Human Rights Online: Redefining the Concept of Freedom of Expression in the Digital Age*

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* For purposes of the given research, the following terms will be used interchangeably: 1) Freedom of expression and freedom of speech; 2) The right to freedom of expression and the right to freedom of speech; 3) The Internet, online space and cyberspace

DECLARATION FORM

The work I have submitted is my own effort. I certify that all the material in the Dissertation which is not my own work has been identified and acknowledged. No materials are included for which a degree has been previously conferred upon me.

Signed: Giorgi Chitidze Date: May 22, 2015

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ABSTRACT

The Internet is undoubtedly one of the most widespread and commonly used tools for expression. The unique characteristics of cyberspace provide individuals with endless possibilities to deliver their ideas and opinions to anyone willing to listen across borders at relatively low cost, more so than has ever been before in the history of mankind. However, as with any powerful innovation the Internet has a potential for abuse. Therefore, a fair balance between protection of the right to freedom of expression and other competing interests should be established.

In this regard, the present study has concentrated on the particular issue of freedom of expression on the Internet. The aim of this research was to explore the interrelation between the Internet and contemporary human rights law, particularly exploring and analyzing current legal trends towards the right to freedom of expression online. Further, this study has examined the influence of human rights discourse on Internet technologies, observing that current legal standards of free speech should not be simply transferred, but the new rules need to be enacted to solve problematic issues with regard to freedom of expression online. Finally, this research has emphasized that redefining the concept of freedom of expression in relation to the Internet could eliminate or substantively diminish the gap between policy (normative framework) and practice in this field.

Key words

Freedom of expression; Internet; Human Rights; Georgia

LIST OF ACRONYMS

AU	African Union
CCG	Constitutional Court of Georgia
COE	Council Of Europe
ECJ	European Union Court of Justice
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
HRC	Human Rights Committee
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	international Covenant on Civil and Political Rights
ICANN	The Internet Corporation for Assigned Names and Numbers
ITU	international Telecommunications Union
IWS	Internet World Stats
MES	The Ministry of Education and Science of Georgia
MOJ	The Ministry of Justice of Georgia
NGO	Non-Governmental Organization
OAS	Organization of American States
OSCE	Organization for Security and Cooperation in Europe
OSGF	Open Society Georgia Foundation
TI	Transparency International Georgia
POG	The Parliament of Georgia
RWB	Reporters Without Boarders
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council

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CHAPTER ONE

1. INTRODUCTION

Freedom of opinion and freedom of expression is a cornerstone of every free and democratic society (HRC, 2011). This statement has also been recognized by the international community almost 60 years ago, with the adoption of the Universal Declaration of Human Rights. The declaration entails, along with other rights, the right to freedom of opinion and expression. Article 19 of the mentioned declaration states: *"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"* (UNGA, 1948). The right to freedom of opinion and expression has also been widely recognized by international human rights law. The International Covenant on Civil and Political Rights (UNGA, 1966a), the European Convention on Human Rights and Fundamental Freedoms (COE, 1950), the American Convention on Human Rights (OAS, 1969), the African Charter on Human and Peoples' Rights (AU, 1998) and hundreds of other international legal instruments expressly recognize the universality of the right to freedom of expression and the need to protect it universally, regardless of frontiers.

The essence of free expression is to enable everyone to seek, receive and impart information and ideas of all kinds freely, by any form and means accessible for mankind in a given time-period. In this regard, very few technologies have had such a revolutionary impact on free speech as the Internet has in modern society (UNHRC, 2011). The pace of change in Internet technologies is accelerating. According to the International Telecommunications Union, the total number of Internet users worldwide had reached almost 3 billion by the end of 2014 (ITU, 2014). At the same time, users of Facebook and Twitter, the biggest social networking platforms, constitute 1.44 billion (Zuckerberg, 2015) and 302 million respectively (Statista, 2015). Unlike traditional mediums of communication, the Internet enables its users to interact to each other, rather than being limited to having a one-way transmission of information only (UNHRC, 2011).

Moreover, as the OAS Special Rapporteur for Freedom of Expression considers, the Internet has been developed by using such principles that have enabled the creation of an open, neutral and decentralized online environment. Therefore, it is necessary to maintain these basic characteristics of the original environment by creating regulations which are based on a dialog and mutual cooperation of different actors (IACHR, 2013). Apart from the question of the lack of regulation of the Internet – which without any doubt is necessary - even existing legal norms and standards have international law problems (Land, 2013).

In this regard, the present study concentrates on the particular issue of freedom of expression on the Internet. The aim of this research is to explore the interrelation between the Internet and contemporary human rights law, particularly exploring and analyzing current legal trends towards the right to freedom of expression online. Further, this study will examine the influence of human rights discourse on Internet technologies, observing that current legal standards of free speech "cannot be simply transferred to the Internet, but, rather, need to be specifically designed for it" (IACHR, 2013:5). Finally, this research emphasizes that redefining the concept of freedom of expression in relation to the Internet could eliminate or substantively diminish the gap between policy (normative framework) and practice in this field.

1.1 Freedom of Expression as a Human Right

The concept of freedom of expression has a long history before it was recognized as a fundamental human right by the international community, and has been entrenched in various legal documents. While discussing a Kantian conception of free speech, Varden (2010) argues that Kantian perspective may contribute to the current debate on free speech; particularly, it gives us a possibility to draw clear lines between virtue and right and between private and public right. The usage of that philosophical foundation might contribute to the effective struggle with seditious speech, hate speech, harassment, defamation and blackmail.

Moreover, as Oozeer (2014) clearly demonstrates, the justification for freedom of expression is centered around the liberal understanding that the issues related to moral choice must be left

solely to individuals. Thus, no matter whether the argument derives from Rawl's social contract theory or Dworkin's assumption that the State has a duty to treat its citizens equally, freedom of expression exists as a basic human right and it defends all kinds of speech and other forms of expression.

Apart from the theoretical and philosophical foundations, the concept of free expression has been successfully translated in legal terms and incorporated in various jurisdictions across the world. Thus, for example, in the case of *Abrams v United States,* in the US Supreme Court, Justice Holmes stated:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out (SupremeCourt, 1919).

In the case of *R v Secretary of State for the Home Department, Ex Parte Simms* from the UK, Lord Steyn sat out that individuals cannot develop either morally or intellectually unless they have the opportunity to express their views and debate with each other (Oozeer, 2014). Similarly, the Canadian courts declared that:

> Freedom of expression, as a principle, pre-dates the Charter. It has been called "the matrix, the indispensable condition of nearly every other form of freedom," and "little less vital to man's mind and spirit than breathing is to his physical existence"" (Karen, 2005:480).

These are only a few examples of how the concept of freedom of expression is commonly embraced by different countries and societies. Although freedom of expression plays a very important role in a modern democratic society, it is not an absolute right. For example, Article

19(3) of the ICCPR states that the right to freedom of opinion and expression may be subject to certain restrictions which are provided by law and are necessary for the respect of the rights or reputations of others: for the protection of national security or of public order (order public), or of public health or morals (UNGA, 1966a). Similar limitations and restrictions are found in other international and domestic legal documents.

I will examine the issues related to restrictions on free expression in the context of Internet expression in a little more detail below (in Chapter IV); however, what is important to note is that examining the right to free speech might be illusory or delusional if individuals do not have the possibility to use any possible means of communication, whether these are traditional mediums such as newspapers, radio or TV broadcasting, or the Internet, mobile networks and/or any other contemporary devices.

1.2 The Internet as a Tool of Expression

The Internet is undoubtedly one of the most widespread and commonly used tools for expression. As mentioned before, the unique characteristics of cyberspace provide individuals with endless possibilities to deliver their ideas and opinions to anyone willing to listen across borders at relatively low cost, more so than has ever been the case before (Dickerson, 2009). Some supporters of cyberspace (Cyberians) have even gone further, arguing that online space might constitute a restructuring of the political institutions, avoiding state-adopted laws and challenging the territorial sovereignty of nation states (Netanel, 2000).

However, it is important to note how the issues related to the Internet can be seen through the lens of human rights discourse. Despite the unique nature and characteristics of the Internet that enable it to serve as a vehicle for promoting free expression, as well as to bring significant changes in political, social, economic and cultural development (IACHR, 2013), as with any powerful innovation, it also has a great potential for abuse (Dickerson, 2009). Therefore, in particular cases and situations it is necessary to find something of a balance between the proper functioning of the Internet and the protection of human rights, including, but not limited to, the

right to freedom of expression online and relevant competing interests such as the protection of others' rights and national security interests.

Contemporary human rights discourse, especially human rights law, addresses these issues and suggests some, albeit very limited, solutions to that problem. Thus, for example, the UN has established the Internet Governance Forum (IGF) in order to deal with existing challenges relating to the Internet. It is a very good platform to bring different people from various stakeholder groups and discuss current problems and challenges in the field.

