals.

The need for and legal status of the limitations to the rights of expression based on Article 13.2 of the American Convention, will depend on their orientation to satisfy an urgent public interest. That is to say, when there are several options for that purpose, the one to be chosen is that which least restricts the right being protected. Taking this into consideration, it is not enough to demonstrate, for example, that the law fulfills a useful or timely purpose; to be in harmony with the Convention, limitations must be justified according to collective purposes which, depending on their importance, clearly prevail over the social need to fully enjoy the right and are restrictive only to the extent needed to ensure full enforcement of the right established in the aforementioned provision<sup>13</sup>.

In this regard, limitations must be strictly proportional to the legitimate interest that justifies them, and must be properly adapted to achieve its purpose, interfering as little as possible in the legitimate enforcement of the right to freedom of expression<sup>14</sup>. In order to determine that the limitation is proportional, it is necessary to evaluate these three factors: “(1) the degree to which the opposite right is affected, i.e. seriously, to an intermediate degree, or moderate; (2) the importance of fulfilling the opposite right; and (3) whether the fulfillment of the opposite right justifies the limitation to the freedom of expression”<sup>15</sup>.

In no case may limitations to the right represent previous censorship, or be discriminatory or imposed through indirect mechanisms - i.e. through abuse of official or private controls – and these limitations must be used only in exceptional cases.

In cases where the discourse enjoys reinforced protection, such as political discourse and discourse on matters of public interest; discourse on public employees exercising their functions or candidates exercising public offices; and discourse that expresses an essential element of personal dignity; the standards of control must be applied more strictly.

In this regard, the European Court of Human Rights has consistently held that as far as **the permissible limitations of freedom of expression** is concerned, a distinction must be made between the restrictions that are applicable when the object of expression refers to a private person, and on the other hand when it is a public person, such as a politician.

The Court states that:

The limits of acceptable criticism are therefore respect for a politician, broader limits than in the case of a private party. Unlike the latter, the former inevitably and consciously submits to the rigorous scrutiny of each and every word and action by newspaper men and the public opinion, so he must show a greater degree of tolerance. Without doubt, article 10, paragraph 2 (Art.10-2) permits protection of the reputation of others – that is, all people – and this protection also includes politicians,

<sup>13</sup> Cfr. La colegiación obligatoria de periodistas, above note No. 85, para. 46; see ambient Eur. Court H. R., Case of The Sunday Times v. United Kingdom, above note 91, para. 59; and Eur. Court H. R., Case of Barthold v. Germany, supra nota 91, para. 59.

<sup>14</sup> 2009 Annual Report of the Special Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights, p. 250. [Spanish version]

<sup>15</sup> Ibid., p. 251.

even when they are not acting as private citizens, but in these cases the requirements of this protection have to be weighed against the interests of an open debate on political questions<sup>16</sup>.

The Inter-American Court thus considers that to foster public deliberation, it is important at the moment to analyze the legitimacy of a restriction that takes into account the fact that public employees voluntarily expose themselves to social scrutiny and that they have better conditions to respond to the acts in which they are involved<sup>17</sup>.

## 5. IMPOSING SANCTIONS FOR ABUSE OF RIGHT

As already mentioned, the right to freedom of thought and expression is liable to restrictions through ulterior responsibilities, under the parameters analyzed above. As a result, the exercise of the right is limited by other fundamental rights, among which the **right to honor** appears as the essential juridical reference for such a ponderation. This right is expressly protected by the Convention in the same article 13 by stipulating that the exercise of the right to freedom of thought and expression must “*assure respect for the rights or reputation of others*” (article 13.2). Then, as the right to expression not only corresponds to journalists or the media, all those who exercise the right are obliged by the Convention to guarantee respect for the rights or reputation of others, especially the right to honor.

According to this order of ideas, since the State is the guarantor of the set of fundamental rights enshrined in the Convention, it has to establish the responsibilities and sanctions that are deemed necessary.

