

The freedom of speech on social networking services

Do we need protection against our own expressions?

Richard Steppe

Onder wetenschappelijke begeleiding van Prof. Dr. Jan Wouters en Mvr. Ann Sofie Cloots

1. GENERAL INTRODUCTION TO THE TOPIC & RESEARCH OUTLINE

These days, social networking services are omnipresent in our Western society. Those who don't have an account yet on either Facebook, Twitter, YouTube or Google Plus are being frowned upon and depicted as a select minority. After the technological revolution and the dawn of the Internet era, we have now been blown into a new stage: the Web 2.0 revolution.¹ The list of advantages is unlimited and the globalization speed has taken an even faster pace. The entire world is interconnected, making the power of the Web 2.0 user enormous.

However, with great power comes great responsibility. It does seem that the collectivity of Internet users is not always aware of this obligation, e.g. shown by the *Ask.fm* case – a site where users have *reportedly* indirectly or directly caused nine teenagers to commit suicide. The dark side of the Internet leaves no one untouched, and causes critics to blame the *providers* of social networking services, rather than the users themselves. Seeing as social networking sites remain companies seeking for profit, they take up their responsibility and adjust their policies. They protect their users against their own human nature, and tighten up the rules by forbidding certain writings or actions.

¹ “The Web 2.0” is a term invented in 1999 by DARCY DiNUCCI and popularized by Internet guru TIM O'REILLY. It is, briefly and superficially described, an evolution in which “people [...] take an interactive part in a particular Web site. This means that they can add all kinds of content to it: video, audio, chat rooms, blogging and instant messages. The Web 2.0 has empowered the Internet user to the highest degree ever”. Cf. T. DI STEFANO, “Social Networking: A Web 2.0 Revolution”, *E-Commerce Times* 2007, <http://www.ecommercetimes.com/story/56576.html> (consulted: 18 October 2013).

Undoubtedly, these social networking sites have a big impact on humanity's daily life – as shown by the role of the social media in the Arab Spring, where people efficiently took advantage of social media in order to rise up against the authorities that had been shackling them. Consequently, when a social networking site with over hundreds of millions of users takes a protective measure to restrict certain thoughts from being shared, people from all over the world are affected.

Nevertheless, do we *want* to be protected against our own nature? The freedom of speech and expression is considered to be one of the greatest and most important human rights, causing every regulation or limit concerning this right to provoke an almost instinctive suspicion: the thin line between lawfully limiting the freedom of expression and censorship is one that needs to be closely observed. In what follows, we'll be taking a closer look at the statement "*The freedom of speech on social networking sites needs to be regulated in order to protect users from themselves*" and ask ourselves if the freedom of speech on the Internet has gone too far, or perhaps hasn't gone far enough yet. In order to enact this, we'll be taking a look at the current situation concerning the international law as well as international tendencies on handling the freedom of speech on the Internet, along with the relevant jurisdictional cases and jurisprudence. Of major prominence in this analysis will be the extensive amount of examples and case studies in order to back each statement. To conclude, we shall take an anticipating look at future prospects, listing the mechanisms that *could (I)*, *should (or should not) (II)* and *will probably (III)* be implemented.

This essay does not pretend to be exhaustive when it comes to the dissection of the sensitive subject that is the freedom of speech on the Internet. Due to settled maximum limits, this paper is rather a plea to expatiate on why this particular topic is of considerable importance, as well as why it is extremely alive nowadays; especially the elaborate case analysis will thoroughly show this. The essay will further describe how the subject is legally taken care of from an international perspective. Most importantly, I hope the narrative will provide food for thought, as this topic usually soaks off a wide variety of different opinions. By the end of the story, I especially hope to have provided enough substance for you – the reader – to have formed your very own theory.

2. THE CURRENT – A CASE DRIVEN OVERVIEW

2.1. INTRODUCTORY CASE ANALYSIS – A LANDSCAPE OF DIFFERENT PHILOSOPHIES

2.1.1. Introduction and scope of the research (I – Social Networking Services)

PRACTICAL POV². – Over the past few years, the use of electronic communication has exponentially increased. With the standardization of the Internet Protocol Suite and thus the introduction of a world-wide system of interconnected TCP/IP networks, the path was paved for the Internet to play a prominent role in humanity's day to day lives. Consequently, the rise of a wide variety of Social Networking Services has not gone unnoticed. As shown before, however, the dawn of this new era has also caused some side-effects, which has moved the legislator to take into account this new means of communication. In order to avoid providing a solely theoretical study, we shall take a glance at the wide range of opinions concerning the freedom of expression, coming from the Social Networking Services themselves. Naturally, all of them are initiatives seeking to stress their own unique approach when letting users post their content: *“the key technological features are fairly consistent, [yet] the cultures that emerge around Social Networking Services are varied”*.³

NETWORK ≠ NETWORKING (I): SOCIAL NETWORK SERVICES. – Simultaneously, however, the span of this essay needs to be limited as well – resulting in the prominence of utilizing a definition. Some state that what defines a Social Network Site is not the fact of allowing strangers to meet each other, but rather the fact of enabling users to display their social networks through communication with people who already take part in their social network or its extension. BOYD and ELLISON state that *“while networking is possible on [social network] sites, it is not the primary practice on many of them, nor is it what differentiates them from other forms of computer-mediated communication”*.⁴ While this POV is understandable, it tends to forget that certain Social Network Sites are used for *networking* purposes⁵ as well. Services as TWITTER and especially LINKEDIN⁶ and COUCHSURFING⁷ also seek to connect strangers with each other, even when for the majority still based on common interests.⁸

² Point of view.

³ D. BOYD and N. ELLISON, “Social Network Sites: Definition, History, and Scholarship”, *Journal of Computer-Mediated Communication* 2008, 210.

⁴ D. BOYD and N. ELLISON, “Social Network Sites: Definition, History, and Scholarship”, *Journal of Computer-Mediated Communication* 2008, 211.

⁵ Networking purposes being interpreted *sensu lato*: *“getting in touch with other people”*.

⁶ LinkedIn.com is a site connecting professionals with each other.

⁷ Couchsurfing.org is a site connecting travellers with each other.

⁸ Oddly, both Couchsurfing and LinkedIn are also discussed by BOYD and ELLISON as falling under the category of Social Network Services – thus going against their own definition. See for

NETWORK \neq NETWORKING (II): SOCIAL NETWORKING SERVICES. – Social *Networking* Sites are thus services focusing on “*relationship initiation*”, an action mostly performed between two strangers.⁹ By the philosophy of those sites, however, “*there are no strangers – only friends you haven’t yet met*”.¹⁰ Exemplary sites consist out of Badoo, Couchsurfing and online dating services such as Match.

NETWORK \neq NETWORKING (III): SOCIAL NETWORK(ING) SERVICES. – Seeing as a definition of Social Network Services – as proposed by Boyd and Ellison – would prove itself to be too narrow, our preference consists out of using the term “Social Network(ing) Services” as a coordinating term. This consequently includes services aiming to maintain users’ current network (*Network* Services), as well as services aspiring to connect strangers and friends that haven’t met yet (*Networking* Services). The combination of these two ideologies will further be referred to as ‘SNSs’.

2.1.2. Facebook Inc.: a heavily supervised playing field?

ORIGINS AND PURPOSE. – As our first case, we shall deal with one of the largest SNSs we have come to know: Facebook. This site is an immense and steadily growing SNS that lets people stay in touch with friends and others who work, study and live around them. Registered users can share photos, links and other information with each other.¹¹ It is estimated that around 1.19 billion users actively visit Facebook each month. Both the web version as the mobile applications have thus shown some impressive growths.¹²

‘IDENTITY’ AND ‘PERMANENCE’. – Facebook employs a system of ‘IDENTITY’ when it comes to user authentication, as opposed to ‘PSEUDONYMITY’ and ‘ANONYMITY’. The principle of ‘IDENTITY’ indicates that Facebook demands users to provide their real names and information; it is thus disallowed to present any false information on Facebook as well as to create “*fake accounts*”.¹³ Additionally, Facebook also engages in a scheme of ‘PERMANENCE’ when it comes to content posted by users. This implies that content, unless removed by Facebook moderators or by the user himself, will

example D. BOYD and N. ELLISON, “Social Network Sites: Definition, History, and Scholarship”, *Journal of Computer-Mediated Communication* 2008, 212, 213 and 216.

⁹ D. BOYD and N. ELLISON, “Social Network Sites: Definition, History, and Scholarship”, *Journal of Computer-Mediated Communication* 2008, 211.

¹⁰ Original quote by WILLIAM BUTLER YEATS, as used by for example Couchsurfing. View www.couchsurfing.org/n/about (last consulted: 09/12/2013).

¹¹ WEBOPEDIA, *What is Facebook?*, www.webopedia.com/TERM/F/Facebook.html (last consulted: 09/12/2013).

¹² Statistics for Q3 of 2013. Cf. B. STEELE, “Facebook exceeds expectations as it tallies 874 million monthly mobile users”, *Engadget*, 30 October 2013, www.engadget.com/2013/10/30/facebook-q3-2013-earnings (last consulted: 09/12/2013) and G. FOWLER, “Facebook: One Billion and Counting”, *Wall Street Journal*, 4 October 2012, <http://on.wsj.com/1hDiTTE> (last consulted: 09/12/2013).

¹³ See art. 4.1 of the following document: FACEBOOK, *Statement of Rights and Responsibilities*, www.facebook.com/legal/terms (last consulted: 09/12/2013).

permanently remain visible for the corresponding public (according to the privacy settings). This system is opposed to the scheme of ‘EPHEMERALITY’, as clearly shown in the 4CHAN case analysis.

A VASTLY MODERATED COMMUNITY. – It appears to be that, out of the examples further discussed (Twitter – Ask.fm – 4chan), this SNS is the most heavily supervised community. Facebook outsources its moderating team to a company called ODESK, which pays a commission to workers who then go through the day-to-day content of Facebook and review any possible violations to the SNS’s community standards.¹⁴ Having a swift look at the official standards, they seem not to be as complicated and intrusive as sometimes portrayed to be.¹⁵ However, when taking a look at the more concrete “*Operation Manual For Live Content Moderators*”¹⁶, it turns out that these standards are way more detailed than at first sight. Not surprisingly, Facebook has a vast appearance in news articles when removing violations to its community standards – a few examples may consist out of a couple of headlines: “*Breast cancer body paintings called pornographic by Facebook*”¹⁷, “[*Painting*] ‘*L’origine du monde*’ by COURBET banned from Facebook because of nudity”¹⁸, “*Facebook apologizes for censoring gay kiss photo*”¹⁹, “*Facebook relents on doll nipples ban*”²⁰, and so forth.

A GOODBYE TO CORPORATE DEMOCRACY? – A few years ago, Facebook users had the ability to vote on privacy changes suggested by the company. In order for that vote to be binding, 30% of the site’s users had to take part.²¹ In 2012, however, Facebook stated that it was proposing to end this practice, seeing as it “*had become a system that emphasizes the quantity of responses over the quality of discussion*”, which it put up for a vote as well.²² This right to voting

¹⁴ D. BOWLING, “Facebook Content Standards: Arty Nudity Okay; ‘Moose Knuckles’ Not So Much”, *WebProNews* 2012, www.webpronews.com/facebook-content-standards-arty-nudity-okay-moose-knuckles-not-so-much-2012-02 (last consulted: 09/12/2013).

¹⁵ View www.facebook.com/communitystandards for Facebook’s community standards.

¹⁶ oDesk, *Abuse Standards 6.2*, www.scribd.com/doc/81877124/Abuse-Standards-6-2-Operation-Manual (last consulted: 09/12/2013).