Moreover, HRC, in its General Comment No.34, addressed the issues of the development of modern technologies, clearly indicating that State parties should take into account that the developments in information and communication technologies have substantively changed communication practices around the world (HRC, 2011). Similarly, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression issued two reports on key trends and challenges to the rights of individuals to seek, receive and impart information and ideas of all kinds through the Internet in 2011 (UNHRC, 2011) and 2013 (UNHRC, 2013) respectively.

Furthermore, the OSCE Special Representative on Freedom of the Media (OSCE, 2011), the OAS Special Rapporteur on Freedom of Expression (IACHR, 2013) and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information addressed several times, separately as well as in their joint declarations (UN Special Rapporteur on Freedom of Opinion and Expression et al., 2011), the importance of online space and the protection of the right to freedom of expression on the Internet.

On 29 June, 2012 the UNHRC adopted a landmark resolution on the "Promotion, Protection and Enjoyment of Human Rights on the Internet" (A/HRC/20/L.13). The resolution states that human rights apply both "online and offline", and must be respected. The right to freedom of expression constitutes the core of the resolution as the *"rapid pace of technological development enables individuals all over the world to use new information and communications technologies"*.

An adoption of international legal instruments or addressing the issues at international level, albeit very important, may not be enough for the successful implementation of those policies in everyday life. The concept of human rights online in general, and freedom of expression in particular, is relatively new, and was built on the presumption that guaranteeing full access to the Internet, as well as transferring existing legal standards to online space, would constitute better protection of the right to free speech.

The main weakness of the given approach lies at the heart of the ignorance regarding the peculiarities of cyberspace. The notion that the same rights that people have offline must also be protected online might be considered as a fragmented solution to the whole puzzle. In the next section below, I will try to emphasize the key problems related to the protection of freedom of expression on the Internet.

1.3 Formulation of the Problem

Despite the existence of regulations on freedom of expression online, the rapid pace of development of digital technologies makes those regulations either ineffective to tackle the current challenges of human rights protection online or renders them too useless to be applied at all. Nor are those legal rules formulated with sufficient precision to enable different actors such as states, private Internet enterprises or even Internet users to regulate their conduct in order to avoid unlawful actions and human rights violations, especially in light of the right to freedom of expression.

Regardless of whether states are interfering in the free flow of information for political considerations and trying to shut down the voices of people in cyberspace (Weber, 2011), or whether private enterprises such as ICANN are trying to restrict the freedom of expression on the Internet (Nunziato, 2003), even the usage of the Internet by individuals to commit unlawful actions (ECtHR, 2013) should not be justified. However, international regulations which are in place today lack the ability to address these practices and solve problems effectively. Hence, deep and comprehensive analysis of the effectiveness of existing legal standards in relation to

freedom of expression will determine what new rules the international community needs to move towards free expression on the Internet and how this should be done.

Moreover, another problem which could arise due to the absence of clear rules and legal regulations is the substantive gap between policy (normative framework) and practice at the level of nation states with regard to freedom of expression, especially in the light of Internet expression. The case study provided in the given research (in Chapter V) could be used to emphasize the relevance of the issue at hand.

Accordingly, two basic questions should be examined within the given research:

- What new rules need to be elaborated for better protection of the right to freedom of expression online?
- How could adoption of the new rules eliminate or substantively diminish the gap between policy (normative framework) and practice in relation to freedom of expression online?

1.4 Study Overview

The paper is designed in the following structure to answer the research questions. A brief overview of each chapter is provided to better understand the essence of the given research.

Chapter I: The first chapter provides a brief overview about the concept of freedom of expression, its meaning and legal status. This chapter also emphasizes the relevance of the Internet for freedom of expression and highlights the main problems related to the protection of the right to freedom of expression online.

Chapter II: This chapter deals with the methodological aspect of the given research. The given chapter explains why certain methods have been chosen for this research, their relevance and applicability to the topic of the paper.

Chapter III: The third chapter explains the legal and theoretical framework of the research. As the given dissertation is based mostly on texts, it is important to identify a particular set of theories and use them as guidance for further research. Also, it is necessary to discuss the existing body of knowledge and identify the aims, research questions and limitations of the research.

Chapter IV: This chapter will explain the concept of freedom of expression online by providing in-depth analysis of the following issues: the key features of the Internet; identifying responsible actors for the protection of the right to freedom of expression on the Internet and exploring restrictions and liabilities imposed on free expression in cyberspace.

Chapter V: This chapter provides the case-study research which is strongly related to the second research question. In particular, this part of the research aims to demonstrate the substantive gap between policy (normative framework) and practice in relation to Internet expression in the example of Georgia.

Chapter VI: This chapter concludes the answers and findings about the research questions and presents some recommendations with regard to freedom of expression online.

CHAPTER TWO

1. METHODOLOGY

1.1 Qualitative Content Analysis

As the given study is based purely on texts and aims to identify the effectiveness of the functioning of legal rules (written regulations) in force, this research will use qualitative content analysis to answer the first research question. Qualitative content analysis is a technique used for observing the content or information given in written documents (Neuman, 2014). It has been used as a research method since the 18th century and its primary goal is to "provide knowledge

and understanding of the phenomenon under study" (Hsieh and Shannon, 2005:1278). Moreover, as Ghimire (2013:8) points out, while citing Bryman (2004:542):

> An approach to documents that emphasizes the role of the investigator in the construction of the meaning of and in texts. There is an emphasis on allowing categories to emerge out of data and on recognizing the significance for understanding the meaning of the context in which an item being analyzed (and the categories derived from it) appeared.

Furthermore, there are three main types of qualitative content analysis: conventional, directed and summative. Conventional content analysis is used when a researcher aims to describe a phenomenon. While using this method of research, relevant theories or other research findings are addressed in the discussion part of the research. The discussion, in turn, entails a summary of how the findings of the study of a researcher contribute to the existing body of knowledge in the particular area of interest (Hsieh and Shannon, 2005).

Conventional content analysis is relevant to answer the first research question. The mentioned research question, as noted above, aims to identify the ineffectiveness of current legal regulations with regard to the protection of the right to freedom of expression on the Internet, and strives to identify possible new rules to address those problematic issues. At the same time, taking into account the fact that the development of Internet technologies is a relatively new issue, as well as the fact that existing literature and materials about human rights on the Internet is somewhat limited, answering this question would enable the researcher to make a significant contribution to the existing body of knowledge. Therefore, conventional content analysis is the best suitable method applicable to the given research.

On the question of the gap between policy (normative framework) and practice with regard to freedom of expression online, another research method, namely case-study research method, needs to be employed. In the next section, I will discuss the relevance of using that particular research technique and its applicability to the second research question.

1.2 Case Study Research

Case-study research entails a study of situations or things in a detailed, varied and extensive manner. It enables a researcher to link abstract ideas with the concrete specifics of the case observed in detail (Neuman, 2014). Moreover, some commentators argue that it is time to move from the 'case study' to the study of the case because *"the study of the case invites a re-think of theoretical assumptions about the way that social life is understood through research and practice"* (Radley and Chamberlain, 2012:390).

Similarly, Neuman (2014) points out that case-study research could produce a theory or constitute a substantive reshape of existing theories. In particular, he identifies three main reasons why this occurs:

> First, as we become very familiar with the in-depth detail of specific cases, we can create/build new theories as well as reshape current theories to complex cases or new situations. Second, when we examine specific cases, the intricate details of social processes and cause-effect relations become more visible. The increased visibility allows us to develop richer, more comprehensive explanations that can capture the complexity of social life. In addition, case studies provide evidence that more effectively depicts complex, multiple-factor events/situations and processes that occur over time and space. Case-study research also can incorporate an entire situation and multiple perspectives within it.

Thus, the case-study method is relevant for the given research for two purposes. First, the study is based on the theory of the relative universality of human rights, which will be discussed in a little more detail below, in Chapter III. However, what is important to note here is that I will examine whether mentioned theory, in its original sense, is applicable to cyberspace in general

and to the right to freedom of expression online in particular, or if there is a need to reshape the theory in order to make it more suitable to the peculiarities of the Internet.

Once the meaning of the theory might be reshaped, I will also discuss the possibility to redefine the concept of freedom of expression through the lens of the already reshaped theory of the relative universality of human rights. In this sense, I will need to take the meaning of both the concept of the right to freedom of expression and the mentioned theory, and link abstract ideas with the concrete specifics of the case I choose to investigate. The given issues are strongly attached to the first research question, particularly with regard to the possibility of redefinition of the concept of freedom of expression.

