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STRIKING THE BALANCE: PRIVACY V FREEDOM OF EXPRESSION UNDER THE ECHR

Oksana NAGNICHUK,
Graduate student at Law Faculty
of the National University of "Kyiv-Mohyla Academy"

Summary

The focus in this article will be directed towards analysis of the main interests that are protected within the right to privacy and freedom of expression under the ECHR and elaboration on how these interests balance between each other. For the purpose of exploring the main aim of the article the following issues will be discussed: how can privacy and freedom of expression be balanced in such spheres as protection of public interest, protection of public figures, right of anonymity and protection of reputation.

Key words: private life, privacy, freedom of expression, public interests, public figures.

Аннотация

В статье внимание уделяется анализу основных прав, которые охраняются ЕКПЧ (право на частную жизнь и право на свободу выражения взглядов), и поиску ответа на вопрос о балансе этих двух прав. С этой целью будут обсуждаться следующие вопросы: каким образом можно найти баланс между правом на приватность и правом на свободу выражения взглядов в таких сферах, как защита общественных интересов и защита публичных лиц, право на анонимность и защиту репутации.

Ключевые слова: приватная жизнь, приватность, свобода выражения взглядов, общественные интересы, публичные лица.

Formulation of the problem. The Convention provides no obligatory point at which the balance must be struck between Articles 8 and 10. However, only be interfered with the extent that such interference is capable of justification within the terms of Article 8(2) and 10(2) respectively. In other words, there is no obligation on any State party to the Convention to draw the line between Article 8 and 10 at any particular point, but any interference with a right must be justified by reference to the principles of legality, pressing social need and proportionality. The Court has generally confined its reasoning to one or other Article, and most often has analyzed such cases under Article 10 and by reference to the Article 10(2) justification of "protection of the reputation or rights of others". [1, p. 43–44]

Background research. The topic of protecting privacy and freedom of expression under the ECHR by the ECtHR is of particular interest for Ukraine as soon as the decisions of the ECtHR are the source of law in Ukraine according to the Article 17 of the Ukrainian law "On Enforcement and Application of the Jurisprudence of the European Court of Human Rights". According to the ranking of the Reporters Without Borders organization in terms of protection of freedom of expression Ukraine loses its ranking with every year. Even though there are till now only 4 cases against Ukraine in the ECtHR concerning protection of freedom of expression, this still does not prove that the situation in the sphere of protection of freedom of expression, in conjunction with the right to privacy, is not alarming. Therefore, it is essential to conduct a research of how these rights are treated under the ECHR by the ECtHR and to apply these vital lessons in Ukraine.

Purpose of article. To answer the question which right (the right to privacy or the right to freedom of expression) should be given preference if there is a conflict between them.

Used methods. To pursue the main aim of the paper the following methods were applied: (i) comparative research which was needed to explore the conflicting interests between two rights when analyzing the decisions of the ECtHR; (ii) descriptive and analytical methods while analyzing numerous cases of the ECtHR on articles 8 and 10 of the ECHR.

Presentation of the basic material.

Public interest. The decisive factor in balancing the protection of private life

against freedom of expression should lie in the contribution of the information to the debate of general interest.

It was stated in the *Von Hannover v Germany* case that "[w]hen balancing the competing interests, the informational value of the events depicted will be of crucial significance. The greater the need of the public to know, the more limited will be the right of the person of contemporary history. By contrast, the need to protect this person's privacy will become greater as the information gained by the public becomes less valuable". [2, p. 43]

In *Krone Verlag GmbH & Co. KG v. Austria, Von Hannover v. Germany, De Haes and Gijsels v. Belgium* the ECtHR held that the press plays an essential role in a democratic society. "Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest". [2, § 37] However, to find whether there was a violation of the right to freedom of expression, Court has to weigh the right to freedom of expression against the right to privacy. In *Campbell v. MGN Limited* the House of Lords said that as part of this process the Courts should take into account the justifications put forward for interfering with each other and apply a test of proportionality. [2, p. 254] The task of this test is to figure out whether the benefit of suppressing the information outweighs the benefit of publishing it. In the cases in which the Court has had to balance the protection of private life against the freedom of expression it has always stressed the contribution made by photos or articles in the press to a debate of general interest. For instance, according to the practice of the ECtHR, namely, in *Krone Verlag GmbH & Co. KG v. Austria* [4] the Court attached particular importance to the fact that the subject in question was a news item of "major public concern" and that the published photographs "did not disclose any details of [the] private life" of the person in question and held that there had been a violation of Article 10.

