

UDC 341.1:[342.727:004.738.5

**FREEDOM of EXPRESSION ONLINE AND INTERNET CENSORSHIP:  
REGULATORY APPROACHES of THE UNITED NATIONS AND THE COUNCIL of EUROPE**

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*The paper provides a comparative analysis of the UN's and the CoE's approaches towards the protection of the freedom of expression online. To this end, the relevant instruments of soft law, hard law, and case law are discussed. Increased emphasis is given to outlining conditions for permissible Internet censorship.*

**Introduction.** The ongoing reinvention and global dispersion of the Internet have turned it into a major medium of expression. Today, the "network of networks" serves as a significant platform for public deliberations and provides access to a broad range of informational sources. In legal terms, the Internet is now considered a new domain for the enjoyment of fundamental human rights, such as the right to freedom of expression [1, p. 23].

At the same time, the spread of the Internet has also triggered the emergence of new challenges. Occasionally, various types of harmful and illegal content appear online, such as calls for terrorism, incitement to violence, child abuse material, etc. The persistence of the unlawful online content makes a case for the state's oversight of the "network of networks", which triggers debates regarding the extent of the government's Internet regulation [1, pp. 19-22]. Contemporary developments demonstrate that an increasing number of states manifest a proclivity to impose disproportionate and/or unnecessary online restrictions, which has led to the deterioration of global Internet freedom indicators over the last decade [2, p. 1]. Having said that, it is imperative to contemplate that not all Internet restrictions imposed by governments necessarily pose an adverse impact on Internet freedoms. States do have a role to play in limiting access to illegal online content. Nevertheless, in order for the state's interference with the information flow on the Internet to be rightful, it must be compatible with international law. Hence, it is essential to explore the circumstances under which states are allowed to remove certain types of online content and to examine the relevant international standards that the countries must abide by.

**Task formulation.** This research aims to provide an analytical outlook on the international legal framework regulating the protection of the freedom of expression on the Internet. More precisely, the paper focuses on the international normative framework relevant to the European region. Special attention is paid to determining the internationally accepted standards that states have to follow when developing their respective Internet policies and exercising Internet censorship. The paper attempts to examine these Internet governance issues through the prism of regulatory approaches adopted by the United Nations (the UN) and the Council of Europe (the CoE).

**Methods of research.** The paramount research method applied in this paper is the comparative method of legal research. When investigating the international legal framework for freedom of expression on the Internet, doctrinal research is conducted with a view to providing a comparative analysis of relevant soft law and hard law instruments adopted within the UN and the CoE.

The study further endorses the employment of the qualitative data collection method. Within the qualitative research method, both primary (international treaties, resolutions, declarations, recommendations, and case law) and secondary (books, reports, and factsheets) sources of data are analyzed.

It is important to note that there are two limitations to this research. Firstly, the paper analyzes only the selected UN's and CoE's legal documents that are essential to comprehend the concept of the freedom of expression online, meaning that some pieces of legislation are consciously omitted. Secondly, while some scholars apply the extended interpretation of the right to freedom of expression on the Internet [1, pp. 23-44], this research narrows the definition of freedom of expression online to include the freedom of opinion and freedom of information.

**Results, their discussion and perspectives.** The UN and the CoE are among the key actors in terms of the promotion and preservation of human rights online. The given part of the paper begins with examining the UN's soft law and hard law regulating the freedom of expression online. This is followed by the analysis of the relevant Internet-related soft law, hard law, and case law adopted within the CoE, as compared to the UN's legal framework.

The United Nations has been one of the most proactive organizations which has served as a common platform for states to handle the issues of (re)asserting and reinforcing the international standards for Internet

governance while guaranteeing the protection of the right to freedom of expression in the normative architecture of the Internet. The UN endorses multi-stakeholderism as an overarching principle for Internet governance. The multi-stakeholder approach is predicated upon the idea of an equal engagement of government officials, members of the private sector, and civil society representatives in Internet governance [3, p. 18]. Some examples of the UN-led multi-stakeholder initiatives include the Working Group on Internet Governance (2004-2005), the annual global Internet Governance Forum, etc. [3, pp. 18-21].