The IACHR and the Court have repeatedly pointed out in jurisprudence that Criminal Law is the most restrictive and severe way to establish responsibilities regarding illicit conduct. Broad typification of crimes of calumny, injury, defamation or disobedience can contradict the principle of minimum intervention and *ultima ratio* of criminal law. In a democratic society, punitive power can only be exercised to a strictly necessary degree in order to protect the fundamental juridical assets from serious attacks that damage or endanger them. In these cases, the measure taken would be disproportionate and unnecessary. The opposite would lead to abusive exercise of the punitive power on the part of the State.<sup>18</sup>

In exercising its role as guarantor, the state must opt for the least costly means of freedom of expression. In the first place, it must appeal to the right to rectification and in cases in which this is insufficient to repair the damage, it may resort to imposing civil juridical responsibilities on whoever has abused the right. In this sense it is necessary that the damage is certain and serious and that it has infringed the rights of other people or juridical assets specially protected by the Convention.

Bearing in mind the considerations formulated so far regarding due protection of freedom of thought and expression, the reasonable conciliation of the demands of protection of that right, on the one hand, and of honor on the other hand, and the principle of minimum penal intervention characteristic of a democratic society, the employment of penal measures must correspond to the need to protect fundamental juridical assets from conduct that implies serious damage to such assets and must be proportionate to the damage inflicted. The penal typification of a conduct must be clear and precise, as determined by the jurisprudence of this Tribunal in examining article 9 of the American Convention.

This topic is increasingly relevant in societies where the rights of individuals are at times affected by the factual power of the media in a context of asymmetry in which, as mentioned by the Court, the State must seek a sense of balance. In order for the State to be able to guarantee the right to honor, in a democratic society paths can be used that the administration of justice offers – including penal responsibilities – within the appropriate framework of proportionality and reasonability, and the democratic and respectful exercise of the set of human rights.

Consequently, everyone is liable to the responsibilities derived from impacting on the rights of third parties. Everyone, journalists or not, must assume their responsibilities. As for the State, it has to guarantee that all its citizens respect the rights of others by limiting any conduct that can jeopardize public guarantees.

<sup>16</sup> Cfr. Eur. Court H.R., Case of Dichand and others v. Austria, note No. 91, para. 39; Eur. Court H.R., Case of Lingens v. Austria, Note 91, para. 42.

<sup>17</sup> 2009 Annual Report of the Special Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights, p. 256. [Spanish version]

<sup>18</sup> Cfr. Ricardo Canece Case, Note No. 44, para. 104, and Palmara Iribarne Case, Note No. 12, para. 79.

Therefore, the right to honor must be a matter of protection. In particular, so-called “objective honor” that has to do with the value that the others attribute to the person in question, to the extent that this affects the good reputation or good fame that that person enjoys in the social environment in which he or she lives. In this sense, within the juridical framework of the application of the right to honor, freedom of thought and expression as a fundamental right neither sustains nor legitimizes manifestly injurious phrases and terms that go beyond the legitimate exercise of the right to opine or the exercise of criticism.

As to the use of penal mechanisms as sanctions on questions of general interest, or on employees or candidates to fill public or political positions, the IACHR considers that in themselves these violate article 13 of the Convention, given the non-existence of any imperative social interest that justifies it<sup>19</sup>.

Likewise, the Inter-American Commission on Human Rights observes with concern that the ambiguity of the legal suppositions compromises the principle of legality, which obliges the States to define in an express, precise and clear manner each one of the conducts that may be liable to sanction.

It should be recalled that in no case can the freedom of thought and expression be limited by invoking mere conjectures on eventual impact on order or hypothetical circumstances derived from subjective interpretations by the authorities in the face of acts that do not clearly present an actual risk that is certain and objective and suggests imminent grave disturbances or anarchistic violence.

## **6. A JOURNALISM OF EXCELLENCE: ETHICS AND TRUTH**

The importance of practicing journalism of excellence, where good practices, truth as an essential element, rigorous compliance with its social function and economic independence all contribute to building values and moral and intellectual principles that are indispensable in any society.

The speed of technological transformation has led to integration of the traditional schemes of written journalism with the Internet, in a race to change as fast as public opinion does. This reality has a common origin, namely the human need for intellectual parameters that allow us to understand today's world better.

