
THE STATE'S INVOLVEMENT IN REGULATING THE INTERNET

1. INTRODUCTION

Current global debates regarding the Internet always focus on issues such as copyright, rights and responsibilities of intermediaries, net neutrality, etc. but in the center of each of these debates is the involvement of authorities on various levels in the control of the Internet. In fact, “experience has shown that authorities will always strive to maintain their hold on the national narrative and undermine any proposed alternative.”¹ But such tendencies of the authorities come across the problem of the very nature of the internet and therefore we must find answers to the following questions:² ‘Regulation by whom?’, ‘Regulation to what end?’ and ‘Regulation with what authority?’

As one of the fundamental human rights, right to freedom of expression should enjoy protection in legislation of any state. The legislative framework of Bosnia and Herzegovina has been created by the international community after the war and its provisions are theoretically in line with international standards and respect of human rights. But as the international community started to withdraw its influence from the country, the pressures exercised by various center of powers over media outlets on all platforms and so on the Internet, started being more visible.

This paper will compare the cases involving online community exercising freedom of expression online in Bosna and Herzegovina and in Serbia, and especially reflect on a legal framework of these two countries regulating freedom of expression on the Internet. Particular attention will be given to the most recent legislation passed in Republika Srpska’s when the National Assembly voted in February 2015 to adapt its Law on Public Peace and Order to include social media, international advocates of freedom of expression raised an alarm. In short, according to many freedom of expression experts, the Law on Public Peace and Order is vague in interpreting what might constitute a breach of public order, and carries fines and the threat of imprisonment even for the content on the Internet. It comes after several cases of alleged censorship, and physical intimidation of media professionals in Bosnia and Herzegovina over the past several years that seems to be gaining momentum. These events will be compared to the ones in Serbia, and the restrictions on freedom of expression particularly in times of state emergency.

The paper therefore aims at providing insights into opinions of relevant stakeholders, lawyers, journalists as well as the perspective of users who found themselves under the legislation regarding internet in both countries. It will bring issues concerning freedom of expression on the Internet to the attention of all relevant stakeholders, and galvanize public support of the right to freedom of

¹ Digital dilemmas: power, resistance and the Internet, M.I. Franklin, p. 138 (Barkai 2012:21)

² Feintuck, Mike, Media regulation: public interest and the law, 2006, p.202

expression and a free media. The paper will reflect on the relevant laws through the indicators of efficiency and clarity, as well as liability.

Finally, this paper acknowledges certain limitations when it comes to gathering data, mainly because the practice is relatively new regarding internet and also because the bodies in charge, as well as practitioners, are often unwilling to cooperate and share relevant data.

2. THEORETICAL CONCEPTS

The Internet is today one of the most common forms of communication, thus legislative frameworks in any country are not to prohibit citizens from freely exercising said rights on this platform. Any similar actions by a government produce a chilling effect and restrict the user's right to express or receive information without interference. Therefore, it is firstly necessary to focus on several key concepts regarding freedom of expression online and then to reflect on international practice.

2.1. CHILLING EFFECT

Social networks have millions of subscribed users, and networks such as, for example, Facebook, usually have terms of use and their own policies regarding e.g. hate speech. They most often turn

In the case of television and radio, the number of speakers is limited by the available spectrum, the ability to speak is limited by the high cost of speaking, and listeners are (at least for the present) merely passive recipients of the communications. With the Internet, on the other hand, the number of speakers is infinite, anyone can speak for a few pence a day (or none) and listeners can respond and engage the speaker in an interactive and continuing dialogue. Eric Barendt, Lesley Hitchens, Media law cases and materials, , p.289

to post-moderation, that is, reacting when there are reports of inappropriate content by users themselves, and thus these networks aim at respecting their rights and responsibilities. At this point we reach an important issue in current debates, and it is the one of users and their role. Unlike in traditional media, users are no longer passive recipients of information, now they have the opportunity to create content themselves, to leave their comments on topics they are interested in, in other words, they have a very active role in online media and they are interacting across borders.

This makes social networks excellent platforms to contact a large group of people simultaneously and chilling effect removes this ability and therefore infringes on users' rights.

A chilling effect represents inhibition or discouragement of full utilization of the right to expression and correspondence.³ Usually it means that the speech or conduct of individuals is suppressed under the threat of penalization. In this instance there is no need to infer if such an

³ US Legal Definitions "Chilling effect" < <http://definitions.uslegal.com/c/chilling-effect/> ; Lamont v Postmaster General [1965] 381 U.S. 301; Zwicker v Koota [1972] 389 U.S. 241.

effect will occur on free speech. Hence, all citizens within the specified radius will be penalized and their right to free speech and expression without interference will be eroded.

New technology poses new problems for authorities, because it is more powerful than ever and subject to abuse. Every citizen has the right to be left alone in terms of their actions online and hence when speaking about online world, we must mention the right to anonymity, because its violation causes a chilling effect and imposes a prior restraint on speech. Anonymity is important when expressing one's opinion, particularly those that are controversial ones. A person fearing for his life and wellbeing may be discouraged from freely expressing himself/herself, if he/she suspects that his anonymity is compromised. Thus self-censorship is acting to restrict freedom to speech and expression. A chilling effect also occurs since the users will be aware that their personal information and their messages can and will be accessed by the government. Finally, the requirement imposes a prior restraint on speech since the right to expression shall be exposed to prior government control. Should it be otherwise, users may be wary of joining social networks in the future, since their membership will be tracked and used against them in potential lawsuits, especially if they intend to share sensitive information or beliefs.

Specifically, the prosecutions are not permissible under Article 29(2) of the Universal Declaration on Human Rights (UHDR). Since opinions enjoy absolute protection in international law, even if they do not equal expression, prosecuting users for merely stating their opinion constitutes a violation of freedom of expression. Additionally, this protection extends to statements and opinions that seemingly have no merit or are offensive. The right to expression is inherently intertwined with the right to receive information. Comments, questions and discussions on the matter of public interest, especially in the domain of political expression, which gives and leads public figures and media, represent the most protected form of freedom of expression and with the prosecutions of users, a government may remove a large source of information for the average citizen.

