

LEGAL LIMITATIONS OF FREEDOM OF EXPRESSION IN MEDIA

Mileva Pavlovic

*Faculty of business studies and law, Univesity „Union-Nikola Tesla” Belgrade, Serbia,
mileva.pavlovic@fbsp.edu.rs*

Abstract: *The paper will base on an attempt to bring the formal statement “there is no definition of freedom” to the realm of legal recognition and the disclosure of its legal concerns. Aware of the fact that a requirement of defining freedom can be overly unsound, just like an attempt to define a human being, we are drawn by the idea of summarizing these two requirements and putting them in the same plane. We could start from the attempt to recognize terms “human being” and “freedom” as synonyms, but we would bring ourselves to the blind side. Randomly speaking, terms “freedom” and “definition” are mutually exclusive and, to a light-minded observer, this attempt can seem allogical in it’s essence and, at the very least, without logical connection between the terms and thus futile. But if we recognize the term “freedom” as the very possibility of autonomus and independent action, then the self-determination of a human being to be free can connotate an unconstrained and un-imprisoned human being. It has been established that the state of freedom is a birth wright of every selfconscious and reason-endowed human being, but also that every relation of an individual with a society is burdened with a certain degree of loss of the very same freedom. Following this path, we take upon ourselves the not-so-easy-task task to talk about the legal restrictions on freedom of expression in the public and the media as one of many aspects of freedom.*

Keywords: *right to freedom of expression, freedom of speech, constitution, legal restrictions, freedom of the media, media*

1. PREAMBLE

We speak of freedom in countless ways that are all reduced to two ways of deliberation: is it an universal category or the creation of society?

It is an intuitive assumption is that the freedom exists at all and so without it we can not talk about ethics, where without freedom there is no choice as to how we will act, and consequently there is no moral responsibility. Therefore, in this respect, freedom as a universal category should exist. This however implies that freedom is a metaphysical term that does not depend on people’s existence, but it inprinted by birth way back from the very genesis and as such has an ontological meaning. But is it possible to talk about freedom without

colleration to human beings and whether human beings are only consumers of freedom as a concept that is empty and independent? Of course not!

2. FREEDOM - RESPECT OF THE SAME RIGHTS IN OTHERS THAT WE DAMAND FOR OURSELVES

The Liberals considered that one of the main definitions of human beings was their freedom, and they regarded freedom as one of the highest political value. But the fact that the political order contains a compulsory component-apparatus, which we call the state, we encounter a problem: how to reconcile the understanding that essentially free beings live under a state policy of enforcement? It is here necessary to acknowledge the difficulty of defining freedom. The controversial definition of freedom of Isaiah Berlin in his work "Two concepts of liberty" resolves the notion of "negative" and "positive" aspect of freedom. He points to the most common confusion in those who fail to distinguish the meaning of these two concepts which leads to complications in the interpretation. According to him, the negative freedom proceeds from the thesis that a person is free to the extent that no one interferes with his activities. If other people diminish the area of our freedom below a certain minimum, then we are not free, but we are enslaved or under certain enforcement. The purport of negative determination of freedom (freedom "from somethng or someone") is not to reveal the one who manages someone's freedom, but how many rules limit that person's freedom. This is, surely, the field to which this work belongs, because the freedom of speech in the media certainly represents the plane of the rules and restrictions on the freedom of expression in the media, as well as the abuse of speech and hate speech.

In his paper "On Liberty" John Stuart Mill, says that the social harmony and progress does not exclude the existence of private spheres of individuals in which state should not step in. Everyone should save the plane of personal freedom if we do not want to lose what is essentially human within ourselves. To Mill, the most important is the individual freedom of a human being because civilization can not progress if people are not allowed to live as they please, of course, in the area that only concerns them. Mill defines freedom as a striving for one's own well-being, although he admits that a state apparatus is necessary because justice demands at least the minimum of freedom for each individual, and each individual must be prevented, even by force, to deprive another of that minimum (for which reason law exists). We necessarily come to the question: Who rules over me? and to which extent the government meddles in my life?, which brings us to another notion of freedom - "positive" freedom or freedom "for something or someone".