The IACHR has sustained that “because of its social and politic transcendence, journalism has duties inherent to its exercise and is liable to responsibilities in the terms set forth in this report. It must be borne in mind that as far as journalists are concerned, requiring responsibilities must heed what is expressed in article 13.2 of the American Convention - in particular the requisites of legality, legitimate objective and the necessity of limitations – and in any case this must attend to the characteristics of the performance of this profession, which is directly connected to the exercise of a right defined and protected by the American Convention. In any case, given the importance of the function carried out by the media in a democratic society, principle 6 of the Declaration of Principles (approved by the IACHR in 2000) establishes that journalistic activity must be guided by ethical conduct which in no case whatsoever can be imposed by the States”<sup>20</sup>.

Journalistic ethics is a polemical concept, with multiple views that require constant, dynamic and obligatory review in order to satisfy the social responsibility inherent to the exercise.

Journalists bear an enormous influence on creating principles and values and on forming the opinion of modern society. That is why access to reliable, timely and censor-free information, applying individual and collective rights, has a transforming effect on the quality of people's lives.

The communication of truth is inseparably linked to the common good and to good practices of informing.

Journalist and expert on the matter, Javier Darío Restrepo claims that “in the professional work of communication, as in all other work, there is a confrontation between what is and what ought to be, between the factual and the utopian, between established routines and the impulse to renew that encourages the passion for excellence. That is where ethics appears as a reference of excellence that makes everything that is done relative and improvable”<sup>21</sup>; he adds that “in the task of communicating,

<sup>19</sup> 2009 Annual Report of the Special Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights, p. 261 and 262. [Spanish version]

<sup>20</sup> Ibid. p. 281- para. 173.

<sup>21</sup> JAVIER DARÍO RESTREPO. *La Niebla y La Brújula*. Editorial Debate. Colombia, 2008. p. 63.

the value that guides the communicator is the truth, so this should be the reference for examining the attitudes of the media (...)”<sup>22</sup>; then he concludes that “(...) the truth brings with it the demand for veracity, that is, coherence and unity between what is said and what is done (...)”<sup>23</sup>.

In this sense, the journalist’s life must be ruled by another ethical consideration: the common good prevails over the individual good. This maxim is a principle that most journalists defend when they evaluate the actions of civil servants or political leaders, or the excesses of government and - in a general sense - of those who exercise power.

Without exception, the role of the media is to make it clear that the common good comes first and that journalists are society’s servants. An illustrative example are those cases where in situations of conflict or risk they put their lives in danger for the purpose of telling the truth.

In this direction, codes of ethics not imposed but rather the fruit of self-regulation take on an exceptional role in order to fully understand the power of the media and the capacity and/or possibility that this power has to produce benefit or damage. It can therefore not be considered that “informing” is an attribute for the exclusive interest of the medium that conveys the news, its owners, or representatives of economic conglomerates or of some institution. And even less so that journalism should be practiced with discriminatory slants that affect people’s rights. Its objective has a destination, which is society as a whole, “the reader, agent, tele-viewer or cybernaut”<sup>24</sup>. This so elementary criterion is primordial for journalists in general to be able to valorize their sources of information and their reports, and to decide whether or not to publish the news. It is not just using the instruments won through technological innovation. This is the real exercise of social responsibility, achieving through good practices quality journalism, which eventually makes it easier to improve standards and allows, through shared experiences, successes and mistakes, practicing journalism with truth, independence and excellence.

The professor quoted above goes on to comment that: “Ethics is different because nobody imposes it, it is not born of some outside pressure but is rather a self-imposition that comes from an inside pressure that Kant described when he spoke of the metaphor of a code or vital key written in the human heart”<sup>25</sup>.

“As a sovereign exercise of his freedom, the journalist who decides that it is good to be able to offer journalism of excellence adopts ethical values and principles that are characteristic of his profession. Converted into his own legislator, he takes over the control of his professional life and follows the path that is written not in laws or regulations but in his nature and in the nature of his profession”<sup>26</sup>.

“Regulations, codes and laws in general are transitory and refer to specific and changing situations. They are dispensable elements. Multiplying ethical norms degrades ethics because this likens it to the language of police codes and regulations. On the other hand, ethical values are as permanent as human nature, but they are not static. Each one of these values is a reference of man’s possibilities. The law points out mistakes, possible flaws, infractions or crimes. Ethics indicates the possibilities of every man”<sup>27</sup>.