¹⁷ P. FRANK, “Breast cancer body paintings called pornographic by Facebook”, *The Huffington Post*, 12 June 2011, <http://huff.to/1bmrQs6> (last consulted: 09/12/2013).

¹⁸ View AFP, “‘L’origine du monde’ by COURBET banned from Facebook because of nudity”, *Hostednews*, 16 February 2011, <http://bit.ly/18pGDWi> (last consulted: 09/12/2013) as well as the following apologies by Facebook: G. DENSON, “Courbet’s Origin Of The World Still Too Scandalous For Media-Savvy Facebook!”, *The Huffington Post*, 11 November 2011, <http://huff.to/1bmP1pF> (last consulted: 09/12/2013).

¹⁹ A. LEE, “Facebook apologizes for censoring gay kiss photo”, *The Huffington Post*, 19 April 2011, <http://huff.to/1dVSWy2> (last consulted: 09/12/2013).

²⁰ Facebook admitted in this case that they made a mistake by banning images of a nude doll. Cf. A. MOSES, “Facebook relents on doll nipples ban”, *The Sidney Morning Herald*, 12 July 2010, <http://bit.ly/1ilvVRe> (last consulted: 09/12/2013).

²¹ If not, these votes would be seen as “advisory”. Cf. E. SCHRAGE, *Results of the Facebook Site Governance Vote*, www.facebook.com/notes/facebook-site-governance/results-of-the-facebook-site-governance-vote/10151840534290301 (last consulted: 09/12/2013).

²² CBS, “Facebook To End Letting Users Vote On Privacy Policy Changes”, *CBS SF Bay Area*, 21 November 2012, <http://cbsloc.al/1cpkl6z> (last consulted: 09/12/2013).

was later renounced by its very own users, seeing as the 30% participation hadn't been reached.²³ Critics were bitterly stating Facebook was now abandoning a fundamental standard, namely that the users “*are citizens in a community, and not simply data points on an advertising algorithm*”.²⁴ As much as other SNS Twitter seems to find itself in a Cornelian dilemma between either fighting for the freedom of speech to the last man or giving in to some of Wall Street's demands, it seems like Facebook has already made its choice for the latter one. Facebook's public policy manager ADAM CONNER has even stated Facebook is “*allowing too much [...] free speech in countries that haven't experienced it before*”.²⁵

2.1.3. Twitter Inc. : a revolutionary platform in an existential crisis?

ORIGINS AND PURPOSE. – Twitter Inc. is “*a social messaging tool that lets people stay connected through brief text message updates up to 140 characters in length. Twitter is based on you answering the question "What are you doing?" You then post thoughts, observations, and goings-on during the day*”.²⁶ The site now has over 230 million monthly active users, while there are 500 million ‘tweets’ sent per day.²⁷

TWITTER'S PHILOSOPHY... – Twitter declares its mission to be “[*giving*] everyone the power to create and share ideas and information instantly, without barriers”. In each case, Twitter is more than just a company: “*From Tahrir Square to Gezi Park, Twitter has made itself indispensable to activists everywhere, providing a tool to decry abuse, organize protests, and help overthrow bad leaders*”.²⁸ It successfully uses the principle of PSEUDONYMITY and – when done correctly²⁹ – the site can also be fully used ANONYMOUSLY. Additionally, Twitter also contains a hint of EPHEMERALITY, as solely an account's most recent 3200 tweets are visible for the public.³⁰ It has built a

²³ K. HILL, “Apathetic Facebook Users Relinquish The Right To Vote On Facebook Privacy Changes”, *Forbes*, 10 December 2012, <http://onforb.es/18v0kc0> (last consulted: 09/12/2013).

²⁴ M. PHILIPS, “The End Of The Facebook Democracy”, *Buzzfeed*, 22 November 2012, <http://bit.ly/1dZsCTM> (last consulted: 09/12/2013).

²⁵ T. BRANIGAN, “Facebook may 'block content' claim as speculation grows over entry into China”, *The Guardian*, 20 April 2011, <http://bit.ly/1bQK2QM> (last consulted: 09/12/2013).

²⁶ WEBOPEDIA, *What is Twitter?*, www.webopedia.com/TERM/T/Twitter.html (last consulted: 09/12/2013).

²⁷ TWITTER, *About Twitter, Inc.*, <https://about.twitter.com/company> (last consulted: 09/12/2013).

²⁸ E. GROLL, “Can Twitter Go Public and Still Be a Champion of Free Speech?”, *Foreign Policy*, 13 September 2013, <http://atfp.co/1cuOIKI> (link will be left out in future references – last consulted: 09/12/2013).

²⁹ K. KOHLI, “Anonymous on Twitter: Going behind the curtain”, *Times of India*, 12 November 2013, <http://bit.ly/1f0lhzo> (last consulted: 09/12/2013) and WISEGEEK, *How can I stay anonymous on Twitter™?*, www.wisegeek.org/how-can-i-stay-anonymous-on-twitter.htm (last consulted: 09/12/2013).

³⁰ Twitter states the following in its FAQ: “*We store all your Tweets. You can click the Me tab to view up to 3200 of your most recent Tweets in your profile timeline. To view more, you can download your Twitter Archive [...]*”, with the latter one only being visible to yourself. Cf. TWITTER, *New user FAQs*, <https://support.twitter.com/articles/13920-new-user-faqs> (last consulted: 09/12/2013).

reputation as a fierce guardian of the freedom of expression and has shown itself to be the first major communication platform to claim the freedom of speech as one of the greatest principles of its network.³¹

... IN AN EXISTENTIAL CRISIS? – Twitter played a prominent role in the uprisings in the Arab countries and has even found its service to be censored (Egypt), threatened to be shut down (United Kingdom), forced to hand over certain user data (France) and be blocked altogether (China).³² Since the introduction of a publicly traded Twitter stock, the danger exists that Twitter won't be able to fulfill Wall Street's needs for profits and revenue that way: when Twitter's servers are not accessible by its users (e.g. due to government censorship), the company loses money, creating a strong inducement for the company to reply to governments' demands in order to reach a certain concordance.³³ A concrete example, showing that these solicitudes are real, consists out of Twitter having changed their policy in January 2012, using the following reasoning: "*As we continue to grow internationally, we will enter countries that have different ideas about the contours of freedom of expression. [...] Until now, the only way we could take account of those countries' limits was to remove content globally. Starting today, we give ourselves the ability to reactively withhold content from users in a specific country — while keeping it available in the rest of the world*" – which it was strongly criticized for.³⁴ This change has later been used as a tool to block a Neo-Nazi account in Germany from being viewed by other German users.³⁵

A CORNELIAN DILEMMA. – Twitter has thus been going through history as a self-declared haven of free speech, stating that one of the core values of Twitter is respect and the necessity of defending the users' voice.³⁶ Nonetheless, however much this freedom of expression is indeed a prominent human right, when the site e.g. gets flooded with hundreds of sexually tinted and violent threats, as well as other kinds of '*inappropriate*' tweets³⁷, Twitter

³¹ Says JILLIAN YORK, director for international freedom of expression at the Electronic Frontier Foundation. Cf. E. GROLL, "Can Twitter Go Public and Still Be a Champion of Free Speech?", *Foreign Policy*, 13 September 2013.

³² R. WAUTERS, "China Blocks Access To Twitter, Facebook After Riots", *Techcrunch*, 7 July 2013, <http://techcrunch.com/2009/07/07/china-blocks-access-to-twitter-facebook-after-riots/> (last consulted: 09/12/2013) and J. YORK, *Free Speech in the Age of Twitter*, *The Cairo Review of Global Affairs* 2011, vol. 3, 32-39 and E. GROLL, "Can Twitter Go Public and Still Be a Champion of Free Speech?", *Foreign Policy*, 13 September 2013.

³³ E. GROLL, "Can Twitter Go Public and Still Be a Champion of Free Speech?", *Foreign Policy*, 13 September 2013.

³⁴ TWITTER, *Tweets still must flow*, <https://blog.twitter.com/2012/tweets-still-must-flow> (last consulted: 09/12/2013).

³⁵ X, "Twitter Blocks Neo-Nazi Account in Germany", *Spiegel Online*, 18 October 2012, www.spiegel.de/international/germany/twitter-blocks-neo-nazi-account-in-germany-a-862018.html (last consulted: 09/12/2013).

³⁶ E. BARNETT, "Twitter chief: We will protect our users from Government", *Telegraph*, 18 October 2011, <http://bit.ly/1gim6I6> (last consulted: 09/12/2013).

³⁷ See the case of British journalist CAROLINE CRIADO-PEREZ who got flooded by hundreds of rape and abuse threats on Twitter and the latter one's lack of action. Cf. K. MOORE, "Twitter

seems to be finding itself to be caught in a tricky dilemma: to censor or not to censor – to restrict the freedom of speech or not to restrict? Twitter will very soon have to answer these questions.

2.2.4. *Ask.fm: a misunderstood guardian of free speech*

ORIGINS AND PURPOSE. – Ask.fm is a site where users are able to make a public account, to which people can submit questions and comments – anonymously or through another registered account.³⁸ It was originally a Latvian start-up, initiated in 2010, yet has ever since increasingly gained popularity and now counts over 70 million registered users.³⁹

CONTROVERSY. – Although not too many people knew about Ask.fm, this certainly changed in the past couple of months, when the site became associated with incidents of cyber bullying. Seeing as the site's active users consists largely of people under the age of 18, chances are some users are not yet able to deal with certain forms of online misconduct.⁴⁰ This became clear when Ask.fm got linked to the suicide cases of 14 teenagers, who allegedly got harassed by other users of Ask.fm – causing a huge media attention from all around the world.⁴¹

INITIAL REACTION FROM ASK.FM. – Initially, the owners of Ask.fm were not too impressed with the vast public debate and consequently refused all media requests. After the website had been accused for its lack of regulation⁴², MARK TEREBIN, one of Ask.fm's founders, stated the following on his own Ask.fm profile: “[...] *It is necessary to go deeper and to find a root of a problem. It's not about the site; the problem is about education, about moral values that were devaluated lately. Ask.fm is just a tool which helps people to communicate with each other, same as any other social network, same as [a] phone, same as [a] piece of paper and [a] pen. Don't blame a tool, but try to*

'report abuse' button calls after rape threats”, *BBC*, 27 July 2013, www.bbc.co.uk/news/technology-23477130 (last consulted: 09/12/2013).

³⁸ N. LERNER, “The problem with Ask.fm”, *The Huffington Post*, 23 October 2013, <http://huff.to/18h6Blk> (last consulted: 09/12/2013).

³⁹ View Ask.fm's tweet: https://twitter.com/ask_fm/status/366822491445936129 (last consulted: 09/12/2013). Also cf. L. KENNINS, “Latvian Web site at center of cyber-bullying inquiry”, *Baltic Times*, 14 November 2012, www.baltictimes.com/news/articles/32099/#.UpyBrsRLPy4 (last consulted: 09/12/2013).

⁴⁰ J. EDWARDS, “Users On This Web Site Have Successfully Driven Nine Teenagers To Kill Themselves”, *Business Insider*, 16 September 2013, www.businessinsider.com/askfm-and-teen-suicides-2013-9 (last consulted: 09/12/2013).

⁴¹ For the story of a few of those 14 teenagers, view the following links: <http://bit.ly/1bDANDz>, <http://bbc.in/1baye9m>, <http://dailym.ai/1dL8PY4>, <http://bit.ly/1isdF8m>, <http://bit.ly/1bDANDz>, <http://bit.ly/1bDB49p>, <http://bit.ly/1eHaytX>, <http://bit.ly/1isdF8m> and <http://bit.ly/18hbQYv> (last consulted: 09/12/2013).