Here we tap to the the source of social control which determines what a person should do or what a person should become. Now we make a step forward from the sphere of interference to the fact that people want to manage their own lives, which is a key issue of positive freedom: Who wants to manage me? Here, a person wants to become his own master and to be treated as an individual, as a person, not as an object.

The polemic between these two notions of freedom can lead us to the thesis that they mutually exclude themselves or, on the other hand that there is a logical connection between them. For example, if we examine the case of negative freedom (freedom "from something or someone") of restriction in public communication of thoughts and beliefs in the media,

we can express it as a positive freedom (freedom “for something or someone”) that these thoughts and beliefs are publicly communicated. Almost every kind of freedom can be expressed through both notions, while nothing is lost in meaning. Ultimately, each definition can mean a loss of freedom.

Now is a moment to perceive the interesting stance of David Spice in the section “Pure Tolerance: A Critique of Critique” where the author points out: “It arises from everything that tolerance is not the freedom to express exclusively the right ideas - it is the freedom to express even the stupid, and the abominable ideas. Its results can improve or reverse the fate of humans or society, although this is not the same from the standpoint of the very principle of tolerance. Those who advocate for tolerance, even for absolute tolerance of ideas, do this because they believe that reason and experience are not the ones that guide people to wrong decisions ...”

On the other hand, Erich Fromm points out in the “Escape from Freedom” that freedom has now reached its critical point in which it is driven by the logic of its own dynamism, threatening to turn itself into its opposite. Nevertheless, hope prevails that this does not form the vicious circle because a person can be free, without being isolated and lonely, that he may be independent, and again be part of the community. In order to achieve this, it is necessary for freedom to be conceived with virtue, to have a firm foothold in the existing criteria of good and evil, worthy and worthless, of human and non-human. That is why the victory of freedom is possible only in a democracy in which the individual and his development and happiness are the center and the backbone of culture, where democratic freedom is legal freedom and where a person can be free only if the freedom of each individual matches the freedom of all other individuals.

Marcuse points out “Liberty is self-determination, autonomy--this is almost a tautology, but a tautology which results from a whole series of synthetic judgments. It stipulates the ability to determine one’s own life: to be able to determine what to do and what not to do, what to suffer and what not. But the subject of this autonomy is never the contingent, private individual as that which he actually is or happens to be; it is rather the individual as a human being who is capable of being free with the others. And the problem of making possible such a harmony between every individual liberty and the other is not that of finding a compromise between competitors, or between freedom and law, between general and individual interest, common and private welfare in an *established* society, but of *creating* the society in which man is no longer enslaved by institutions which vitiate self-determination from the beginning. In other words, freedom is still to be created even for the freest of the existing societies.”

3. LIBERTY AS A REBELLION AGAINST IDEOLOGICAL DICTATE OF POLITICS OR THE TWILIGHT OF THE SERBIAN INTELLECTUAL

The disappearance of intellectual class influenced the significant weakening of the Serbian national identity. One of the key reasons for which Serbia finds itself in such an unsettled situation is certainly the fact that in Serbia, since the Second World War, there has been no decisive break with totalitarian, anti-democratic forms of government, and because of

the absolute dominance of totalitarian awareness at all levels of our individual and collective existence.

The atmosphere of existential insecurity characteristic of postmodern civilization is not dying down, it is only taking on new forms. In this sense, Serbia is no exception to the world. In 1951 Cammus publishes the "The Rebel", a work that has exasperated the entire intellectual-political public, and can completely refer to the current Serbian intellectual moment: "In his urge the rebel denies any interference to his essence. He is fighting for the integrity of one part of his being. He does not seek to conquer first, but to impose his value. Notice then that rebellion does not arise only, and necessarily, in oppressed, but that it can also be born by looking at the oppression whose victim is someone else. In this case there is going to be identification with another individual ... It may happen that we do not tolerate watching others take insults we have ourselves endured without rebellion ... Individuum is not in itself the value that he wants to defend. At the very least, it needs all mankind to make it. When he rebels, a man identifies himself with other men and so surpasses himself, and from this point of view human solidarity is metaphysical. Simply put, for the moment it is about the solidarity that arises from the chains."