“The members of the Forum of Argentinean Journalists (Fopea)<sup>28</sup>, which last November convoked colleagues from all over the country to gather for a national congress, set the objective of this meeting to be to proclaim and adopt a code of ethics that they had worked on for three years, based on a workshop on ethics that showed the differences between some legal regulations and norms and a code of ethics. A preliminary draft with norms written from a negative approach was corrected upon

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<sup>22</sup> Ibid. p. 64.

<sup>23</sup> Ibid. p. 65.

<sup>24</sup> Ibid. p. 66.

<sup>25</sup> Ibid. p. 209.

<sup>26</sup> RESTREPO, Op. Cit., p. 209.

<sup>27</sup> Ibid. p. 210.

<sup>28</sup> See *Código de Fopea: Primer Congreso Nacional de Ética Periodística*, Buenos Aires, November 25, 2006.

concluding that ethics is a proposal and not a prohibition, a sum and not a remainder, it opens paths rather than closes them”<sup>29</sup>.

“The confusion between ethical and police codes or any other regulations stands as a solid obstacle *to the ethical and technical development of journalists* because the ethical appears as transitory and relative as the legal; the ethical loses its universal, permanent character and the conception grows that, like laws, the ethical can be derogated, replaced or substituted by other codes and regulations, which should only be done when there is some pressure from or in the presence of an authority.

“Consequently, ethical norms appear as avoidable as any traffic law or tax regulations that if not urged on and imposed by some outside action of an authority, may remain unknown. The difference being that those authorities who impose the law can be identified, whereas no analogous authority is known or recognized for enforcing the ethical.

“The confusion also gives rise to the peripheral idea that ethics restricts or suppresses the freedom of journalists, since the norms that prohibit, for instance, violating the intimacy of others, or that rule on investigative rigor or the plurality and diversity of sources, restrict themes, publications or treatment of news of events and personalities. The confusion prevents seeing journalistic ethics as the utmost exercise of freedom. (...)

“This confusion achieves such a radical suppression of the contents of what is ethical that it explains the accessory and dispensable character that ethics has in the eyes of the media and journalists and the urgency of answering the challenge of reclaiming the contents of what is ethical. It also becomes logical to complain about ethics being ineffective. Codes do not stop abuses, nor is it their function to dissuade abusers, but they do strengthen and accompany as guides those who are honest and those who want to become so”<sup>30</sup>.

In this context, ethical codes become an act of freedom, a personal and institutional pledge that the Inter-American Juridical Committee recommends in the framework of its mandate.

## 7. GOOD PRACTICES

Exercising journalism has always been a challenging job. The traditional challenges are complemented by global changes; political and economic as crises; regional conflicts; the new challenges of the use of technology; the model of journalism; in a word, numerous aspects that imply renovating and updating practices and contents in order to preserve its legitimacy and readers’ confidence. Reviewing these dynamics has led different organizations to suggest criteria designed to put into place new working schemes which, although they may condition journalistic work, should continue moving positively towards self-regulation so as to offer better information, as demanded by the society of knowledge.

Numerous situations arise in this analysis. For example, one is the view of the ethics of the directors or editorial heads of a medium, and another the ethics to which field journalists may subscribe. Not necessarily does the fact reported coincide with what should be published. Certainly, sensibilities and views must be made compatible in the face of these conceptual lapses.

How, within licit bounds, to present the reality of a happening without falling into sensationalism, the spectacular, or damaging the honor of people or institutions? How to preserve transparency and relations with sources of information in the face of so many occasions of aggressive mechanisms outside the media designed to condition contents or prevent diffusion of a piece of news of public interest?

The Inter-American Juridical Committee (IJC) has no intention of solving the underlying questions of this polemic, nor is that its mandate.

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<sup>29</sup> RESTREPO, Op. Cit., p. 210.

<sup>30</sup> RESTREPO, Op. Cit., p. 211 and 212.