The landmark event occurred in 2012, when the UN Human Rights Council (HRC) adopted a Resolution on the promotion, protection and enjoyment of human rights on the Internet, stipulating the following [4, p. 2]:

1. *[HRC] Affirms that the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with articles 19 of the Universal Declaration of Human Rights [the UDHR] and the International Covenant on Civil and Political Rights [the ICCPR].*

The importance of the UN HRC Resolution was that it unequivocally proclaimed the existence of human rights on the Internet, most notably the right to freedom of expression. It is worth emphasizing that the Resolution referred to Articles 19 of the UDHR and the ICCPR as a basis for preserving human rights on the Internet. All upcoming resolutions on the promotion, protection and enjoyment of human rights on the Internet consistently included the reference to Articles 19 of the UDHR and the ICCPR, too [5, p. 2; 6, p. 3; 7, p. 4]. Additionally, each successive resolution extended the scope of issues touched upon in the previous documents. Thus, the resolutions from 2014, 2016, and 2018 called upon states to foster multi-stakeholder cooperation [5, p. 2; 6, p. 4; 7, p. 5]; the resolutions from 2016 and 2018 condemned undue state interference with the Internet-based freedom of information and freedom of opinion that runs contrary to international human rights law [6, p. 4; 7, p. 5].

With a view to ensure a better comprehension of the UN's concept of the freedom of expression online, it is necessary to examine the international law sources referred to by the UN HRC in the above-mentioned resolutions - Articles 19 of the UDHR and the ICCPR. More precisely, Article 19 of the UDHR states 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" [8, pp. 74-75]. As regards Article 19 of the ICCPR, it stipulates the following provisions [9]:

1. *Everyone shall have the right to hold opinions without interference.*
2. *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, [...] through any [...] media [...].*
3. *The exercise of the rights provided for in paragraph 2 of this article [...] may [...] be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.*

As can be concluded from Article 19 of the UDHR and paragraphs 1 and 2 of Article 19 of the ICCPR, both documents provide a rather broad definition of the right to freedom of expression that covers the freedom to hold opinions and the freedom to seek, receive and impart information through any media of an individual's choice. Moreover, by explicitly stating that every individual has the right to express oneself via any given medium, the UDHR and the ICCPR left the room for manoeuvre, providing the mechanism for adjustment and inclusion of the upcoming technological advancements under the scope of application of the respective documents [10, p. 7]. Viewed from this perspective, both the UDHR and the ICCPR are considered applicable to the Internet's realm.

Furthermore, paragraph 3 of Article 19 of the ICCPR contains references to the circumstances which justify the implementation of restrictive measures concerning the freedom of expression. The paragraph indicates that any limitation of the freedom of expression and information must be enforced only as an exceptional measure and has to comply with the so-called three-part, cumulative test [1, p. 45; 10, p. 19]:

1. It has to be "provided by law", as per the principle of legality.
2. It has to pursue at least one of the purposes enshrined in paragraph 3 of Article 19 of the ICCPR, as per the principle of legitimacy.
3. It has to be necessary, with necessity indicating, *inter alia*, the least restrictive measure required to reach the purported goal, as per the principle of necessity and proportionality.

The aforementioned provisions constitute the basis of the UN's normative framework that the states ought to rely on when developing their respective Internet policies.

Speaking about the Council of Europe, it is an international organization with a broad mandate for tackling human rights issues, including the rights that individuals enjoy on the Internet. One of the most important institutions responsible for preparing the legal ground for the CoE's Internet policies is the Committee of Ministers. The Committee of Ministers, in return, is supported by the activities of multiple multi-stakeholder expert groups

operating within the Steering Committee on Media and Information Society, such as, for example, the Group of Specialists on Human Rights and the Information Society [1, p. 56-57]. The work of expert groups lays the foundation for the Committee of Ministers' actions in the field of human rights and the information society, which bring forth a number of declarations and recommendations. One of the first documents of this kind was the Declaration on Human Rights and the Rule of Law in the Information Society, adopted by the Committee in 2005. Paragraph 2 of Provision 1.1 of the Declaration reads the following [11]:

*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.*

The significance of the 2005 Declaration was that it stressed that the freedom of expression and information, as defined by Article 10 of the European Convention on Human Rights (ECHR), should apply both in the digital and the physical world. The same stance was then reiterated in successive recommendations and declarations of the Committee of Ministers [12]. Moreover, the equal applicability of Article 10 of the ECHR online just as offline was reaffirmed by the European Court of Human Rights (ECtHR) case law. Some of the precedents on the freedom of expression online include, but are not limited to, the following cases: *Ahmet Yildirim v. Turkey*, the judgment of 18 December 2012, Application no. 3111/10; *Cengiz and Others v. Turkey*, the judgment of 1 December 2015, Applications nos. 48226/10 and 14027/11; *Vladimir Kharitonov v. Russia*, the judgment of 23 June 2020, Application no. 10795/14; *OOO Flavus and Others v. Russia*, the judgment of 23 June 2020, Applications nos. 12468/15, 23489/15, and 19074/16; *Bulgakov v. Russia*, the judgment of 23 June 2020, Application no. 20159/15; *Engels v. Russia*, the judgment of 23 June 2020, Application no. 61919/16, etc. [13, pp. 2-3].