Today's Serbian intellectual has given up against the temptations of corruptive mechanisms and thus contributed to the strengthening of totalitarian consciousness in its more conspicuous varieties, having played a decisive role in erasing the demarcation line between the private and public sphere. This enabled the individual to be controlled by state coercion and, consequently, the disappearance of each and every individual freedom. And while contemplating individual and professional freedoms, it is important to put freedom of expression as a human right at the center of this paper. For freedom of speech is also an obligation that draws the crucial question: Is the freedom of speech and expression necessary for the functioning of a democratic society? The fight for freedom that has been going on for centuries has not yet been put to an end by anyone. The aforementioned John Stuart Mill, in the 1859 book "On Liberty" argued that "freedom of expression is important not only because each of us has the right to express own opinion, but also because the community in which we live has the right to hear diverse opinions... And that tolerance of the stances of an individual is an important component of the democratic political system". He laid the foundation for a modern defense of freedom of speech that we meet today in international conventions. He loudly points out: "If all mankind but one person had one and the same opinion, mankind would have no more justification to silence that one person than he or she, if in power, would have for silencing mankind."

This philosophical argumentation on the right to freedom of expression is codified and guaranteed in international declarations and conventions on human rights. The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on December 10, 1948. It is not legally binding, it does not form part of international law, but it represents a significant step forward in the defense of human rights. Article 19 of the Declaration states that "everyone has the right to freedom of opinion and expression; this right includes freedom of thought without interference from others, as well as seeking, receiving and communicating notifications and ideas by any means and regardless of borders." Five years later, on September 3, 1953, the European Convention on Human Rights was put into effect. It has improved the protection of human rights in two key segments. It is the first legally binding human rights agreement and a very important implementation mecha-

nism has been established in the form of the European Court of Human Rights. Article 10 protects freedom of expression. In section 10.1. it is said: “Everyone has the right to freedom of expression. This right includes freedom of thought and freedom to receive and transmit information and ideas without interfering with public authority and regardless of borders. This Article does not prevent States from requiring licenses from radio, television and film companies.” It must be emphasized that freedom of expression is not an absolute right, but rather a relative one, or in other words, some interference in it can be justified.

Section 10.2. states that “the exercise of these freedoms, since it includes obligations and responsibilities, may be subject to such formalities, conditions, restrictions or sanctions as provided for by law and which are necessary in a democratic society in the interests of national security, territorial integrity or public security, the prevention of disorder or crime, protection of the health and morals, reputation or rights of others, the prevention of the spread of confidential information or in the interests of preserving the authority and impartiality of the judiciary “. States Parties have negative and positive obligations as to the Convention. Negatives restrict the state’s interference with this right, and positive ones demand state pro-activity in the sense of protecting that right under certain circumstances. Through the rich practice of the European Court of Human Rights, one can observe that the scope of protection of freedom of expression has spread over the years. In a series of guidelines for the interpretation of Article 10 of the European Convention, it is pointed out that over the years, the court has also crystallized the difference between information - the facts, and the idea-value statements. It also emphasizes that freedom of expression has an active and passive part. Journalists actively use the part that guarantees the right of expression, but the passive part of that right is also important. That part is with viewers and it guarantees them the right to hear those news and ideas. For this reason, the European Court of Human Rights pointed out that if the right of expression is banned or restricted, that decision not only affects journalists, but also consumers of that information, as they also have the right to obtain this information. Freedom of expression, as a relative right, may be restricted only in exceptional circumstances as set out in Article 10.2. The European Court of Human Rights uses a three-part test when deciding on limiting freedom of expression.