Secondly, the method employed here will help me to explore the gap between policy (normative framework) and practice in relation to freedom of expression in cyberspace in the example of Georgia, and answer the second research question. This, in turn, is strongly related to the first research question as these two questions are interrelated and interdependent, because both of them are intended to address the problem of the protection of the right to freedom of expression on the Internet from different angles.

Further, one may ask why the Georgian case is relevant for the given research. Basically, there are two main reasons for doing that. First, the Georgian case is a very ambivalent one. With the adoption of the Constitution in 1995, everyone is entitled to receive and disseminate information, to express and disseminate his/her opinion orally, in writing, or otherwise; the mass media shall be free, according to the Constitution. Censorship shall be inadmissible (Constitution of Georgia, 1995). Moreover, in 2004 Georgia adopted the law On Freedom of Speech and Expression, which is considered as one of the most liberal regulations in the world. For example, the mentioned bill grants absolute freedom of thought and qualified privilege to appeal of expression. It also states that the *"appeal shall lead to legal liability only when a person commits a deliberate action that creates obvious, direct and essential danger with illegal consequence"* (POG, 2004).

According to FreedomHouse (2015), Georgia is a partly free country in relation to press freedom and free with regard to the Internet. The latest report of RWB (2015) indicates that *"in Europe, Georgia (69th, up 15) continued to rise for the third year running and is now close to where it was before the 2008 war. It is enjoying the fruits of reforms undertaken after a change of government through elections, but it continues to be handicapped by the extreme polarization of its news media"*. It should also be noted that among Eastern Partnership Agreement countries, Georgia remains the leader in terms of having the highest rate of media freedom index in comparison to Ukraine, Azerbaijan, Armenia, Moldova and Belarus (EU, 2014).

However, there is no clear relation between policy (normative framework) and practice towards the freedom of expression, including Internet expression. On one hand, the number of Internet users has increased from 20,000 (in 2000) to 2,188,131 (30 Jun, 2014), as documented by the IWS (2014). At the same time, Georgia is trying to promote open government initiatives, including e-governance, electronic public services and so forth. Georgia is also a member of the Open Government Partnership and the Ministry of Justice has recently presented the open government national action plan of 2014-2015 (MOJ, 2014). Similarly, the Ministry of Education and Science is implementing different projects to promote informational technologies in schools, including free access to the Internet, delivering free personal computers to all public schools throughout the country, and providing special training for teachers on using the Internet and electronic media (MES, 2013).

On the other hand, before 2012 there were regulations in force which allowed relevant bodies (persons) carrying out operational-investigative activity to monitor a closed-type Internet-communication without the permission of the court (CCG, 2012). On 24 October, 2012, those regulations were declared unconstitutional by the Constitutional Court of Georgia. Further, after the parliamentary elections in 2012, the new government destroyed 144 files with 180 hours of recordings, containing scenes of intimate character. The files contained illegal surveillance recordings of private conversations by celebrities, politicians and journalists made by the Interior Ministry (RFERL, 2013).

Nevertheless, in December, 2014 the new government introduced amendments to the legislation, allowing the Interior Ministry and other relevant bodies live monitoring of electronic communications, including Internet communications, by using different program interfaces and without the permission of the court. Those regulations have been appealed to the Constitutional Court of Georgia and I had the privilege to be personally engaged in drafting the mentioned complaint. Furthermore, at the time of writing of this paper, the Parliament of Georgia has enacted some amendments to the Criminal Code of Georgia in order to criminalize certain types of expression made in public, including statements made in cyberspace.

Secondly, I had an opportunity to work as a chief legal adviser at the Constitutional Court of Georgia and I was engaged in the drafting of all decisions and judgments produced by the court after 2010 with regard to the right to freedom of expression. Hence, I am very familiar with current trends, developments and challenges in Georgia in this field. Also, due to the limited time and capabilities in which this research should have been produced, I preferred to conduct a case study about the context I am most familiar with.

In light of the above, I've decided to investigate the Georgian case and put all findings coming from this study into the framework of the given research.

1.3 Sampling

Although the paper is theoretical and purely based on texts, it is still necessary to explain why some particular texts are used in the given research and others are excluded. On the question of conducting research on legal issues, I have identified the main legal instruments of contemporary international law. The UN documents have been chosen because the UN is the biggest international organization and is responsible for determining the rules of the game on human rights issues, including the right to freedom of expression online. Similarly, the Council of Europe and the Organization of American States are powerful regional entities operating via their judicial bodies, which in turn are capable of delivering mandatory judgments and decisions to their state parties on human rights issues.

As to the question of using theoretical materials such as books, journal articles and other scholarly works, it should be noted that the topic of the given research is relatively new, therefore materials are somewhat limited as well. Thus, I tried to choose the most relevant works and analyze them together with other textual material in order to make the research more credible and coherent.

With regard to the case-study research, as it has been already noted above, I am very familiar with Georgian reality, I am fluent in Georgian, and therefore I will have free access to all relevant data necessary to conduct credible research.

1.4 Ethical Consideration

Due to the limited time and resources, I will not be able to conduct field work and/or interviews. Therefore, ethical issues are not likely to arise. Moreover, conducting a paper-based research, i.e., analyzing only textual materials without direct communication with decision-makers, could be considered as the limitation of both methods used throughout the given research.

CHAPTER THREE

2. THEORETICAL FRAMEWORK

2.1 Theory of the Relative Universality of Human Rights

As mentioned before, the research will be based on a theory of *The Relative Universality of Human Rights*, which has been elaborated by the leading American scholar Jack Donnelly. The main concept of this theory is that possession and enforcement of human rights need to be distinguished. The universal possession of human rights does not necessarily mean that they are also enforced universally to the same amount and extent by all states and/or societies throughout the world. Norm creation has been internationalized; however, the global human rights regime still relies on national implementations of globally recognized human rights. Therefore, different interpretations of human rights in a country's individual process of enforcement do not contradict the notion of universal and equal human rights. On the contrary, if relativist arguments (which will be analyzed in detail further below) need to be considered, then this would always be related to the enforcement, not possession, of human rights (Donnelly, 2007).

Moreover, in order to understand the relevance of this theory, I will examine a more detailed overview of the most discussed issue in the contemporary theory of human rights, namely the debates over universalism versus cultural relativism. The relevant sub-sections below outline the more concrete arguments of this debate.

2.1.1 The Universalist Approach

The concept of universal rights is encapsulated in a basic formula that human rights are rights that a person has simply because he/she is human. This proposition leads us to the conclusion that human rights are equal because we either are or are not human beings, equally. Moreover, it also emphasizes that human rights are universal and inalienable rights, due to the fact that being

a human is defined by nature and is not something that could be earned or be lost (Donnelly, 2007).

This notion is strongly entrenched in the core human rights instruments. According to the preamble of the UDHR *"...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". That also constitutes a foundation of the two main covenants adopted in 1966 (Baehr, 2002). Furthermore, Article 1 of the mentioned declaration states that "all human beings are equal in rights".* The Vienna Declaration reaffirms that *"all human rights are universal, indivisible and interdependent"* (Freeman, 2002).

However, as Freeman (2002) rightly notes, the legal wording of human rights documents is often vague and controversial. For example, Article 18 of the UDHR says that everyone has the right to freedom of religion, although some religious groups (and religions) do not recognize the right of its members to change their religion. It simply means that the implementation of some rights would ultimately require the violation of others. Therefore, universal and equal rights for all might not work well in practice.

However, the simplistic approach that human rights do not consider cultural difference and might be applied to all human beings regardless of context, strengthens the criticism that *"human rights are merely part of a Western, imperialist project, and reflect discourses that are predominantly Western, patriarchal, modernist, and individualist"* (Ife, 2007:76).

In reply to this objection, Baehr (2002) demonstrates that the concept of human rights, although originally Western, have been accepted or will be accepted by non-Western societies as well. Donnelly (2007) even suggests that the most societies throughout the world have already practiced human rights during their entire history. Thus, the argument that the concept of human rights is Western-biased is not valid and could not be used against the universalism and equality of human rights. The next sub-section briefly underlines the key counter-arguments on the universalism of human rights from the cultural relativist perspectives.

2.1.2 The Cultural Relativist Approach

The theory of cultural relativism gained importance in the human rights debate when the AAA produced its famous "Statement on Human Rights". This statement has rejected the possibility of adopting the UDHR on three grounds. First, the statement argued that anthropology had shown that moral and ethical systems are different in form and content, therefore the normative universality of human rights could not apply to all human beings regardless of cultural context. Second, anthropology could not contribute to a project that required prescriptive judgments about particular cultural practices. Third, the consequences of adopting the universal declaration would lead to the denial of freedom of individuals or cultures whose ideals are clearly incompatible with the standards enshrined in the declaration (Goodale, 2006).

