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FREEDOM OF EXPRESSION VERSUS PRIVACY IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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The article provides general analyses of the relationship between freedom of expression and privacy and, in particular, examines the appropriate weight to be attached to each of the rights concerned where the dispute has arisen. It further focuses on the special position of the media in relation to freedom of expression and suggests the defenses developed by the European Court of Human Rights case law which override the individual interest in privacy protection and, therefore, justify the invasion on privacy.

Key words: freedom of expression, privacy, balancing exercise, public interest, legitimate expectations

INTRODUCTION

The increasing need in contemporary society for privacy protection is convincingly established both at national and international levels. The Council of Europe in its Resolution 1165 has acknowledged that 'people's private lives have become a highly lucrative commodity for certain sectors of the media. The victims are essentially public figures, since details of their private lives serve as a stimulus to sales'.[1]

Admittedly, publications involving details of the personal life of celebrities and other public figures significantly increase the newspapers sales volume. The nature of this type of reporting and the means by which some materials are obtained are highly controversial, so that the effect it has on the lifes of those involved has raised great concerns about privacy invasion. However, commercial interest of the newspaper and the public interest attached to the publication might well go together. In this respect the courts are increasingly being called upon to strike the balance between two conflicting fundamental rights: one person's right to privacy with another's right to freedom of expression.

In the last decade, the European Court of Human Rights (hereinafter – the

[1] Resolution 1165 (1998) Right to Privacy // Council of Europe Parliamentary Assembly, adopted on 26 June 1998 (24th Sitting) – http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta98/eres1165.htm#_ftn1 (last accessed August 17, 2012).

Court) has considerably extended the protective scope of the privacy provision of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention). At the same time, there is no established definition of privacy. Nor is that of the private life. The Court considered it unsusceptible of providing an exhaustive definition. In *Niemietz v Germany* the Court has commented generally that it "does not consider it possible or necessary to attempt an exhaustive definition of the notion of 'private life'".[2] Moreover, the Court has expressed in such terms so as to avoid spelling out precisely which interest(s) is (are) implicated when an applicant has claimed a violation of more than one of them (for instance, in *Klass v FRG* the Court has declared telephone conversations to be a part of 'private life, family life and correspondence'.[3]

However, when a certain right is enforceable and interference with it becomes subject to legal control and might result in legal remedies, it is essential to define the limits of that right in order to establish the standards which other individuals and the state must comply with. Moreover, application of both freedom of expression and privacy requires a balancing exercise between the need to protect human rights and the Contracting States' margin of appreciation.

Therefore, where a conflict has arisen, how to resolve the competing values encompassed in the two rights becomes an essential and troublesome question. The present paper examines the limits of justifiable restriction on freedom of expression in case when its exercise results in infringement of personal privacy, and discusses the factors influencing the outcome of the balancing exercise.

CONFLICT BETWEEN FREEDOM OF EXPRESSION AND PRIVACY: GENERAL COMMENTS

Article 8 of the Convention which protects the right to respect for private and family life, home and correspondence, contains the criteria upon which the interference with those rights may be justified, of which freedom of expression falls into the category of 'protection of the rights and freedoms of others'.

Article 10 which protects freedom of expression has a similar structure. It allows the interference with freedom of expression, *inter alia*, on the ground of 'protection of the reputation or the rights of others'. Therefore, the relationship of free speech and privacy creates a conflict between two well-established fundamental rights. In national judicial practice degree of legal protection of free speech has been clarified in the following terms: "'Free' in itself is vague and indeterminate. It must take its colour from the context. Free speech does not mean free speech: it means speech hedged in by all laws against defamation, blasphemy, sedition and so forth. It means freedom governed by law…".[4]

Despite the qualified character of freedom of expression its broad scope is generally accepted: it protects activities which carry a risk of damaging or actually damage interests of others.[5]

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[2] Niemietz v Germany (1993), 16 EHRR 97, para.29.
[3] Klass v Germany (1978), 2 EHRR 214, para. 41.
[4] James v Commonwealth of Australia [1936] A.C. 578 at 627.
[5] See e.g. Handyside v UK (1976), 1 EHRR 737, para. 49 (ideas which offend, shock or disturb).

More specifically, the law must balance the right to respect for private life on the one hand, and on the other the right of the public to be informed about matters of concern and the freedom and duty of the media to satisfy that concern.[6] Thus cases involving the media most obviously demonstrate the tension between the right to privacy and the freedom of expression.