Step 1: Any limitation of rights must be prescribed by law.

Step 2: The restriction must serve one of the prescribed reasons stated in the documents protecting human rights.

Step 3: The restriction must be necessary to achieve the prescribed purpose.

It is sufficient that only one part is not met for a restriction to be declared unlawful. Likewise, human rights must not be used to violate other human rights. One of the most important elements in assessing the legitimacy of constraints is whether it concerns issues of public interest.

A Guide to Interpretation of Article 10 points out that the Court stated that it had “little room ... to limit political speech or debate on matters of public interest.” Likewise, “the limits of acceptable criticism are ... wider when it comes to a politician as such than when it comes to a private person.” In addition to politicians, governments, corporations and public figures are also subject to greater criticism. As a result, the Court is ready to give media activities a large measure of protection under Article 10, but as long as journalists “act in good faith and

in accordance with journalistic ethics”.

And finally, freedom of expression is not the same as journalism. Freedom of expression does not guarantee the right of the journalist to write what he wants, because their job is “limited” by a professional code, public interest and respect for other human rights. No human right should be used for the violation of other human rights. (This text is part of the lecture within the program “Free Voices: Promoting Freedom of Expression and Freedom of the Media in BiH”, supported by Civil Rights Defenders from November 2016.)

4. FREEDOM OF SPEECH AS THE FOUNDATION OF DEMOCRACY

Patrick Peninks (European Council): “For the European Council, freedom of expression is one of the pillars of democracy. When there is no freedom of expression there is no democracy. In that sense, the media, in their role as controllers of the authorities, are key to the promotion of this freedom and to the guarantee of its respect in the member states.”

Another international organization keeps track of whether the countries respect the freedom of the media and informs the world public about it. The Reporters Without Borders organization, based in Paris, helps endangered journalists and media, and publishes the World Press Freedom Index every year which measures the extent of this freedom in one hundred eighty countries. For Reporters Without Borders “freedom of expression and information is the first and most important of all freedoms.”

July Majerzak (Reporters Without Borders) “Freedom of information is a kind of power counterbalance, since states are often presented as serving citizens in the name of general interests, but we know that this is not always the case, and that the bearers of power, both economical and political, tend to abuse it. If journalists do not play the role of government controller, all abuses are possible, everything is allowed. Those who rule can act illegally, then the door is opened for arbitrary or corruptive behavior, and therefore freedom of information is crucial and lies within the very foundation of democracy.”

It is important to know that the right to free expression is guaranteed to every individual, but it is also necessary to understand that there are situations when it can be limited.

In that sense, it is not an absolute human right from which there is no deviation, such as, for example, rights that protect people from torture, slavery, and unlawful punishment.

Freedom of expression can be restricted and its misuse punished in accordance with the law, “in the interests of national security, territorial integrity or public security, in order to prevent disorder or crime, to protect health or morals, to protect the reputation or rights of others, to prevent the disclosure of confidential information, or for the preservation of the authority and impartiality of the judiciary,” states Article 10 para. 2 of the European Convention on Human Rights.

Patrick Peninks (European Council): “When freedom of expression is limited in accordance with Article 10 of the European Convention on Human Rights, these constraints must be in accordance with law, they must be proportionate to the goal that is to be achieved, and to be firmly based on democratic principles. The Court’s case-law on human rights says that governments in no way should threaten freedom of expression and must be committed to its promotion.”

5. HOW AUTHORITARIAN GOVERNMENTS SUPPRESS FREEDOM OF EXPRESSION - CASE SERBIA

In recent history, Serbian citizens were witnesses and victims of limitation of right to freedom of information. In the 1990s, during the reign of Slobodan Milošević and the war on the territory of the former Yugoslavia, the most influential media became a powerful center of the state propaganda machinery. Independent editorial offices who refused to put themselves in the function of the then regime suffered pressures or were assumed by more eligible ones. Journalists who did not want to step over their professional and ethical standards were subjected to pressures of every kind, including physical ones. They were prevented from working, being out of work, or leaving the editorial offices in which the right to freedom of information was no longer respected.