Basically, cultural relativism states that universal human rights do not exist, as the concept has emerged in Western societies and belongs to only one culture. At the same time, adherents of this approach maintain that "standards and values are relative to the culture from which they derive" (Messer, 1997:293); not all societies necessarily consider human rights as the best possible tool to rule a society. Moreover, as Renteln (1990) points out, universal standards, including human rights, should be challenged because:

> It aimed at getting people to admit that although it may seem to them that their moral principles are self-evidently true, and hence seem to be grounds for passing judgment on other peoples, in fact, the self-evidence of these principles is a kind of illusion (Renteln, 1990:65).

However, taking into consideration the argument that human rights are culturally relative and that they will mean different things in different contexts, this could become an obstacle to intervening in cases of human rights violations for fear of disrespecting other cultures (Ife, 2007). The relativist approach, however, does not preclude the possibility of establishing so-called 'cross-cultural universals' which could be applicable to all cultural groups and communities throughout the world. Renteln (1990) argues that if empirical cross-cultural data could reveal such values, cultural relativism will be compatible with them.

2.1.3 The Main Criticism

The main criticism lies at the heart of the notion that neither universalism nor relativism is capable of handling the human rights challenges both in theory and in practice. Goodhart (2008) suggests that human rights are neither relative nor universal. His account on human rights says nothing about their moral and metaphysical status. Instead, he argues that *"as human rights become more inclusive and the range of threats to which they respond more general, the number of contexts in which they might be appealing will continue to expand"* (Goodhart, 2008:193). Thus, human rights are legitimate due to their global appeal. However, this argument is not convincing, as it simply ignores the main problem related to the lack of philosophical (scientific) foundations of human rights, which mainly generates tensions and difficulties regarding their protection in practice.

Another way to solve a resistance between universalism and relativism is embedded in the concept of multiculturalism. Multiculturalism calls for respecting and celebrating the culture of the individual in the public sphere. Xanthaki (2010) argues that states have an obligation under international law to equally protect every culture, including those of minorities and indigenous peoples. The multiplicity of cultural frameworks encourages the development of cultural norms and values, which are consistent with the common values that mankind has agreed upon. In cases of clashes between the cultural practice of minorities and majority rights, decisions on which right will prevail should be made on a case-by-case basis by applying established standards rather than a pre-determined hierarchy (Xanthaki, 2010). Although multiculturalism can play a very important role in protecting the rights of different cultural groups within a society, it still requires an adoption of some universal values to which cultural practices should be consistent. Thus, it moves us back to the debate over universalism and relativism.

3. The Relevance of Theory

The theory of the relative universality of human rights, in its original sense, is somewhere between universalism and cultural relativism. This approach suggests a somewhat compromised attitude towards the concept of human rights and it is applicable to all rights, including the right to freedom of expression. On the other hand, the Internet is a global space designed to promote

the free flow of information across the borders of nation states and different societies. Among the unique characteristics of the Internet are: universal access, net-neutrality, pluralism, non-discrimination, private control, and the non-existence of borders and jurisdictions. As mentioned before, the same principles need to be taken into account while constructing the meaning, purpose and scope of human rights (especially the right to freedom of expression) on the Internet.

Therefore, it is worth analyzing whether it is possible to clearly distinguish the possession and enforcement of human rights in relation to cyberspace, as required by the mentioned theory. Placing the given research in this theoretical framework, as well as using the research methods employed, will enable the researcher to do the following: a) check the validity of the theory with regard to freedom of expression online; and b) discuss the opportunity to redefine the theory in a manner more suitable to online space.

CHAPTER FOUR

4. THE CONCEPT OF FREEDOM OF EXPRESSION ONLINE

4.1 The Key Features of the Internet:

This chapter and the next two chapters discuss the findings of the research with regard to freedom of expression online. The main findings in relation to the research questions will be presented using the methodology techniques discussed in previous chapters.

In this section, the key features that are vital for the proper functioning of the Internet will be analyzed. It is important to highlight these core principles of online space in order to better understand the relationship between human rights, especially the right to freedom of expression and online space. The four main principles such as: universal access, the e2e principle (net neutrality), pluralism and non-discrimination will be discussed further below.

4.1.1 Universal Access

Universal access to online space is one of the most important preconditions to use the Internet as a medium of expression. According to principle 2 of the Declaration of Principles on Freedom of Expression, *"all people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition"* (OAS, 2000). Moreover, the office of the OAS Special Rapporteur on Freedom of Expression considers that particular steps should be taken progressively in order to promote an universal access to the all information available on the Internet and take out all barriers to access to infrastructure, technological devices and information online (IACHR, 2013). Further, the importance of universal access with regard to the Internet has been recognized as an "essential foundation for an inclusive information society by the World Summit on the Information Society (WSIS, 2003-2005).

However, the main weakness of the current approach is non-recognition of universal access to the Internet as an independent legal right. Nor it is recognized as a part of the right to freedom of expression in the context of States' positive obligation to provide such an access to all users at least progressively, to the maximum of its available resources. Notably, such an approach is already recognized in relation to social, economic and cultural rights because promotion and protection of those rights are strongly attached to economic resources available to the particular country. The clear example of this is the International Covenant on Economic, Social and Cultural Rights, in particular Article 2 of the mentioned Covenant states: *"each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures"* (UNGA, 1966c).

Taking into account all above mentioned, maintaining the principle of universal access is vital for the proper functioning of the Internet as well as for the protection of the right to freedom of expression online. However, existing legal standards need to be substantively redefined to guarantee universal access to the internet. The issues related to this problem will be discussed in details later on in the given research.

4.1.2 THE E2E Principle (Net Neutrality)

Another major unique characteristic of the internet is the end-to-end ("e2e") principle. This is a theoretical concept which means that the Internet should function simply as a carrier by transferring information from sender (content provider) to receiver. Hence, all data packets sent through online space are to be treated on an equal basis regardless of their content (Dickerson, 2009). According to this view, the Internet is a neutral platform for sharing and disseminating information freely, regardless of frontiers. Initially, that was a main purpose of creating and designing a cyberspace and still remains a sacred concept for believers in the openness of online space (Palfrey and Rogoyski, 2006). The famous declaration on the Independence of Cyberspace

proclaimed by Parlow (1996) echoes the idea of maintaining the e2e principle as a feature of cyberspace. In particular, the declaration states:

> Cyberspace consists of transactions, relationships, and thought itself, arrayed like a standing wave in the web of our communications. Ours is a world that is both everywhere and nowhere, but it is not where bodies live (Parlow, 1996:2).

In spite of being anarchistic and somewhat utopian manifesto, it was an important document which firstly portrayed an enormous potential of the Internet in becoming an indispensable part of everyday lives of individuals. And the time has proved the validity of that statement. However, the e2e principle remained a purely technical term which has never been translated into policy documents or legal norms. This principle has been loosely translated in political term of "net neutrality" being widely used in contemporary human rights law.

The difference between those two terms were determined as imposing different modes of control over the Internet used from early 1990s until present time has produced different consequences in relation to the e2e principle (Palfrey and Rogoyski, 2006). According to Palfrey and Rogoyski (2006) there are five main approaches towards Internet regulation, in particular: a) banning transmission of certain types of information which are harmful to certain segment of society; b) banning possession or intentional receipt of such information; c) restricting some sort of information to be sent without additional specific information; d) Blocking certain packets as they pass through the Internet; and e) limiting the free flow information directly by States.

The first three types of restriction do not necessarily contradict to the e2e principle as they are intended to regulate the activities at the nodes (end points) of the network. Such restrictions, for instance, includes the ban on sending and receiving child pornography; redistributing an unlawful copyright materials; restricting sending spam e-mails to users and other similar activities (Palfrey and Rogoyski, 2006).

Unlike the first modes of control of the Internet, the second cluster of restrictions is designed to impose more control at the middle of the network. This approach, without any doubt, is more effective in terms of regulating a cyberspace and consuming less human and material resources. The primary benefit of such a trend is that, the regulations are stationed at midpoints of the network rather than at the billion end-points which, in turn, increases an efficiency of restrictions. Therefore, it is being actively used by different countries and that practices are unlikely to be changed in the reasonable future (Palfrey and Rogoyski, 2006).

However, increasing the role of private corporations in regulating the content of information as it pass though the network might pose a significant threat on effective examination of the right to freedom of expression on the Internet. Taking into account the fact that these ISPs and intermediaries are often based in other jurisdictions as well as their views on free expression might not be in conformity with human rights law, could create more obstacles for people willing to use the internet to raise their voices and share their views through the most important mediums of information such as the Internet (IACHR, 2013). Similarly, the usage of the same regulation approaches by States does not constitute any less dangerous threat on enjoying the right to free speech on the internet.

