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# The Impact of Digital Platforms and Social Media on Freedom of Expression and Pluralism – in specific terms<sup>1</sup>

*Wpływ platform cyfrowych i mediów społecznościowych na wolność wypowiedzi i pluralizm – w ujęciu szczegółowym*

## Abstract

*This paper aims at providing a comprehensive report on the conference titled The Impact of Digital Platforms and Social Media on the Freedom of Expression and Pluralism held on 23 November 2021 in Budapest and organized by the Ferenc Mádl Institute of Comparative Law. This conference report addresses one plenary and two sessions of the event in separate chapters. The symposium was part of a conference series organized within the framework of the Central European Professors' Network. This network operates with an active contribution of thirty-four professors from seven Central European countries: Croatia, the Czech Republic, Hungary, Poland, Serbia, Slovakia, and Slovenia. The Central European Professors' Network divided comprehensive international scientific research into four groups. The conference presented the outcomes of one of these research groups, simply referred to as the social media research group.*

**Keywords:** conference report, digital platforms, freedom of expression, practice, social media

## Streszczenie

*Niniejszy artykuł ma na celu przedstawienie kompleksowego raportu z konferencji pt. Wpływ platform cyfrowych i mediów społecznościowych na wolność wypowiedzi i pluralizm, która odbyła się 23 listopada 2021 r. w Budapeszcie i została zorganizowana przez Instytut Prawa Porównawczego im. Ferencza Mádl. Niniejsze sprawozdanie dotyczy jednej sesji plenarnej oraz dwóch sesji tego wydarzenia opisanych w osobnych rozdziałach. Sympozjum było częścią cyklu konferencji organizowanych w ramach Central European Professors' Network. Sieć ta działa przy aktywnym udziale trzydziestu czterech profesorów z siedmiu krajów Europy Środkowej: Chorwacji, Czech, Węgier, Polski, Serbii, Słowacji i Słowenii. Central European Professors' Network podzieliła kompleksowe międzynarodowe badania naukowe na cztery grupy. Na konferencji zaprezentowano wyniki jednej z tych grup badawczych – grupy badawczej mediów społecznościowych.*

**Słowa kluczowe:** raport z konferencji, platform cyfrowe, wolność wypowiedzi, praktyka, media społecznościowe

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<sup>1</sup> Conference report, 23 November 2021, Budapest, Hungary.

## 1. Plenary session

The International Scientific Conference titled “The Impact of Digital Platforms and Social Media on Freedom of Expression and Pluralism – in specific terms” was held at the ceremonial hall of the Budapest Bar Association on 23 November 2021. Assoc. Prof. Dr. Zsolt Zódi (National University of Public Service, Budapest, Hungary) moderated the conference.

Prof. Dr. János Ede Szilágyi delivered the opening speech for the one-day event. Throughout his presentation, Professor Szilágyi introduced a series of books published within the framework of the Studies of the Central European Professors’ Network. Each research group issued a scientific monograph to assess the outcomes of the research conducted by the group’s professors.

The first book<sup>2</sup>, titled “The Impact of Digital Platforms and Social Media on the Freedom of Expression and Pluralism”, was edited by Prof. Dr. Marcin Wielec. The study’s main findings are that freedom of expression and pluralism are legally protected in all analyzed Central European countries, however the state response is inefficient in controlling of fake news and censorship arising from the digital era. No adequate legal framework or uniform international standard has been adopted to address the digital age. It can be stated that websites and social media as private companies stand above the law and public communication, and that the liability rules of social media platforms are not properly described. According to the findings of the second book<sup>3</sup>, “Religious Symbols in the Public Sphere” edited by Prof. UO Paweł Sobczyk, religious symbols are fundamental building blocks of Central European countries’ state structures. Therefore, the use of religious symbols in public spaces is considered a long-standing tradition. The presence of religious symbols is widespread, however their use is not sufficiently regulated by law, and relevant case law is relatively poor within this area. The indirect prohibition on the use of religious symbols can only be found in Slovenia, where religious education is expressly forbidden by law. It can also be concluded that constructive discussions usually solve problems and disputes occurring from the presence of religious symbols in the public sphere. The presence of religious symbols can be considered a standard feature or value within society.

“Family Protection from a Legal Perspective” edited by Prof. Dr. Tímea Barzó and Prof. Dr. Barnabás Lenkovics forms the third part<sup>4</sup> of the book series. The book shows that families and marriages share the sense of similar high-level protection in the analyzed countries. According to the research group’s summaries, in the inspected Central European countries, a man and a woman may only marry based on the same Christian tradition. It is also an important finding that same-sex partnerships are accepted in every country. Some countries provide legal status to same-sex partnerships,

<sup>2</sup>M. Wielec (ed.), *The Impact of Digital Platforms and Social Media on the Freedom of Expression and Pluralism*, Budapest-Miskolc: Ferenc Mádl Institute of Comparative Law and Central European Academic Publishing 2021.

<sup>3</sup>P. Sobczyk (ed.), *Religious Symbols in the Public Sphere*, Budapest-Miskolc: Ferenc Mádl Institute of Comparative Law and Central European Academic Publishing 2021.

<sup>4</sup>T. Barzó, B. Lenkovics (eds.), *Family Protection from a Legal Perspective*, Budapest-Miskolc: Ferenc Mádl Institute of Comparative Law and Central European Academic Publishing 2021.

and in other countries there is an ongoing discussion about an adequate solution to be implemented. There are attempts to guarantee a suitable family environment to protect minors and ensure that only minors are subject to adoption, except in the Czech Republic. Joint adoption by same-sex partners is forbidden in all the examined countries, and it can be concluded that the legal protection of families and people in different relationships is based on the same common principles and Christian tradition, with particular emphasis on marriage.

