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# The freedom of expression versus the right to privacy – considerations

As an essential attribute of democracy, freedom of expression is legitimised through a range of both national and international instruments. In the European Convention on Human Rights (hereinafter – the Convention) this concept was reinforced in Article 10. In the case of *Handyside v. the United Kingdom*, we observe the importance given by the European Court of Human Rights (ECHR) to this principle – “freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man”.

In the same case, the European Court emphasised that freedom of expression is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.

Freedom of expression is not an absolute right and, as the Court showed in *Morice v. France*, it is accompanied by exceptions that require a strict interpretation, and the need to restrict it must be convincingly established.

Any interference with the applicant's right to freedom of expression needs to be conclusively and unequivocally motivated by the court, considering the principle of proportionality. In addition, it is necessary to argue that this interference is a necessary one in a democratic society.

Thus, if in the exercise of the right to express one's opinion some unjustified insult is resorted to infringing the right to a good reputation, the court is called to take into account all aspects of the case, including analysing whether the main purpose of the value judgement was rather to raise public awareness of a matter of public interest, even if expressed in an exaggerated or provocative manner, rather than denigrate.

We are in the presence of a violation of Article 10 of the Convention when the reasons invoked by the national courts cannot be considered relevant and sufficient to justify the interference with the right to freedom of expression of an applicant and when this interference is disproportionate in relation to the legitimate aim pursued.

In the *Marunić v. Croatia* case, the European Court decided that there was a violation of Article 10 of the Convention, finding that the interference with the applicant's freedom of expression in the form of summary dismissal was not necessary in a democratic society to protect the reputation and rights of the society in question. In this case, the applicant, director of a municipal company providing services of public interest, was summarily dismissed following public statements in which she defended herself, statements made a week after the president of the company criticised her activity in an article of the press. The dismissal decision was motivated by the fact that her statements to the press harm the company's reputation. The applicant complained that her statements to the press were made only to refute the false accusations against her and that her dismissal violated her right to freedom of expression.

The Court held that, although the obligation of loyalty, reserve and discretion normally prevents employees from publicly criticising the employers' activity, in the present case the essential element is the appearance in the press of the other member of the company's management and the public criticism of the activity of the applicant. Under these conditions, she could not remain silent and not defend her reputation in the same way. It would be regarded as stretching the duty of loyalty to request otherwise.

The internal laws of the member-states may require the proof of the veracity of the statements made publicly, and this does not seem to contravene Article 10. On the contrary, such measures are intended to prevent gratuitous personal attacks, with

unnecessarily hurtful comments, that is, without any valid justification.

In the case of *Axel Springer AG v. Germany*, it was shown that the quality of public personality of the person whose reputation protection is weighed against the restriction of freedom of expression plays an important role. This being a sufficiently well-known actor, and the fact that he had been arrested in public and actively sought to come to the fore by revealing information about his private life in a series of interviews, meant that his legitimate belief that his private life will be effectively protected was limited.

We observe a similar perspective in the case of *Axel Springer AG v. Germany (no. 2)*, where the Court noted that the case concerned aspects of public interest and that the former chancellor, insofar as he had occupied one of the highest political positions of the Federal Republic of Germany, had a duty to show a much greater degree of tolerance than a private person.

In the constant jurisprudence of the Strasbourg Court it is highlighted that the limits of acceptable criticism are greater towards a politician than towards a private person. Politicians unavoidably and knowingly expose themselves to the scrutiny of their every word and deed by the public and must therefore display a greater degree of tolerance for criticism.

In the decision of *Mladina D. D. In Ljubljana v. Slovenia*, the Court likewise emphasised that the limits of acceptable criticism are greater in relation to a politician, particularly as he himself had made controversial public statements, than in relation to a private person. Both the context in which the editor's article was written (an intense political debate) and the style used (similar to the parliamentarian's provocative behaviour and comments) were not sufficiently taken into account by the national courts. Therefore, the article was not a gratuitous personal attack on the MP, but a reply to the MP's own public remarks. Consequently, it was concluded that the domestic courts had not struck a fair balance between the competing interests of protecting the reputation or rights of the parliamentarian and the publisher's right to freedom of expression.

In *Reznik v. Russia* the applicant complained that his right to freedom of expression had been disproportionately restricted. The European Court ruled that it was indeed violated Article 10 of the Convention, finding that the applicant did not exceed the limits of acceptable criticism, that his statement was based on a sufficient factual basis and that the Moscow Court, which convicted him of libel, did not base its decision on an acceptable assessment of the relevant facts. In particular, the tribunal did not maintain any balance between the need to protect the petitioners' reputation and the public interest. Furthermore, although the applicant was ordered to pay only a small sum of money as compensation, the initiation of a libel suit against him was likely to have a chilling effect on his freedom of expression.