2.2 MEDIA AS PUBLIC WATCHDOG

The media has the obligation to act as a public watchdog, and prosecuting journalists constitutes a violation of the right to freedom of expression as declared in the UHDR. The public generally expects media to act as a public watchdog, guarding against improper behavior.⁴ The role of the media as 'watchdog' is a traditional characterization of the role of the news media in particular.⁵ This watchdog role can take many forms depending on the nature of the medium concerned, as well as on the state of democracy and development in a particular country. Essentially, this role is to provide information – to be the 'eyes and ears' of the public in monitoring what is happening in public life by reporting on daily events as they unfold.

2.3 RIGHT TO PRIVACY

The right to privacy is one of the most important basic human rights.⁶ Modern technology has changed the face of society and the right to privacy has never been more important. Governments

⁴ Bureau of International Information Programs, United States Department of State, Media Law Handbook: A Framework for a Free Press (2010).

⁵ Justine Limpitlaw, Media Law Handbook for Southern Africa, Konrad-Adenauer-Stiftung Regional Media Programme, 2012.

⁶ Universal Declaration on Human Rights(adopted 10 December 1948 UNGA Res 217 A(III)), art 12; European Convention on Human Rights, Article 8; American Convention on Human Rights, Article 11; Privacy Act of 1974.

around the world have been building their surveillance networks⁷, which can and will be abused in order to bypass due process and track everyone, and the capacity to identify, track and document each and every citizen in the name of “national security” is being built constantly.⁸

As Warren and Brandeis defined it, the right to privacy is the “right to be left alone”.⁹ It also is the right to keep a bubble of privacy around us, one that contains all the things that are “part of us, such as our body, home, property, thoughts, feelings, secrets and identity.”¹⁰ It is clear that this right extends to sensitive personal information.¹¹

Any form of collecting messages and user information constitutes a form of surveillance.¹² It necessarily implies storage of data, which is not in accordance with established guidance notes on data collection and storage.¹³ Furthermore, there is no telling how the collected data will be used or misused¹⁴, and how it will be monitored¹⁵. Regardless of this, storing any personal information such as messages and user identity information constitutes an interference with the right to privacy.¹⁶

Moreover, in order to maintain freedom of expression there has to be substantial protection of anonymous speech.¹⁷ Anonymous speech is part of the “...honorable tradition of advocacy and of dissent.”¹⁸ It is “a shield from the tyranny of the majority.”¹⁹ The protection of anonymity reflects the historical practice of “according greater weight to the value of free speech than to the dangers of its misuse.”²⁰ Various courts have interpreted that this right also extends to the online world.²¹ Anonymity is thus an important facet of freedom of association, especially as it pertains to online communities.²² It has been suggested that the government surveillance measures affect the daily lives and routines of citizens who modify their behavior in order to avoid suspicion and

⁷ Elizabeth Flock, “Warrantless Wiretapping Was Far More Involved Than Previously Known, New Book Says” (U.S. News, 19 September 2012) < <http://www.usnews.com/news/blogs/washington-whispers/2012/09/19/warrantless-wiretapping-was-far-more-involved-than-previously-known-new-book-says>

⁸ Naomi Wolf, “The new totalitarianism of surveillance technology” The Guardian (15 August 2012).

⁹ Warren and Brandeis, ‘The Right to Privacy’ [1890] 4 HLR 193, 195.

¹⁰ Yael Onn, et. al., Privacy in the Digital Environment (Haifa Center of Law & Technology, 2005) 1-12.

¹¹ Data Protection Act 1998, Part I, Section 2; Coeriel et al v The Netherlands Communication No 453/1991, UN Doc CCPR/C/52/D/453/1991 (1994) (HRC); X v United Kingdom App no 9072/82 (ECtHR, 6 October 1982); App no 14661/81 (ECtHR, 9 July 1991); App no 9804/82 (ECtHR, 7 December 1982).

¹² Ronald Deibert, ‘Black Code: Censorship, Surveillance and the Militarization of Cyberspace’ (2003) 32 J. Int’l Stud. 501; Steven J. Murdoch and Ross Anderson, ‘Tools and Technology of Internet Filtering’ in Ronald Deibert and others (eds), Access Denied: Practice and Policy of Global Internet Filtering (MIT Press 2008) 64.

¹³ Data Protection Act 1998.

¹⁴ USA PATRIOT Act 2001 (US); KU v Finland [2009] App no 2872/02 (ECtHR); Lessig, Code: Version 2.0 (Perseus Books 2006) 215.

¹⁵ Paul M Schwartz, ‘Beyond Lessig’s Code for Internet Privacy: Cyberspace Filters, Privacy-control and Fair Information Practices’ (2000) Wisc L Rev 743, 747; Steven J Murdoch and Ross Anderson, ‘Tools and Technology of Internet Filtering’ in Ronald Deibert and others (eds), Access Denied: Practice and Policy of Global Internet Filtering (MIT Press 2008) 64.

¹⁶ Leander v Sweden [1987] 9 EHRR 433 (ECtHR); Kopp v Switzerland [1998] App no 23224/94 (ECtHR); Amann v Switzerland [2000] ECHR 87 (ECtHR); Rotaru v Romania [2000] 8 BHRC 449 (ECtHR).

¹⁷ United States Constitution, First Amendment.

¹⁸ McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995).

¹⁹ Ibid.

²⁰ US Supreme Court position; Mark Twain, Voltaire, Charles Dickens, Benjamin Franklin, and other great thinkers published under assumed names.

²¹ Doe v. Cahill, 884 A.2d 451 (Del. 2005); Krinsky v Doe 6, 159 Cal. App. 4th 1154 (2008).

²² American Civil Liberties Union of Georgia v. Miller 977 F. Supp. 1228 (N.D. Ga. 1997); Anderson v Hale 159 F Supp 2d 1116 (ND Ill 2001).

harassment.²³ The users would be discouraged to send and receive further messages, thus inducing a chilling effect on their speech via self-censorship.²⁴

At this point we reach to the concept of a prior restraint which exists when the right to expression is subjected to prior government control.²⁵ The users might be discouraged from sending further messages in fear of repercussions. This does not mean it shall disregard lawful²⁶ requests, instead it shall carefully review the request and only provide information within the scope and authority of the request.