⁴² R. COOPER, “Bullying is relentless these days - there is no break from it: Mother's campaign to close Ask.fm after her daughter's suicide because of online abuse”, *MailOnline*, 19 November 2013, <http://dailym.ai/1faYZfj> (last consulted: 09/12/2013).

make changes [...]”.⁴³ What it came down to was, in its essence, a consideration between either (1) limiting the freedom of users to post what they wish to and thus regulating the site, or (2) letting the freedom of expression prevail.

FOLLOWING REACTION FROM ASK.FM. – As the pressure on Ask.fm started to grow⁴⁴, the owners of Ask.fm employed professional advisors to perform an extensive and independent audit of the site as well as its safety features. When the audit was finished, the site promised to change its policy in multiple aspects. This included, amongst other things, the alteration of the amount of moderation by recruiting more moderators to oversee the site. Additionally, a more prominent position was going to be provided for the report button – thus implying users would now certainly not be able to post whatever they would want to anymore. In addition to this, Ask.fm now requires unregistered users to register in order to gain full access to the site in order to take notice of the emails as well as IP addresses of possible infringers. The site consequently went from the possibility of FULL ANONYMITY to the implementation of PARTIAL PSEUDONYMITY, along with putting a certain restraint on the freedom of expression.⁴⁵ However, the general consensus does state the implementation limits were a necessary good. The reasoning was the following: seeing as this type of anonymous forum – by its nature – fosters bullying, the users needed to be protected against their own destructive essence.⁴⁶

2.1.5. 4chan: an anonymous haven of free speech?

ORIGINS AND PURPOSE: THE ODD ONE OUT. – In the list of the previously discussed SNSs, 4chan seems to be the odd one out: it is an image-based bulletin board, where users are able to discuss with each other in the different sections of the forum. Recently, FOX NEWS tried to describe 4chan by referring to the website as the “*rude, raunchy underbelly of the Internet*”. According to FOX NEWS, “[it] is the self-proclaimed Internet home for people who lack a social conscience, a Web site that's become a surreptitious cultural

⁴³ See MARK TEREBIN’s answer on his Ask.fm profile: <http://ask.fm/mark/answer/11724326664> (last consulted: 09/12/2013).

⁴⁴ An example: the fact that SPECSAVERS, VODAFONE, LAURA ASHLEY, EDF ENERGY and the charity ‘SAVE THE CHILDREN’ all pulled their adverts from Ask.fm in the aftermath of the schoolgirl’s death. Cf. S. JONES, “Ask.fm unveils new measures to combat cyberbullying after death of teenager”, *The Guardian*, 19 August 2013, <http://bit.ly/1aqqGvA> (last consulted: 09/12/2013). Another example consists out of a mother’s campaign to get Ask.fm closed through a petition, which already reached over 12k supporters. Cf. www.change.org/petitions/shut-down-cyberbullying-website-ask-fm-in-memory-of-izzy-dix-12-other-teens-globally (last consulted: 09/12/2013).

⁴⁵ N. LOMAS, “Ask.fm Makes Changes To Safety Policy Aimed At Combating Bullying In Wake Of Teen Suicide”, *TechCrunch*, 19 August 2013, <http://techcrunch.com/2013/08/19/ask-fm-safety-policy> (last consulted: 09/12/2013).

⁴⁶ L. KENNINS, “Latvian Web site at center of cyber-bullying inquiry”, *Baltic Times*, 14 November 2012, www.baltictimes.com/news/articles/32099/#.UpYBrSLPy4 (last consulted: 09/12/2013).

powerhouse".⁴⁷ While these statements are most likely a tad too generalizing and short-sighted, this site *is* nonetheless notorious for the vast list of online actions its users have initiated. These actions include, but are not limited to: making North-Korean leader KIM JONG UN *Time's* 2012 Person of the Year by rigging its online vote⁴⁸, being the root of the now loosely associated international network of "*hacktivists*" called Anonymous, creating a rumor stating Apple's – then still alive – CEO Steve Jobs had passed away (which caused Apple's stocks to plummet), as well as catching animal abusers and creating Internet memes such as the LOLcats.⁴⁹

THE PRINCIPLES BEHIND THE SITE (I): ANONYMITY. – 4chan operates a system of complete anonymity: due to the fact that 4chan lacks the adoption of usernames linked to a profile, all written posts are marked as written anonymously by default. These posts only rarely contain pseudonyms or any other kind of identity characteristics, making regular reputation structures unworkable.⁵⁰

THE PRINCIPLES BEHIND THE SITE (II): EPHEMERALITY. – On top of the previously mentioned anonymity, 4chan is also known for the transience of its content. Each section of the site can only have a limited amount of topics, causing topics to solely exist for a short amount of time: in a section where only 225 topics are allowed at the time, the 226th topic will be automatically deleted when newer content arrives. This often happens very fast-paced: the total time of existence of a thread can vary from 28 seconds (shortest) to 3.9 minutes (median) to 6.2 hours (longest).⁵¹ Additionally, there are no archives of these threads kept by 4chan itself.⁵²

A UNIQUE PROJECT? – Admittedly, 4chan isn't the brightest example of what happens when an unlimited amount of internet users are given an (almost⁵³) unlimited amount of anonymity. 4chan's user base produces an incredibly vast amount of extreme opinions, hate speech and slander, as well as shock images and sexually tinted illustrations. 4chan is not even the strongest argument

⁴⁷ X, "4Chan: The Rude, Raunchy Underbelly of the Internet", *Fox News*, 8 April 2009, <http://fxn.ws/1cdXhtd> (last consulted: 30/11/2013).

⁴⁸ L. HORN, "How 4Chan Made Kim Jong Un Time Readers' Person of the Year", *Gizmodo*, 13 December 2012, <http://bit.ly/1aMBapm> (last consulted: 30/11/2013).

⁴⁹ A. FEINBERG, "The Best and Worst Things 4Chan Gave the World", *Gizmodo*, 1 October 2013, <http://gizmodo.com/the-best-and-worst-things-4chan-gave-the-world-1436402768> (last consulted: 30/11/2013).

⁵⁰ The following structure would thus not work: http://farm4.static.flickr.com/3054/2681008129_9f5779ff43_o.jpg. Cf. also M. BERNSTEIN, A. MONROY-HERNÁNDEZ, D. HARRY, P. ANDRÉ, K. PANOVICH and G. VARGAS, *4chan and /b/: An Analysis of Anonymity and Ephemerality in a Large Online Community*, 1, <http://eprints.soton.ac.uk/272345/1/4chan-icwsm.pdf>.

⁵¹ M. BERNSTEIN, A. MONROY-HERNÁNDEZ, D. HARRY, P. ANDRÉ, K. PANOVICH and G. VARGAS, *4chan and /b/: An Analysis of Anonymity and Ephemerality in a Large Online Community*, 4.

⁵² Sometimes, however, third party sites archive popular threads such as e.g. 4CHANDATA.

⁵³ The server still keeps track of IP addresses, yet the site can be used fully anonymously when using e.g. proxy servers.

when it comes to safeguarding online anonymity: protecting activists and whistleblowers or LGBTQ youngsters seeking advice about coming out to their family are much stronger reasons for anonymity.⁵⁴ However, if one really wants to assess anonymity and the correlating freedom of expression on the Internet at an astonishingly large scale, it is the most honest example that is able to be provided. To cite a famous, yet relevant quote by Oscar Wilde: *"Man is least himself when he talks in his own person – give him a mask, and he will tell you the truth"*, which couldn't count more for this website. There are many sites that applaud the freedom of speech, yet do not cover its unconditional, non-restrained implementation. The users sort of camouflage themselves with a mask of anonymity, in a separated world where identity is mocked and frowned upon. Concerning this topic, a user stated: *"What emerges is a shocking sort of honesty. Revolting, yet oddly beautiful; an ever-shifting, ephemeral monument to every embarrassing thought, guilty pleasure, squelched impulse and repressed desire – in short, an expression of humanity, in basest form"*.⁵⁵ The 4chan project is a unique sociological monument: the freedom of speech knows almost no boundaries and is solely limited by the blatantly illegal – and even that is known to be relative: *"moderators need sleep, too"*.⁵⁶

2.1.6. Intermediate conclusion

TWO OPTIONS, FIVE ELEMENTS. – We have seen that in the aforementioned narrative, if we put it in an oversimplified manner, SNSs mainly have the choice between (1) either preserving the freedom of speech at all costs or (2) regulating content to give in to the public opinion and/or the economic market. Additionally, we have seen the different POVs of this short ensemble of SNSs: (1) Facebook – handling a system of PERMANENCE and IDENTITY – is a strong content regulator, (2) Twitter – handling a system of PSEUDONYMITY and SEMI-EPHEMERALITY – is a supporter of the freedom of speech, yet is starting to show indulgences towards regulation, (3) Ask.fm – handling a system of PSEUDONYMITY/ANONYMITY and PERMANENCE – is a strong supporter of the freedom of speech as well and has said to make some concessions towards regulation, yet is only very slowly implementing regulatory systems and (4) 4chan – handling a system of ANONYMITY and EPHEMERALITY – is the strongest supporter of the freedom of speech out of all four cases, in such a way only the barely legal posts are eradicated. Finally, we have also taken a look at the effects of ANONYMITY-PSEUDONYMITY-IDENTITY and EPHEMERALITY-PERMANENCE on mentioned freedom of speech.

⁵⁴ View the following link for a bunch of other reasons to safeguard online anonymity: D. MAASS, *Online Anonymity Is Not Only for Trolls and Political Dissidents*, <http://bit.ly/1buAUzD> (last consulted: 09/12/2013).

⁵⁵ By "camcann" – view <https://news.ycombinator.com/item?id=1119342> (last consulted: 09/12/2013).

⁵⁶ X, *Mods Are Asleep*, <http://knowyourmeme.com/memes/mods-are-asleep> (last consulted: 09/12/2013).

2.2. THE FREEDOM OF SPEECH & EXPRESSION: LEGAL OVERVIEW

INTRODUCTION. – Having had a case analysis as a first building block of the rationale of this essay, the introduction of a second conceiving element seems viable. In what follows, we shall take a further look at the structure as well as the originating philosophy of the freedom of speech as was symbolically and generally written down in the 1789 Declaration of the Rights of Man and the Citizen.⁵⁷

2.2.1. *Scope of the research (II – The meaning of ‘speech’)*

PRO MEMORIA. – When talking about the concept of ‘speech’, this is, for the scope of this essay, the kind of speech that is able to be applied to SNSs – thus including the act of sharing text of any kind (containing opinions, facts, witticism, etc...), the act of posting images and videos online and generally anything that can be uploaded to an SNS. Issues concerning intellectual property rights and the creation of separate sites will thus be excluded from the scope of this research.

2.2.2. *Origins and philosophy (Pro memoria)*

FOUR CORNER STONES. – The freedom of speech and expression, as we contemporarily know it, has four main foundations and justifications: (1) the freedom of expression is essential for the dignity as well as self-development of the individual, (2) the freedom of expression is a means for unraveling truth, (3) the freedom of expression is inherently connected with democratic political decision-making and (4) the freedom of expression brings integration and social stabilization.⁵⁸ In what follows, we’ll take a short look at all four of these philosophies.