In addition, in *Bergens Tidende and others v. Norway* [5]the Court stressed that the national margin of appreciation is circumscribed by the interests of a democratic society in enabling the press to exercise its vital role of "public watchdog" by imparting information of serious public concern. On the other hand, the Court established in *Frezzos and Roire v. France* [6] case that not only does press have the task of imparting such information and ideas on matters of public interest; the public also has a right to receive them. Moreover, in *Ceylan v Turkey Court* [7] held that freedom of expression includes the right to engage in open discussion of difficult problems, analysing the underlying causes and expressing possible solutions.

The question of public interest in balancing between right to privacy and right to freedom of expression was also raised in case *Bladet Tromso and Stensaas v Norway*. The majority of the Court in this case held that the articles in question and the subsequent defamation proceedings brought successfully against the newspaper and its editor fell on the other side of the line, and accordingly the Court found a violation of Article 10. The newspaper had reported critical findings of an official inspector's report into seal hunting. The majority of the Court did not expressly refer to the balance required between the Articles 8 and 10, but it did emphasize of freedom of expression under Article 10(2) which are liable to assume significance when, as in that case, there is a question of attacking the reputation of private individuals and undermining the "rights of others." [8] By reason of those duties and responsibilities, the safeguard afforded by Article 10 of the ECHR to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting "in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism". [2, § 65, 54] The Court has concluded that the convictions for defamation were disproportionate to the legitimate aim of protecting the seal hunters' reputations, and accordingly found a violation of Article 10. [10]

In case of *Hachette Filipacchi Associes (Paris-Match) v. France* [11] the question about dissemination of photograph facing famous dead person and its relation to privacy. In that case several important questions had been raised. Firstly, it was contended that publication of the photograph of the bloodied and mutilated body of their relative was not information, which could possibly be useful to the public. Secondly, the accent had been done on that issue that family were still mourning loss of their family member, and the fact that they had not given their consent on publication, constituted a gross intrusion in their grief. Accordingly, the intimacy of their private life also has been breached. The ECtHR considered that the interference with freedom of expression had pursued a legitimate aim (protecting the rights of others) and it noted that the rights concerned fell within the scope of Article 8 of the Convention, guaranteeing the right to respect for private and family life. As to "necessary in a democratic society", within the framework of duties and responsibilities inherent in the exercise of freedom of expression, the Court reiterated that "the death of a close relative and the ensuing mourning, which were a source of intense grief, must sometimes lead the authorities to take the necessary measures to ensure respect for the private and family lives of the persons concerned."

Reasonable expectation of privacy. In cases of balancing private and public life the test of "reasonable expectation of privacy" is applied as a guide for judging when private life is protected. Bart Willem Schermer mentioned in his work that "the reasonable expectation of privacy criterion limits the right to privacy to the extent where an individual indeed has a reasonable expectation of privacy. In other words, the individual must demonstrate the wish that his conduct remains private and society must acknowledge the fact that the individuals conduct is indeed private". [12, p.127]

The concept of reasonable expectation of privacy appeared in ECtHR in case *Lüdi v. Switzerland* [13] where it was stated that a person involved in criminal activities is entitled to a lesser expectation of privacy. [14, p. 334] The concept of reasonable expectation of privacy can also be found in the case *Halford v United Kingdom.* [15] In this case the telephone calls of the applicant were intercepted without warning by her employer. As it was stated in *Halford case* [16] case the notion of "private life" also includes activities of a professional and business nature. In the *Halford case* with respect to Article 8 the Court concluded that telephone calls made from business premises may be covered by notions of "private life" and "correspondence". There was no evidence

of any warning about taping phone calls having been given to Ms Halford. Thus, the ECtHR considered that there was a violation of applicant's right under Article 8 of the ECHR because she had reasonable expectation of privacy at the work place.

Right of Anonymity and Privacy. Right of anonymity is one of the aspects of the freedom of expression. This right includes "the right to receive and impart information and ideas without interference by public authorities" (Article 10 of the ECHR). It means that the person is able to communicate ideas and share information without bias. Anonymity can be considered as a "shield against oppression, harassment, retaliation, censorship or discrimination and therefore is it considered as a vital component of freedom of speech or freedom of expression" [17].

Right of anonymity can also provide with the same benefits as right to privacy because both of them help to preserve such human values as security, self-fulfilment and peace of mind. [18, p. 215] Person can feel more safety while discussing such sensitive topics as AIDs, diseases, abortion or some other personal issues if he/she does not reveal the name. The ECtHR has ruled several cases on Article 8 (right to privacy) where it decided not to disclose the name of the applicant. One of them is *Z. v Finland* [19] case where the Court concluded that disclosure of information (revealing the name of the applicant in legal procedural materials) concerning the applicant's HIV positive status gave rise to a violation of the applicant's right to respect for her private and family life as guaranteed by Article 8 of the ECHR.