3. STATE INTERFERENCE

Right to correspondence is protected in international documents.²⁷ However, this right is a qualified right²⁸, meaning that the state also has the right to interfere with the private life of an individual under certain circumstances²⁹. The state carries the burden to justify an interference with this right.³⁰ These obligations of the state fall onto all public authorities.³¹

The new measures that may be taken must bring no restrictions to users to receive information. The right to freedom of expression also entails the right to receive information from various sources without interference from public authorities.³² Moreover, the government has a burden to demonstrate that there were no other less restrictive alternatives in case the interference occurs after all.³³ Governments have a much greater obligation to justify their actions,³⁴ and “the individual should not have his freedom of action limited beyond the degree necessary in the public interest.”³⁵

When an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to “receive” information and ideas. Its second aspect, on the other hand, implies a collective right to receive any information and to have access to the thoughts expressed by others. It is equally important for citizens to have the

²³ Dawinder S. Sidhu, „The Chilling Effect of Government Surveillance Programs on the Use of the Internet By Muslim-Americans” (2007) Vol 7 University of Maryland Law Journal of Race, Religion, Gender and Class.

²⁴ NAACP v Button 371 US 415 (1963); Lamont v Postmaster General 381 US 301 (1965).

²⁵ Southeastern Promotions, Ltd v Conrad 420 US 546 (1975); Thomas R Litwack, ‘The Doctrine of Prior Restraint’ [1977] Harv CR-CL L Rev 519, 520.

²⁶ David Walker, Oxford Companion to Law (Oxford University Press 1980) 1003.

²⁷ European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) (ECHR), art 8.

²⁸ Ibid., Article 8(2); Human Rights Review 2012, Article 8: The right to respect for private life, home and correspondence, < http://www.equalityhumanrights.com/uploaded_files/humanrights/hrr_article_8.pdf >

²⁹ Universal Declaration on Human Rights(adopted 10 December 1948 UNGA Res 217 A(III)), art 29(2).

³⁰ Ibid. Human Rights Review [10]

³¹ Human Rights Act 1998, art 6; European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) (ECHR), art 29(2).

³² Universal Declaration of Human Rights article 19 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978), art 13(1); European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) (ECHR) art 10(1); Lamont v Postmaster General [1965] 381 US 301; Schneider v Smith [1968] 390 US 17 ; The Sunday Times v United Kingdom [1991] App no 13166/87 (ECtHR) ; Jawara v Gambia [2000] AHRLR 107 (ACtHPR); Article19 v Eritrea [2007] AHRLR 73 (ACtHPR).

³³ Geoffrey.R.Stone, “Content Regulation and the First Amendment“ [27].

³⁴ Schad v. Borough of Mount Ephraim [1981] 452 U.S. 61; NAACP v. Button [1963] 371 U.S. 415; Schneider v. State [1939] 308 U.S. 147.

³⁵ International Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide [1970] ECR 1125

right to access opinions of others and general information as it is for them to have rights that protect their ability to impart their own opinions.³⁶

European Court for Human Rights (ECtHR) has established a hierarchy of values that protect freedom of expression.³⁷ Under that hierarchy, comments and discussions about matters of public interest obtained by media are the most protected form of freedom of expression. ECtHR has almost always concluded that it is the matter of restriction of freedom of expression in applications considering defamation lawsuits of high representatives and public figures.³⁸

ECtHR also emphasizes that the duty of media exceeds simple and monotonous reporting on facts, affirming that the duty of media is also to analyze facts and events in order to inform the public and to contribute to the public interest.³⁹

4. FREEDOM OF EXPRESSION IN BOSNIA AND HERZEGOVINA

In a multicultural society which has, in addition, faced violent conflicts and which is hence still trying to recover, the full respect of freedom of expression on all platforms and adequate implementation of relevant laws is still a big challenge. This is precisely the situation with Bosnia and Herzegovina which in its transition had to make important decisions that would guarantee the right to freedom of expression to be enjoyed and be in line with international standards. However, numerous challenges keep slowing this process down.

The very process of adoption of necessary legislation is one of them, as it is widely believed to be politically influenced rather than addressing real issues. Media independence, even public service media, is also challenged.

Similar situation in other countries of the region makes this project relevant outside the borders of Bosnia and Herzegovina, because the spill-over of practices is a likely option when it comes to the regulation of the Internet.

Specifically, when it comes to the RS's Law on Public Peace and Order, it is particularly worrisome to include social media within the definition of a "public space." While such legislation is not unfamiliar to the west (the United Kingdom's Guidelines on Social Media Prosecutions), the interpretation of this legal trend is deeply concerning: it gives power to the police and magistrate judges to interpret the law and sanction any social media action as they see fit.

This is problematic, as the law does not include concrete standards for the definition of social media, it does not explain what constitutes "offensive" or "indecent" material, nor denies that citizens can be prosecuted outside of Republika Srpska.

This concern has been expressed by many international actors including OSCE's Representative on Freedom of the Media Dunja Mijatović as well as organizations such as Human Rights Watch.

³⁶ Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, November 13, 1985, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985), ¶30.

³⁷ European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) (ECHR), art. 10.

³⁸ *Lingens v Austria* [1986] 8 EHRR 407; *Oberchlick v Austria* [1991] App no. 11662/85 (ECtHR).

³⁹ Mehmed Halilovic and Amer Dzihana, *Media law in Bosnia and Herzegovina*, (Internews u Bosni i Hercegovni 2012).