Therefore, it is a rule that "where a question arises of interference with private life through publication in mass media, the state must find proper balance between the two Convention rights",[7] while the function of the Court is to examine whether this balance was properly struck by domestic courts.[8] But the Convention itself does not set definite obligatory point at which this balance must be struck, providing only the basic rule that interference with either right must be justified by compliance with the principles of legality, pressing social need and proportionality. However, some basic factors, although not exhaustively, can be derived from the body of case law, which are always subject to detailed analysis of the Court and finally shift the balance in favour of either side.

LIMITED PROTECTION AFFORDED TO POLITICIANS

The status of the claimant is an important factor in determining whether free expression should prevail over privacy. It is established by the Court's jurisprudence that speech bringing into question the probity or competence of public officials, is covered by a free expression clause, since it can not be disentangled from criticism of the government. This is a good point for reiterating the important role of freedom of expression in ensuring effective democracy. The value of freedom of expression as a cornerstone of democratic rights and freedoms embodies an assumption that free expression is necessary not only to the personality of the citizen and individual dignity, but also to democratic government and social progress.[9] Some legal commentators in elaboration of this principle state that, as far as a candidate for Parliament or Presidency is concerned, people are entitled to know the details of private character (such as whether he has committed a marital infidelity) or disreputable conduct, before deciding how to vote.[10]

In sum, freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.[11] What is more, politicians have enough means, apart from judicial protection, to affect the public opinion when their reputation is attacked.

The underlying principle of a very extensive freedom to comment on politicians was developed in *Lingens* case. The Court declared that "the limits of acceptable criticism are accordingly 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

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[6] Barendt E. Freedom of Speech. – 2nd ed. – Oxford University Press, 2005. – P. 230.
[7] KVN v Sweden (1987), 50 D&R 173.
[8] For the task and supervisory jurisdiction of the Court see Handyside v UK (1976), 1 EHRR 737, para. 49; Sunday Times v UK (1979), 2 EHRR 245, para. 65; Vogt v Germany (1995), Series A 323, para. 52.
[9] Robertson G., Nicol A. Media Law. – 5th ed. – London: Penguin Books Ltd., 2008. – P. 44.
[10] Schauer F. Can Public Figures have Private Lives? in E. F. Paul, F. D. Miller, and J. Paul (eds.) The Right to Privacy. – Cambridge: CUP, 2000. – P. 293.
[11] Stoll v Switzerland, no. 69698/01, judgment of 10 December 2007, para. 122.

and the public at large, and he must consequently display a greater degree of tolerance".[12] In that respect it is not considered decisive whether the criticism involved a discussion of certain aspects of the 'private' morality of the politician concerned, as this could also be of public relevance.[13]

Moreover, in *Colombani and Others v France* the Court denied the legitimacy of special protection afforded by domestic legislation for foreign heads of State in comparison with that for ordinary citizens. It ruled that conferring on foreign heads of State a special privilege, shielding them from criticism solely on account of their function or status, would undermine Article 10 of the Convention which protects freedom of expression.[14]

In *Lopes Gomes da Silva v Portugal,* the case concerning journalistic comments on political beliefs and ideology of the regional election candidate, the Court has particularly stressed that 'political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society',[15] thereby confirming wider parameters of permissible expression relating to politicians protected by Article 10(1).

PUBLIC INTEREST DEFENCE

The high value of informed discussion of matters of public concern is clearly recognised by Strasbourg authorities. In particular, the Court has well established that in order to assess whether the interference complained of was based on "sufficient" reasons which rendered it "necessary in a democratic society", account must be taken of any public interest aspect of the case.[16] A set of fundamental principles has been developed in this area.

While recognising a vital role of "public watchdog"[17] on behalf of the news media stemming from its duty to impart information and ideas on all matters of public interest,[18] the Court has pointed out a corresponding right of the public to receive such information.[19]

Furthermore, it called for the most careful scrutiny in cases when the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern.[20]

However, public interest should be weighed carefully to keep intimate personal details protected against unauthorized direct invasion. Again, the status of the person concerned can weigh heavily in determining whether a publication contributes to a debate on public interest matters. As far as public figures are

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[12] Lingens v Austria (1986) 8 EHRR 497, para. 42; Oberschlick v Austria (1991), 19 EHRR 389, para. 58.
[13] Van Dijk P., Van Hoof G. J. H. Theory and Practice of the European Convention on Human Rights. – 2nd ed. – Kluwer Law and Taxation Publishers, 1990. – P. 415.
[14] Colombani and Others v France, no. 51279/99, judgment of 25 June 2002, Reports of Judgments and Decisions 2002-V, paras. 68 – 69.
[15] Lopes Gomes da Silva v Portugal, CEDH 2000-X, № 34, para. 34.
[16] Sunday Times v UK (1979), 2 EHRR 245, para. 65.
[17] Goodwin v the United Kingdom, judgment of 27 March 1996, Reports of Judgments and Decisions 1996-II, p. 500, para. 39.
[18] Jersild v. Denmark, judgment of 23 September 1994, Series A 298, para. 31.
[19] Bladet Tromsø and Stensaas v. Norway (1999), 29 EHRR 125, para. 59.
[20] Stoll v Switzerland, no. 69698/01, judgment of 10 December 2007, para. 106; Jersild v. Denmark, judgment of 23 September 1994, Series A 298, para. 35; Bladet Tromsø and Stensaas v. Norway (1999), 29 EHRR 125, para. 64.

concerned, their publicly conveyed image is significantly broader and thus, the balance of conveniences requires wider interpretation of the freedom of expression.