These brave journalists, aware of the right to freedom of speech and citizens' right to true and timely information, formed new weekly newspapers and daily newspapers, radio and TV, which, as a rule, reached a small number of users and thus had little influence, so the government tolerated them until the moment they became visible and could endanger it. That's why the regime carefully monitored their work and did not hesitate to use the most brutal moves in order to suppress the freedom of speech and expression. There have been cases of bringing journalists to the interrogation, abduction, and blackmails even their brutal execution. Until today, it has not been revealed who is responsible for the deaths of Dada Vujasinovic, Slavko Curuvija, Milan Pantic, journalists who considered express their opinions was legitimate.

A recent case of false accusation that an RTS journalist and the wife of opposition leader Vuk Jeremic, Natasha Jeremic, is a narco-boss, points to the fact that the weight of the spoken lie is in reverse proportion to its retraction. Moreover, if those who place a lie (in this case, a party in power) also own the media as a platform from which it is placed, and the opportunity to deny the same media to the other party for retraction, then there is an obvious example of the suppression of media freedom and spinning, all happening during the election campaign.

The picture is not one bit nicer in terms of freedom of informing and freedom of media in Europe. Due to global security threats such as terrorism, various types of extremism, mass migration, the protection of media freedoms has been questioned to a greater or lesser extent throughout the world, even on the European continent, which has always been considered to be the most free.

Faced with the threat of terrorism, governments in European countries are violating media freedom by misusing anti-terrorist measures, passing laws on mass surveillance of citizens, as well as by tight control of public and private media, warn Reporters Without Borders in its latest annual report.

July Manzarek, Reporters Without Borders "The other threats are private companies that are increasingly taking over the media. I would say that threats come from both sides, but it depends on country to country. For example, in France, the danger comes more from economic powerhouses, from industrialists who have grabbed, appropriated media, while in countries such as Poland or Hungary it is more about the state, the government that seeks to control the media. "

Patrick Peninks, European Council: "Unfortunately, it turns out that, as a regime is more powerful, it exposes the tendency to limit the opinion of the other party. This is a

very unfortunate development, but a phenomenon that is increasingly occurring in the European context. We are witnesses that the situation of freedom of expression, unfortunately, does not go for the better nowadays in Europe. The Secretary General recently presented a report on the state of human rights, the rule of law and democracy in Europe. And the picture of freedom of expression is quite gloomy. “

The report of the European Council’s Secretary General of 2016 states that: “Almost half of the 47 member states of the European Council do not guarantee the safety of journalists in a satisfactory manner. The situation has deteriorated over the last year, with an increase in physical attacks and destruction of property. The level of media pluralism is unsatisfactory in 26 member states, and there is particular concern about the influence on media content. Another important area of concern is the freedom of expression on the Internet.

6. PROTECTION OF RIGHTS IN FREEDOM OF EXPRESSION - LEGAL REGULATION

The right to freedom of expression and information through media must be guaranteed by national regulations and the exercise of this right must be secured; a large number of court cases related to this right point to problems in the application of national media regulations, which should require the modification of the regulations or practice itself. In Serbia there are numerous legal guarantees of freedom of expression and freedom of the media. They are primarily guaranteed by the Constitution, and then specified by the Law on Public Information and the Broadcasting Law. Serbia has also ratified the most important international legal acts guaranteeing freedom of opinion and freedom of the press, the International Covenant on Civil and Political Rights and the European convention for the protection of human rights and fundamental freedoms. The Constitution of Serbia requires the provisions on rights related to freedom of expression and media information to be interpreted in favor of promoting the values of a democratic society, in accordance with the applicable international standards and practices of international institutions, including the European Court of Human Rights (Article 18).