In her two letters⁴⁰ Dunja Mijatović expressed her concerns that the Law on Public Peace and Order “*could be used to limit free expression on social media.*” She continued by saying that “*(o)fficials may be left to interpret what is considered disturbing or offensive, possibly leading to arbitrary or abusive charges.*” In her second statement after the Law was adopted she expressed her disappointment “*that so many local and international voices of concern were simply ignored.*” This is particularly important because Ms. Mijatović has in her first letter offered “*to assist the authorities to conduct a legal analysis of the law and issue recommendations.*”⁴¹ Similar statement was made by Human Rights Watch researcher Lydia Gall where she said that “*extremely wide and incoherently formulated prohibitions in this law seem to have no other purpose but to limit freedom of speech on the Internet.*” She has continued by calling the National Assembly of Republika Srpska to dismiss this problematic law. All of these calls remained without a response. .

There is also concern that an expansion of the measure into the Federation of Bosnia and Herzegovina (FBiH) is the next step. This is a textbook chilling effect law, and has the potential to severely hamper freedom of expression in Bosnia and Herzegovina. It comes after an alarming trend of clampdowns on media in Bosnia and Herzegovina over the past several years that seems to be gaining momentum. The 2014 Media Sustainability Index (MSI) shows a substantial decrease in media freedom over the last five years –from 2.81 in 2009 to 1.66 in 2014. According to data of Reporters without Borders, since 2006 to present, freedom of the press in the country has plummeted from 19th to 66th place.

Such Law, therefore, directly and without a doubt contravenes the provisions of the UDHR and the right to freedom of speech and expression of people detained has been heavily violated. The right of users to correspondence without interference, enshrined in Article 12 of UDHR is thus violated even on the Internet, the most widely used tool of correspondence. In general, interference in any manner in any means of communication is the hallmark of oppressive regimes, while national security cannot be used as an excuse as it is too broad a term and is being used for purposes unrelated to national security.

Furthermore, the new law is also void due to overreach. Specifying such a broad radius could potentially lead to innocent citizens being penalized for doing nothing wrong. Less onerous ways of preventing violence, riots or any other form of possible threat to national security must be found. The actions taken do not serve a legitimate aim since national security or public order, under certain circumstances, cannot be considered as satisfied aims. Moreover, democratic societies should be void of such arbitrary provisions because they violate the freedom of expression of Internet users, which has been commonly recognized under international law⁴². The government must be able to “establish that the expression poses a serious threat to national security”⁴³ and the

⁴⁰ “OSCE Representative warns that legal amendments pose threat to free expression in Bosnia and Herzegovina; offers legal assistance” 27 January 2015 <<http://www.osce.org/fom/136911>>

⁴¹ “New law devastating for free expression and free media on the Internet in Republika Srpska, Bosnia and Herzegovina, Mijatović says” 5 February 2015 <<http://www.osce.org/fom/139191>>

⁴² European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) (ECHR) art 8, art 10; International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) , art 19; Communication Decency Act (CDA) 1996; Federal Statutory Immunity – section 230; Universal Declaration on Human Rights(adopted 10 December 1948 UNGA Res 217 A(III)), art 19; African Charter on Human and People's Rights (ACHPR) (adopted 27 June 1981, entered into force 21 October 1986) , art 9; Johannesburg Principles on National Security, Freedom of Expression and Access to Information, UN Doc E/CN.4/1996/39 (1996), art 19.

⁴³ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996), Principle 1.3(a).

restriction constitutes the “least restrictive means”⁴⁴ available. “Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public’s right to know.”⁴⁵

The Government does not state any explicit reason for detaining users of social networks. Doing this does not serve to protect the “rights and reputation of others ... national security, public order, public health or morals.”⁴⁶ It is clear in this instance there was no threat to national security as “... local or relatively isolated threats to law and order” cannot be considered as such.⁴⁷ Furthermore, there is no proven causal link between any incidence of violence and posts on social networks. Such a link must be established first in order for the aim of protecting public order to be viable.⁴⁸

The contents of the posts on social networks the authors of which were detained, do not intend or seem likely to incite riot or any threat to national security, and there is no proven, only speculative link between posts and possible threats to public order. One of the most important cases of this kind was the one of a journalist, Danijel Senkic, also a representative of an NGO ‘Front’. On his Facebook wall, Senkic spoke about the authorities in BiH when they arrested Bosniak returnees in Republika Srpska, and called their activities a terror, some police officers criminals and Bosniak politicians mute observers. The status was, among other, as follows: ‘The police in Zvornik terrorizes Bosniak population and their politicians stay silent or vaguely oppose. And so, as a Vlah, pardon me, I wish to say a few words...’⁴⁹ The status continues with reference to the father of one police officer and murder he committed during the war between 1992 and 1995, and states that even now he terrorizes the population in a nearby village, protected by his son. The danger of this status lies in the fact that even though the disputable Law was passed in one entity, its provisions have spread to the population in the other entity because Senkic lives in Tuzla, a city in FBiH.⁵⁰ In this way, the authorities did not put focus on verification of information regarding war crimes, but on prosecuting a person who speaks on their Facebook wall. Danijel Senkic was under interrogation at the police station in Tuzla, and had it been Republika Srpska, he could have been detained for 24 hours.⁵¹ Experts agree that the only way in which it would have been possible for Danijel Senkic to come before court would be for defamation at best, and only had it been the father of the policeman himself.⁵² Another important case to mention is the one of detaining a Facebook user, Sanel Menzil, from Kotor Varos, even though he deleted the comment he made by himself. Menzil criticized the decision of proclaiming the Mourning Day in FBiH when there was an attack on a police station in Zvornik, while also stating that the day of genocide in Srebrenica is not a Mourning Day in RS.⁵³

⁴⁴ Ibid Principle 1.3(b).

⁴⁵ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996), Principle 17.

⁴⁶ International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976)

⁴⁷ Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, cl I(B)(30).

⁴⁸ Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, cl I(C)(54).