The case of *Rodriguez Ravelo v. Spain* concerned language used by a lawyer in a written application that contained value judgments about a female judge and attributed reprehensible behaviour to her. The applicant complained about the conviction and the sentence imposed on the grounds that they represented a disproportionate interference with the exercise of his right to express himself freely in the context of his professional duties. The Court decided that Article 10 of the Convention was violated. Certainly, the applicant's conviction and sentence were provided for by law and the interference with the exercise of his right to freedom of expression had pursued the legitimate aim of protecting the judge's reputation and rights and maintaining the authority and impartiality of the judiciary. However, the Court found that the applicant's conviction could have a deterrent effect on lawyers called upon to defend their clients. The Spanish criminal courts therefore did not strike a fair balance between the need to maintain the authority of the judiciary and the need to protect freedom of expression. The punishment pronounced against the lawyer was therefore not proportionate to the legitimate aim pursued and was therefore not necessary in a democratic society. We observe that this sanction in the specific circumstances of the case were excessive.

A case also worthy of attention is *Morice v. France*, in which the conviction of a lawyer, considering the observations presented in the press, for complicity in slander against investigating judges who had been recused from the judicial investigation regarding the death of a judge was targeted. The applicant argued that the conviction for complicity in defamation violated his right to freedom of expression under Article 10 of the Convention. It was not disputed in this case that the decision to convict the applicant constituted an interference with the exercise of his right to freedom of expression, as provided by law, to protect his reputation or the rights of others. The Court decided, however, that there was a violation of Article 10 of the Convention, noting

that the conviction for complicity in slander pronounced against the applicant can be seen as a disproportionate interference with his right to freedom of expression and therefore was not necessary in a democratic society within the meaning of Article 10.

At the same time, it should be noted that, considering his specific status and his position in the administration of justice, the Court considers that the lawyer cannot be assimilated to a journalist. Indeed, their respective places and missions in judicial debate are inherently different. The journalist must communicate, in compliance with his duties and responsibilities, information and ideas on all matters of general interest, including those relating to the administration of justice. In turn, the lawyer acts as an actor of the justice system, directly involved in its operation and in the defence of a party. Therefore, he cannot be assimilated to an external witness responsible to inform the public.

Another important aspect to consider refers to the attestation of the existence of any element suggesting bad faith on the part of the person issuing public statements, as was shown in the judgement of *Kanellopoulou v. Greece*. At the same time, in this case the European Court established that the Greek courts did not place the applicant's statements in the specific context of the case, nor did they correctly consider the suffering felt by the applicant when she made the statements, in this case being the patient who endured the shortcomings of an operation conducted by a renown cosmetic surgeon. Therefore, we conclude that the consequences suffered by a person due to the actions of another plays a significant role when it comes to expressing their opinion publicly.

Often there is an incidence between Article 10 (freedom of expression) with Article 8 (the right to respect for private and family life) of the Convention. In such situations, the incidence between these values must be balanced and analysed in relation to the concrete circumstances of the case, as well as the legitimate goal pursued by each of the parties, to avoid disproportionate sanctions. When we talk about the violation of Article 8 of the Convention, the consequences that may exist are discussed, such as: the stigmatization of an individual, which has a major impact on his honour and reputation and affects his private and family life; inability to continue working; being forced to leave his home or the community he belongs to, leading to his social exclusion; the suffering of extremely serious damages in terms of psychological and moral integrity, but also physical (aggression from other people, self-flagellation, suicide), etc. The gravity of such consequences must not be the subject of speculation, but a causal link between the statement and the effect will be proved in order to convince an impartial and independent court of the truth of such facts.

In this sense the *Petrenco v. Republic of Moldova* case becomes relevant. At the time of the facts, the applicant was the president of the Association of Historians from the Republic of Moldova and a university professor. He complained that his reputation had been damaged because of the publication of claims in the official newspaper of the Moldovan government suggesting that he had collaborated with the KGB in his past. The European Court decided that Article 8 of the Convention was infringed, finding that the reasons invoked by the Moldovan courts to protect the right to freedom of expression of the newspaper and the author of the article in dispute were insufficient for the first against the right to respect the reputation of the applicant. The Court observed, in particular, that the article was published in the context of an animated debate of great public interest and that the applicant, who was a public figure, was obliged to tolerate greater public scrutiny and criticism than if he had been a private person. Therefore, the general tone of the article and the offensive language did not in themselves constitute a violation of the applicant's right to respect for his reputation. However, by suggesting that the applicant collaborated with the KGB as if it were an established fact, to the extent that it was mere speculation on the part of the author, the article overstepped the bounds of acceptable commentary in the context of a public interest debate.

The courts are called upon to strike a fair balance between the relevant interests when two rights of equal importance, such as freedom of expression and respect for privacy, are brought before them, explaining at length and reasonably the reasons why one value takes precedence over the other in each individual case and subjecting the interference on any right to the test of proportionality.

We believe that the right to verbalise observations or criticisms on a subject of general interest, even if in a harsh or even acidic manner, should not be restricted in a democratic society in the absence of relevant and absolutely justified reasons, especially if it is about value judgments, made in general terms and having a sufficient factual basis.

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