FOUNDATIONS (I): ESSENTIALITY FOR THE INDIVIDUAL. – Some theories – which put the individual as the main protagonist in this story of speech and expression – state that the freedom of speech automatically stems from human dignity. According to these theories, the soul and the spirit are the inner core of a human being. It is thus of great prominence to be able to execute this freedom, seeing as this freedom is connected with freedom of conscience, the freedom of religion and the freedom of philosophy of life.⁵⁹ Seeing as there are not only senders, but also recipients, the freedom of expression also leads to another freedom: the freedom of reception. The receiver is able to compare thoughts and feelings with others, leading to the creation of new ideas and ambitions, since he is able to choose from a wide variety of stories, opinions

⁵⁷ A. KOLTAY, *Freedom of Speech – The Unreachable Mirage*, Budapest, CompLex, 2013, 21.

⁵⁸ A. NIEUWENHUIS, *Over de grens van de vrijheid van meningsuiting*, Nijmegen, Ars Aequi Libri, 2011, 21.

⁵⁹ A. NIEUWENHUIS, *Over de grens van de vrijheid van meningsuiting*, Nijmegen, Ars Aequi Libri, 2011, 23 and 24.

and feelings.⁶⁰ This will lead to an *open society*, “in which individuals are confronted with personal decisions”, in contrast with a *closed society*.⁶¹

FOUNDATIONS (II): UNRAVELING THE TRUTH. – Another justification theory for the freedom of expression is that it encourages the quest for what is truthful: in a society where no person is infallible, a ‘*marketplace of ideas*’ forms a solid provision to the threat of adopting falsehood.⁶² The freedom of speech results in a varied offer of information, in which the rivalry between opinions precipitates a purifying effect.⁶³ According to MILL, this will automatically lead to favorable results: even if a minority opinion is only to be expressed by one individual, there is still a possibility of that individual disclosing the truth.⁶⁴ HOLMES considers the essence of the freedom of expression to consist out of the facilitation of joint-decision making.⁶⁵ This philosophy, introduced by pioneers such as MILL, HOLMES, and MILTON, has been criticized because it doesn’t correlate with the actual truth: in reality, the public opinion seems to be a tool of power to harden the process of the individual constructing a critical POV.⁶⁶ However, in the United States, there is an almost unlimited faith in the freedom of expression and in particular the theory of the ‘*free market place of ideas*’. The *First Amendment* further supports the philosophy stating that only speech can be the antidote against inappropriate statements.⁶⁷

FOUNDATIONS (III): DEMOCRATIC DECISION-MAKING. – Another theory consists out of the fact that, in a liberal democracy, rights concerning any kind of freedom – thus including the freedom of expression – cannot be limited in such a way that this limitation would also be conceivable in a totalitarian society. After all, democracy implies that there *is* a freedom of expression on a political level.⁶⁸ Additionally, the freedom of speech is a prerogative of the people’s sovereignty, seeing as the principle of sovereignty implies that people make their own laws. A citizen is thus co-sovereign with all other citizens and

⁶⁰ A. NIEUWENHUIS, *Over de grens van de vrijheid van meningsuiting*, Nijmegen, Ars Aequi Libri, 2011, 25.

⁶¹ K. POPPER, *The Open Society and Its Enemies*, Oxfordshire, Routledge Classics, 2011, 165.

⁶² A. KOLTAY, *Freedom of Speech – The Unreachable Mirage*, Budapest, CompLex, 2013, 4 and 8.

⁶³ F. DE BEAUFORT and P. VAN SCHIE, “Gemaakt voor gevoelige momenten” in A. ELLIAN, G. MOLIER AND T. ZWART (eds.), *Mag ik dit zeggen? Beschouwingen over de vrijheid van meningsuiting*, The Hague, Boom Juridische Uitgevers, 2011, 42.

⁶⁴ F. DE BEAUFORT and P. VAN SCHIE, “Gemaakt voor gevoelige momenten” in A. ELLIAN, G. MOLIER AND T. ZWART (eds.), *Mag ik dit zeggen? Beschouwingen over de vrijheid van meningsuiting*, The Hague, Boom Juridische Uitgevers, 2011, 42 and A. NIEUWENHUIS, *Over de grens van de vrijheid van meningsuiting*, Nijmegen, Ars Aequi Libri, 2011, 30.

⁶⁵ A. KOLTAY, *Freedom of Speech – The Unreachable Mirage*, Budapest, CompLex, 2013, 20.

⁶⁶ A. NIEUWENHUIS, *Over de grens van de vrijheid van meningsuiting*, Nijmegen, Ars Aequi Libri, 2011, 28 and 32.

⁶⁷ A. NIEUWENHUIS, “De ruimte voor racistische uitlatingen in de Verenigde Staten en Groot-Brittannië” in G. SCHUIJT and D. VOORHOOF, *Vrijheid van meningsuiting – Racisme en revisionisme*, Gent, Academia Press, 1995, 107.

⁶⁸ A. NIEUWENHUIS, *Over de grens van de vrijheid van meningsuiting*, Nijmegen, Ars Aequi Libri, 2011, 28 and 36.

cannot be limited in his expressions.⁶⁹ Seeing as the political decision-making of a government usually imposes binding consequences for its citizens, these arrangements concern every citizen. Consequently, citizens need to be able to share their opinion with reference to these decisions.⁷⁰

FOUNDATIONS (IV): INTEGRATION & STABILIZATION. – A last philosophy states that communication and integration are an integer: undoubtedly language shapes a connection between people, as does receiving the same information (watching the same TV shows, visiting the same Internet sites, etc...). It may even lead to a sense of unity, thus creating a positive catalyst for the process of integration.⁷¹ It also ameliorates the process of stabilization: suppressing opinions may feed turmoil, seeing as ‘negative’ ideologies are never able to surface and thus gain in power underground. This reasoning prefers extreme *statements*, rather than extreme *actions*. The freedom of expression thus functions as some sort of ‘safety valve’.⁷²

CONCLUSION. – Having explained the most important rationales in favor of the freedom of expression, as well as why it is therefore an important human right, it must also be stated that none of these are without criticism. Consequently, there is no one-size-catch-all justification and all philosophies must thus be combined in order to advocate the freedom of speech in our modern society. However, one important rule must be stated: all suppositions need to be a part of the social debate. Thus, for example: the opinion of the majority on whether or not the Internet should be censored, does not create a ground for limiting the debate in which ‘Internet censoring’ is discussed – at least in an ‘open society’, this should not be tolerated.⁷³

2.2.3. Legislative outline

AN EXPANSION OF RIGHTS. – From Socrates in 399 BC to the 1215 *Magna Carta*, from the 1689 *Bill of Rights* (granting freedom of expression in Parliament) to the 1789 *Declaration of the Rights of Man and of the Citizen* (providing freedom of speech), from the 1791 *First Amendment* (providing four freedoms, including freedom of speech) to the 1948 *Universal Declaration of Human Rights* (promoting freedom of expression): history has

⁶⁹ A. NIEUWENHUIS, “De ruimte voor racistische uitlatingen in de Verenigde Staten en Groot-Brittannië” in G. SCHUIJT and D. VOORHOOF, *Vrijheid van meningsuiting – Racisme en revisionisme*, Gent, Academia Press, 1995, 107 en A. NIEUWENHUIS, *Over de grens van de vrijheid van meningsuiting*, Nijmegen, Ars Aequi Libri, 2011, 28 and 36.

⁷⁰ A. NIEUWENHUIS, *Over de grens van de vrijheid van meningsuiting*, Nijmegen, Ars Aequi Libri, 2011, 28 and 38.

⁷¹ A. NIEUWENHUIS, *Over de grens van de vrijheid van meningsuiting*, Nijmegen, Ars Aequi Libri, 2011, 33 and 34.

⁷² A. NIEUWENHUIS, *Over de grens van de vrijheid van meningsuiting*, Nijmegen, Ars Aequi Libri, 2011, 35.

⁷³ A. NIEUWENHUIS, *Over de grens van de vrijheid van meningsuiting*, Nijmegen, Ars Aequi Libri, 2011, 45.

proven itself to be very productive when it comes to the gradual expansion of the freedom of speech.⁷⁴

CURRENT INTERNATIONAL LAW. – When this legislation is seen from an international perspective, there are multiple treaties to be found. The United Nations Universal Declaration of Human Rights (abbreviated as UDHR – adopted in 1948), provides in article 19 that “*everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*”⁷⁵, an article that had been vastly influenced by the prominent example of the 1789 French Declaration.⁷⁶ However, the 1948 document was never meant to be a treaty or an international agreement: it was a declaration, some sort of announcement of the main principles of human rights as well as the human freedoms. It was a document serving “*as a common standard of achievement for all peoples of all nations*” – a proclamation with a “*primarily moral authority*”.⁷⁷ It would be the first part of an “*International Bill of Rights*”, of which the second part would consist out of the International Covenant on Civil and Political Rights (ICCPR).⁷⁸ This treaty was deliberately adopted as a legally binding one, of which article 19 is of major prominence for this essay.⁷⁹ ⁸⁰ Amongst other things, this article states that “*everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in*

⁷⁴ D. SMITH and L. TORRES, “Timeline: a history of free speech”, *The Guardian*, 5 February 2006, <http://www.theguardian.com/media/2006/feb/05/religion.news> (last consulted: 09/12/2013) and J. MEJIA, “Libertad De Expresión, Redes Sociales Y Derecho Penal - Estudio Del Caso Nicolás Castro”, *Revista Derecho del Estado* 2010, vol. 25, 161.

⁷⁵ Art. 19 Universal Declaration of Human Rights of 10 December 1948, www.un.org/en/documents/udhr.

⁷⁶ C. LEBEN, “Is there a European Approach to Human Rights?” in P. ALSTON, *The EU and Human Rights*, Oxford, Oxford University Press, 1999, 69; S. JOSEPH, J. SCHULTZ and M. CASTAN, *The International Covenant on Civil and Political Rights – Cases, Materials and Commentary*, Oxford, Oxford University Press, 2004, 5; J. DE MEIJ, *Uitingsvrijheid – De vrije informatiestroom in grondwettelijk perspectief*, Amsterdam, Otto Cramwinckel Uitgever, 1989, 14 and P. VALCKE, “Democratie en diversiteit op de informatiesnelweg: beschouwingen over de vrijheid van meningsuiting op het Internet” in S. PARMENTIER (ed.), *De rechten van de mens op het Internet*, Antwerp – Apeldoorn, Maklu, 2000, 98.

⁷⁷ H. HANNUM, “The Status of the Universal Declaration of Human Rights in National and International Law”, *Georgia Journal of International and Comparative Law* 1995-96, 318.

⁷⁸ A. ROBERTSON, “The United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights”, *British Yearbook of International Law* 1968-69, vol. 43, 21 and S. JOSEPH, J. SCHULTZ and M. CASTAN, *The International Covenant on Civil and Political Rights – Cases, Materials and Commentary*, Oxford, Oxford University Press, 2004, 7.

⁷⁹ H. HANNUM, “The Status of the Universal Declaration of Human Rights in National and International Law”, *Georgia Journal of International and Comparative Law* 1995-96, 318.