## 8. GUIDING CRITERIA

The Committee wishes to suggest some guiding criteria for the purpose of respecting the right to freedom of expression, to valorize ethical criteria in its exercise, to always remember its function and social responsibility, and to improve daily the quality of journalism. Some proposals that have been debated and that the Inter-American Juridical Committee would like to emphasize are presented below:

- The juridical framework described in the first part of this opinion, especially that established in the American Convention and in the pronouncements of the Commission and the Inter-American Court of Human Rights, the Rapporteurship for the Freedom of Expression and other International Organizations, is the one that best enables the means of communication of the hemisphere to find the most transparent and efficacious path to incorporate good practices into its laudable task of providing truthful information to the citizens of the continent.
- The clear separation between information and opinion facilitates obtaining journalism with quality.
- The speed and mass information that exist today thanks to the digital era leads us to the need for a more analytical and interpretative journalism. Conciliating speed and rigor is a pressing need already being worked on by numerous media to facilitate the right to be truthfully informed.
- Journalism of excellence is convenient for society as a whole. Good journalism:
  - has a commitment to the truth;
  - is independent before all public, political and economic powers, which ensures that it provides impartial information;
  - has the self-critical capacity to recognize its mistakes, this being an unmistakable sign of its pledge to provide the truth;
  - is well informed, that is, it presents all the different angles of the happenings;
  - is well written and technically edited to facilitate better understanding;
  - has the capacity to publish good news;
  - has the capacity to conciliate internal divergences, no matter how difficult, by always clarifying and defining the contents and scope of the news<sup>31</sup>.
- Numerous newspapers that have changed the criterion of good journalism into an essential proposal have had to revise their internal organizing structure by dismounting traditional, vertical and authoritarian schemes in favor of a more participative, horizontal scheme for their editorial staff. This has facilitated optimizing the human potential, making the newspapers more creative and less imposing.
- What could be called team journalism offers a better elaborated product that has more rigorous contents that favor the use of ethical criteria and certainly improves good journalistic practices.
- In addition, with this process of entrepreneurial re-engineering, newspapers are using two very healthy figures, namely the reader's defender and interactivity with the audience, however this is defined.
- The reader's defender analyzes complaints about an apparent or real violation of rights, representing him in reclaiming these rights, or achieving due reparation when this violation is proved in an impartial procedure with the parties. This function contributes positively to receiving truthful information.

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<sup>31</sup> The Director of the Journalism School of the University of Kentucky, Edmon Lambeth, summarized his view on good journalist practice as follows: "committed and humanly truthful journalism, ready to report unfair situations, respectful of its own independence and that of others; is seriously committed to freedom of expression and seeks the best ways to inform people and to form a community that ensures its survival within a free society".

- Also, establishing mechanisms of participation of readers with instruments to channel their complaints and suggestions is an excellent practice that facilitates improving the quality of the information, thereby observing deontological norms in the journalistic profession by breaking dogmatism and introducing a critical view that is of great use in renewing the content of the news.
- In turn, self-criticism allows us to understand reality better, favors ethical dialogue in the editorial rooms in the quest for truth, and makes journalists sensitive to ethical criteria, thereby advancing the objective of achieving a journalism of excellence.
- The Committee reiterates that the best way to guarantee freedom of expression is the ethical practice of good journalism. The only limit is imposed by self-regulation. Otherwise there is a serious risk of direct or indirect violation by some form of government, whatever its ideology.
- Self-regulation should be a permanent, organized and collective activity through analysis prior to the decision to publish some news. Authentic self-regulation is the result of the express wish to comply with ethical codes that valorize the contents of information by attending to its function and social responsibility and not to some other type of commercial or discriminatory interests.
- The Committee agrees with what the IACHR expresses in principle 12 of the Declaration of Principles when it states that “the monopolies or oligopolies in the property and control of the media should be liable to antimonopoly laws for conspiring against democracy by restricting the plurality and diversity that ensures the full exercise of the citizen’s right to information. In no case should these laws be exclusive to the media. Radio and television assignments must consider democratic criteria that guarantee equality of opportunity for all individuals to access same”<sup>32</sup>.
- Furthermore, the Committee agrees with the Inter-American Court that “neither would it be admissible that on the basis of the right to diffuse information and ideas, public or private monopolies were constituted in the media in an attempt to mold public opinion according to a single point of view.”<sup>33</sup>
- The Committee considers that the technical advances made in communications should be used for the benefit of the ethical exercise of freedom of expression and expression. There are certainly complex challenges to gain effective control, especially in spreading abusive material that damages public health, morals or order. But it is clear that any restriction to the use of the digital era must be compatible with the criteria defined in the pronouncements analyzed in this opinion and emitted by the Committee and the Inter-American Court of Human Rights and the Special Rapporteurship for Freedom of Expression in application of the American Convention.