The issues related to the responsibilities of States and private enterprises will be discussed in a little more detail in the different sections below. However what is important to note here is that, despite the fact, whether it is more effective to use the "e2e principle" entailing less regulation possibilities or "net-neutrality" with relatively broad capacity of imposing more tough restrictions on the Internet, preserving the internet as a neutral platform of expression shall always be uphold. As the IACtHR outlined in the case of *Kimel v Argentina, "restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression"* (IACtHR, 2008). Therefore, it is of utmost importance to preserve both principles as the key feature of the internet as well an integral part of the right to freedom of expression online.

4.1.3 Pluralism

The internet has an opportunity to enable unlimited number of people to participate in the virtual marketplace of ideas. It is one of the key features of the internet that need to be remained unchallenged concept if a modern society want to keep the Internet as a medium of expression. Every attempt to exclude certain group of people from online space at any ground and in contradiction to the principle of maximum pluralism will automatically affect the functioning of cyberspace and it will lose its original goal to serve as a universal, neutral and global platform to seek, receive and impart information freely, without any boarders and jurisdictions.

Therefore, it is up to the States and other relevant actors to preserve Internet's necessary conditions for promoting and maintaining informational pluralism (IACHR, 2013). In this sense, the pluralism in not only applicable to users participating in the global network but to ideas and information they are willing to share through the Internet as number and diversity of voices is both means and end of modern democratic society.

In this regard, the ECtHR in its decision on the case of *Hertel v. Switzerland* (no. 25181/94) stated that:

> Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...

4.1.4 Non-Discrimination

The non-discrimination clause with regard to the Internet in applicable to both prohibition of discrimination in the treatment of *"Internet data, based on the device content, author, origin and/or destination of the content, service or application"* (UN Special Rapporteur on Freedom of Opinion and Expression et al., 2011:2) and discrimination that may deprive certain groups to participate in online network system (IACHR, 2013). Moreover, the infrastructure and architecture of the Internet was originally designed to be available to everyone regardless of race, color, sex, nationality, ethnicity, sexual orientation and other distinctive feature. Nevertheless, there are still people who do not have a free access to online space. It is important to eliminate such practices especially with regard to people belonging to minorities or vulnerable groups or part of the society expressing criticism on matters of public interests (IACHR, 2013).

Another reason of having discrimination practices on the Internet is the privatized nature of cyberspace. The Internet is controlled mostly by private enterprises which, in turn, have only contractual obligations to their clients. At the same time, there is no mandatory international legal instrument on the responsibility of business sector for human rights violation. The orthodox view on the relationship between Internet users and ISPs is based on "free market" logic when the market is able to tackle all problematic issues, including those affecting the users' right to freedom of expression online as a result of regulatory activities of private enterprises (Dickerson, 2009). Although, it is at some degree a strong argument, relying purely on the free market and its "indivisible hand" to tackle the issues of discrimination in online space, might not solve the whole problem in this regard. The issues related to responsibilities of private enterprises as well as a role of the free market in online space regulation, will be discussed in the next section below.

5. Responsible Actors for the Protection of the Right to Freedom of Expression on the Internet

5.1 States

States are primarily responsible for the protection of the right to freedom of expression online. The obligation to respect and protect freedom of expression is binding on every state as a whole (HRC, 2011). As Article 19(3) of the ICCPR states, the restrictions imposed on freedom of expression must be provided by law, can only be imposed for one of the grounds set out in the mentioned article and must satisfy the strict test of necessity and proportionality (HRC, 2011).
The established standard of the so-called three step model of assessment of interference into the right to freedom of expression has been established and addressed by human rights courts and other judicial bodies at every level – national, regional and/or international.

However, while that model might be effective in addressing violations of the right to freedom of expression offline, it might not be as effective in cyberspace. Due to the specialties and unique characteristics of the Internet, states do not have as much power to control online space by addressing those instruments as are being used to solve problems in offline space. Nor do they have sufficient enforcement power and mechanisms to do so. As the Internet is a heavily privatized medium of communication, there is a need to re-think the role of states in addressing the issues of protection and enforcement of the right to freedom of expression online. In the next section, I will reflect more on these issues while analyzing the role of private enterprises with regard to freedom of expression online.

However, it also need be noted that "*states should stop hiding behind private companies and using them to impose practices that violate human rights. The responsibility of states for failing to ensure respect for human rights by private entities and the responsibility of business enterprises in relation to their activities affecting the Internet should both be clarified"* (COE, 2014:38).

5.2 Private Enterprises

In general, the obligation of private enterprises to protect human rights, as well as their responsibility for human rights violations, is one of the most discussed issues in contemporary human rights law. This notion is strongly related to the discussion of globalization and human rights. Globalization is a very complicated process which involves a lot of problematic issues and concerns. The major feature of this process is the rise of the economic, social and political power of corporations. As some commentators pointed out, corporations account for 45 of the 100 largest economies in the world, or 91 of the 150 largest. Therefore, they claim that private enterprises are primarily responsible for human rights violations occurring in the fields in which they operate (Addicott et al., 2012).

Moreover, as to the question of legal instruments, international human rights documents do not contain specific provisions on the human rights obligations of private enterprises. However, there are certain duties imposed on private companies indirectly through obliging nation states to regulate private conduct in the human rights field. Furthermore, such obligations may also derive from voluntary commitments entrenched in different policy documents and codes of conducts, such as the OECD and the ILO codes of conduct for private companies (Addicott et al., 2012). There is also the UN Guiding Principle on Business and Human Rights, which declares that the responsibility to respect human rights is a global standard of conduct for all private enterprises, regardless of the field in which they operate. This standard applies to companies independently of a state's willingness to fulfill their own human rights obligations.

The role of private Internet companies (which includes web hosting companies, ISPs, search engines and social media platforms) in protecting human rights online, especially the right to freedom of expression, might be a crucial one. Without private companies, especially ISPs, there would be no Internet access at all. However, due to their capabilities to provide access to the Internet, private Internet enterprises are under increasing pressure from states and other interest groups (Article19, 2013). The clear example of such pressure, as already discussed above, is when states are trying to impose restrictions at the middle of the network rather than restricting the end-points of online space. Thus, it would be impossible without intermediaries that are enforcing those restrictions in practice.

In order to demonstrate the main weaknesses of contemporary legal standards in addressing the right to freedom of expression online, particularly in light of the obligations of private Internet companies, three practical examples will be discussed: 1) the ECJ decision against Google on the right to be forgotten (ECJ, 2014); 2) the ECHR decision against the Estonian media company Delfi about defamation on the Internet (ECtHR, 2013); and 3) the ICANN panel decision on copyright in online space (Nunziato, 2003).

On May 13, 2014, The European Union Court of Justice (ECJ) delivered its landmark decision against American Internet giant Google stating that, in specific cases, Internet operators are obliged to delete personal information upon individual requests. The court found that according to European Union law, Internet users are entitled to have control over their private data. If they want irrelevant or wrong information about themselves to be deleted, they have the right to request it – even if the information was legally published. Therefore, Google and other search engines ought to evaluate whether the public interest of users to receive that information outweighs the data subject's right to a private life. In the absence of such interest, personal information must be removed.

The decision gained controversial feedback. Google argued that forcing it to remove personal information from the search engine was akin to censorship. The company explained that it does not collect, process or publish any information. The algorithm being used by the search engine compiles existing data that is already available online. As a result, it has no control over personal data distribution and should not be liable, especially if the information has legally been published on the Internet.

Unlike Google, the ECJ judgment was fully welcomed by EU officials. The European Commissioner Viviane Reding stated that *"It was a clear victory for the protection of personal data of Europeans. The ruling confirms the need to bring today's data protection rules from the "digital stone age" into today's modern computing world"* (Reding, 2014).

In general, there is no doubt that Internet users' right to a private life needs to be protected. However, the judgment is neither well-grounded nor effective in terms of the protection of human rights online (Chitidze, 2014).

As already noted above, there are almost 3 billion Internet users all over the world. Online space is being used as one of the most important sources for sharing, receiving and disseminating information. Furthermore, while using the Internet, users expect to get information freely and in a reasonable time period. It constitutes an important pre-condition to the effective realization of the right of freedom of expression, which in turn is also considered as a basic right, along with the right to a private life.

However, the given ruling is problematic in relation to users' right to freedom of expression online. It obliges Google and other search engines **not to** provide information which has already been legally published and is available for free online. In fact, the court decision does not protect data subjects' right to a private life but it, in turn, aims to create additional obstacles for other users to freely get information, although not through the Google search engine but directly from the website where it was initially published.

The single claim of the particular user to be forgotten in Google or in other search engines might not be used as a valid justification to restrict others' rights to freedom of expression, especially the right to get information online. Moreover, the judgment not only violates users' rights to freedom of expression but the rights of Google and other Internet operators to disseminate information and provide an appropriate service to its clients.