The book edited by Prof. Dr. Zoltán J. Tóth, “Constitutional Reasoning and Constitutional Interpretation”<sup>5</sup>, emphasizes that Central and Eastern European national constitutional courts more often refer to the case law of the European Court of Human Rights than to the case law of the Court of Justice of the European Union. Comparative law arguments are moderately common, and mostly only have a strengthening or ornamental nature. The question thus arises, why the constitutional courts of Central and Eastern Europe do not refer to each other’s decisions. Some legitimacy problems stem from the fact that the European Court of Human Rights explicitly declares that its argumentation constantly changes depending on the circumstances. By contrast, national constitutional courts do not declare this. Moreover, there are more moral arguments in their case law than in the case law of the European Court of Human Rights.

Prof. Dr. János Ede Szilágyi also introduced dozens of dissemination events organized within the framework of the Central European Professors’ Network. Overall, more than fifty events were organized to share the researchers’ experiences. He also spoke about the Central European Junior Programme, which consists of a PhD programme at the Deák Ferenc Doctoral School of Law at the University of Miskolc and an internship programme at the Ferenc Mádl Institute of Comparative Law. The book series called “Legal Studies on Central Europe” aims at supporting the PhD programme by providing the PhD students with an up-to-date curriculum. The first publications in the newly founded journal “Law, Identity and Values” will be published in the first few months of 2022. A new publishing house called Central European Academic Publishing has been established. The publishing house was determined to serve as a specialized publishing house for English-language scholarly books and journals. Three national associations established the Central European Association for Comparative Law to set up a new framework for Central European national scientific communities. Prof. Dr. Szilágyi concluded that cooperation launched in the Central European Professors’ Network Framework will continue during the next year. Nevertheless, its activities will take place within the framework of a new organization.

Prof. Dr. Marcin Wielec (Cardinal Stefan Wyszyński University in Warsaw, Institute of Justice, Poland) expressed his satisfaction that the cooperation between the Ferenc Mádl Institute of Comparative Law (*Mádl Ferenc Összehasonlító Jogi Intézet*) and the Institute of Justice in Warsaw (*Instytut Wymiaru Sprawiedliwości*) was further strengthened by the operation of the four research groups. He introduced the aim of the social media research group, as well as the eight researchers working in this

<sup>5</sup>Z.J. Tóth (ed.), *Constitutional Reasoning and Constitutional Interpretation*, Budapest-Miskolc: Ferenc Mádl Institute of Comparative Law and Central European Academic Publishing 2021.

research team. He said there was no doubt that the impact of digital platforms on freedom of expression and pluralism is a trending issue that requires an interdisciplinary research approach. The members of the research group are specialists in different fields of law such as civil law, criminal law, economic law, and contract law. He stated that there is a great need to operate such international research programs in the Central European area. One of the most important effects of the Central European Professors' Network is that it unites researchers from the Central European region. Through this project, the network sends a strong signal that there is vast scientific potential in this part of Europe, which gives rise to sustainable and healthy ideas that are useful for society.

The book was reviewed by Dr. Marcin Romanowski (Deputy State Secretary, Ministry of Justice of Poland). Within the framework of the scientific work, two main issues were addressed in the monograph: the problem of fake news and censorship on the Internet. Both of these issues required in-depth analysis. The work resulted in numerous proposed solutions and postulated *de lege ferenda* proposals enriching European achievements in the legal sciences. Social media research groups may be considered a normative orientation in Central Europe in this respect. One of the main results of the scientific work was the creation of a research monograph, which included the analysis of the reported problem of fake news and censorship on social networks. The monograph consists of nine chapters in addition to one concluding chapter. The authors of the chapters are professors of the social media research group. Prof. Dr. Marcin Wielec from Poland wrote a chapter on fake news as an essential factor in digital platforms and the impact of social media on freedom of expression and truth of information. Professor Dr. András Koltay from Hungary devoted his work to the monograph on the regulation of social media platforms in Hungary. Assoc. Prof. Dr. Sanja Savčić analyzed the impact of digital platforms and social media on freedom of expression and pluralism in Serbia. Prof. Dr. Davor Derenčinović from Croatia dealt with the issue of social media, freedom of speech, and regulation of fake news in the legal system in Croatia. Dr. Kristina Čufar (University of Ljubljana, Faculty of Law, Ljubljana, Slovenia) analyzed the legal aspects of content moderation in social networks in Slovenia. Assoc. Prof. Dr. Aleš Rozehnal, from the Czech Republic, wrote a chapter on the role of social media in shaping society. Assoc. Prof. Dr. Gábor Hulkó from Slovakia addressed the impact of digital platforms and social media on freedom of expression and pluralism in Slovakia. Prof. Dr. Dušan Popović from Serbia analyzed the issue of freedom of expression in social networks from an international perspective. Bartłomiej Oręziak from Poland on the other hand analyzed the censorship of digital platforms and social media in light of freedom of speech from the Polish law perspective. The monograph began with two points of reference for the legal analysis conducted. The first concerns the phenomenon of fake news, including the impact of fake news on reality, considering the current structure of social media and digital platforms. The definitions and classification of fake news, the reasons and the means of creating fake news, the relationship between fake news and deep fake news, the role and significance of the use of fake news, and the liability for the creation and dissemination of fake news in the fields of criminal, civil,

and administrative law were the main focus of the research. Proposals for the legal regulation of fake news were an integral part of the book. According to Dr. Marcin Romanowski, the fight against fake news is based on five pillars: identification, combating, liability, legislation, and the impact of fake news on the guarantees of freedom of expression and truthfulness of the information. The second point of reference is the negative phenomenon of censorship on digital platforms and social media platforms. Numerous general issues were analyzed, such as the concept of censorship, legal and factual grounds of censorship, relevant international standards, entities deciding on censorship, and criteria for censorship. Dr. Marcin Romanowski pointed out other essential characteristics of the book. According to him, the problems were accurately and deeply analyzed with the help of an appropriate research methodology and the use of the legal comparative method.