In this respect the Committee would like to stress that on the 1<sup>st</sup> June 2011 the Special Rapporteurs on Freedom of Thought of the Americas, Europe, Africa and the United Nations signed a significant joint statement on the need to protect and promote the Internet and the limits of the State when regulating this medium. Given its transcendence, the Committee includes it as an attachment to this report<sup>34</sup>. Emphasis should be made on some of the criteria and principles enounced in the following terms:

- The transforming nature of the Internet deserves emphasizing, being a medium that enables thousands of millions of people across the world to express their opinions by significantly increasing their capacity to access information and in this way foster pluralism and the spreading of information;

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<sup>32</sup> Court I.D.H., *Caso Rios y otros Vs. Venezuela*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Decision of January 20, 2009, Series C No. 194, para. 105. Court I.D.H., *Caso Perozo y Otros Vs. Venezuela*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Decision of January 28, 2009, Series C No. 195, para. 116.

<sup>33</sup> Court I.D.H., *La Colegiación Obligatoria de Periodistas*. (Arts. 13 y 29 Convención Americana sobre Derechos Humanos). Consultive Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 33.

<sup>34</sup> *Libertad de expresión e internet*. Joint Declaration of Human Rights Rapporteurs. July 1, 2011.

- It points to the potential of the Internet to promote the realization of other rights and public participation, as well as to facilitate access to goods and services;
- Some governments are admitted to have acted by adopting measures specifically designed to restrict freedom of expression on the Internet, which goes counter to international law;
- Exercising the right to freedom of expression may be liable to those limited restrictions set down by law that are acknowledged to be necessary, for example for the prevention of crime and protection of the fundamental rights of others, including minors, but underscoring that such restrictions must be balanced and comply with the international norms with regard to the right to freedom of expression;
- Concern arises because even when carried out in good faith, many government initiatives in response to the above-mentioned need fail to take into account the special characteristics of the Internet and as a result unduly restrict the freedom of expression.

The following general principles are adopted:

- The freedom of expression applies to the Internet in the same way as to all the other media. The restrictions to freedom of expression on the Internet are only acceptable when they comply with the international standards that among other matters declare that they should be provided for in the law, pursue some legitimate objective recognized by international law, and be necessary to reach such an objective (the “tripartite” test).
- On evaluating the proportionality of a restriction to freedom of expression on the Internet, one should consider the impact that such a restriction could have on the capacity of the Internet to guarantee and promote freedom of expression, as opposed to the benefits that the restriction would offer for the protection of other interests.
- The focus of regulation developed for other media, such as telephony or radio and television, cannot be simply transferred to the Internet, it has to be designed specifically for this medium and attend its particular characteristics.
- In response to illicit contents, greater relevance should be assigned to the development of alternative and specific approaches that adapt to the peculiar characteristics of the Internet, and which in turn recognize that no special restrictions should be established against the content of the material that is diffused over the Internet.
- Self-regulation can be an effective tool to deal with harmful expressions, and as such should be promoted.
- Educational and awareness-raising measures should be sponsored to promote the capacity of all people to make autonomous, independent and responsible use of the Internet (“digital literacy”).

Other comments refer to the responsibility of intermediaries for acts of third parties; to obligatory filtering and blocking as an outside measure; to criminal and civil responsibility; to the neutrality of the net; to access to Internet; and finally the suggestion that the States should adopt detailed long-term action plans that include standards of transparency, presentation of public reports and monitoring systems.

In the juridical framework exposed with the general criteria pointed out above, the Inter-American Juridical Committee considers the mandate of the General Assembly of the OAS fulfilled. It trusts that these reflections will serve as a contribution to good journalistic practices, to achieve each and every day a better quality of journalism, and that the profession will be exercised in accordance with ethical criteria that satisfy its social accountability.

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## APPENDIX

**Freedom of expression and the Internet.**  
**Joint statement of rapporteurs on human rights**

[CEPPDI]. 1 June 2011. The special rapporteurs on freedom of expression of the Americas, Europe, Africa and the United Nations emitted a joint statement on the need to protect and promote the Internet and the limits of the State when regulating on this medium.