By comparison, the US legislation and case-law set up opposite standards in this respect. In particular, the US First Amendment rights provide not only a possibility to receive and disseminate information but also to establish the positive obligation of the State to protect access to information without censorship. Hence, the ECJ decision contradicts those principles, which means that the ruling of the EU court would not be enforced in Google's home land. Therefore, only European users are affected by the restrictions at hand, while others might fully benefit from services provided by Google.

Implementing such restrictions may also cause enormous technical difficulties. A clear example is an attempt of the Turkish government to block Twitter accounts, although many users find alternative ways to flout the ban. Even the President, Abdullah Gül, flouted it himself and posted a series of messages on Twitter saying that *"the shutdown of an entire social platform is unacceptable. Besides, as I have said many times before, it is technically impossible to close*

down communication technologies like Twitter entirely. I hope this measure will not last long" (Guardian, 2014).

The same had happened when the Russian government tried to block the nternet magazine 'Грани.ру. Similar to the Turkish case, the publisher and its users found alternative ways to continue publishing articles online (Lenta.ru, 2014). Thus, it is always possible to avoid any restriction by using proxy servers or other technical means in order to receive and disseminate desirable information online.

Although private enterprises still share a responsibility to protect human rights, they lack the legitimacy and appropriate instruments to do so to a full extent. Google and other companies have neither the competence nor capability to assess whether the public interest of users outweighs the data subject's right to a private life. In essence, the assessment needs to be carried out by an impartial and independent judicial body. Moreover, private Internet enterprises that simply provide technical Internet services should not be liable for content generated and/or shared by others as long as they do not participate directly in unlawful actions (**more conduit principle**) (UN Special Rapporteur on Freedom of Opinion and Expression et al., 2011).

Another case was decided by the ECtHR, where the Court found Delfi, one of the largest news portals on the internet in Estonia, liable for defamatory comments posted by its readers on the website. The court stated that although the article published on the Delfi news portal was a balanced one and contained no offensive language, "*the fact that the comments were posted in reaction to an article published by the applicant company in its professionally-managed news portal run on a commercial basis, the insufficiency of the measures taken by the applicant company to avoid damage being caused to other parties' reputations and to ensure a realistic possibility that the authors of the comments will be held liable, and the moderate sanction imposed on the applicant company, the Court considers that in the present case the domestic courts' finding that the applicant company was liable for the defamatory comments posted by readers on its Internet news portal was a justified and proportionate restriction on the applicant company's right to freedom of expression"(ECtHR, 2013:32).*\

The case decided by the ICANN panel is quite different from those two discussed above. The ICANN is a private entity which is not affiliated to any particular government or state and it is in

charge of registering and maintaining the domain names and IP addresses of websites. This entity also deals with issues related to copyright on the Internet. In particular, *"it empowers the owner of a trademark (or of some other recognized right in a name) to have a domain name removed from a domain name holder by establishing: (1) that the domain name is identical or "confusingly similar" to the trademark at issue; (2) that the domain name holder has no "rights or legitimate interests" regarding the domain name; and (3) that the domain name was registered and is being used in "bad faith"* (Nunziato, 2003:206).

In the case of *Caixa d'Estalvis y Pensions de Barcelona ("La Caixa") v. Namezero.com* (WIPo Case No. D2001-0360), the domain owner registered the web-site Lakaixa.com, in which the letter "C" had been replaced by "K" and the content available on the mentioned website was dedicated to criticize the famous Spanish bank La Caixa. The letter "K" has been used by the domain owner as a symbol of left-wing and anarchist protest in order to criticize the Bank's activities (Nunziato, 2003).

Despite the fact that the owner of the website had a legitimate right to express his critical views on the Internet and thus exercise his right to freedom of expression online in this form, the ICANN panel ruled that *"counterculture meaning of political criticism embodied in converting 'Cs' to 'Ks' would likely be understood only by a minority of Internet users," and advertising to the fact that one of the links on the website at issue was to an (unrelated) commercial service, the panelist found that the domain name was confusingly similar to the trademark, that the domain name holder had no rights or legitimate interests in the domain name, and that the domain name was registered and used in bad faith"* (Nunziato, 2003:210).

Unlike the two cases discussed above, this ruling is a clear example how decisions of private enterprises could also significantly affect users' right to freedom of expression online. This happens because the current legal framework towards those issues is incomplete and ineffective. Further, the analysis of those practical examples has revealed that the theory of the relative universality of human rights, in its original sense, is not applicable to Internet expression and needs to be substantively reshaped.

In particular, the essence of the theory, as previously mentioned, is that possession and enforcement of human rights needs to be distinguished. As the universal nature of the right to freedom of expression online is not challenged in international human rights law, this part of the theory is not problematic in this regard. However, when it comes to the enforcement part, it is not applicable to Internet expression, because due to the unique characteristics and infrastructure of online space, nation states are not and could not be solely responsible for implementing enforcement mechanisms in this regard.

The practical examples analyzed above clearly demonstrate that private enterprises are primarily responsible actors who have both technical capabilities and other necessary means to control cyberspace. Therefore, the impact of their decisions on human rights, especially on the right to freedom of expression online, is much more significant than the decisions of nation states. However, it is obvious that private Internet companies have neither the competence nor the legitimacy to deal with human rights issues in cyberspace. They are not capable of deciding whether there is an infringement of certain rights or not. This question should be left solely to impartial and independent judicial bodies, which are equipped with the necessary knowledge to decide those issues with regard to human rights on the Internet.

At the same time, the responsibilities of private enterprises should not be fully discarded. Rather, the enforcement responsibility on the right to freedom of expression online should be shared among states and private Internet companies in the cause of achieving maximum effectiveness of the protection of that right. This could be done by:

1) recognizing the Internet as a public good rather than an ordinary product falling within the ambit of the supply-and-demand principle; 2) delegating (deputing) a power to regulation of private enterprises in relation to the Internet; and 3) implementing a public-private partnership model in relation to the Internet regulation. Those three conditions are cumulative and should be implemented together.

The recognition of the Internet as a public good will also lead to the recognition of private Internet enterprises as public bodies, exercising public authority in the context of imposing

certain regulations on cyberspace (Lucchi, 2011). It will also change the whole perception about the nature of the Internet, by transforming it from being an ordinary product subject to the contractual agreement between private parties to a public good to which universal access should be guaranteed. Further, it has a particular importance for guaranteeing universal access to online space as declaring the Internet as a public good would oblige states to provide access to it for all, at reasonable conditions and prices.

Delegating (deputing) a power to regulation is a purely legal concept that is used in administrative law. According to this concept, states are entitled to delegate their authority to regulation to private individuals and/or enterprises in particular spheres. For example, when private companies are managing a municipal transportation system they are acting as public bodies in this sphere. They have certain duties and obligations, such as providing access to public transportation to all, protecting the safety and security of commuters and other necessary activities which otherwise would have been an obligation of the State as if it was managing the system to which it gave the authority to private enterprises.

However, while delegating power to regulate Internet space, states should not oblige private enterprises to ascertain whether there was a violation of human rights, including the right to freedom of expression. Private enforcement mechanisms should be abolished. Otherwise, empowering private enterprises with the same enforcement mechanisms might cause a restriction of the right to freedom of expression which is not proportional to the legitimate aims it sought to achieve (Palfrey and Rogoyski, 2006), (UNHRC, 2013).

Therefore, it is important to implement a public-private partnership model which enables the state to deliver a power of regulation to private Internet companies by giving them: a) clear and precise guidelines and standards to solve the issues related to human rights violations on the Internet; b) empowering them to apply to the court and/or any other relevant entity for advisory opinions and professional consultations; c) obliging private Internet enterprises to implement notice-to-notice systems in order to respond to human rights infringements on the Internet properly and in an effective manner. Implementing this model of partnership, on the one hand, will guarantee better protection of human rights, especially the right to freedom of expression

online, and on the other hand would eliminate or at least substantively diminish anti-human rights practices exercised by private Internet companies, such as the decision of the ICANN panel discussed above.

In short, implementing the above mentioned practices would lead to the reshaping of the theory of the universality of human rights in order to be more effective and applicable to deal with the issues of human rights online, especially the right to freedom of expression. It will also lead to the substantive redefining of the concept of freedom of expression by changing the current legal norms in order to guarantee better protection of the right to freedom of expression online.