In his address, Prof. Dr. András Koltay (National University of Public Service, Budapest, Hungary) referred to the legal regulations of social media platforms<sup>6</sup>. Professor Koltay talked about the enormous influence of new gatekeepers (social media platforms) on freedom of expression and the public sphere, emphasizing that these are private powers that restrict freedom of expression and can make decisions on what and how the content is available to the public<sup>7</sup>. According to him, regulation methods can be divided into the following six categories: no regulation, self-regulation, co-regulation, private regulation, private law regulation, and media regulation. The doctrine of *no regulation* is obviously outdated and may be considered a metaphor for the Wild West in the online word<sup>8</sup>. Self-regulation is a process whereby an organization volunteers to monitor its adherence to legal and ethical standards rather than having a governmental entity enforce those standards. Self-regulation can be internal or more or less independent, such as through the Facebook Oversight Board. For economic reasons, it is difficult to imagine an efficient self-regulatory system in the online platform market<sup>9</sup>. Co-regulation is

<sup>6</sup> Title of the presentation: A typology of social media regulations. Further relevant publications from the author: A. Koltay, *The Right of Reply in European Comparative Perspective*, "Acta Iuridica Hungarica – Hungarian Journal of Legal Studies" 2013, Vol. 1, pp. 73–89; A. Koltay, *Az Alkotmánybíróság határozata az internetes kommentek polgári jogi megítéléséről*, "Jogesetek Magyarzata" 2015, No. 1, pp. 9–22; A. Koltay, *On the Constitutionality of the Punishment of Scaremongering in the Hungarian Legal System*, "Hungarian Yearbook of International Law and European Law" 2021, Vol. 9, pp. 23–42; A. Koltay, *A véleményszabadság alkotmányos védelme az Alaptörvény első évtizedében*, "Acta Humana: Hungarian Centre for Human Rights Publications" 2021, No. 9(2), pp. 37–93; A. Koltay, *The private censorship of Internet gatekeepers*, "University of Louisville Law Review" 2021, Vol. 59 No. 1, pp. 255–304; A. Koltay, *Médiaszabályozás az online platformok korában: Ami eddig történt, és ami előttünk áll* [in:] *Magyarország 2020: 50 tanulmány az elmúlt 10 évről*, Á. Mernyei, B. Orbán, Budapest 2021, pp. 457–477; A. Koltay, *New Media and Freedom of Expression: Rethinking the Constitutional Foundations of the Public Sphere*, Hart Publishing 2021; A. Koltay, *A szólásszabadság doktrínája és a fake news jelensége az online platformokon* [in:] *Ünnepi kötet a 65 éves Imre Miklós tiszteletére*, E.M. Kovács (ed.), Budapest 2020, 450 p., pp. 231–268.

<sup>7</sup> For more information about this issue, read the paper published by A. Koltay, *Online gatekeepers and the future (and present) of the democratic public sphere*, "In Focus" 2020, No. 1, pp. 119–124.

<sup>8</sup> For more about the doctrine of "no regulation" read: A. Koltay, *A sajtószabadság fogalma ma* [in:] *Sajtószabadság és médiaszabályozás a 21. század elején 2.*, A. Koltay, B. Török, Budapest 2015, pp. 136–137.

<sup>9</sup> The establishing of the Facebook Oversight Board is an apt example for the self-regulation. For more about the initiative read E. Klein, *Mark Zuckerberg on Facebook's hardest year, and what comes next*, available at: <https://bit.ly/37oMi2A> [accessed on: 2 December 2021].

a joint effort by state and industry agents combining a codified law and a self-regulation system. This kind of regulation is an umbrella term, as it has many possible forms and shades of cooperation between the state and the concerned industry. The eCommerce Directive and the AVMS Directive are excellent examples of co-regulation. According to the eCommerce Directive, since 2000, platforms are host providers and may not be subject to any general monitoring obligations; they are required to remove any violating content only after they become aware of its infringing nature<sup>10</sup>. This process is called the “notice and takedown” procedure. In this case, platforms must decide upon the legality or infringing nature of certain user-uploaded content. The most critical issue of the eCommerce Directive is that platforms are forced into a decision-making role regarding user content<sup>11</sup>. According to the AVMS Directive of 2008, video-sharing platform providers operating within their respective jurisdictions must take appropriate measures to ensure the protection of minors, deleting incitement of violence or hatred against a group, and the lawfulness of commercial communications. The provisions of the AVMS Directive are not directly aimed at content, but focus on procedural provisions. Applying rules of private regulation platforms may enforce the regulation of their users’ content through the respective contract with them, for example, filtering, blocking, suspending, and deleting<sup>12</sup>. The Facebook Oversight Board may also be considered a private regulation as far as users’ rights are concerned. The problem with these types of regulations is that the platform’s codes of conduct and standards can have a legally binding force between the parties, but no free speech guarantees can be observed. Content curation practices such as up-ranking and prioritization that determine which content is circulated and accessed online have been under less scrutiny. Users do not necessarily encounter opinions that contradict their personal views and opinions unless they specifically seek them. Personalized services can reduce the diversity and selection of news that individual users encounter when using a platform<sup>13</sup>. Contract law-based regulation involves applying public law rules to directly affect legal relations between private individuals in their relations with other private legal entities. The media regulation toolbox controls ownership concentration, right to reply, fair news coverage, so-called must-carry rules, and the coverage of local news and broadcasting public service content. The presentation concluded that the judicial system or public authority would not be able to handle the workload associated with the operation of the platforms, so the notice and takedown system remains the basis for the liability of the platforms as an emergency measure.

<sup>10</sup> eCommerce Directive 2000/31/EC, art. 12–14.

<sup>11</sup> eCommerce Directive 2000/31/EC, art. 14.

<sup>12</sup> The general prohibition appears to have been undermined by the judgment of the Court of Justice of the European Union in *Glawischnig-Piesczek v. Facebook* case, in which the court ruled that it was not contrary to EU law to oblige a platform provider to delete posts with similar or the same content as a defamatory post that has previously been declared unlawful.