⁴⁹ <https://www.facebook.com/danijel.senkic.3/posts/10206446620113660?fref=nf>

⁵⁰ <http://www.nap.ba/new/vijest.php?id=13080>

⁵¹ Mehmed Halilovic, Progon glasnika losih vijesti, analiziraj.ba

⁵² Mehmed Halilovic, Progon glasnika losih vijesti, analiziraj.ba

⁵³ <http://www.klix.ba/vijesti/bih/zbog-facebook-komentara-o-napadu-u-zvorniku-uhapsen-sanel-menzil-iz-kotor-varosi/150501025>

All international documents⁵⁴ propose a “three-part test” to determine the legitimacy of restrictions on freedom of expression. Therefore, a limitation is legitimate if it falls within the very narrow conditions defined in the three-part test. The first condition is that the restriction is provided by law, the second one is that there is a legitimate aim to limit the freedom of expression and the third one is that it has to be necessary in democratic society.⁵⁵ Finally, the government has to establish the situation where expression poses a serious threat to national security. Every restriction must be, according to international documents, the least restrictive means available in order to fulfill the third part of three-part test. Any broad definition of public space does not meet any of these requirements, and it presents a great opportunity for abuse. Vaguely worded legislation, the scope of which is unclear, does not meet the standard of being “prescribed by law” and are therefore not legitimate.⁵⁶ However, even though civil society and media were against this, OSCE, Human Rights Watch and other organizations warned about this law, it was still passed.⁵⁷

While the Federation of BiH or its Cantons haven’t introduced any strict laws or jurisdiction over the Internet there have been several cases that are showing inclinations to restrict freedom of expression of mostly journalists and other media representatives. These attacks are becoming more common but it is important to point out those cases where state bodies, particularly police and judiciary, were directly involved. There are three particular events when this happened. In two of them even OSCE RFoM strongly reacted reminding the authorities of BiH “*that there must be no impunity for attacks against journalists.*”⁵⁸

The first case from 2012, that hasn’t been widely reported, is related to editor-in-chief of portal Poskok.info Ivan Šušnjar⁵⁹, who was arrested and accused of computer crime because he used a web site Emkei’s Fake Mailer (www.emkei.cz) to misrepresent himself as a party friend of at that time ambassador of BiH to Italy Nerkez Arifhodzic and his abrupt decision to declare himself as a Croat in order to get this position. Mr. Arifhodzic replied to this e-mail which Susnjar used to create a satirical article about it. Subsequently, police officers from State Investigative Police Agency raided offices of Poskok.info, seized all of their equipment and brought in Mr. Šušnjar for questioning. He was very quickly released but was afterwards charged for committing a computer crime by breaching into e-mail of Mr. Denis Becirovic, at that time presiding over the Parliament of BiH, whose identity Susnjar used. Even though Mr. Susnjar explained his methods and intentions he was banned from using any computer device for two years until in 2015 he was cleared of all charges. Press Council reacted just before the proceedings started stating that “*(e)ditor Susnjar, exercising the right to free satire and sarcasm, pointed the public's attention to the case of the public person, who, through abuse of national identity and false national*

⁵⁴ Such as: Universal Declaration on Human Rights(adopted 10 December 1948 UNGA Res 217 A(III)), European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) (ECHR), American Convention on Human Rights, African Charter on Human and People's Rights (ACHPR) (adopted 27 June 1981, entered into force 21 October 1986).

⁵⁵ International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976), Art.19; Universal Declaration on Human Rights(adopted 10 December 1948 UNGA Res 217 A(III)), art.29(2).

⁵⁶ Article19.org < <http://www.article19.org/pages/en/limitations.html> >

⁵⁷ <http://www.oslobodjenje.ba/vijesti/bih-eu/zakon-o-javnom-redu-i-miru-republike-srpske-ko-se-boji-javne-rijeci>

⁵⁸ Representative on the Freedom of Media. "New attacks on media freedom in Bosnia and Herzegovina, OSCE representative calls for swift and thorough investigation." 24 June 2014. OSCE. Web. 28 01 2016.

⁵⁹ "SIPA privela vlasnika portala Poskok.info." 2012. *Bljesak.info*. <http://www.bljesak.info/rubrika/vijesti/clanak/sipa-privela-vlasnika-portala-poskokinfo/29663>. 2016.

declaration, has gained a diplomatic position.⁶⁰”. Press Council further pointed out that *“it is the editorial orientation of the portal poskok.info to present things satirically, as it did in this case also.”*

Other two cases both happened in 2014 and in both cases police agencies were directly involved. In February 2014 protests were happening across the country, most particularly in Federation of BiH. Police department of Tuzla canton tried to exercise pressure on journalists covering these protests through direct attacks and pressures. Cameraman of Tuzla based TV Slon Branislav Pavićoć was covering the protests during a very tense first day. When police officers were trying to push back the protesters, one of them hit Pavlicic while he was filming even though he was wearing a badge identifying him as a journalist⁶¹. Government of Tuzla Canton announced an investigation into this incident but in the end it never did. Second incident related to protests also took place in Tuzla a week after this one. In this case a journalist was stopped by police officers. These police officers demanded that a journalist hand over footage he recorded at protests in Tuzla and also give them contacts of all other journalists in possession of other footage. OSCE RFoM reacted in both of these cases and recognized *“that journalists may be required to provide materials when serious crimes are investigated”* but this should not be done through intimidation and through proper channels⁶².

The final case of government interference with media freedom is a well-known case of Klix.ba from December 2014. Ppolice officers of Canton Sarajevo and Republika Srpska searched their offices for 7 hours to find a confidential source⁶³. This raised a lot of controversy and reaction from domestic and international actors. Press Council issued a statement saying that this *“is a direct attempt of deterring journalists from publishing information in the public’s interest and sends a message of what will happen to any media who publishes in the public’s interest.”⁶⁴* OSCE RFoM Dunja Mijatovic also issued a statement in this case emphasizing that *“(t)he protection of sources is one of journalists’ key privileges and it must be safeguarded. Interrogation and pressure on members of the media to reveal their sources is simply unacceptable.”⁶⁵* While all these cases do not show serious intent of BiH governments to restrict media it raises an issue of need to work more with government bodies to establish protocols defining what and how should be done in cases of protests and release of information in public interest. This also raises concern that spillover of legal solutions applied in Republika Srpska to Federation of BiH is a possibility and should be resolved through a constructive dialogue between the government and representatives of journalists.