⁸⁰ This treaty came into force in 1976 when it had 35 ratifications. Cf. art. 49 ICCPR and S. JOSEPH, J. SCHULTZ and M. CASTAN, *The International Covenant on Civil and Political Rights – Cases, Materials and Commentary*, Oxford, Oxford University Press, 2004, 8 and 517.

writing or in print, in the form of art, or through any other media of his choice”.⁸¹ ⁸² Currently, the ICCPR has 167 parties and 74 signatories.⁸³

CURRENT EUROPEAN LAW. – Although international consensus concerning the freedom of speech had the tendency to move a little slow, the situation evolved in a rapid pace in Europe nonetheless. In May 1948⁸⁴, the Hague Congress had called for a “*Charter of Human Rights, guaranteeing liberty of thought, assembly and expression, as well as the right to form a political opposition*”, followed two years later by an actual convention: the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁸⁵ Article 10 of this Convention handles the freedom of expression, which states: “*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises*”. While it may seem like article 19 ICCPR resembles article 10 ECHR a lot, it does appear that the Committee of Ministers of the Council of Europe has adopted a broader perspective. Namely does this article not only constitute a fundamental element of “*the principles of genuine democracy, the rule of law and respect for human rights*”, but does it also support “*the pursuit of an open information policy in the media sector, including access to information [...]*”.⁸⁶ However, the amount of grounds of justification for restriction of the freedom of expression is slightly more extensive under art. 10 ECHR than under the corresponding art. 19 ICCPR.⁸⁷

2.2.4. Lawfully limiting the freedom of expression

TREATY LIMITS (I): ICCPR. – The freedom of speech is, judicially speaking, not an absolute right.⁸⁸ In article 19(3) of the ICCPR, it is explicitly stated that

⁸¹ International Covenant on Civil and Political Rights of 16 December 1966, *United Nations Treaty Series*, vol. 999, 171.

⁸² PRO MEMORIA: The third part of this “*International Bill of Rights*” consists out of the *International Covenant on Economic, Social and Cultural Rights*. Cf. A. ROBERTSON, “The United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights”, *British Yearbook of International Law* 1968-69, vol. 43, 21.

⁸³ Information taken from the United Nations Treaty Collection Databases: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV4&chapter=4&lang=en (last consulted: 09/12/2013).

⁸⁴ This was six months before the adoption of the Universal Declaration of Human Rights (10 December 1948).

⁸⁵ This convention was signed in Rome on the 4th of November, 1950. Cf. A. ROBERTSON, “The United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights”, *British Yearbook of International Law* 1968-69, vol. 43, 22.

⁸⁶ A. MASON, “The Relationship Between Freedom of Expression and Freedom of Information” in J. BEATSON and Y. CRIPPS (eds.), *Freedom of Expression and Freedom of Information*, Oxford, Oxford University Press, 2000, 228-229.

⁸⁷ E. LIEVENS, P. VALCKE and D. STEVENS, *Praktijkboek Recht en Internet*, Bruges, Vanden Broele, 2005, 17.

⁸⁸ A. BUYSE, “Van woorden naar daden? Het EVRM, de vrijheid van meningsuiting en conflictescalatie” in A. ELLIAN, G. MOLIER AND T. ZWART (eds.), *Mag ik dit zeggen?*

this freedom could be abused in order to frustrate others' rights, allowing article 19 to be restricted for a series of causes (namely to confirm the rights and reputation of others, as well as for the protection of e.g. national security and public order).⁸⁹ However, these limitations need to be provided by the law, as well as justified as 'necessary' (introducing an "element of proportionality") for the State party, and answering to a legitimate goal: it can only be used for one of the purposes described in subparagraphs (a) and (b) of the third paragraph.⁹⁰

TREATY LIMITS (II): ECHR. – The ECHR doesn't confirm the freedom of speech to be an infinite right either: article 10(2) ECHR states that "*the exercise of these freedoms, [...] may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society*". This has also been called the 'escape-clause' and can only be applied when the restrictions (1) are prescribed by law, (2) are necessary in a democratic society and (3) fall under the category of one of the grounds of justification.⁹¹

CONCLUSION. – JOHN STUART MILL was of the opinion that there should be close to no restrictions to the freedom of expression, gaining the support of a wide array of liberal philosophers.⁹² Nowadays, however, the human right on the freedom of expression is not an absolute right; it is rather a flexible diaphragm which provides a wide protection in some cases, and a limited safeguard in other cases.⁹³ Basic rights function in correlation with other values, interests and rights, and where the freedom of expression conflicts with other fundamental values, this freedom can be restricted.⁹⁴ The freedom of expression tends to be mostly regulated by the penalization of the so-called

Beschouwingen over de vrijheid van meningsuiting, The Hague, Boom Juridische Uitgevers, 2011, 50.

⁸⁹ S. JOSEPH, J. SCHULTZ and M. CASTAN, *The International Covenant on Civil and Political Rights – Cases, Materials and Commentary*, Oxford, Oxford University Press, 2004, 517.

⁹⁰ D. CUCERANU, *Aspects of Regulating Freedom of Expression on the Internet*, Antwerp – Oxford, Intersentia, 2008, 216 and S. JOSEPH, J. SCHULTZ and M. CASTAN, *The International Covenant on Civil and Political Rights – Cases, Materials and Commentary*, Oxford, Oxford University Press, 2004, 524-525.

⁹¹ P. VALCKE, "Democratie en diversiteit op de informatiesnelweg: beschouwingen over de vrijheid van meningsuiting op het Internet" in S. PARMENIER (ed.), *De rechten van de mens op het Internet*, Antwerp – Apeldoorn, Maklu, 2000, 102 and E. LIEVENS, P. VALCKE and D. STEVENS, *Praktijkboek Recht en Internet*, Bruges, Vanden Broele, 2005, 22.

⁹² F. DE BEAUFORT and P. VAN SCHIE, "Gemaakt voor gevoelige momenten" in A. ELLIAN, G. MOLIER AND T. ZWART (eds.), *Mag ik dit zeggen? Beschouwingen over de vrijheid van meningsuiting*, The Hague, Boom Juridische Uitgevers, 2011, 44.

⁹³ A. BUYSE, "Van woorden naar daden? Het EVRM, de vrijheid van meningsuiting en conflictescalatie" in A. ELLIAN, G. MOLIER AND T. ZWART (eds.), *Mag ik dit zeggen? Beschouwingen over de vrijheid van meningsuiting*, The Hague, Boom Juridische Uitgevers, 2011, 53.

⁹⁴ C. UYTENDAELE, "Bescherming van de communicatievrijheid in digitale omgevingen: verminderde bruikbaarheid van nationaal (grondwettelijk) recht?" in S. PARMENIER (ed.), *Jaarboek Mensenrechten 2000-2001 van het Interuniversitair Centrum Mensenrechten*, Antwerp – Apeldoorn, Maklu, 2002, 13.

'undemocratic' opinions, also known as "harmful or illegal content".⁹⁵ In each case, an analysis of interests and other rights will prove itself to play a prominent role when it comes to the determination of the span of this freedom, especially when a clash of interests has been publicly provoked on an SNS – one of the most important means of online expression nowadays.⁹⁶

2.3. THE FREEDOM APPLIED – AN ONLINE PERSPECTIVE

INTRODUCTION. – Now both the case analysis and the main principles of the Freedom of Speech and Expression have been unfolded, it seems feasible to combine both elements by applying this immemorial right to the Internet era, as well as shedding some light on current practices.

2.3.1. Legislative outline

ONLINE APPLICABILITY OF ART. 19 ICCPR. – There is no validation for treating the freedom of speech that has been expressed on the Internet in a less respectful way, merely on the ground that it has not been voiced on one of the 'traditional' platforms. Quite on the contrary, "*freedom of expression applies to the Internet, as it does to all means of communication. Restrictions on freedom of expression on the Internet are only acceptable if they comply with established international standards, including that they are provided by law, and that they are necessary to protect an interest which is recognized under international law (the 'three-part' test)*".⁹⁷ Consequently, a state party to the ICCPR has to rigidly engage in applying the rights provided under art. 19 ICCPR to the Internet.⁹⁸ It has been stated that the ICCPR, along with the UDHR, is one of the best suited instruments for tackling issues concerning the freedom of speech on the Internet, seen its universal and cross-border nature.⁹⁹

ONLINE APPLICABILITY OF ART. 10 ECHR. – Art. 10 ECHR protects "*every way to express, spread or let pieces of information or conceptions be known*". Those actions are protected, "*no matter the medium or the channel of distribution*". There is a general consensus concerning the fact that article 10

⁹⁵ P. VALCKE, "Democratie en diversiteit op de informatiesnelweg: beschouwingen over de vrijheid van meningsuiting op het Internet" in S. PARMENTIER (ed.), *De rechten van de mens op het Internet*, Antwerp – Apeldoorn, Maklu, 2000, 103.

⁹⁶ A. BUYSE, "Van woorden naar daden? Het EVRM, de vrijheid van meningsuiting en conflictescalatie" in A. ELLIAN, G. MOLIER AND T. ZWART (eds.), *Mag ik dit zeggen? Beschouwingen over de vrijheid van meningsuiting*, The Hague, Boom Juridische Uitgevers, 2011, 53.

⁹⁷ Cf. the "Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression" of 21 December 2005, <http://www.osce.org/fom/78309> (last consulted: 09/12/2013).

⁹⁸ Z. KOZHAMBERDIYEVA, "Freedom of Expression on the Internet: A Case Study of Uzbekistan", *Review of Central and East European Law* 2008, vol. 33, 98.

⁹⁹ D. CUCERANU, *Aspects of Regulating Freedom of Expression on the Internet*, Antwerp – Oxford, Intersentia, 2008, 216.

of the ECHR is to be applied in a technology independent or neutral fashion, thus making this article applicable on new communication networks and electronic information systems such as SNSs on the Internet.¹⁰⁰ Additionally, the COMMITTEE OF MINISTERS of the Council of Europe has stated that “*Freedom of expression, information and communication should be respected in a digital as well as in a non-digital environment, and should not be subject to restrictions other than those provided for in Article 10 of the ECHR, simply because communication is carried in digital form*”.¹⁰¹

LIMITS TO AFOREMENTIONED ARTICLES. – Notwithstanding the fundamental right on the freedom of expression, there are some forms of opinion and information that aren’t allowed because they appear to be harmful for society or for individual people or groups.¹⁰² A couple of cases may consist out of the following examples: (1) the limits mentioned in art. 10 ECHR (e.g. the interests of national security, territorial integrity or public safety; the protection of health or morals), (2) the production, offering, distribution, procuring and possession of child pornography, as mentioned in article 9 of the 2001 Cybercrime Convention¹⁰³ and explained in its Explanatory Report¹⁰⁴ and (3) racial comments or hate speech as well as denying the genocide, as declared punishable by the additional protocol to the Cybercrime Convention.¹⁰⁵

2.3.2. Short applied jurisdictional case: the Facebook ‘like’ button

USING THE ‘LIKE’ BUTTON ON FACEBOOK... – A U.S. Court recently¹⁰⁶ handled a case concerning six employees who had lost their jobs at a Sheriff’s Office after showing support for their boss’ competitor in a forthcoming sheriff election. The particularity in this case consisted out of some of those employees having liked this competitor’s online Facebook page.¹⁰⁷ After their dismissal, the employees had a writ served against the Sheriff, stating that their

¹⁰⁰ E. LIEVENS, P. VALCKE and D. STEVENS, *Praktijkboek Recht en Internet*, Bruges, Vanden Broele, 2005, 13.

¹⁰¹ Declaration on human rights and the rule of law in the Information Society, COM/2005/56 final.

¹⁰² E. LIEVENS, P. VALCKE and D. STEVENS, *Praktijkboek Recht en Internet*, Bruges, Vanden Broele, 2005, 25.

¹⁰³ Convention on Cybercrime of 23 November 2001, CETS, no. 185.

¹⁰⁴ In particular article 94, 95, 96 and 97. Cf. Explanatory Report to the Convention on Cybercrime, CETS, no. 185.

¹⁰⁵ In particular by article 3. Cf. COUNCIL OF EUROPE, Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems of 28 January 2003, CETS, no. 189.

¹⁰⁶ 4th U.S. Circuit Court of Appeals, *Bland et al v. Roberts*, no. 12-1671, <http://www.ca4.uscourts.gov/Opinions/Published/121671.P.pdf>.