According to the Constitution, freedom of expression can be restricted only in exceptional cases that are set aside in accordance with the restrictions imposed by international instruments. The ban on the dissemination of information through the media is also in accordance with international standards. It is possible to prevent calls for violent destruction of the order or violation of the territorial integrity of the country, the prevention of propagation of the war or incitement to direct violence and the advocacy of racial, national or religious hatred that incites discrimination, hostility or violence, and only by a court decision, and if necessary in a democratic society (Article 50).

The Serbian Constitution and media laws affirm the importance of media coverage of issues of public importance. Constitutional guarantees of the right to information have been significantly strengthened by the Law on Free Access to Information of Public Importance, although Serbia has adopted this law among the latter in Europe and the region (2004).

In practice, journalists are often exposed to limitations of freedom and rights that occur in very different forms, from physical attacks, threats to security, cancellation of advertisements, personnel shifts, various types of pressures, to newer forms such as preventing the

distribution of information through blocking websites. Journalists work under conditions of strongly expressed financial dependence (from the interests of owners, advertisers, state financiers) that causes self-censorship and censorship, which have been intensified over the past several years due to the current economic crisis.

However, direct attacks on media freedom often come from political sources and from the connection with political interests.

According to a survey of chief editors of information media, in 2016, only 22% of the media did not face any form of violation of media freedom in their everyday work. Of those who did, a third (34%) experienced the denial of access to information of public importance; One third (30%) was unequally treated in relation to other media by sources of information; Quarter (27%) were canceled advertisements, and the same number (26%) were exposed to interference in editorial policy (in the form of a ban on publishing certain information, imposing “desirable” and “undesirable” content, etc.). Other forms of violation of freedom and rights were present in less than 20% of the media.

As the imposers of the biggest pressure on their media houses, the surveyed media editors listed the ruling political parties (47% of the media), the executive authorities (32%), the opposition parties (26%), and in the same extent private companies as advertisers (16%) and the public enterprises (16%).

The analysis of concrete cases of violation of media freedom, which received the biggest media publicity, also shows that the most frequent direct violations of the freedom of the media come from the political field. During the year, 73 such cases were registered. As particularly difficult, among them are 9 physical attacks on journalists. There were four replacements of editors-in-chief or media directors and five attacks on media properties.

In 15 cases, there were pressures on editorial policy, and in nine the prevention of the presence or work of journalists at a public event. Other cases include disrupting the distribution of information and threats of the disruption, media discrimination and verbal violence.

7. CONCLUSION

At the end of this exercise on freedom, we have an opportunity to establish that the right to freedom of expression, opinion and information through the media, and in the media, must be guaranteed by national regulations. More importantly, the exercise of this right must be secured and implemented. The fact that a large number of court cases in connection with this right are in process or unprocessed indicates a problem in the application of media regulation which implies a change in regulations or in practice. For, once again, in the end, freedom of speech does not imply an absolute obstruction of every kind of prohibition, censure, ethics, politics, but the freedom of one's own promotion, opinion, expression, without the tendency of endangering anyone else who holds the same rights as ourselves.

LITERATURE

1. Arnold Toynbee, *A Study of History*, Prosveta, Beograd, 1970.
2. Bernard-Henri Lévy, *Eloge des intellectuels*, SIC Beograd, 1988.

- 3 Julien Benda, *The Betrayal of the Intellectuals*, Socijalna misao, Beograd,1996.
4. Bernard Henri Levy, *Le Testament de Dieu*, Bernard Grasset, Paris,1979.
5. Željko Simić, *Preobražaji totalitarne svesti*, KPZB, Beograd , 2006.
6. Kosta Čavoški, *Mogućnosti slobode u demokratiji*, Beograd, Istraživačko izdavački centar SSO Srbije, 1981.
7. Albert Camus, *The Rebel*,1951.
8. Erich Fromm, *Avoidance of Freedom*, 1941.