<sup>13</sup> For more information about this trending issue read: A. Koltay, *New Media and Freedom of Expression: Rethinking the Constitutional Foundations of the Public Sphere (Book Review)*, “Hungarian Yearbook of International Law and European Law” 2020, Vol. 8, pp 425–428.



## 2. First panel

In his address, Prof. Dr. Davor Derenčinović focused on analyzing Article 17 of the European Convention on Human Rights (hereinafter referred to as ECHR)<sup>14</sup>. Freedom of expression is considered a principal fundamental value of a democratic state. Numerous international legal documents, including ECHR, have protected this fundamental right. According to Article 10 of the ECHR, everyone has a right to freedom of expression. This right includes the freedom to hold opinions and to receive and impart information and ideas without interference by any public authority, regardless of the frontiers<sup>15</sup>. The right to the freedom of expression has both active and passive aspects. The European Court of Human Rights (hereinafter referred to as the ECtHR) further developed the substance and the scope of this right. Freedom of expression is not an absolute right; it can be restricted to certain conditions. According to the exclusion clause of Article 10 of the ECHR, “the exercise of these freedoms, since it carries with its duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary for a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”<sup>16</sup>. Certain forms of freedom of expression are not protected by Article 10 of the ECHR. According to Article 17 of the ECHR, the ECtHR has the authority to *prima facie*, excluding some forms of freedom of expression from the protective reach of Article 10 of the ECHR. Article 17 of the ECHR, titled Prohibition of Abuse of Rights, enshrines that “nothing in this European Convention on Human Rights may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”<sup>17</sup>. Article 17 of the ECHR was described by some commentators as a guillotine provision that undermines the foundations of the ECHR. In cases in which the court established

<sup>14</sup>Title of the presentation: Freedom of expression and its restrictions in Europe – on the applicability of Article 17 of the European Convention on Human Rights to disinformation (fake news). Further relevant publications of Prof. Dr. Davor Derenčinović and important papers of other scholars on this topic: F. Cassim, *Regulating hate speech and freedom of expression on the internet: Promoting tolerance and diversity*, “South African Journal of Criminal Justice” 2015, Vol. 28 Issue 3, pp. 303–336; S. Roksandić Vidlička, *Possible future challenge for the ECtHR: Importance of the Act on exemption and the Sanader case for transitional justice jurisprudence and the development of transitional justice policies*, “Zbornik Pravnog Fakulteta Zagrebu” 2014, Vol. 64 No. 5–6, pp. 1091–1120; B. Henson, B.W. Reynolds, B.S. Fisher, *Fear of crime online? examining the effect of risk, previous victimization, and exposure on fear of online interpersonal victimization*, “Journal of Contemporary Criminal Justice” 2013, Vol. 29 Issue 4, pp. 475–497; M. Kettemann, *Follow-Up to the Comparative Study on ‘Blocking, Filtering, and Take-Down of Illegal Internet Content’*, Germany 2019, available at: <https://rm.coe.int/dgi-2019-update-chapter-germany-study-on-blocking-and-filtering/168097ac51> [accessed on: 8 December 2021]; G. Nielsen, *Populism, Fake News, and the Flight from Democracy* [in:] *Navigating Fake News, Alternative Facts, and Misinformation in a Post-Truth World*, K. Dalkir, R. Katz, IGI Global Disseminator of Knowledge 2020, pp. 238–257; M.A. Peters, S. Rider, M. Hyvönen, T. Besley (eds.), *Post truth, fake news: Viral modernity and higher education*, Singapore 2021.

<sup>15</sup>European Convention on Human Rights, Article 10 paragraph 1.

<sup>16</sup>European Convention on Human Rights, Article 10 paragraph 2.

<sup>17</sup>European Convention on Human Rights, Article 17.

grounds for applying Article 17 of the ECHR, the three-step test of Article 10 of the ECHR would not apply. This can be considered a short-track mechanism for rejecting claims of alleged free speech violations that have been used to exclude hate speech from the protective function of Article 10 of the ECHR. Notwithstanding, the entire democratic and liberal dimension of some forms of fake news, particularly those integrated into large-scale disinformation campaigns, undoubtedly runs contrary to the text and spirit of the conventions. Many valid arguments justify the curbing of the blanket lifting of the free-speech mechanism provided in Article 10 of the ECHR. Therefore, applying the clause in disinformation should be decided exclusively on a case-by-case basis, considering all relevant arguments discussed.

Assoc. Prof. Dr. Aleš Rozehnal (Charles University, Faculty of Law, Prague, Czech Republic) spoke about the new dimensions of freedom of expression in the first part of his presentation<sup>18</sup>. The media is an indispensable part of a democratic society. Protecting freedom of expression creates a marketplace for ideas and allows citizens to hold public officials and figures accountable for their actions. However, protecting freedom of expression does not automatically imply the credibility of the media actors themselves. Media credibility depends mainly on strict adherence to ethical practices. It can be concluded that there is noticeable tension between traditional media and citizen journalism. The general values of traditional journalism include accuracy, verification, and impartiality. The most important values of social media are its immediacy, transparency, and strong opinions. These values should be protected in all possible manners. The second part of the presentation focused on fake news and hate speech. Many media require journalists to use social media to gather information on such services and start blogs, Facebook pages, or Twitter accounts. Nevertheless, the media are not responsible for contributing to the amount of fake news circulating in cyberspace. Just by forwarding or publishing information from someone else, the media is a guarantor of the truth of that information. When media are often accused of spreading fake news, it is crucial that journalists use platforms including social media, chat rooms, and forums for their reporting and that they verify their sources and information from these sites. It is an essential issue that there are no boundaries for digital monopolies, which is why they have emerged recently. By removing post-blocking users' content, monopolies can influence the outcome of elections and influence public debate. The European Union has the ability to halt this undemocratic environment. For twenty years, the Internet has evolved with minimal rules to become a truly digital Wild West. Freedom of speech on the Internet must be guaranteed to all, not just to strong information service providers. Their procedures must be transparent and they must be accountable for their actions. It is time to set some basic rules so that online democracy remains real. If we do not want to become obedient payers supporting large digital companies and sooner or later follow their political preferences, this is a necessary step, however, it is necessary to be careful about over-regulation.