At the same time, it is reasonably emphasized in the doctrine that the matters which are of interest to the public should be differentiated from those which are in a public interest.[21] It is only the latter which serve a ground for justification of intrusion on privacy.

A landmark decision on privacy of public figures was delivered by the Court in *Von Hannover* case. Before this decision it was accepted that routine activities conducted in public places carried no guarantee of privacy and the public right to be informed of the misdemeanors and activities of public figures was justified on the basis that such people were role models, and the public had a genuine and thus legitimate interest in receiving such information.[22] However, the judgment in *Von Hannover* interprets an extremely wide reach of 'private life' and the Court has introduced a far more strict approach to the applicability of public interest defence.

It clearly established that the right of the public to be informed is not relevant where the information is published with the sole aim of satisfying public curiosity as to the details of a person's private life, whereas such a publication itself "cannot be deemed to contribute to any debate of general interest to society despite the [person concerned] being known to the public".[23]

Princess Caroline of Monaco sued and lost in the German courts over the publication of a series of photos about her private life and daily activities in the tabloid press.

Despite the fact that all the photographs were taken in public places, the issue of violation of the right to respect for private life was at question. The Court has well established that there is a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life".[24] Moreover, disclosure of personal photographs is commonly regarded as the most intrusive and flagrant violation of privacy, making private information easily accessible by a large audience. In cases of this kind the Court would therefore consider the audience to which the disclosure is directed (adults, children, the general public or specific group of recipients of information).[25]

Princess Caroline did not perform any state function, but was a celebrity, and the German courts at all three instances particularly emphasized her status of 'a figure of contemporary society "*par excellence*"'. This conclusion was a major ground for decision that the right to protection of private life for such a figure does not extend to activities in public places. Conversely, the European Court held that a

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[21] Robertson G., Nicol A. Media Law. – 5th ed. – London: Penguin Books Ltd., 2008. – P. 282.
[22] Foster S. Human Rights and Civil Liberties. – 2nd ed. – Pearson Education Ltd., 2008. – P. 609.
[23] Von Hannover v Germany, no. 59320/00, judgment of 24 June 2004, Reports of Judgments and Decisions 2004-VI, para. 65.
[24] P.G. and J.H. v the United Kingdom, no. 44787/98, ECHR 2001-IX, para. 56.
[25] Harris D.J., O'Boyle M., Wabrick C. Law of the European Convention on Human Rights. – London:Butterworths, 1995. – P. 374 – 375.

person in whom the interest of the general public and the press is based solely on her membership of a royal family, does not fit such a definition.[26]

Furthermore, the domestic court based its judgment on spatial criterion. Accordingly, it kept distinct part of the photos depicting the applicant in 'secluded place' describing it as a place to which persons retire "with the objectively recognisable aim of being alone and where, confident of being alone, they behave in a manner in which they would not behave in public",[27] and found them violating the applicant's right to privacy, unlike the rest of the photographs. The European Court considered this criterion too vague and insufficient to protect the applicant's private life effectively. However, the important conclusion in this respect is that both domestic court and the Strasbourg Court had particular regard to the concept of '*legitimate expectations'*, which requires effective protection of privacy in case when certain steps were taken to manifest a wish to be private. The concept is analysed in greater detail below in this paper. In that particular case it should be stressed that the Court applied this concept more flexibly than domestic courts, concluding that the expectations can still be legitimate in public places, and even in relation to the persons known to general public.