⁶⁰ “Reaction to the Court Processing of Mr. Ivan Susnjar, editor of the portal Poskok.Info”. 2015. *Press Council*.

http://english.vzs.ba/index.php?option=com_content&view=article&id=2085%3Areaction-of-the-press-council-in-bih-to-the-court-processing-of-mr-ivan-susnjar-editor-of-the-portal-poskok&catid=14%3Areactions-and-press-releases&Itemid=17&lang=en. 2015.

⁶¹ <http://www.e-novine.com/region/region-bosna/98439-Policija-izbacila-prosvjednike-zgrade-Vlade.html>

⁶² <http://www.osce.org/fom/111335>

⁶³ <http://www.klix.ba/vijesti/bih/mup-rs-vise-od-sedam-sati-pretresao-prostorije-klix-ba-zbog-slucaja-dva-papka/141229061>

⁶⁴ http://english.vzs.ba/index.php?option=com_content&view=article&id=2078%3Areaction-of-the-press-council-in-bih-to-the-police-raid-and-blockade-of-the-editorial-staff-of-klixba-29122014&catid=14%3Areactions-and-press-releases&Itemid=17&lang=en

⁶⁵ <http://www.osce.org/fom/129941>

5. SERBIA

Debates in Serbia have so far posed questions of how online media can fit into national legislation but remain free and keep their global nature that is crucial for their proper functioning and a full enjoyment of freedom of expression in digital age.

It has been acknowledged that there are numerous advantages of exercising freedom of speech on social networks, particularly in times of crisis, thus any limitations imposed on the Internet may bring troubles rather than solutions. It is therefore specifically the time of floods that hit the region of Western Balkans in spring 2014 that deserves a closer attention in terms of the interference of authorities in online speech.

The Constitution of Serbia guarantees the freedom of expression and freedom of media in general. Article 46 states that “the freedom of thought and expression shall be guaranteed, as well as the freedom to seek, receive and impart information and ideas through speech, writing, art or in some other manner.”⁶⁶ The Internet is therefore not excluded, moreover, it is explicitly mentioned in the Law on Electronic Media and the Law on Public Information and Media adopted on August 2, 2014, by the Serbian National Assembly. According to the latter: “media are, in particular, dailies and periodicals, news agency services, radio and television programs and the electronic editions thereof as well as independent electronic editions (editorially shaped websites or Internet portals), entered in the Media Register in accordance with this Law.”⁶⁷

But what is necessary to have in mind here is that such provision may include blogs, forums, Facebook pages, etc. which may contain the issues of public interest, and in this way the Internet sphere in Serbia falls more under the control of the government and leaves very little space for full enjoyment of freedom of expression.⁶⁸

Therefore, civil society, media experts and others, agree that the best solution for tackling online content in Serbia is self-regulation which should have a multi-stakeholder approach and include all relevant actors in this process.⁶⁹ Legislative framework is thus currently perceived as more fit for traditional forms of media and their regulation, while the regulation of the Internet content is rather disputable.

The question often posed here is-where is the line between the freedom of expression guaranteed by the Constitution (Article 46, Constitution of Republic of Serbia), the right to be informed (Article 51, Constitution of Republic of Serbia) and undisturbed functioning of a state particularly in the sphere of national security and protection of life and health of citizens and the property of a high value. Are freedom of expression and the right to receive information absolute rights or do they have certain restrictions, and is it possible to misuse those rights and bring damage to the citizens?

⁶⁶ Constitution of Serbia, Article 46, paragraph 1

⁶⁷ Article 29, Public Information Law

⁶⁸ Krivokapic, Đorđe, Regulatorni okvir za onlajn medije u Srbiji (Regulatory framework for online media in Serbia), Share Foundation http://www.shareconference.net/sites/default/files/u741/regulatorni_okvir_za_onlajn_medije_u_srbiji_2_draft.pdf

⁶⁹ Krivokapic, Đorđe, Regulatorni okvir za onlajn medije u Srbiji (Regulatory framework for online media in Serbia), Share Foundation http://www.shareconference.net/sites/default/files/u741/regulatorni_okvir_za_onlajn_medije_u_srbiji_2_draft.pdf

Article 51 of the Constitution states that everyone has the right to receive truthful, complete and timely information about the public interest issues, and that media are obligated to respect this right. Everyone has the right to free access to information found in public institutions and organizations trusted with certain authority. However, according to Article 20 of the Constitution, human rights and minority rights may succumb to certain restrictions, as long as they are necessary in a democratic society. The level of human and minority rights cannot be lower than the one guaranteed by the Constitution. When bringing these restrictions, all public bodies and so courts too, must take into account the very nature of the right that is restricted, the importance of the purpose of restriction, nature and scope of restriction, relation of the restriction and its purpose and whether there is a way to reach the purpose of the restriction by as small restriction of a certain right as possible.

Deciding on a state of emergency, which is by its nature *ultima ratio*, is constitutional category (Article 200). State of emergency may be proclaimed only when there is danger to the state and its citizens, but there is a very small possibility for a situation of such intensity.

More precisely, the Law on Emergency Situation (Official Gazette of Republic of Serbia, No. 111/2009, 92/2011 and 93/2012) stipulates (Article 8, par. 1/1) that the emergency situation emerges when there are risks or threats or consequences of disasters, emergency events and other danger to the population, environment or material and cultural goods and when they are as intensive as when their occurrence or consequences cannot be prevented by regular actions of bodies in charge, which is why it is necessary to use special measures, forces and means with stronger activities. A crucial article is Article 5, paragraph 1, stating that data on dangers and the activities taken by state bodies, bodies of autonomous provinces, local self-management units and other subjects of protection and rescue are public.

However, there is still a question of classification of the data which may be public. The security of the population is above any publicity of information. The principle of public data in emergency situations can collide with the obligation of the state to preserve the security of the citizens. The very Law on Emergency Situations, Article 133, stipulated the compensation of damage, and so: a natural person or legal person, who has deliberately caused threat to persons and material goods or has deliberately caused an accident, shall have to cover:

- 1) Costs of protection and rescue interventions;
- 2) Costs of repair and restoration to the original condition;
- 3) Damages to natural persons and legal entities.