<sup>18</sup> Title of the presentation: Social Media - Digital Democratic Agora or Threat to Democracy? Further relevant publications from the professor: A. Rozehnal, *Media Laws - A Commentary*, Prague 2008; A. Rozehnal, *Protection of Personality in the Media* [in:] *Media, Communication and Culture*, J. Bystrický (ed.), Pilsen 2008; A. Rozehnal, *Media Law*, Pilsen 2015; A. Rozehnal, *Media Law in the Czech Republic*, Kluwer Law International 2013.



In his address, Prof. Dr. Dušan Popović (University of Belgrade, Faculty of Law, Belgrade, Serbia) critically analyzed the case laws of the ECtHR and the Court of Justice of the European Union (hereinafter referred to as the CJEU)<sup>19</sup>. At the beginning of the presentation, the professor highlighted that anonymous Internet communication was predominantly valued. However, people have started increasingly using this type of protection provided by online anonymity to attack others. One way to do so is by posting comments on the Internet, which may be moderated or left unmoderated by the platform. The moderation of comments may be exercised either *ex ante* (before posting a comment) or *ex post* (after posting a comment). The protection of freedom of expression stems from various legal sources, the most important of which are the ECHR, The Charter of Fundamental Rights of the European Union (hereinafter referred to as the CFR), several national Constitutions, and relevant case-law. Article 10 of the ECHR states that freedom of expression includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority, regardless of frontiers.

In the second part of the presentation, Dr. Popović introduced three critical cases dealing with moderating comments. In the case of *Eva Glawischnig-Piesczek*<sup>20</sup>, the CJEU provided some practical, interpretative guidance regarding the safe harbor regime and the prohibition of a general monitoring obligation<sup>21</sup>. The CJEU held that the eCommerce Directive did not preclude a member state from ordering a hosting provider to remove information that has been held to be unlawful as well as information that is identical or equivalent to such unlawful information posted by any user. In *the Delfi v. Estonia case*<sup>22</sup>, the ECtHR decided on the liability of Delfi, a high-volume Estonian online news outlet, for defamation based on offensive comments posted by readers below one of its online news articles. The case of *MTE v. Hungary*<sup>23</sup> also concerned the liability of online intermediaries for user comments. In 2010, MTE, a self-regulatory body of Hungarian Internet content providers, published an article on two real estate management websites. Shortly thereafter, several offensive pseudonymous comments were posted in the article. The same type of comments appeared when the full text of the opinion was reproduced on other online portals such as [www.index.hu](http://www.index.hu). In *the Delfi*

<sup>19</sup>Title of the presentation: Defamatory online comments: a critical analysis of ECtHR and CJEU case-law. For further relevant publications from the author see: D. Popović, M. Jovanović: *Pravo Interneta – Odabrane teme, I izdanje*, Beograd 2019. For further relevant publications on this topic read: V. Balasubramani, *Online Intermediary Immunity Under Section 230*, "The Business Lawyer" 2016/2017, Vol. 72 Issue 1, pp. 275–286; S.W. Brenner, *Should online defamation be criminalized?*, "Mississippi Law Journal" 2007, Vol. 76 Issue 3, pp. 705–787; C. Castets-Renard, *Algorithmic content moderation on social media in EU law: Illusion of perfect enforcement*, "University of Illinois Journal of Law, Technology & Policy" 2020, Issue 2, pp. 283–323; F. Durach et al., *Tackling Disinformation: EU Regulation of the Digital Space*, "Romanian Journal of European Affairs" 2020, Vol. 20 No 1, pp. 5–20.; K. Klönick, *The new governors: the people, rules and processes governing online speech*, "Harvard Law Review" 2017, Vol. 131 Issue 6, pp. 1598–1670; O. Pollicino, L. Somaini, *Online disinformation and freedom of expression in the democratic context: The European and Italian responses* [in:] *Misinformation in referenda*, S. Baume et al. (eds.), London and New York 2020, pp. 171–193.

<sup>20</sup>Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, Judgement of the Court of Justice of the European Union (Third Chamber) of 3 October 2019.

<sup>21</sup>For more information about the safe harbour regime, visit <https://www.alrc.gov.au/publication/serious-invasions-of-privacy-in-the-digital-era-dp-80/10-defences-and-exemptions/safe-harbour-scheme-for-internet-intermediaries/> [accessed on: 4 December 2021].

<sup>22</sup>Grand Chamber Case of *Delfi AS v. Estonia* (Application no. 64569/09).

<sup>23</sup>Case of *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v. Hungary* (Application no. 22947/13).

*v. Estonia case*, the ECtHR listed four specific factors to guide the balancing process: the context of the comments, the measures applied by the platform to prevent or remove the comments, the liability of the actual authors of the comments as an alternative to the platform's liability, and the consequences of domestic proceedings for the platform. In *the MTE v. Hungary case*, the ECtHR added a fifth factor: the consequences of the comments for the victim. Although the eCommerce Directive provides for the limitation of liability for intermediaries, its provisions do not correspond to recent technical developments and the appearance of new forms of online communication. Moreover, it does not harmonize the conditions for holding intermediaries liable, but only the requirements for exempting Internet intermediaries from liability. In the last part of the presentation, Prof. Dr. Dušan Popović introduced the Digital Services Act proposal (hereinafter referred to as the DSA)<sup>24</sup>, which makes it obligatory for service providers to act when they receive orders about a specific item of illegal content. Such illegal content is defined as any information that, per se or by its reference to an activity, including the sale of products or provision of services, is not in compliance with EU law or the law of a member state, irrespective of the precise subject matter or the nature of that law. Given that the DSA proposal refers to illegal content that may be disabled or removed under certain conditions, it seems that all types of online comments will not be captured under the proposed mechanism. This brings us back again to the complex distinction made by the ECtHR between the categories of "manifestly illegal comments" and "merely offensive comments."