Another aspect of the right of anonymity is the protection of journalistic sources. It receives high level of protection under Article 10 of the ECHR as it plays an essential role in delivering information of public interest. The ECtHR stated in the case *Goodwin v U.K.* that: "[f]reedom of expression constitutes one of the essential foundations of a democratic society and that, in that context, the safeguards guaranteed to the press are particularly important. Furthermore, protection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital "public watchdog" role of the press may be undermined and the ability of the press to provide accurate and reliable reporting may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect that an order for disclosure of a source has on the exercise of that freedom, such a measure cannot be compatible with Article 10 unless it is justified by an overriding requirement in the public interest" [20, § 39].

Indeed, the right to anonymity enhances the possibility of people to be engaged in the public debate. The ECtHR has several times reiterated that limitations on the confidentiality of journalistic sources "call for the most careful scrutiny by the Court". [21] Though, on the other hand, this right can not be an absolute one. The information disseminated by the anonymous source could be illegal, with harmful content or could reveal personal details that might endanger lives. Therefore, it is important to find a liable person. Here raises a question of balancing the right of anonymity with other rights of the individuals, such as right to privacy, and public interest.

Right of privacy and freedom of expression for public figures. The Court several times has mentioned that public persons have a legitimate expectation of protection of respect for their private life and that they may legitimately expect to be protected against intrusion of their privacy or against the propagation of unfounded rumors relating to intimate aspects of their life [22].

On the other hand, the ECtHR has always underlined the special status of politicians and emphasized the freedom of political debate. The Court has recognized that there are wider limits of acceptable criticism as regards a politician or a public figure then as regards a private individual. [23, § 47] It was reiterated in several cases that "the limits of acceptable criticism are … wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance". [24, § 42] A critical statement or a negative opinion about a politician, regarding facts and behaviour in relation to his public activities cannot be considered to have an impact on the private life of the person concerned. In such circumstances, the Court is of the opinion that the alleged harm of the reputation as a politician is not a sustainable claim regarding the protection of the right to respect for personal integrity under Article 8 of the ECHR [25, p. 19]. Instead, the Court views that any limitation of freedom of expression for the sake of a politician is disproportional according to the Article 10 of the ECHR.

The Court has also emphasized that "[i]n a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media" [26, § 46].

Protection of reputation versus right to freedom of expression. The practice of the Court concerning the protection of reputation is inconsistent. In some cases the right to reputation is considered as an independent right which is an element of the right to respect for private life which is directly guaranteed by Article 8 of the ECHR and in other cases, the Court denies the importance of reputation as a separate law and decides on the protection of the reputation solely by the application of Article 10 of the Convention, which recognizes the protection of the reputation as a legitimate restrictions of freedom of expression.

One of the recent cases concerning protection of the right of reputation is the case *Petrina v. Romania* [27]. This time the Court protected the right to reputation of the politician who suffered attacks from media under Article 8 of the ECHR. The most intriguing thing is that the applicant lost his case in national courts because the latter referred to the decision of the ECtHR concerning protection of freedom of expression.

In its decision the Court noted that the issue of this case – namely, the adoption of a law that would regulate the disclosure to those who worked with the State Security

Service Securitate, – is an issue widely covered in the media and which played a significant role in the Romanian society. Cooperation policy with the service was very sensitive social and moral themes in the context of the history of Romania.

However, the Court noted that despite the satirical direction of the Catavencu magazine, the articles concerning the politicain were by their nature offensive to the applicant, as there was no evidence that he ever belonged to the organization Securitate. In addition, it is important to note that the messages contained in the articles were sufficiently clear and unequivocal, and without any ironic or humorous subtext.

The Court has noted that the way in which journalist delivered information about the politician overstepped all allowed boundaries even in the light of principles of freedom of expression. The Court found that the reality was distorted with no evidence for that reason. Journalists went beyond the maximum limits when they accused politician for being involved in an organization that used the repressive measures and terror in their activities in the interests of the old regime. Moreover, at that time there was no legally defined mechanism that would determine access to secret service files of the Securitate, for activities of which the applicant can not be held accountable.

Accordingly, the Court was not convinced that the grounds, on which the domestic courts gave preference to protect freedom of speech and journalists, were enough to outweigh the right to respect his reputation. Thus, the Court unanimously held that there was a violation of Article 8 of the Convention and appointed Mr. Petrini 5 000 euros for non-pecuniary damages which must be paid by the government of Romania.