Apart from the liability for damage, the person misusing his/her constitutional rights may be criminally responsible, too. Article 343 of the Criminal Code regulates: Causing Panic and Disorder:

- 1) Whoever by disclosing or disseminating false information or allegations causes panic, or serious disruption of public peace and order or frustrates or significantly impedes enforcing of decisions of government authorities or organizations exercising administrative authority, shall be punished by fine or imprisonment spanning from three months to three years

2) If the offence specified in paragraph 1 of this Article is committed through media or similar means or at public gathering, the offender shall be punished by imprisonment spanning from six months to five years.

When there is a state of emergency there is not enough time to establish whether information is false, that is, untrue. But in a digital age when information travels very fast, and may not even be false, it may cause an even bigger tragedy in a state of emergency.

But state authorities must be cautious and do not qualify every dissemination of information in a state of emergency as causing panic and disorder. The Court of Appeal in Kragujevac deems that: In order to be guilty of causing panic and disorder in the form of intensive disturbing of citizens, or a more serious disturbance of public order and peace, it is not enough to state that the offender used his/her statements to cause panic and disturb public order and peace, and not specify the nature of prohibited consequence... The Court of Appeal states that panic is a sudden intensive disturbance of citizens caused by fear when expressing public news and statements. The consequence of spreading panic and disorder is alternatively explained by the Code and it may even be a serious disturbance of public order or peace, which is caused when this disturbance is more intensive and it must be assessed individually in each particular case.'

Spreading panic and disseminating false information or fully or partially true information which is inappropriate for publication in a specific moment may be contrary to productive and damage life and health of citizens and property of a high value.

In order for management in emergency situations not to be chaotic, and making decisions and taking actions not to be problematic, and especially for the citizens to be prepared for such situations and informed on appropriate actions, it is necessary to conduct a constant preventive training. The Republic of Serbia has National strategy of protection and rescue in emergency situations (Official Gazette of Republic of Serbia, No. 86/2011) where Strategic Field 3 stipulates using knowledge, innovation and education so as to build a culture of security and resistance at all levels.

The Strategy states that consequences of disasters may be diminished if the citizens are adequately and well informed about possible risks, options and measures that may be taken in order to minimize the jeopardy and be better prepared. The public may be better informed if there is timely and available information about dangers and risks of disasters. The educational system and media play a very important role here. All necessary information must be available to everyone, including people with disabilities in appropriate forms and by using appropriate technology. It is especially children that can be timely informed about the aspects of integrated system of protection and rescue by including this topic in formal and informal education. Conducting trainings of all subjects of the integrated system of protection and rescue could contribute for citizens and relevant bodies to be well-equipped to deal with disasters. The staff of this system is to be especially trained because in this way they would be able to offer adequate help to children, the elderly, disabled persons, etc. Media informing about these risks should encourage the behavior directed at minimizing the risks.

In this specific situation, the role of media is crucial. The Law on Public Information and Media, stipulates that informing is free and does not succumb to censorship (Article 4). Article 5 provides

a more specific regulation of information on public interest stating that: media outlets shall freely publish ideas, information and opinions on phenomena, events and personalities about which the public has a justified interest to know, unless otherwise specified by the law. Everyone has the right to receive truthful, complete and timely information on the issues of public interest and the media are obligated to respect this right. The provisions of this Law may not be interpreted or applied in the manner which disables the freedom of public information or restricts to a greater degree than the one prescribed by the Law. The provisions are in line with international standards and protection of human rights, and the practices of international institutions (Article 14).

But in the sense of this Law, media does not include platforms such as forums, social networks and other, which enable free exchange of information, ideas and opinions, nor does the term include blogs, web-presentations and similar unless they are registered in the Register of Media Outlets, in line with Article 30, paragraph 2. Therefore, if social networks are not media, there is the question of control of published content: is censorship possible, is it allowed to remove certain content after there is an order of relevant authority, is it mandatory to share only accurate content or can any person express themselves freely?

At this point we must reflect on the Law on Free Access to Information of Public Importance. Article 2 of the Law states that the information of public importance is information held by a public authority body, created during or relating to the operation of a public authority body, which is contained in a document and concerns anything the public has a justified interest to know. For information to be considered information of public importance, it shall be irrelevant whether the source of information is a public authority or another person, which medium carries the document containing the information (paper, tape, film, electronic media, etc.), on which date the information was created or in which way the information was obtained, nor shall any other similar properties of such information bear any Furthermore, Article 4 stipulates that: justified public interest to know within the meaning of Article 2 of this Law shall be deemed to exist whenever information held by a public authority concerns a threat to, or protection of, public health and the environment, while with regard to other information held by a public authority, it shall be deemed that justified public interest to know within the meaning of Article 2 of this Law exists unless the public authority concerned proves otherwise.

The right to free access to information may be restricted (Article 8) to the extent necessary in a democratic society to prevent a serious violation of an overriding interest based on the Constitution or law. But no provision must be interpreted in the way justifying the revocation of a right conferred by this Law or its limitation to an extent exceeding that provided for in paragraph 1 of this Article.

Furthermore, Article 9 deals with cases when it is possible to revoke or limit the right to free access to information of public importance. This is possible only in the following cases, among other 1) Expose to risk the life, health, safety or another vital interest of a person; 3) Seriously threaten national defense, national and public safety or international relations; 5) Make available information or a document qualified by regulations or an official document based on the law as state, official, commercial or other secret, i.e. if such a document is accessible only to a specific group of persons and its disclosure could seriously legally or otherwise prejudice the interests that are protected by the law and override the access to information interest.

It must be emphasized that the process of providing a free access to information of public importance takes too much time when it comes to emergency situation. The request must first be submitted in writing to a state authority body. If the information is not available within 15 days, the person submitting the request may turn to the Commissioner for Free Access to Information of Public Importance and Personal Data Protection (the Commissioner). This process takes some time as well, depending on the circumstances of a case. Even when the Commissioner decides that the information must be made available, it has often happened that the authorities do not respond to such decision, and even prefer to fines, although they are rather symbolical.