Assoc. Prof. Dr. Sanja Savčić (University of Novi Sad, Faculty of Law, Novi Sad, Serbia) devoted her presentation to analyzing the status of online discrimination in Serbia<sup>25</sup>. First, the professor quoted Article 46 of the Constitution of Serbia<sup>26</sup>, which guarantees that freedom of thought and expression shall be guaranteed as well as the freedom to seek, receive, and impart information and ideas through speech, writing, art, or in some other manner<sup>27</sup>. Freedom of expression may be restricted by law if it is necessary to protect the rights and reputation of others, uphold the authority and objectivity of the court, and protect public health, the morals of a democratic society, and the national security of the Republic of Serbia. Apart from the general provision, there are many special laws that apply to the protection of freedom of expression. According to the professor, the most frequent violations were threatening content, compromising security, different kinds of insults, unfounded accusations, hate speech, and discrimination. Almost half of the reported Internet-based violations are related to hate speech and discrimination. Assoc. Prof. Dr. Sanja Savčić introduced the most

<sup>24</sup> More information about the DSA package available at <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package> [accessed on: 5 December 2021].

<sup>25</sup> Title of the presentation: Is there an effective civil action against discrimination in Serbia? For further relevant literature read: H. Allcott, M. Gentzkow, *Social Media and Fake News in the 2016 Election*, "Journal of Economic Perspectives" 2017, Vol. 31 No. 2, pp. 211-236; J. Colliander, *This is fake news: Investigation the role of conformity to other users' views when commenting on and spreading disinformation in social media*, "Computers in Human Behavior" 2019, Vol. 97, pp. 202-215; D.O. Klein, J.R. Wueller, *Fake News: A Legal Perspective*, "Journal of Internet Law" 2017, Vol. 10, pp. 5-13.

<sup>26</sup> Constitution of Serbia (*Устав Србије*).

<sup>27</sup> Constitution of Serbia, Article 46.

important sources of law related to the breach of the right of equity in Serbia, according to which, the essential sources of laws are the Law on Prohibition of Discrimination of the Republic of Serbia (2009), the Law on Public Information and Media (2014), and the Code on Journalists (2015). Discrimination is any unjustified differentiation, inequitable conduct, or misconduct about persons or groups or members of their families or persons close to them, directly or indirectly, if this behavior is based on race, colour, ancestry, citizenship, nationality or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, property status, birth, genetic characteristics, health status, disability, marital or family status, conviction, age, appearance, membership in a political, trade union, and other organisations, and other natural or assumed personal characteristics. Violation as a criminal offence can lead to up to three years of imprisonment. If it is directed against a public officer, the penalty rate ranges from three months to five years. Civil claims, which can be initiated by the rightsholder, can aim to determine the infringement, cease the violation of the right, remove the infringement's consequences, compensate for the damage caused by infringement, and publish judicial decisions. The responsibility for the infringement can be in case of registered media, the editor-in-chief, or in case of a claim for compensation for the damage, the editor-in-chief, and the journalist. According to the relevant provision of the eCommerce Directive<sup>28</sup> according to court or administrative decisions, the service provider must inform competent state authorities and disclose and remove content or disable access. However, there is no obligation to monitor content and the most frequently used services fall outside of domestic jurisdiction. One particular problem is identifying the direct perpetrator.

### 3. Second panel

In her address, Dr. Kristina Čufar introduced the relevant case law in Slovenia and analyzed the impact of social networks on the Slovenian judicial system<sup>29</sup>. Problematic expressions on social networks are distributed extremely quickly, gain much media attention, spark controversy, divert from real issues, lower the standards of public debates, and cause lasting consequences that injunctive orders cannot entirely prevent. In extreme cases, problematic online expressions might spill over and materialize in the physical

<sup>28</sup> See Article 18 of the eCommerce Directive: "...when he knew or could have known about the unlawful actions of service users or the content of the data and did not remove or disable the access to the given data immediately upon acknowledgement of an unlawful action or data".

<sup>29</sup> Title of the presentation: (Re)constructions of Social Networks in Slovenian Case Law. Further relevant bibliography: V. Bajt, *Online Hate speech and the "refugee crisis" in Slovenia* [in:] *The disaster of European refugee policy: Perspectives from the 'Balkan route'*, Š. Neža Kogovšek, I.Ž. Žagar, M. Lukšič Hacin (eds.), Newcastle upon Tyne UK 2018, pp. 133-155; V. Bakir, A. McStay, *Fake News and The Economy of Emotions*, "Digital Journalism" 2018, Vol. 6 Issue 2, pp. 154-175; L. Bayer, *Inside Slovenia's war on the media*, 2021, available at: <https://www.politico.eu/article/slovenia-war-on-media-janez-jansa/> [accessed on: 3 December 2021]; U. Godnov, T. Redek, *The use of Twitter for political purposes in Slovenia*, "Romanian Journal of Political Science" 2014, Vol. 14 No.1, pp. 3-33; U. Horvat, *Slovenia as the last EU country that does not yet have a GDPR implementing law*, 2020, available at: <http://jadek-pensa.si/en/slovenia-as-the-last-eu-country-that-does-not-yet-have-a-gdpr-implementing-law/> [accessed on: 3 December 2021]; C. Vaccari, A. Chadwick, *Deepfakes and Disinformation: Exploring the Impact of Synthetic Political Video on Deception, Uncertainty, and Trust in News*, "Social Media + Society" 2020, Vol. 6 No. 1, pp. 1-13.

world. The reviewed case law demonstrates that the courts in Slovenia perceive social networks to be important forums of public expression and seek to avoid the chilling effect and excessive restrictions on freedom of expression in the online sphere. As online public debates are becoming more polarised, it seems that courts go increasingly far to ensure freedom of expression on social networks, exonerating speech that would otherwise not be permitted. The political debate on social networks is transforming into a competition of insults instead of debating the various aspects of society's problems. The fact that the Slovenian Supreme Court<sup>30</sup> recognized what would usually be considered an offensive *ad personam* attack as a political critique in need of protection, evoking the pursuit of the truth and enlightenment principles, is the most dramatic example of a lowering standard of acceptable speech on social networks in Slovenian case law. It will be interesting to see how courts deal with this phenomenon in the future and whether this new normal will become habitual in the eyes of the legal system.