*"The States have the obligation to promote universal access to the Internet in order to guarantee effective compliance with the right to freedom of expression. Access to the Internet is also necessary to ensure respect for other rights, such as the right to education, attention to health and work, the right of meeting and association, and the right to free elections."*

**Joint statement on freedom of expression and the Internet**

*The Special Rapporteur of the United Nations (UN) for the Right to Opinion and Expression, the Representative for Freedom of Means of Communication of the Organization for Security and Cooperation in Europe (OSCE), the Special Rapporteur of the Organization of America States (OAS) for Freedom of Expression, and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission of Human Rights and the Rights of Peoples (CADHP).*

*Having analyzed* these questions in conjunction with article 19, Global Campaign for Free Expression, and the Centre for Law and Democracy;

*Recalling and reaffirming* our Joint Statements of 26 November 1999, 30 November 2000, 20 November 2001, 10 December 2002, 18 December 2003, 6 December 2004, 21 December 2005, 19 December 2006, 12 December 2007, 10 December 2008, 15 May 2009 and 3 February 2010;

*Emphasizing*, once more, the fundamental importance of freedom of expression — including the principles of independence and diversity — both in itself and as an essential tool for the defense of all the other rights, as a fundamental element of democracy and for advancing the objectives of development;

*Paying special attention* to the transforming nature of the Internet as a medium that enables thousands of millions of people across the world to express their opinions by significantly increasing their capacity to access information and thus foster pluralism and the spreading of information;

*Attentive* to the potential of the Internet to promote the realization of other rights and public participation, as well as to facilitate access to goods and services;

*Celebrating* the notable growth of access to the Internet in almost all countries and regions worldwide, and observing in turn that thousands of millions of people still do not enjoy access to the Internet or rely on access of poorer quality;

*Warning* that some governments have acted or adopted measures for the specific purpose of unduly restricting freedom of expression on the Internet, against international law;

- *Recognizing* that exercising freedom of expression may be liable to those limited restrictions established in law and that are necessary, for example to prevent crime and protect the fundamental rights of others, including minors, but recalling that such rights that such restrictions must be balanced and comply with the international norms with regard to the right to freedom of expression;
- *Concerned* because even when carried out in good faith, many government initiatives in response to the above-mentioned need fail to take into account the special characteristics of the Internet and as a result unduly restrict the freedom of expression;

*Considering* the mechanisms of the multi-sectorial focus of the United Nations Forum for Governance of the Internet;

*Aware* of the broad spectrum of actors who participate as intermediaries of the Internet — and offer services such as access to and interconnection with the Internet, transmission, processing and forwarding traffic on the Internet, storing and accessing material published by third parties, referencing contents or searching for material on the Internet, financial transactions and facilitating social networks — and the attempts of some States to make these actors responsible for damaging or illicit contents;

**On 1 June 2011 we adopted the following Joint Statement on Freedom of Expression and the Internet:**

**1. General principles**

- a. Freedom of expression applies to the Internet in the same way as to all the other media. The restrictions to freedom of expression on the Internet are only acceptable when they comply with the international standards that among other matters declare that they should be provided for in the law, pursue some legitimate objective recognized by international law, and be necessary to reach such an objective (the “tripartite” test).
- b. On evaluating the proportionality of a restriction to freedom of expression on the Internet, one should consider the impact that such a restriction could have on the capacity of the Internet to guarantee and promote freedom of expression, as opposed to the benefits that the restriction would offer for the protection of other interests.
- c. The focus of regulation developed for other media, such as telephony or radio and television, cannot be simply transferred to the Internet, it has to be designed specifically for this medium and attend its particular characteristics.
- d. In response to illicit contents, a greater relevance should be assigned to the development of alternative and specific approaches that adapt to the peculiar characteristics of the Internet, and which in turn recognize that no special restrictions should be established against the content of the material that is diffused over the Internet.
- e. Self-regulation can be an effective tool to deal with harmful expressions, and as such should be promoted.
- f. Educational and awareness-raising measures should be sponsored to promote the capacity of all people to make autonomous, independent and responsible use of the Internet (“digital literacy”).