¹⁰⁷ H. KELLY, “U.S. court says ‘liking’ something on Facebook is free speech”, *CNN*, 19 September 2013, <http://edition.cnn.com/2013/09/18/tech/social-media/facebook-likes-free-speech/> (last consulted: 09/12/2013).

discharge violated their right to freedom of expression, as protected under the First Amendment.¹⁰⁸

...PROTECTED AS A HUMAN RIGHT? – While a previous ruling had stated that a ‘like’ on Facebook is “*not sufficient to trigger first amendment protection*”¹⁰⁹, the 4th U.S. Circuit Court of Appeals decided otherwise. The Court of Appeals stated that “*on the most basic level, clicking on the “like” button literally causes to be published the statement that the User “likes” something, which is itself a substantive statement*”¹¹⁰ and “*in this way, it is the Internet equivalent of displaying a political sign in one’s front yard*”¹¹¹, ruling that Facebook users, who like a page on Facebook in order to show support for a political candidate, “*engage in legally protected speech*”.¹¹² It is thus shown that the First Amendment in the United States is also applicable to online speech (thus getting the same application span as the ECHR and ICCPR), even when it merely consists out of a ‘like’.

2.3.3. *A call for regulation: an unreachable delusion?*

DESIRES FOR REGULATION. – The aforementioned documents of European and International institutions seem to create the expectation that, thanks to the World Wide Web and the rise of SNSs, the span of every person’s individual freedom is now almost unlimited. Because of SNSs such as Facebook and Twitter, dissidents are able to criticize dictatorships or let the world know about ongoing cruelties, and citizens are able to revolt against new legislation by spouting their opinion online. The use of SNSs has become of major importance to both citizens as activists and NGOs, as well as companies and governments. Simultaneously, however, this great power needs to come with great responsibility: the Internet can easily be abused. Sites such as 4CHAN and ASK.FM show that the Internet can actually form a considerably scary place: when so-called ‘*Internet trolls*’¹¹³ upset teenagers online and deliberately attempt to have them commit suicide, while also sharing racist, pornographic as well as other ‘*inappropriate*’ content, it is easy to forget about the big ‘*freedom of speech*’ picture.¹¹⁴ This is why there have been requests for a stronger regulation of communication through the Internet. Governments have

¹⁰⁸ U. Gunawardena, “Does Facebook ‘Like’ Count as Free Speech?”, *Working Paper Series* 2013, <http://ssrn.com/abstract=2273241>, 2 (last consulted: 09/12/2013).

¹⁰⁹ U. Gunawardena, “Does Facebook ‘Like’ Count as Free Speech?”, *Working Paper Series* 2013, <http://ssrn.com/abstract=2273241>, 7 (last consulted: 09/12/2013).

¹¹⁰ 4th U.S. Circuit Court of Appeals, *Bland et al v. Roberts*, no. 12-1671, <http://www.ca4.uscourts.gov/Opinions/Published/121671.P.pdf>, 39.

¹¹¹ 4th U.S. Circuit Court of Appeals, *Bland et al v. Roberts*, no. 12-1671, <http://www.ca4.uscourts.gov/Opinions/Published/121671.P.pdf>, 40.

¹¹² J. STEMPEL, “Facebook ‘like’ deserves free speech protection: U.S. court”, *Reuters*, 18 September 2013, <http://reut.rs/1dipEFg> (last consulted: 09/12/2013).

¹¹³ A troll is “*a person who makes a deliberately offensive or provocative online posting*”. Cf. OXFORD DICTIONARIES, *Definition of troll in English*, <http://www.oxforddictionaries.com/definition/english/troll-2> (last consulted: 09/12/2013).

¹¹⁴ M. PRICE and S. VERHULST, *Self-Regulation and the Internet*, The Hague, Kluwer Law International, 2004, 16.

therefore, as they have also done with the rise of the printing press and the dawn of radio and television, been trying to take care of this new flow of information. An example may consist out of the American *Communications Decency Act (CDA)*, however declared unconstitutional regarding the First Amendment (an amendment concerning the freedom of speech). Another example may be found in the *Child Online Protection Act (COPA)*, however also declared unconstitutional regarding the same First Amendment. It seems that, because of these failures, one can wonder if an American statute concerning a comprehensive Internet censoring can überhaupt even be drafted without going against the principles of the First Amendment. The U.S. has therefore seemingly given up on taking initiatives to prosecute any other Internet related crimes than child pornography.¹¹⁵

BETWEEN TWO EXTREMES. – There are two possibilities when it comes to regulating the freedom of expression on the Internet and on SNSs especially. The governments could practice a “*laissez-faire*” attitude and leave the Internet fully unregulated: the freedom of speech namely also includes the right to use offensive or insulting language, establish commotion or make defamatory statements.¹¹⁶ On the other hand, governments could also decide to provide an exhaustive protection of the weak(est) users of the Internet (e.g. children), in order to fully ban all ‘*inappropriate*’ content from being viewed by that group.¹¹⁷

FEASIBILITY OF EXTENSIVE REGULATION (I): GLOBAL VS. LOCAL. – The peculiarly problematic element of regulating content on the Internet in general and on SNSs in particular, lays in the fact that the Internet is a global concept. If no censors are in place (either from the government, the SNS in question or the user’s computer) and no adaptation of the site based on IP geolocation¹¹⁸ is active, an SNS will look exactly the same in the United States as it will in Belgium. However, while the Internet is a universal, decentralized¹¹⁹ system,

¹¹⁵ L. EDWARDS, “Pornography, Censorship and the Internet” in L. EDWARDS and C. WAEDELDE (eds.), *Law and the Internet*, Oxford, Hart Publishing, 2009, 644-647 and P. VALCKE, “Democratie en diversiteit op de informatiesnelweg: beschouwingen over de vrijheid van meningsuiting op het Internet” in S. PARMENTIER (ed.), *De rechten van de mens op het Internet*, Antwerp – Apeldoorn, Maklu, 2000, 95 and United States District Court for the Eastern District of Pennsylvania 22th of March 2007, no. 98-5591, American Civil Liberties Union et al. vs. Alberto R. Gonzales, <http://www.paed.uscourts.gov/documents/opinions/07D0346P.pdf>.

¹¹⁶ D. VOORHOOF, “Vrijheid van meningsuiting” in J. VANDE LANOTTE en Y. HAECK, *Handboek EVRM – Deel 2, Artikelsgewijze Commentaar – Volume I*, Antwerp, intersentia, 2004, 901.

¹¹⁷ P. VALCKE, “Democratie en diversiteit op de informatiesnelweg: beschouwingen over de vrijheid van meningsuiting op het Internet” in S. PARMENTIER (ed.), *De rechten van de mens op het Internet*, Antwerp – Apeldoorn, Maklu, 2000, 96.

¹¹⁸ Geolocation technologies allow websites to “*quickly and automatically determine an Internet user’s physical location. By customizing content and regulating access according to a user’s location, sites can re-create jurisdictional borders on the Internet*”. Cf. K. King, “Geolocation and Federalism on the Internet: Cutting Internet Gambling’s Gordian Knot”, *The Columbia Science and Technology Law Review* 2010, vol. 11, 45.

¹¹⁹ Meaning “*Internet servers are interconnected to each other in a rather anarchic fashion [, resulting] in a network of networks*”. Cf. J. MAILLAND, “Freedom of Speech, the Internet, and the

values, laws and standards are not. The latter ones are mostly regional and almost never fully internationally accepted: e.g. soft-core pornography may be allowed in Belgium, however isn't in Saudi-Arabia.¹²⁰

FEASIBILITY OF AN EXTENSIVE REGULATION (II): PERSECUTION. – Another element of problematic nature interacts with the principle of persecution. In order for people not to publicly deny the genocide on SNSs, for example, it is prominent that there are certain penalties when the correlating article 3 of the Cybercrime Convention has been breached by a user. However, the actual tracing of that particular user may not prove itself to be as easy as it seems. Proxy servers¹²¹, VPNs¹²², anonymity networks such as TOR¹²³, as well as anonymous – e.g. 4CHAN – or pseudonymous SNSs – e.g. TWITTER and ASK.FM – make it particularly hard to track down users with criminal intentions.

FEASIBILITY OF AN EXTENSIVE REGULATION (III): SOVEREIGNTY. – Given the fact the Internet is – as mentioned – a global structure, it is legally troublesome to arrest e.g. German users who share child pornography or other harmful content on U.S. SNSs. Seeing as the sovereignty of a nation is a key principle in international law, it will often be more difficult to penalize offenders if the latter ones are located in a different country than the authority in question.¹²⁴

FEASIBILITY OF AN EXTENSIVE REGULATION (IV): EVIDENCE. – As a final remark, digital information contains intangible material that is less easy to

Costs of Control: The French Example”, *New York University Journal of International Law & Politics* 2010, vol. 33, 1196.

¹²⁰ P. VALCKE, “Democratie en diversiteit op de informatiesnelweg: beschouwingen over de vrijheid van meningsuiting op het Internet” in S. PARMENTIER (ed.), *De rechten van de mens op het Internet*, Antwerp – Apeldoorn, Maklu, 2000, 110.

¹²¹ A proxy server is “a server that sits between a client application, such as a Web browser, and a real server. It intercepts all requests to the real server to see if it can fulfill the requests itself. If not, it forwards the request to the real server”. It can thus be used to hide the user’s IP address. Cf. WEBOPEDIA, *Proxy Server*, http://www.webopedia.com/TERM/P/proxy_server.html (last consulted: 09/12/2013).

¹²² A VPN is “a network that is constructed by using public wires — usually the Internet — to connect to a private network, such as a company’s internal network”, meaning this can be used as an anonymizer as well. Cf. WEBOPEDIA, *VPN - virtual private network*, <http://www.webopedia.com/TERM/V/VPN.html> (last consulted: 09/12/2013).

¹²³ TOR is a software package that “offers a technology that bounces internet users’ and websites’ traffic through “relays” run by thousands of volunteers around the world, making it extremely hard for anyone to identify the source of the information or the location of the user”. Cf. S. DREDGE, “What is Tor? A beginner’s guide to the privacy tool”, *The Guardian*, 5 November 2013, <http://www.theguardian.com/technology/2013/nov/05/tor-beginners-guide-nsa-browser>.

¹²⁴ Cf. the PRINCIPLE OF SOVEREIGNTY over a nation’s territory and its appurtenances. Cf. J. CRAWFORD, *Brownlie’s principles of Public International Law*, Oxford, Oxford University Press, 2012, 204.

¹²⁵ P. VALCKE, “Democratie en diversiteit op de informatiesnelweg: beschouwingen over de vrijheid van meningsuiting op het Internet” in S. PARMENTIER (ed.), *De rechten van de mens op het Internet*, Antwerp – Apeldoorn, Maklu, 2000, 111.

trace.¹²⁶ The scope of this statement becomes clear when taking the example of 4CHAN, where content can sometimes appear and disappear in a matter of seconds or minutes, making it near to impossible to take account of all posts.

CONCLUSION. – When it comes to the regulation of the freedom of expression on SNSs, an actor analysis shows that there is a wide variety of stakes held by multiple stakeholders. The SNS does not urgently feel like introducing a vast amount of regulating measures, unless it is in its own so-called “*enlightened self-interest*”¹²⁷. The governments all over the world are interested in handling this new wave of information as smoothly as possible, while efficiently imposing and enforcing national legislation. The citizen himself wishes an experience where both his own freedom of expression as well as his own freedom of information is respected, yet wants others’ freedoms regulated when it appears to work against him (e.g. slander, a father’s child being exposed to pornography, and so forth).