Engagement with case law also shows that courts carefully dissect the circumstances of each case when it comes to deciding whether a post may be considered a breach of personal rights. While courts are vigilant when it comes to unlawful breaches of privacy, they also consider that we live in a world in which the means of communication have changed, leading to lower expectations of privacy in public settings. Technologies such as smartphones and social networks have already transformed our lives and relationship with the notion of privacy, which is reflected in the court's reasoning. The transformations of communication and societies provoked by social networks are a global phenomenon – like in all jurisdictions – and the Slovenian legal system is negotiating the impacts of living in a digital society. The fact that more people can reach wider audiences with their expressions has many positive effects on society, as previously invisible stories can emerge and marginalised groups gain the possibility to get connected. In the near future, courts will deal with many more cases involving social networks. For example, technological developments and deepfake technologies pose new challenges that must be accommodated by the legal system. “As ever, judicial system will have to adapt and invent responses to our changing realities,” concluded Dr. Čufar.

In his address, Prof. Dr. Marcin Wielec (Cardinal Stefan Wyszyński University in Warsaw / Institute of Justice, Poland) analysed legal criminal protection against fake news in Poland<sup>31</sup>. This analysis shows that criminal liability for fake news is

<sup>30</sup>Supreme Court of Slovenia (*Vrhovno sodišče republike Slovenije*).

<sup>31</sup>Title of the presentation: Polish criminal law and fake news. Other relevant papers from the author: M. Wielec, *Wartosci – analiza z perspektywy osobliwosci postepowania karnego*, Lublin 2017; M. Wielec (ed.), *Odpowiedzialnosc dyscyplinarna. Standardy polskiego systemu prawnego na przykladzie wybranych zawodow prawniczych*, Warszawa 2018. Further relevant publications on this topic: A. Bąk, *Serwisy społecznościowe – efekt Facebooka i nie tylko*, “Media i Społeczeństwo” 2016, No. 6, pp. 134–146; K. Bąkiewicz, *Wprowadzenie do definicji i klasyfikacji zjawiska fake newsa*, “Studia Medioznawcze” 2019, Vol. 20 No. 3, pp. 280–289; A. Brenda-Mañkowska, *Fake news, clickbait, żebrołajki – problemy mediów w dobie postprawdy* [in:] *Mass media we współczesnym świecie*, V. Tanaś, W. Welskop (eds.), Łódź 2019; D. Bryndał, P. Kocharński, *Multimedialne platformy cyfrowe*, “Rzeczpospolita”, 21 September 1998; K. Daniel, *Media wobec fake newsów – motywy kreowania, przyjmowane postawy, podejmowane działania*, “Polityka i Społeczeństwo” 2018, Vol. 16 No. 3, pp. 95–114.; I. Dąbrowska, *Deepfake, Nowy wymiar internetowej manipulacji*, “Zarządzenie Mediami” 2020, Vol. 8 No. 2, pp. 89–101; J. Dębowski, *O klasycznej koncepcji prawdy i jej filozoficznych podstawach. Czy w Matrixie możliwa jest prawda?* [in:] *Oblicza prawdy w filozofii, kulturze, języku*, A. Kikiewicz, E. Starzyńska-Kościszko (eds.), Olsztyn 2014.

not strictly provided for in the Polish criminal law system. Thus, the actual legal act in the form of the Penal Code<sup>32</sup> does not list prohibited acts that directly involve the creation, dissemination, or changing of information to the extent that it becomes a carrier of false content. However, criminal law is a specific type of law in all legal systems. Therefore, criminal law should deal with fake news with the most significant impact, that is, disinformation that threatens the highest values, such as state security. Disinformation of minor importance should be addressed in other branches of law such as civil law, administrative law. To answer the question of whether there is a possible punishment for fake news, it is necessary to balance the conflict between the constitutional value of the freedom of expression and the construction of a fake news offence. To cover disinformation under criminal law, one must establish a catalogue of the types of conduct and behaviors that make up for this type of offence. Compiling such a catalogue is very difficult. Therefore, there will be difficulties in the legal definition of fake news, and it will also be challenging to prove this type of offence in a criminal trial. However, the legislative work agenda in Poland features a draft act on protecting the freedom of social network users. It is a thorough administrative regulation, and the character of the act should be preserved. Criminal law should always be used as a last resort, as an *ultima ratio* regulation.

The *Renckhoff case* (C-161/17) and the censorship of contents were critical points of the address delivered by Bartłomiej Oręziak<sup>33</sup> (Cardinal Stefan Wyszyński University in Warsaw/Institute of Justice, Poland). The *Renckhoff* ruling introduced censorship on the Internet, with normative justification on copyright grounds. This censorship applies to the posting of hyperlinks to content lawfully communicated online, that is, with the consent of the copyright holder. In this ruling, the CJEU failed to use the model it had developed for the admissibility of hyperlinking to content made available on the Internet illegally, that is, without the consent of the copyright holder. The argumentation and interpretation of Article 3 (1) of Directive 2001/29/EC adopted in the *Renckhoff case* appear to be incompatible with the specific nature and content-communicated principles of the Internet. The inaccuracy or even defectiveness of this ruling is one thing; its consequences for the realization of freedom of expression on the Internet in practice is another one. It may paralyse hyperlinking in any form, disrupting the proper functioning of the Internet and causing an unjustified

<sup>32</sup> Polish Penal Code (*Kodeks Karny*, consolidated text: Dz.U. z 2021 r. poz. 2345 ze zm.).