All this shows that it is necessary to find an adequate manner of accessing the information of public importance in an emergency situation. In order to protect the security, life and health of citizens, the authorities must inform the citizens adequately in the state of emergency, too, (via television, radio, the Internet) and offer adequate, sufficient and truthful information. The authorities are also obligated to do everything in their power so as to ensure the security of the state, citizens, life and health of the population.

As previously mentioned, when Serbia was affected by floods in spring 2014, the social networks were used to share useful information about humanitarian actions and similar, but also to criticize the government's actions in this times. The Serbian police stated that ““tweeting and re-tweeting” helped in rescuing of over a thousand people who would have otherwise stayed trapped in their flooded homes, without means to communicate their location.”⁷⁰ But on the other hand, some posts on social networks were stated to be “inciting panic during a state of emergency” and the authorities interrogated some users for “spreading panic”⁷¹ and which spoke critically of the relief efforts, while some posts were removed, too.⁷² The posts primarily referred to the number of victims of floods,⁷³ and to misuse of humanitarian aid.⁷⁴

This has caused a chilling effect and provoked a petition ‘U lice cenzuri’ supported, among other, by Serbian Commissioner Rodoljub Sabic and Ombudsman Sasa Jankovic. Bloggers, journalists and citizens reposted the petition on dozens of blogs in Serbia over less than a day, and the hashtag #uLiceCenzuri trended on Twitter.”⁷⁵ Law experts pointed out that “the state of emergency does not keep us from calling the state authorities to account, criticizing them. Our right to “give lessons”, based on the human right of article 46 in the Constitution (freedom of opinion and expression), according to law, exists in a state of emergency to the same extent as in any ordinary situation.”⁷⁶

⁷⁰ Heini Järvinen, Social media in key role in the Balkans floods – incited censorship, <https://edri.org/social-media-in-key-role-in-the-balkans-floods-incited-censorship/>

⁷¹ <http://www.rts.rs/page/stories/sr/story/135/Hronika/1609284/Prijave+zbog+%22C5%A1irenja+panike%22+.html>

⁷² Heini Järvinen, Social media in key role in the Balkans floods – incited censorship, <https://edri.org/social-media-in-key-role-in-the-balkans-floods-incited-censorship/>

⁷³ http://www.huffingtonpost.com/sasa-milosevic/aleksandar-vucic-serbia-flood_b_5406322.html

⁷⁴ <http://www.balkananalysis.com/bosnia/2014/05/28/balkanfloods-online-the-impact-of-social-media-on-recent-reporting/>

⁷⁵ Heini Järvinen, Social media in key role in the Balkans floods – incited censorship, <https://edri.org/social-media-in-key-role-in-the-balkans-floods-incited-censorship/>

⁷⁶ Vesna Rakic Vodinelic, professor at the University Union School of Law, Belgrade, Heini Järvinen, Social media in key role in the Balkans floods – incited censorship, <https://edri.org/social-media-in-key-role-in-the-balkans-floods-incited-censorship/>

6. CONCLUSION/CHALLENGES FOR THE FUTURE

In general, the restrictions on free speech are built in the relevant media-related legislation as a consequence of the authorities' tendencies to provide a higher level of security. Attempts to control the platforms notwithstanding, it is the intermediaries that are often called to provide user data, thus violating the right to anonymity and causing the users to fear the consequences of online speech. While "China, Iran, North Korea, are the usual suspects for such practices, more recently there are cases in Western Democracies, too, primarily aiming at prevention of terrorism."⁷⁷ This is how most recently we have seen big pressures on intermediaries to take down the content which may be connected with terrorism. However, "attempts to control the Internet, its operation or content, have been notoriously unsuccessful. Its anarchy and resistance to regulation is, in the minds of many, its strength and attraction."⁷⁸

Still, on a global level, there is a wish to find a proper balance between enabling more freedom of speech and keeping platforms safe, too. A need for policies and global standards which are implementable has been identified, since sometimes there are standards that seem good on paper but they are difficult to be implemented, which is why rules and regulations must be drafted with a particular care and with their feasibility in mind.⁷⁹

Internet governance is also about who gets to participate in decision-making about Internet policy and technology, and how. Since its infancy, the Internet has benefited from a lightweight, decentralized, multistakeholder approach to governance that combines targeted government regulation with various formal and informal multistakeholder organizations to help guide its global development... To be sure, current implementation of the multistakeholder model remains imperfect and there are still challenges to address. Llanso (2012) in M.I. Franklin, Digital dilemmas: power, resistance and the Internet, p.148

Another point to have in mind is different types of intermediaries. There are, e.g. Internet Service Providers - ISPs which are generally not liable but may be asked to block access or take similar actions. There are social platforms such as Facebook, Twitter, Youtube where most content is user generated and liability in these cases may be excluded. Finally, there are online news providers which allow comments and in this case their liability depends on the national law and the way in which it treats defamation, copyright, etc. But the general global agreement is that if intermediaries become familiar with the illegality of certain user generated content, they need to remove it. Therefore, there are differences between hosting providers and acting providers, but there are also similarities and this is why numerous stakeholders agree that there is a need to redefine the notion of providers.

⁷⁷ OSCE expert meeting, Vienna, 9 December 2015

⁷⁸ Media law cases and materials, Eric Barendt, Lesley Hitchens, p.289

⁷⁹ Llanso (2012) in M.I. Franklin, Digital dilemmas: power, resistance and the Internet, p.148

In conclusion, the debates about regulation of online speech in terms of preserving public peace and order and avoiding panic in Bosnia and Herzegovina and in Serbia respectively are yet to unfold and to gain even more momentum as the Internet takes over the news consumption from traditional media and has more and more users every day. Control over the content has two sides. The removal of certain content may be perceived as causing chilling effect and affecting freedom of expression, while there also may be the problem of keeping history searches, etc. which later on put the users' privacy on display. Therefore it is also a general agreement that "the digital age brings opportunity... Yet it also brings new threats to hard-won civil liberties."⁸⁰

⁸⁰ Healy 2012, in Digital dilemmas: power, resistance and the Internet, M.I. Franklin, p.176