3. THE FUTURE – THREE QUERIES

3.1. WHAT COULD BE?

INTRODUCTION. – Although the ability to censor the Internet is very unpredictable – new technologies arrive every day, and thus one does not know if the Internet is really incomprehensible when it comes to censorship – we shall try to take a forecasting look at forthcoming possibilities and probabilities when it comes to legislative tendencies.

3.1.1. Power of the SNSs – 1st possibility

THE PRINCIPLE. – A vast amount of people claim that “*keeping the Internet a safe and secure place to work, learn and play*”¹²⁸ is the duty of the Internet Service Providers (ISPs), also including SNSs.¹²⁹ According to this principle, consequently, all SNSs would have to put private censors and appoint a team of moderators in order to ensure the safety of their network.

¹²⁶ P. VALCKE, “Democratie en diversiteit op de informatiesnelweg: beschouwingen over de vrijheid van meningsuiting op het Internet” in S. PARMENTIER (ed.), *De rechten van de mens op het Internet*, Antwerp – Apeldoorn, Maklu, 2000, 111.

¹²⁷ The “*self-interest rightly understood*” or “*enlightened self-interest*” is a concept by sociologist ALEXIS DE TOCQUEVILLE. It implies that people who fulfil the needs or interests of others, fundamentally serve their own self-interest. Cf. ALEXIS DE TOCQUEVILLE, *How the Americans combat individualism by the principle of self-interest rightly understood*, http://xroads.virginia.edu/~HYPER/DETOC/ch2_08.htm (last consulted: 09/12/2013).

¹²⁸ As mentioned by the European Commission. Cf. Communication of 16 October 1996 on Illegal and Harmful Content on the Internet, COM(96)487, 7.

¹²⁹ L. EDWARDS, “Pornography, Censorship and the Internet” in L. EDWARDS and C. WAEDELDE (eds.), *Law and the Internet*, Oxford, Hart Publishing, 2009, 628. (713 p.)

CRITICISM. – Although Facebook and Twitter, as well as Ask.fm and even 4chan, all have a moderating team installed, it is obvious that SNSs aren't too eager about having to deal with the censorship of a wide variety of content. Not only will users feel restricted, but SNSs will also have to manage an additional workload with all its correlating economic consequences. Others forthrightly state that this privatization of censorship goes against the principles of the freedom of expression in a “*non-transparent, non-democratic and non-accountable way*”.¹³⁰

EUROPEAN DEVELOPMENT. – With the introduction of the “*Safer Social Networking Principles for the EU*”, SNS providers – such as Facebook, Myspace, Google and Netlog – gained an incredible amount of responsibility when it comes to establishing a generally safer SNS environment for youngsters.¹³¹

3.1.2. Power to the government: keeping it national – 2nd possibility

THE PRINCIPLE. – If anything, the governments are already majorly in charge of telling SNSs and users which actions they are (not) allowed to take. The aforementioned example of Twitter censoring a Neo-Nazi account in Germany – which is otherwise perfectly visible in other countries – shows that governments *do* have their say. Facebook Public Policy Manager ADAM CONNER suggesting that Facebook might be “*bringing too much freedom of expression in some nations*” does so even more. On the legislative level of a national governmental, the Internet is thus far from underregulated.¹³²

CRITICISM. – The most prominent objection to the distribution of any more power to the government is that the Internet is global – a local government is not. Quite on the contrary, a government's laws concerning child pornography, slander, racial remarks, etc. will only apply to criminal acts that (1) have been carried out in that specific country (*'territorial principle'*¹³³) or (2) affect citizens from that state (*'passive personality principle'*¹³⁴) or (3) cause harmful effects in that state (*'effects doctrine'*¹³⁵). On top of that, one may wonder if democratic governments should even attempt on putting restrictions on the Internet in the first place, seeing as the current technological infrastructure

¹³⁰ L. EDWARDS, “Pornography, Censorship and the Internet” in L. EDWARDS and C. WAEDELDE (eds.), *Law and the Internet*, Oxford, Hart Publishing, 2009, 628. (713 p.)

¹³¹ View the document “*Safer Social Networking Principles for the EU*” for a better understanding of these responsibilities: https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/sn_principles.pdf.

¹³² L. EDWARDS, “Pornography, Censorship and the Internet” in L. EDWARDS and C. WAEDELDE (eds.), *Law and the Internet*, Oxford, Hart Publishing, 2009, 632.

¹³³ J. CRAWFORD, *Brownlie's principles of Public International Law*, Oxford, Oxford University Press, 2012, 458.

¹³⁴ J. CRAWFORD, *Brownlie's principles of Public International Law*, Oxford, Oxford University Press, 2012, 461.

¹³⁵ J. CRAWFORD, *Brownlie's principles of Public International Law*, Oxford, Oxford University Press, 2012, 462-463.

isn't exactly well-known for providing a great ability to control. If we've come to learn anything throughout the narrative of this essay, it is that the Internet is generally very hard to control¹³⁶ – let alone one government would be able to make an everlasting difference¹³⁷: there is simply not a lot a government can do seeing as, in the end, cyberspace is less “*regulable*” than real space.¹³⁸ The decentralized and universal nature of the Internet causes any nation's censorship attempts to only be neutralized by restriction evasions and regulatory arbitrage.^{139 140}

3.1.3. *United in diversity: a regional system – 3rd possibility*

THE PRINCIPLE (PRO MEMORIA). – Another solution could consist out of creating a harmonization of minimum standards on a regional level, such as for example the European one.¹⁴¹ However, just like the U.S., it seems that the EU has given up on trying to prosecute anything other than child pornography.¹⁴² When it comes to these children-related Internet issues, however, the regional system has already accomplished quite some initiatives.

3.1.4. *International regulation and cooperation – 4th possibility*

THE PRINCIPLE (I): INTERNATIONAL REGULATION. – This theory states that, seeing as the Internet essentially has a cross-border nature, it is impossible for national or even supranational systems to fully cover the entirety of legal elements in a problematic online situation.¹⁴³ Rather than a collection of independent regulatory attempts by different nations separately, the medium of public international law seems more suitable for effective and efficient Internet governance. Harmonizing processes on an international level can fuse a wide

¹³⁶ However, it is important to notice that the structure of the Internet is still exposable to change; new means of censoring aren't necessarily far away. Cf. J. MAILLAND, “Freedom of Speech, the Internet, and the Costs of Control: The French Example”, *New York University Journal of International Law & Politics* 2010, vol. 33, 1196.

¹³⁷ J. MAILLAND, “Freedom of Speech, the Internet, and the Costs of Control: The French Example”, *New Fre University Journal of International Law & Politics* 2010, vol. 33, 1181.

¹³⁸ L. LESSIG, *The Laws of Cyberspace – Draft 3*, <http://bit.ly/1kmOTbQ>, 6.

¹³⁹ Regulatory arbitrage is the ability of people to “*arrange their affairs so that they evade domestic regulations by structuring their communications or transactions to take advantage of foreign regulatory regimes*”. It thus means Internet users will move to jurisdictions with regimes that give them a more favourable treatment concerning regulation – the users chooses his own governing authority. Cf. M. FROMKIN, *The Internet as a Source of Regulatory Arbitrage*, <http://osaka.law.miami.edu/~froomkin/articles/arbitr.htm> (last consulted: 09/12/2013) and D. HARVEY, *internet.law.nz*, Wellington, LexisNexis, 2007, 120.

¹⁴⁰ D. HARVEY, *internet.law.nz*, Wellington, LexisNexis, 2007, 110.

¹⁴¹ P. VALCKE, “Democratie en diversiteit op de informatiesnelweg: beschouwingen over de vrijheid van meningsuiting op het Internet” in S. PARMENTIER (ed.), *De rechten van de mens op het Internet*, Antwerp – Apeldoorn, Maklu, 2000, 111.

¹⁴² L. EDWARDS, “Pornography, Censorship and the Internet” in L. EDWARDS and C. WAEDELDE (eds.), *Law and the Internet*, Oxford, Hart Publishing, 2009, 647.

¹⁴³ P. VALCKE, “Democratie en diversiteit op de informatiesnelweg: beschouwingen over de vrijheid van meningsuiting op het Internet” in S. PARMENTIER (ed.), *De rechten van de mens op het Internet*, Antwerp – Apeldoorn, Maklu, 2000, 111.

range of legal trends into one pooled, consolidated legal system that can be applied as a whole to the universal organism that is the Internet.¹⁴⁴

THE PRINCIPLE (II): INTERNATIONAL COOPERATION. – It has thus been stated that the nature of the Internet inescapably leads to a transnational strategy regarding governance. This does not solely count for legislation; namely when it comes to locating and tracing, as well as prosecuting online misbehavers, only a thorough, global cooperation can prove itself to be effective. A great example consists out of “*Project Spade*”, a long-term child exploitation investigation, which led to the rescue of 386 children and 348 arrests worldwide and to which about 30 countries participated (including countries as the U.S., Australia, Norway, Greece, South-Africa, and so forth).¹⁴⁵

3.1.5.A focus on user empowerment: towards a ‘netiquette’? – 5th possibility

THE PRINCIPLE. – This solution, conjointly known as “*self-regulation*”, covers a scheme wherein Internet users who do not abide by a certain code of online behavior are being given away by their co-users. This also covers a structure where users decide upon their own values: they are able to block and restrict access to certain content for both themselves as well as their children, thanks to the help of filtering and rating software.¹⁴⁶ Additionally, it also covers the situation of the industry of SNSs regulating themselves.¹⁴⁷ It is said that self-regulation could bring about a greater trust in SNSs, since it boosts their credibility: it makes sites as Facebook seem conscientious, sensible and capable.¹⁴⁸

ARGUMENTS *CONTRA*. – While the European Union strongly supports the use of self-regulating tools, such as filtering software and behavioral codes, concerns grew that “*these self-regulating instruments didn’t all have a transparent and responsible status*”. Additionally, these sensitive assignments – normally taken care of by the government – thus became strongly privatized, leading to a “*diminished democratic quality of sensible matters*”. While one should not forget the liberal POV “*the lesser a government interferes with the freedom of speech, the better*”, this sudden shift in preference has led to the implementation of a so-called “*co-regulation*”.¹⁴⁹ One could however argue to

¹⁴⁴ D. HARVEY, *internet.law.nz*, Wellington, LexisNexis, 2007, 110 and 111.

¹⁴⁵ View the following map to see the international extent of this project: <http://bit.ly/1ctVsZj>. Cf. TORONTO POLICE SERVICE, *Project spade saves children*, <http://bit.ly/1ckIERl> (last consulted: 09/12/2013) and L. KLOMPENHOUWER, “Internationaal kinderpornonetwerk opgerold - 348 arrestaties”, *NRC*, 14 November 2013, <http://bit.ly/18tX2pz> (last consulted: 09/12/2013).

¹⁴⁶ L. EDWARDS, “Pornography, Censorship and the Internet” in L. EDWARDS and C. WAEDE (eds.), *Law and the Internet*, Oxford, Hart Publishing, 2009, 648.

¹⁴⁷ M. PRICE and S. VERHULST, *Self-Regulation and the Internet*, The Hague, Kluwer Law International, 2004, 16.

¹⁴⁸ M. PRICE and S. VERHULST, *Self-Regulation and the Internet*, The Hague, Kluwer Law International, 2004, 17.