<sup>33</sup> Title of the presentation: *Renckhoff case* (C-161/17): Internet Content Censorship and Freedom of Expression For more relevant literature see: B. Oręziak, *Judgement of the Court of Justice of the European Union (Second Chamber) of 8 September 2016 in Case C 160/15 in the proceedings of GS Media v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruid Dekker*, "Comparative Law Review" 2018, Vol. 23 No.1, pp. 243–253; B. Oręziak, *Judicial Dialogue between the European Court of Human Rights and the Court of Justice of the European Union in the Field of Legal Liability for Posting Hyperlinks*, "International Community Law Review" 2019, Vol. 21 Issue 5, pp. 432–448. Further relevant publication from the author: B. Oręziak, *Czy linkowanie w sieci jest dopuszczalne? Analiza w świetle najnowszego orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej* [in:] *Własność intelektualna w Internecie*, D. Żak (ed.), Lublin 2018, pp. 137–157; B. Oręziak, *Ograniczenia linkowania w Internecie w świetle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej – analiza orzeczenia z dnia 14 czerwca 2017 roku w sprawie C-610/15*, "Przegląd Prawno-Ekonomiczny" 2018, No. 4, pp. 199–219; B. Oręziak, *Analiza prawnej dopuszczalności zamieszczania hiperlinków w internecie. Uwagi na tle wyroku Europejskiego Trybunału Praw Człowieka z 4.12.2018 r. w sprawie MAGYAR JETI ZRT przeciwko Węgrom*, "Prawo w Działaniu" 2019, Vol. 40, pp. 181–192.



limitation in the implementation of legal norms related to the freedom of expression in the digital environment. It should be emphasized that the comprehensive analysis carried out in this paper concludes that the court decision in the *Renckhoff case* may be deemed a normatively ungrounded restriction of freedom of expression on the Internet. Furthermore, its illogical disharmony is striking regarding the degree of severity of the response to a subsequent communication to the public within the meaning of Article 3 (1) of Directive 2001/29/EC, where Internet users must expect a harsher reaction when hyperlinking content is legally available on the Internet, and a more lenient reaction when hyperlinking content is illegally available. To conclude the scholarly analysis above, first, the judgement in the *Renckhoff case* should be assessed critically by the presented arguments and to the substantive extent of these arguments. Second, it is proposed that all the *de lege ferenda* postulates proposed in this regard be introduced into law. The latter can be achieved either by amending Directive 2001/29/EC and using the national law to implement this directive or a ruling issued by the CJEU, which will depart from the construction adopted in the *Renckhoff case*.

In her presentation, Assoc. Prof. Dr. Marta Dragičević Prtenjača (the University of Zagreb, Faculty of Law, Zagreb, Croatia)<sup>34</sup> introduced the most important sources of law concerning criminal law in Croatia. The presentation focused on freedom of expression, fake news, and trending issues in this field of law. The Constitution of Croatia<sup>35</sup> protects freedom of expression at its highest level<sup>36</sup> through numerous acts, such as the Penal Code<sup>37</sup>, the Media Act<sup>38</sup>, the Electronic Media Act<sup>39</sup>, and the Misdemeanors Act against Public Order and Peace<sup>40</sup>, which ensure the high-level protection of this fundamental right. The speaker asked the following questions: How can freedom of expression be defined? Can this be limited by law? Alternatively, is it an unlimited fundamental law? The professor also talked about Articles 10 and 127 of the ECHR on Freedom of Expression, According to which, as mentioned before, freedom of expression is limited by criminal offences such as insults, defamation, false alarms, public incitement to violence, and hatred. In Croatia, aiding in and abetting to commit a criminal offence is not a special offence. There is no criminal offence referred to in Article 147 of this Act if the perpetrator achieved its characteristics in scientific, professional, literary, artwork, or public information, in the performance of duties prescribed by law, political or other public or social activities, in journalistic work, or defense of some right, and that is done in the public interest or for other justifiable reasons. The next part of the presentation focused on the definition of fake news.

<sup>34</sup> Title of the presentation: Limits of Freedom of Expression in Relation of Fake News in Contemporary Criminal Law - Croatian perspective.

<sup>35</sup> The Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*).

<sup>36</sup> The Constitution of the Republic of Croatia, OG 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14 - Art. 38. Constitution of the Republic of Croatia; restrictions Art. 16. Constitution of the Republic of Croatia.

<sup>37</sup> Penal code (*Kazneni zakon*), OG, 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21 - Art. 127 PC.

<sup>38</sup> Media Act (*Zakon o medijima*), OG 59/04, 84/11, 81/13.

<sup>39</sup> Electronic Media Act (*Zakon o elektroničkim medijima*), OG 111/21.

<sup>40</sup> Misdemeanours Act against Public Order and Peace (*Zakon o prekršajima protiv javnog reda i mira*), OG, 5/90, 30/90, 47/90, 29/94.



Concluding the varied perspectives, it can be stated that it is difficult to determine whether something is a fake news. After identifying fake news, the question is, who is responsible for creating and disseminating fake news and who is authorized to determine whether something is fake news or not? There are several repercussions that do not prevent fake news. Currently, there are more issues than answers. Who is authorized to censor fake news? What about robots and semi-truths? How can we determine whether something is fake or true? What types of scientific methods can support the identification of fake news? The following conclusions were drawn: There are limits to freedom of expression. Censorship may only be forbidden if it is unlawful. Several boundaries can be found in criminal offences, but creating and disseminating fake news is not a criminal offence in Croatia.

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