The recent practice of the EctHR shows that there were a lot of cases in which the Court refused to defend freedom of expression, giving preference to any other rights. Among the recent cases are: *Pfeifer v. Austria* (November 15, 2007), *Stoll v Switzerland* (December 10, 2007); *Flux v Moldova number 6* (July 29, 2008); *Ivanova v Bulgaria* (April 14, 2008). In all these decisions the Court refused to defend the interests of free speech, because the journalists acted irresponsibly and unethically. For example, in the case against Moldova the journalists accused the headmaster in bribery only on the facts of the anonymous letter without other evidences. Later, the magazine where such accusation was published refused the headmaster in his right to respond [28].

The ECtHR started to give more attention not only to the issue whether information contributes to the public debate but also to the quality of journalist's work. The decision in the case of Mr. Petrin against Romania only continues this practice.

Conclusion. To sum up, there are several ways in which the right to freedom of expression and right to privacy can be balanced. One of the generalizations made by the ECtHR was expressed in a recent case *Karako v Hungary* [29, § 25] where it was stated that: "The Court is therefore satisfied that the inherent logic of Article 10, that is to say, the special rule contained in its second paragraph, precludes the possibility of conflict with Article 8. In the Court's view, the expression "the rights of others" in the latter provision encompasses the right to personal integrity and serves as a ground for limitation of freedom of expression insofar as the interference designed to protect private life is proportionate." The balance of rights and proportionality of the interference depends on several factors, such as who is protected and concerning what. The decisive factor in balancing the protection of private life against freedom of expression is in the contribution of information to the debate of general interest. Thus, information concerning the public person and which has public interest will receive higher protection under the right to freedom of expression rather then right to privacy.

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ОСОБЕННОСТИ ДОКАЗЫВАНИЯ ПО ДЕЛАМ, КОТОРЫЕ ВОЗНИКАЮТ ИЗ КРЕДИТНЫХ ПРАВООТНОШЕНИЙ

Виктория ПОЛИВАЧ,
аспирант кафедры правосудия юридического факультета
Киевского национального университета имени Тараса Шевченко

Summary

The current problem of the features of court proving process in cases that arise from credit relationships is researched. The general list of means of proof, the need to observe the principles of proving, differentiation of concepts of ensuring and reclamation of proofs with a purpose of approval the legal and well-founded decision is determined.

Key words: credit contract, subject of proving, principles of proving, ensuring and reclamation of proofs.

Аннотация

В статье рассмотрена актуальная проблема особенностей процесса доказывания по делам, возникающим из кредитных правоотношений. Выяснен примерный перечень доказательств, необходимость соблюдения принципов доказывания, а также разграничения понятий обеспечения и истребования доказательств по делам данной категории с целью их возможного практического применения и принятия законного и обоснованного судебного решения.

Ключевые слова: кредитный договор, предмет доказывания, принципы доказывания, обеспечение и истребование доказательств.

Постановка проблемы. Исследование процессуальных особенностей судебного производства по отдельным категориям гражданских дел становится в последнее время все более актуальным. Это связано с развитием национального законодательства и, соответственно, с появлением разнообразия дел, рассматриваемых судами.

В условиях мирового финансового кризиса особенно остро стало разрешение проблем, связанных с выполнением условий кредитных договоров. Это повлекло за собой появление в судах большого количества споров, возникающих из кредитных правоотношений, процессуальный порядок рассмотрения которых уже несколько лет является предметом обсуждения как теоретиков, так и практиков гражданского процессуального права. Такое внимание к данной категории дел обусловливается их многочисленностью (в настоящее время они составляют основную часть всех гражданских дел, рассматриваемых судами общей юрисдикции: за 2013 год в местные общие суды поступило 184 989 дел по спорам, что возникают из договоров займа, кредита, банковского вклада, за 2012 год – 157 567 дел [1]), тенденцией к увеличению их количества, а главное – отсутствием единой судебной практики их разрешения.

Актуальность темы. Анализ судебной практики рассмотрения дел, возникающих из кредитных правоотношений, свидетельствует о том, что суды по-разному применяют не только нормы материального, но и процессуального права. В частности, актуальным является вопрос доказывания (относимости и допустимости доказательств, обеспечение доказательств и т. п.) по делам данной категории, пренебрежение которым, во-первых, приводит к дисбалансу гражданско-процессуальных прав сторон, во-вторых, затрудняет выяснение всех существенных обстоятельств для разрешения спора, возникшего из кредитных правоотношений. Исследования данного вопроса важны, в частности, для совершенствования гражданского процессуального законодательства Украины, поскольку единообразие судебной практики является неотложной задачей развития теории гражданского процессуального права.

Следует отметить, что проблемы доказывания в разное время были предметом исследования многих ученых-процессуалистов. Существенный вклад в развитие концепции доказательств и доказывания сделали Е.В. Васьковский, К.И. Малышев, А.Ф. Клейман, Т.М. Яблочков, Я.Л. Штутин, И.В. Решетникова, М.К. Треушников Т.В. Сахнова,