6. Restriction and Liability on Freedom of Expression Online

The right to freedom of expression, as noted before, is not an absolute right. Any restriction imposed on that right needs to be provided by law, justified on permissible grounds defined by international law and should be proportionate to the legitimate aims it has sought to achieve (UNHRC, 2013). In the given section, I will analyse the effectiveness of restrictions to the right to freedom of expression online with regard to four main areas where such restrictions could usually be applied in both offline and online space: a) privacy; b) defamation; c) copyright infringements; d) national security and public safety interests. However, due to the limited capabilities of the given dissertation, it is impossible to conduct a deep and comprehensive research on each of these aspects. Therefore, a brief overview of each of them and their effectiveness in relation to freedom of expression online will be presented.

The exercise of the right to privacy is very important for the realization of the right to freedom of expression (UNGA, 2014). In order to guarantee online freedom it is important to maintain privacy of people's communication. Indeed, without a private sphere free from arbitrary interference from states or private enterprises, the right to freedom of expression online could not be fully exercised (IACHR, 2013).

Nevertheless, as we've already seen in the example of the ECJ decision, it should not be acceptable to stifle the right to freedom of expression simply because some users do not want information about themselves to be available on Google or any other search engines. It is a clear example that this kind of formulation of the right to privacy should be rejected in online space as it undermines the key feature of the Internet: to be a neutral platform for receiving and disseminating information freely and quickly.

Defamation, as a legitimate ground to restrict the right to freedom of expression, is widely recognized by various human rights instruments. Hence, it is also applicable to cyberspace. However, as previously noted, due to the unique characteristics of the Internet, existing legal standards on freedom of expression should be redefined. A clear example is the decision of the ECtHR in which the user was considered liable for defamatory comments made by others. These kinds of practices should be eliminated. As the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression rightly emphasized:

> Due to the unique characteristics of the Internet, regulations or restrictions which may be deemed legitimate and proportionate for traditional media are often not so with regard to the Internet. For example, in cases of defamation of individuals' reputation, given the ability of the individual concerned to exercise his/her right of reply instantly to restore the harm caused, the types of sanctions that are applied to offline defamation may be unnecessary or disproportionate (UNHRC, 2011:8).

The same standard should be applicable to copyright infringements; in particular, it is unacceptable to shut down voices and critical expression of any kind, including undesirable comments towards trademark owners, for the purposes of protecting the copyright of the owner affected by users' speech, as in the case of the ICANN panel ruling.

Moreover, content restrictions on the Internet might only be justified on the basis of strictly defined rules and proportional means which aim to sought legitimate aims. For example, the ECtHR in the case of *AHMET YILDIRIM v. TURKEY (Application no.3111/10)* had found a violation of the Article 10 (freedom of expression) of the ECHR on the ground that the blocking

an entire web-site for the publishing particular information which has been deemed as illegal contradicts to the right to freedom of expression (ECtHR, 2012).

With regard to the matter of national security and public safety interests, the IACHR Special Rapporteur for freedom of expression acknowledged that the exceptional use of special surveillance programs or systems might be occasionally legitimate, when necessary for achieving particular legitimate aims such as crime prevention (IACHR, 2013). Moreover, *"such limitations… must be established beforehand in a law, and set forth expressly, exhaustively, precisely, and clearly both substantively and procedurally"* (IACHR, 2013:69). The issues related to Internet surveillance will be discussed in a little more detail in the Georgian context, in the next chapter below.

As to the question of liabilities on freedom of expression online, two main types of liability should be discussed: a) civil liability; b) criminal liability. Civil liability in relation to the right to freedom of expression online can be invoked against ordinary users as well as private Internet enterprises. Ordinary users might be found liable for illegal activities such as: defamation, hate speech, copyright infringement and other unlawful actions committed in cyberspace (UN Special Rapporteur on Freedom of Opinion and Expression et al., 2011). Moreover, Internet companies might be found liable for the same actions as some countries that also proposed laws imposing civil liabilities on intermediaries if they *"do not filter, remove or block content generated and/or transmitted by users which is deemed illegal"* (IACHR, 2013:11). The latter practice, as mentioned many times before, should be eliminated as it creates significant barriers to the exercise of freedom of expression online.

Criminal liabilities on freedom of expression online are often aimed to silence critical voices and legitimate expression (UNHRC, 2013). Therefore, this kind of liability must be used as an exceptional means and only in cases of unlawful appeals, when a person commits a deliberate action that creates obvious, direct and essential danger with illegal consequence in offline space. As such danger could not physically exist in cyberspace; maintaining the mentioned link

between online and offline spaces should be deemed as an essential pre-requisite to impose criminal sanctions on speech made in online space.

In short, restrictions and liabilities imposed on Internet expression should be examined in a manner to be consistent with the unique characteristics and peculiarities of the Internet. Otherwise, using those mechanisms by the States or private enterprises would infringe the right to freedom of expression online.

CHAPTER FIVE

7. FREEDOM OF EXPRESSION ONLINE: ***THE CASE OF GEORGIA***

7.1 Country Profile

Georgia is a small country in the Caucasus region, with a population of 3.5 million and shared borders with Azerbaijan, Armenia, Turkey and the Russian Federation. Georgia is a former Soviet country which restored its independence on 9 April, 1991, and soon after that it became a member of the UN in 1992 and the COE in 1999 respectively. It is a unitary, semi-presidential republic, having a written constitution adopted in 1995.

8. Legal and Policy Framework towards the Right to Freedom of Expression

Article 24 of the Constitution of Georgia, as mentioned before, guarantees the right to freedom of expression. According to the CCG, *"Art.24 of the Constitution protects freedom of information, free dissemination and receipt of information from generally accessible sources. Without freedom of information it is impossible to form independent opinions. This is the norm which prohibits creating an "informational filter" characterizing non-democratic regimes"* (CCG, 2007). Moreover, "*The constitutional court in its subsequent decisions repeatedly indicated and underlined the special importance of freedom of expression: the right of freedom of expression is one of the necessary preconditions for the existence of democratic society, its*

full-fledged development. Free, unimpeded dissemination of information secures diversity of opinions, promotes public and informed discussions on issues that are important for a society, it makes possible engagement of each member of the society in public life" (CCG, 2012).

In 2004, Georgia adopted the law On Freedom of Speech and Expression and set up a liberal regime towards the right to freedom of expression. However, as the legal framework is strongly inclined to produce the highest possible standards of protection of the right to freedom of expression, the policy framework and the corresponding practice is far from serving those ideals expressed in legal rules.

As to the question of freedom of expression, on one hand, as mentioned before, Georgia strives to promote informational and digital technologies, freedom of Internet, e-governance and implementing various electronic public services. On the other hand, existing surveillance policies and regulations, as well as government interference in citizens' private communications, is an ordinary practice in Georgia. As the COE Commissioner for Human Rights, Nils Muižnieks, stated in the annual activity report of 2014, *"the continued presence of surveillance equipment in the premises of telecommunication operators, giving the Ministry of Internal Affairs direct and unrestricted access to all communications, should be addressed"* (COE, 2014:13).

Further, at the time of writing of this paper, some amendments to the Criminal Code of Georgia have been enacted in order to criminalize particular expressions (certain types of appeal) made in public, including statements made on the Internet.

In the next sections, I will focus on two issues which are the most relevant topics on the current Georgian agenda with regard to freedom of expression online: a) the "this affects you too campaign", which was launched by Georgian NGOs to address the problematic issues concerning government surveillance policies and regulations; b) current amendments to the Criminal Code of Georgia, which aims to criminalize certain types of speech in both offline and online space.

8.1 Current Challenges and Problems:

8.1.1 The "This Affects you too" Campaign

The civil campaign, initially, was launched as a joint campaign by Georgian NGOs and the media with the support of OSGF in 2011, and was aimed to address the issues in relation to the legislative amendments made at the end of December 2011; in particular, the bill on Political Unions of Citizens and amendments to the Election and Criminal Codes (OSGF, 2011). Later on, when a new government came to power and decided to maintain old surveillance policies and practices which are in contradiction with human rights, especially the right to freedom of expression, the name of the campaign slightly changed and it has become the "this affects you too-they are still listening" campaign. The second part of the title has been added to underline the importance of preserving communication privacy from the State's interference.

Nowadays this campaign aims to struggle against illegal eavesdropping practices and the supportive legislation. The campaign's primary concern is the continuation of what has been expressed as: *"unrestricted secret eavesdropping by the law enforcement authorities has been a serious issue in Georgia for years already, in particular by means of the so-called "black boxes" kept with cell phone operators; law enforcement authorities are able to eavesdrop on thousands of people simultaneously, determine their location, read their mobile text messages and personal correspondence via e-mail, Viber, WhatsApp, BBM and other applications"* (GYLA, 2014).

In general, states have an obligation to create a safe environment for the exercise of the right to freedom of expression, and the violation of communication privacy has a chilling effect on the exercising of that right in practice. Thus, unlawful and unrestricted collection of data not only affects the right to privacy and the right to freedom of expression but *"also contradicts the tenets of a democratic society"*(IACHR, 2013:10).