In order to gain a greater understanding of the CoE's approach towards the freedom of expression on the Internet, it is imperative to investigate it through the lens of Article 10 of the ECHR, which has been mentioned in numerous CoE's declarations, recommendations, and resolutions in the field of media and information society [12]. Article 10 of the Convention stipulates the following [14, p. 12]:

1. *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.*

2. *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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

Reflecting on the definition of the right to freedom of expression provided by paragraph 1 of Article 10 of the ECHR, it can be observed that the notion "freedom of expression" is formulated similarly to the interpretations presented in Articles 19 of the UDHR and the ICCPR referred to by the UN. All three documents offer a relatively broad understanding of the freedom of expression, which includes both the right to hold opinions and the right to receive and share information through any kind of media. Consequently, two primary rights derive from such interpretation of the freedom of expression - freedom of opinion and freedom of information. Concerning the applicability of Article 10 of the ECHR in online settings, some legal scholars assert that the freedom of expression enshrined in the ECHR applies to the Internet domain because the wording of paragraph 1 of Article 10 of the ECHR makes the Convention dynamic, offering certain flexibility of interpretation. Accordingly, the absence of strictly defined forms of media that fall within Article 10 of the ECHR suggests that no kind of media is left out [1, p. 24]. In other words, all forms of media, including the Internet, fall under the scope of Article 10 of the ECHR.

Regarding Internet censorship, paragraph 2 of Article 10 of the ECHR indicates the conditions for permissible limitations of the freedom of expression and information. The extended interpretation of the implementation of paragraph 2 of Article 10 of the ECHR in the Internet domain was provided by the Recommendation of the Committee of Ministers to member States on Internet freedom (2016). Provision 2.4 of the Recommendation clarified that any action which *prima facie* limits an individual's right to freedom of expression online must be consistent with the principles of legality, legitimacy, necessity and proportionality, enumerated in paragraph 2 of Article 10 of the European Convention on Human Rights [15]. For that to be the case, the three requirements ought to be fulfilled – the so-called three-part, cumulative test. That is to say [15]:

1. a restrictive measure has to be provided by law in a narrowly defined and unequivocal manner.
2. a restrictive measure must pursue at least one of the legitimate objectives set out in the ECHR.
3. a restrictive measure ought to be necessary in a democratic society, with necessity implying the least restrictive proportionate measure needed to meet the pursued legitimate objective.

Having analyzed the policy frameworks towards the Internet censorship undertaken by the Council

of Europe and the United Nations, respectively, one can safely conclude that both organizations adopted the same approaches concerning restrictions of the right to freedom of expression online. More explicitly, both the CoE and the UN apply the three-part, cumulative test to determine the conditions for acceptable Internet restrictions.

**Conclusion.** Legal mechanisms for defining the role of states in Internet governance and protecting an individual's right to freedom of expression online, which have been elaborated within the United Nations and the Council of Europe, are similar and mutually reinforcing. To be more specific, the UN and the CoE endorse the multi-stakeholder approach to Internet policy-making, which allows for equal participation of states, private sector, and civil society in Internet governance. Additionally, the UN and the CoE have developed a substantial soft law and hard law basis obliging states to protect the right to freedom of expression, as stipulated by Articles 19 of the UDHR and the ICCPR (within the UN), as well as Article 10 of the ECHR (within the CoE), both offline and online. Besides, while interpreting the freedom of expression online, both organizations define the term broadly to cover the freedom of opinion and freedom of information. The same approach has been reiterated by the ECtHR case law. With respect to Internet censorship, both the UN and the CoE apply identical policy frameworks concerning the permissible limitations of the right to freedom of expression online. More specifically, the organizations indicate that any restriction of the freedom of expression on the Internet must conform to the three-part, cumulative test criteria: legality, legitimacy, necessity, and proportionality.

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