¹⁴⁹ E. LIEVENS, P. VALCKE and D. STEVENS, *Praktijkboek Recht en Internet*, Bruges, Vanden Broele, 2005, 49.

what extent this “*co-regulation*” is a new concept, since ‘pure’ self-regulation rarely exists without some kind of relation with the state.¹⁵⁰

3.2. WHAT SHOULD (NOT) BE? OPINION ON THE DANGERS OF TOO MUCH DIGITAL REGULATION

A UNIQUE ERA. – We are currently finding ourselves in a world that is being increasingly overwhelmed by an entire new wave: the technology wave. Additionally, this world also consists out of an overlap of two, unique generations. The youngsters of this era are the first ones to be raised in an atmosphere of technology and – thanks to the SNSs – global, cross-border interconnection. Synchronically, the elder generation is the last generation to have seen the full burgeon of the digital revolution as well as the first blossoming of the SNSs. We’re at a unique point in history and are steadily making a shift towards an irreversible intervention of technology in our day-to-day lives.

THE ANTITHESIS. – However, conjointly, we are also finding ourselves in some sort of danger. To quote the, when it comes to this subject, incredibly important American academic and pioneer LAWRENCE LESSIG¹⁵¹: “*Cyberspace has the potential to be the most fully, and extensively, regulated space that we have ever known — anywhere, at any time in our history. It has the potential to be the antithesis of a space of freedom*”.¹⁵² LESSIG thus implies that, if we don’t keep our eyes peeled, we might end up in what appears to be a “*transition from freedom into control*”.

LIMITS TO THE FREEDOM? – Freedom of speech on the Internet is thus an important good; as stated before, the ability to speak your mind on SNSs has already led to the accomplishment of considerable phenomenons. However, it seems like sometimes we’re not able to handle this freedom ourselves and tend to contravene certain limits, leading to cases such as earlier seen with ASK.FM, where a woman kicks off a petition in order to shut down the site, gaining over 12k signatories. Should we therefore bluntly restrict the entirety of freedom of speech of some who can’t handle it? I believe that does not necessarily need to be the case. It is every user’s responsibility and duty to deal with his freedom in an adequate manner; this is not only in the interest of other co-users, but also in his self-interest. However, if a user deals with aforementioned freedom in a way that is not “*socially admissible*”, a society should not have the right to fully and everlastingly restrict such execution. In any case, they have the right to bluntly ignore him or silence him with arguments, but a mere opinion should never be silenced with judicial tools. As DE BEAUFORT and VAN SCHIE

¹⁵⁰ M. PRICE and S. VERHULST, *Self-Regulation and the Internet*, The Hague, Kluwer Law International, 2004, 3.

¹⁵¹ For more information about professor LESSIG, visit <http://www.lessig.org/about/> (last consulted: 09/12/2013).

¹⁵² L. LESSIG, *The Laws of Cyberspace – Draft 3*, 3-4, <http://bit.ly/1kmOTbQ>.

state: “*A society that abuses the government to muzzle someone, rather shows its own weakness with this breach on freedom*”.¹⁵³

3.3. WHAT WILL (PROBABLY) BE?

NOT IF, BUT HOW. – What we should be asking ourselves nowadays does not lie in the question *if* we need to regulate the freedom of speech on SNSs and other Internet related communication means. After all, governance of the Internet will happen anyway, be it by the law (e.g. by governments through treaties), be it by social norms (e.g. a user mocking the recent death of NELSON MANDELA on Facebook will be reprimanded severely by other users), be it by the market (e.g. Twitter being in a Cornelian dilemma lately: the market demands Twitter’s profits, the people demand freedom of speech), be it by the architecture (e.g. the code of Facebook not allowing certain comments from being posted (such as e.g. certain spam links that are on a blacklist)).¹⁵⁴ The only question remaining is *how* this governance would happen.

LACK OF CONSOLIDATION (I): MISBEHAVING MATTERS. – It seems like a full amalgamation of Internet misbehaving, as some sort of one-size-fits-all, is not very likely to be implemented. It is clear that Internet coordinating legislation is, generally speaking, not always widely accepted. Except for maybe the irregular example of child pornography¹⁵⁵, not all states share the same opinion when it comes to the illegal status of certain Internet content.

LACK OF CONSOLIDATION (II): REGULATING AUTHORITIES. – Additionally, it has been shown that a government should rather not directly and straightforwardly be seen as an authority of censorship of the Internet. The unconstitutionality of both the *Communications Decency Act* as well as the *Child Online Protection Act* has shown that the freedom of speech is not just an ignorable human right. Rather than a *top-down* approach, states should opt for *bottom-up* schemes where possible.

THE EU: A STRICT DISTINCTION. – As a solution for this lack of consolidation, the European Union is currently making a clear distinction between (1) illegal content (which possesses some form of consolidation) and (2) other harmful content (of which the consolidation is not as widely spread). The first one might consist out of e.g. the posting of child pornography on SNSs. The second one may consist out of e.g. offending other users on an SNS because of racial issues. While – according to the EU – illegal content could be dealt with

¹⁵³ F. DE BEAUFORT and P. VAN SCHIE, “Gemaakt voor gevoelige momenten” in A. ELLIAN, G. MOLIER AND T. ZWART (eds.), *Mag ik dit zeggen? Beschouwingen over de vrijheid van meningsuiting*, The Hague, Boom Juridische Uitgevers, 2011, 47.

¹⁵⁴ L. LESSIG, *The Laws of Cyberspace – Draft 3*, 2 and 3, <http://bit.ly/1kmOTbQ>.

¹⁵⁵ L. EDWARDS, “Pornography, Censorship and the Internet” in L. EDWARDS and C. WAEDELDE (eds.), *Law and the Internet*, Oxford, Hart Publishing, 2009, 647.

by direct top-down censorship, the second one could be dependent on user or parental control, rather than any state intervention.¹⁵⁶

A MIXTURE BETWEEN TOP-DOWN AND SELF-REGULATION. – Bearing in mind this clear distinction, it does seem that there is a shift from direct and blunt state censorship to a mixture between top-down regulation and self-regulation (the latter one including SNS providers, but also users themselves, as well as teachers and parents).¹⁵⁷ A great EU-related example consist out of “*European Strategy for a Better Internet for Children*”, which states that “*regulation remains an option, but, where appropriate, it should preferably be avoided, in favor of more adaptable self-regulatory tools, and of education and empowerment*”.¹⁵⁸ Another example of the preference of self-regulation is the fact that, when the “*Safer Social Networking Principles for the EU*” were introduced, a vast responsibility was put on the SNS providers rather than regulating the matter through top-down criminal law.¹⁵⁹ The EU thus focuses on (1) empowering users to be able to block access from certain content as well as for them to be able to install filters on their end and (2) investing in research on appropriate filtering as well as the development of rating systems and the fostering of international co-operation.¹⁶⁰

A FURTHER SHIFT TO TOP-DOWN REGULATION? – EDWARDS states that, seeing as the UK has shifted to a top-down approach of illegal online material, “*it is more than possible that Europe may follow [...] in this direction*”. She subsequently provides the example of the then proposed – now approved as a directive¹⁶¹ – “*Framework Decision on combating the sexual abuse and sexual exploitation of children and child pornography*”, stating this Framework would certainly indicate such a shift.¹⁶² In my opinion, this does not indicate any shift, as child pornography is one of the most globally loathed matters. Although I have defended in previous essays that the European Union will gradually harmonize an exponential amount of matters throughout time, I personally see no arguments for believing in the gradual shift to a more top-down oriented EU Internet regulation based on the proof of this directive.

¹⁵⁶ Cf. Communication of 16 October 1996 on Illegal and Harmful Content on the Internet, COM(96)487, 10 and 11 and L. EDWARDS, “Pornography, Censorship and the Internet” in L. EDWARDS and C. WAEDELDE (eds.), *Law and the Internet*, Oxford, Hart Publishing, 2009, 647.

¹⁵⁷ L. EDWARDS, “Pornography, Censorship and the Internet” in L. EDWARDS and C. WAEDELDE (eds.), *Law and the Internet*, Oxford, Hart Publishing, 2009, 648.

¹⁵⁸ *European Strategy for a Better Internet for Children*, COM(2012)196, 2.

¹⁵⁹ View the document “*Safer Social Networking Principles for the EU*” for a better understanding of these responsibilities: https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/sn_principles.pdf.

¹⁶⁰ L. EDWARDS, “Pornography, Censorship and the Internet” in L. EDWARDS and C. WAEDELDE (eds.), *Law and the Internet*, Oxford, Hart Publishing, 2009, 648.

¹⁶¹ Directive European Parliament and Council no. 2011/92/EU, 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, Official Journal of the European Union 17 December 2011, vol. 335, 1.

¹⁶² L. EDWARDS, “Pornography, Censorship and the Internet” in L. EDWARDS and C. WAEDELDE (eds.), *Law and the Internet*, Oxford, Hart Publishing, 2009, 648.

A FURTHER SHIFT TO CO-REGULATION? – Due to reasons of concern, there has been a further shift noticeable from self-regulation to co-regulation. While the first kind of regulation is ‘pure’ in the sense that only private self-regulating initiatives control what content is and isn’t supervised, the latter one implies a considerably bigger participation of the public authorities.¹⁶³ Namely, the government can “*take care of a judicial framework wherein self-regulation initiatives [(such as SNSs)] can function effectively, e.g. by providing a safety net when the self-regulation initiative has any shortcomings or in order to carry out independent evaluations*”. The system could thereupon be able to provide a well-suited balance between (1) the human right on the freedom of speech and expression, and (2) the need for regulation where necessary (e.g. child pornography, cyber-bullying, etc...). According to LIEVENS, VALCKE and STEVENS, this scheme of co-regulation would contain “*few fixed legislative obligations, yet simultaneously provide more certainties than in a ‘pure’ self-regulatory framework*”.

4. MAIN CONCLUSION

Having reached the end of this essay, I most certainly hope to have you convinced of the great importance of this topic in our contemporary society, and to have provided a certain introduction to the current set of legislation and minds regarding the balance between the freedom of expression and the need for regulation. Most of all, however, I hope to have brought you enough tools and material to form your own opinion regarding this subject – as this topic knows a particularly wide variety of opinions.

In a community where the legislative atmosphere consists out of an increasingly growing amount of laws and standards, it is sometimes important to remember how *not* having something regulated could be interesting as well. Sometimes the focus needs to be put more on the freedom aspect instead of the legislative restrictions. Albeit a very interesting thought, it is also a very sensitive and perhaps a revolting one: it is exceptionally onerous to explain a mother, whose child has been a victim of cyber bullying, that the freedom of speech *is* in fact a good thing.

However much permanently prioritizing the freedom of speech is a delicate proposition, it is likewise remarkably tricky to put legislative restraints on this very freedom. Clear examples consist out of the unconstitutionality of the CDA and the COPA, as well as the current mindset in Europe that would rather promote self-regulation and co-regulation at the most, rather than direct schemes of restriction. Regardless, a meticulous assessment between the freedom of speech and the need for restrictions will need to be made on a case-

¹⁶³ Second Evaluation Report from the Commission to the Council and the European Parliament on the application of Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity, COM(2003)776 final, 5.

to-case basis, including the test of arts. 19(3) ICCPR and 10(2) ECHR. Although one might occasionally lose track of the importance of the freedom of speech when, for example, confronted with condemnable online misbehavior, the question always needs to be raised if there are no other less disrupting, yet likewise effective alternatives.¹⁶⁴ It is thereby of enormous importance to additionally bear the original philosophy of the freedom of speech in mind. Or as WILLIAM O. DOUGLAS had stated it: "*The framers of the constitution knew human nature as well as we do. They too had lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardized thought. They weighed the compulsions for restrained speech and thought against the abuses of liberty. They chose liberty*".

¹⁶⁴ E. LIEVENS, P. VALCKE and D. STEVENS, *Praktijkboek Recht en Internet*, Bruges, Vanden Broele, 2005, 50.