Unfortunately, the government of Georgia continues such unlawful practices, which make its efforts to strengthen policies (normative framework) towards freedom of expression in general and Internet expression in particular, illusory and ineffective. After unsuccessful negotiations with relevant government officials and members of the Parliament, the NGOs and participants of

that civil campaign lodged a constitutional complaint to the CCG and appealed those regulations enabling unlawful surveillance of individuals' communication to be declared unconstitutional. The case is pending before the Court.

8.1.2 Criminalization of Speech

Article 239[1]of the amendment to the Criminal Code of Georgia, adopted on the first plenary hearing by the Parliament of Georgia, reads as follows: *"public calls for violent actions, made verbally, in written or through other forms of expression and aimed to cause hostility or discord between racial, religious, national, regional, ethnic, social, linguistic and/or other groups if it creates obvious, direct and essential danger with illegal consequence"* could result in criminal prosecution and imprisonment from two to five years for individuals, and liquidation or deprivation of the right to work or fines for legal persons, including media companies and Internet intermediaries.

The civil organizations have already assessed those amendments as a risk constituting unreasonable restriction of the right to freedom of expression and restraint of criticism. According to their statement, *"the government's effort to regulate the freedom of expression is not aimed at protecting discriminated minority groups but instead at limiting freedom of expression and strengthening the dominant social and moral discourse. Such an assessment is based on the existing context and the normative content of the proposed amendment"* (TI, 2015).

Deriving from the above, the following lessons should be learnt from the Georgian example:

- Absence of clear, precise and transparent international standards with regard to the right to freedom of expression online could create a significant gap between policy (normative framework) and practice, as nation states are left with a wide margin of appreciation when it comes to the defining and enforcing of legal norms in relation to freedom of expression online.

- Promoting and adopting domestic regulations in accordance with current international legal standards could not solve problems of Internet expression in practice because those international standards are often vague, ineffective and incompatible with the unique characteristics of the Internet.

- The Georgian case has proved once again that there is an urgent need to make significant changes in the current legal framework at any level - domestic, regional or international - in order to elaborate new rules which will be more adapted to the online environment. That, in turn, will provide better protection of human rights, especially the right to freedom of expression online.

In the next chapter, I will sum up the main findings of the given research and present an overview of the answers to the research question. Further, I will provide certain recommendations with regard to better protection of the right to freedom of expression online.

CHAPTER SIX

9. CONCLUSION AND RECCOMENDATIONS

The main conclusions of the given research fall within two broad clusters. which will be presented below. The first cluster entails issues related to the validity of the theory of the relative universality of human rights in relation to freedom of expression online. The research itself has been put in the general framework of the mentioned theory. Therefore, it was the primary goal of the researcher to explore whether the theory, in its original sense, was applicable to freedom of expression in cyberspace and if not, how it should be reshaped to become more effective with regard to online expression.

The second cluster involves the issues related to the redefinition of the concept of freedom of expression. One of the research questions was whether existing legal standards are sufficient and effective to address the problematic issues of Internet expression, as well as what new rules need to be elaborated for better protection of the right to freedom of expression online. Thus, this cluster summarizes the findings of the research, which prove the need for substantive redefinition of the concept of freedom of expression by creating new legal rules which, in turn, would lead to better protection of the right to freedom of expression online. The answers to the second research question are also outlined in this cluster, as creating a new legal framework for Internet expression might eliminate or substantively diminish the gap between policy (normative framework) and practice in relation to freedom of expression online.

This study has revealed that the theory of the relative universality of human rights, in its original sense, is not applicable to the right to freedom of expression online and should be substantively reshaped. The relevant findings proving a validity of this conclusion are outlined below.

First of all, as the study disclosed, one of the key features of the Internet is universal access. At the same time, the universal nature of the right to freedom of expression online, as well as its universal possession, is not disputed in contemporary human rights law. Therefore, the theory is

not problematic in this regard. However, when it comes to the enforcement mechanisms, the theory is proving to be worthless. In particular, as the given study outlined, the Internet is a global network mostly controlled by private enterprises which are often based in other jurisdictions, outside the control of particular countries. The privatized nature of online space makes traditional human rights enforcement mechanisms either ineffective or renders them too useless to be applied at all. Any attempt of particular states to take initiatives on regulating freedom of expression in cyberspace has the ultimate effect of censorship, and implementation of such restrictions may also cause enormous technical difficulties, as has been shown in the examples of China, Turkey and the Russian Federation, discussed in Chapter Four. Further, hiding behind private enterprises and using them to implement enforcement mechanisms is also deemed as an unacceptable practice employed by states.

Secondly, nor are private Internet enterprises solely capable of implementing enforcement mechanisms with regard to freedom of expression online. Although they have both technical capabilities and other necessary means to control cyberspace, they have neither competence nor legitimacy to do so, as was demonstrated in the example of the ICANN panel decision.

In light of the above, states are not able to enforce human rights, especially the right to freedom of expression online, because they lack the technical instruments and other necessary means to do so. On the other hand, private Internet companies do not have a legitimacy and sufficient knowledge to assess whether there is a violation of human rights or not.

Therefore, the given research has proposed the implementation of a public-private partnership model by declaring the Internet as a public good and delegating (deputing) a power to regulate private enterprises in relation to the Internet. At the same time, as the given study suggests, private enforcement mechanisms must be abolished; instead, private Internet companies need to be able to address a court or any other relevant body for advisory opinions and professional consultation. This alternative model to existing rules would enable states to implement effective enforcement mechanisms in relation to freedom of expression online; on the other hand, human

rights violations, especially infringement of the right to freedom of expression online committed by private Internet companies, would substantively be decreased.

As to the question of the need to redefine the concept of freedom of expression in relation to the Internet, the given research suggests that existing legal rules are not effective and capable to tackle problematic issues concerning freedom of expression online. The key features of the Internet, such as universal access, net neutrality, pluralism and non-discrimination, should be given priority over other competing interests.

Moreover, while analyzing relevant legal instruments and corresponding case law, as well as the scholarly works with regard to freedom of expression online, the given research revealed that the same rules which are applicable and effective in offline space should not be automatically transmitted to online space, as was discussed in the examples of defamation cases.

In particular, restriction and liability imposed on freedom of expression should be different from those sanctions which are used in offline space. For example, blocking access to an entire website because of certain illegal content published on it is not acceptable. Further, content based restrictions, as well as blocking and filtering the content produced in online space, should be used as an exceptional means, based on clearly defined rules and procedures. Obliging private Internet companies to block or filter the content generated or transmitted by users is deemed as a violation of internet freedom. Similarly, imposing liability on Internet users, including news portals and media companies, for illegal comments or expressions made by other users constitutes a violation of their right to freedom of expression online, as was demonstrated in the example of the case of Delfvi v Estonia.

With regard to liability, the given study suggests that civil liabilities should be used in cases involving freedom of expression online. As the study also promotes the model of public-private partnership, administrative sanctions might also be applicable in those cases. Criminal sanctions should be used only in those cases involving unlawful appeals: when a person commits a deliberate action that creates obvious, direct and essential danger with illegal consequence in

offline space. Maintaining a strong link between offline and online space is of utmost importance in order to impose criminal liability on users. Therefore, it is obvious that new rules should be elaborated to solve the problematic issues pertaining to freedom of expression online.

Moreover, the absence of clear, precise, transparent and effective regulations cause a significant gap between policy (normative framework) and practice in relation to freedom of expression online. Nation states are left with an extremely wide margin of appreciation to control free expression on the internet. An adoption of regulations which are in conformity with current human rights standards in the field of Internet expression could not solve problems in practice because those international standards are often vague, ineffective and incompatible with the unique characteristics of the Internet, as was demonstrated within case-study research in Georgia. Therefore, an adoption of new rules would substantively diminish the gap between policy and practice in this regard, as the states would have an obligation to follow and obey those rules.

In addition, on the basis of the given study, the following recommendations are made in relation to freedom of expression online:

- The UN should adopt a new international treaty on human rights online, with particular priorities given to the right to freedom of expression on the Internet.
- The UN should promote a public-private partnership model in relation to the Internet.
- The new rules must be adopted at regional level by the COE, the OAS and the AU.
- The structure and competences of the ICANN should be changed, or the competence of assigning the names and IP addresses should be moved to the UN.
- The government of Georgia should abolish Internet surveillance regulations.
- The government of Georgia should not pass the amendments to the Criminal Code of Georgia, criminalizing certain types of speech made in public, including online space.

Finally, the given research had neither ambition nor capability to examine all relevant issues pertaining to freedom of expression online. This study revealed key problems and certain solutions to those problems in relation to the right to freedom of expression online.

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