**2. Responsibility of intermediaries**

- a. No person who offers only technical Internet services such as access, searching and keeping information in the hidden memory should be held responsible for contents generated by third parties and spread through such services, as long as they do not intervene specifically in such contents or refuse to comply with a court order that demands that such contents be eliminated when they are in conditions to do so (“principle of mere transmission”).
- b. Consideration must be given to the possibility of protecting other intermediaries completely, including those mentioned in the preamble, with regard to any responsibility for the contents generated by third parties in the same conditions set forth in paragraph 2(a). At least the intermediaries should not be required to control the content generated by users, nor should they be made liable to extrajudicial norms on canceling contents that do not offer sufficient protection to freedom of expression (as happens with many of the norms on “notification and withdrawal” that are currently applied.)

**3. Filtering and blocking**

- a. Obligatory blocking of entire web sites, IP addresses, ports, network protocols or certain types of uses (such as social networks) constitutes an extreme measure — analogous to prohibiting a newspaper or a radio station or television channel — that can only be justified according to international standards, for example when it is necessary to protect minors from sexual abuse.
- b. The systems of filtering contents imposed by governments or providers of commercial services that are not controlled by the final user constitute a form of previous censorship and do not represent a justified restriction of the freedom of expression.

- c. It should be required that the products meant to facilitate filtering by final users be accompanied by clear information directed to these users concerning the way they work and the possible disadvantages if the filtering should prove excessive.

#### **4. Criminal and civil responsibility**

- a. Competence as regards causes connected to Internet contents should correspond exclusively to the States with which such causes present the closest contacts, normally due to the fact that the author lives in that State, the content was published there and/or this is directed specifically to the State in question. Private parties should only be allowed to start legal action in a jurisdiction where they can show that they underwent substantial loss (this norm is designed to prevent what is known as "libel tourism").
- b. The norms of responsibility in civil procedures (including exclusions from responsibility) should bear in mind the general interest of the public in protecting both expression and the jurisdiction in which it is pronounced (that is to say, the need to preserve the function of "public meeting-place" that the Internet fulfills).
- c. In the case of contents that have been published basically with the same format and in the same place, the terms for interposing judicial actions should be computed from the first time they were published and should only allow one single action for damage to be presented in respect to these contents, and when applicable, only one single reparation for damage suffered in all the jurisdictions (rule of "single publication").

#### **5. Neutrality of the network**

- a. The treatment of Internet data and traffic should not be the object of any type of discrimination because of factors such as devices, content, author, origin and/or destination of the material, service or application.
- b. Transparency should be required of Internet intermediaries as regards the practices they use to administrate traffic or information, and any relevant information on such practices should be made available to the public in a format that is accessible to all those interested.

#### **6. Access to the Internet**

- a. The States are obliged to promote universal access to the Internet in order to ensure effective benefit of the right to freedom of expression. Access to the Internet is also necessary to ensure respect for other rights, such as the right to education, attention to health and work, the right of meeting and association, and the right to free elections.
- b. Interrupting access to the Internet or to part of it, applied to whole populations or to determined segments of the public (cancellation of the Internet) can by no means be justified, not even for reasons of public order or national security. The same applies to measures of reduced browsing speed on the Internet or parts of it.
- c. Denying the right of access to the Internet by way of sanction constitutes an extreme measure that can only be justified when there are no other less restrictive measures and whenever ordered by the Justice department, bearing in mind the impact on the exercise of human rights.
- d. Other measures that limit access to the Internet, such as imposing obligations to register or other requirements of service providers are only legitimate if they satisfy the test established by international law for restrictions of freedom of expression.
- e. The States have the positive obligation to facilitate universal access to the Internet. At least the States should:
  - i. Establish regulatory mechanisms that contemplate price regimes, requirements of universal service and licensing agreements – to foster broader access to the Internet, including poor sectors and distant rural zones.

- ii. Lend direct support to facilitate access, including setting up community centers of information and communications technologies (ICT) and other points of public access.
  - iii. Generate awareness of the proper use of the Internet and the benefits this can bring, especially among poor sectors, children and the elderly, and distant rural populations.
  - iv. Adopt special measures that ensure egalitarian access to the Internet for persons with handicaps and the less favored segments of the population.
- f. In order to implement the above measures, the States should adopt detailed long-term action plans to expand access to the Internet, including clear and specific objectives as well as standards of transparency, presentation of public reports and monitoring systems.

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