It is worth noting, that as a result of its position in *Von Hannover* case, the Court was criticised for assigning exceeding priority to personal emotions of the applicant and her sufferings inflicted by press harassment, and that, putting it objectively, the test of 'secluded place' is no more vague than the numerous restraints on freedom of expression treated by the Court as sufficiently predictable and 'prescribed by law' for the purposes of Article 10 (2).[28]

In the recent *Von Hannover (no. 2)* decision the result of the balancing between public interest and personal privacy fell on the other side of the line. This time Princess Caroline of Monaco and her husband, Prince Ernst August von Hannover, applied to the European Court following the refusal by German courts to prohibit further publication of photos taken of them on vacations. Most crucially, the picture (the only one against which domestic courts had not granted an injunction) was accompanied by an article on Prince Rainier III of Monaco (Princess Caroline's father) health problems. The Court examined the interference in question basing on five criteria: 1) relevance to the matters of public concern; 2) publicity of the person concerned and the subject of the report; 3) the prior conduct of the person concerned; 4) the content, form and consequences of the publication, and 5) circumstances in which the photos were taken. The Grand Chamber held unanimously that the Prince Rainer health was "an event of contemporary society", and the photos in the context of the article, "did at least to some degree contribute to a debate of general interest".[29] Therefore, the publication was declared acceptable as being in general interest and weighed reasonably against the right to respect for private life.

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[26] Von Hannover v Germany, no. 59320/00, judgment of 24 June 2004, Reports of Judgments and Decisions 2004-VI, para. 22.
[27] Ibid, para. 25.
[28] Robertson G., Nicol A. Media Law. – 5th ed. – London: Penguin Books Ltd., 2008. – P. 272 – 273.
[29] Von Hannover v Germany, supra note 26, para. 118.

To put it generally, what matters in balancing the rights of individual against the public interest is the question whether the information was presented in a manner compatible with the Convention. For answering that question the Court examines the proper exercise of 'duties and responsibilities' prescribed by Article 10 (2). In general, the Court subjected the safeguard afforded by Article 10 to journalists in relation to reporting on issues of public interest 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".[30] Accordingly, it was formulated the concept of responsible reporting which shows due respect to conflicting rights of others. Given the broadness of the above standard, the decision as to whether the duties and responsibilities have been fulfilled would depend on the circumstances of particular case.

THE CONCEPT OF REASONABLE EXPECTATIONS

In the light of development of advanced technologies judges become increasingly concerned with the means of ensuring an individual's right to control personal information by determining who can access the information and how the information will be used.

The concept of 'reasonable expectations of privacy' is a key concept in a claim for protection of private information invoked by the Court on numerous occasions.

The Court has expressly recongnised the role of a person's reasonable expectations as to privacy as a significant factor, since there are situations when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner (although it stressed that this factor may not necessarily be conclusive).[31]

In *Perry v UK* the applicant complained that he was covertly videotaped by the police in the custody suite of a police station. At that time the applicant was a suspect in the armed robbery investigation and the video was shown to various witnesses of the armed robberies for the identification purposes. However, neither the applicant nor his solicitor were informed that a tape had been made or used in such a way. In this respect the Court recalled that the normal use of security cameras *per se* whether in the public street or on premises, such as shopping centers or police stations where they serve a legitimate and foreseeable purpose, do not raise issues under Article 8(1) of the Convention.[32] But the result would be different when the device was fit specifically for processing information about concrete person having no regard to that person's will. The Court found that the footage in question as it had not been obtained voluntarily or in circumstances where it could be reasonably anticipated that it would be recorded and used for identification purposes, disclosed an interference with the applicant's right to respect for private life.[33] Consequently, the determinative fact in this case was that the challenged actions of the police officers were incompatible with the applicant's legitimate expectations of privacy.

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[30] Bladet Tromsø and Stensaas v. Norway (1999), 29 EHRR 125, para. 65.

[31] P.G. and J.H. v the United Kingdom, no. 44787/98, ECHR 2001-IX, para. 57.

[32] Perry v UK , no. 63737/00, judgment of 17 July 2003, ECHR 2003-IX, para. 40; Herbecq and Another v. Belgium, applications nos. 32200/96 and 32201/96, Commission decision of 14 January 1998, DR 92-A, p. 92.

[33] Perry v UK , supra note 32, paras. 42 – 43.

More specifically, the Court has distinguished the purposes of recording information about an individual by official authorities concluding that in some instances this purpose will give rise to a violation of the right to respect for private life within the meaning of Article 8 (1) of the Convention.

In *P.G. and J.H. v the United Kingdom* recording of the suspects' voices without their knowledge when being charged at the police station and when in their police cell, for the purposes of expert examination of voice samples for obtaining culpatory evidence for the prosecution, was considered an interference with their right to respect for private life. The Court found a violation of Article 8 on the basis that the interference was not clearly regulated by domestic law and therefore was not "in accordance with the law",[34] thus violating the very first requirement for justification of the interference with private life set out in paragraph 2 of Article 8.

Conversely, in the view of the Commission expressed in *Friedl* case, there is no interference with private life when the photographs taken of participants of public demonstration in a public place and retained by the police in a file as a record of the demonstration, but without taking any action in order to identify the persons photographed.[35]

CONCLUSIONS

The essential role of the freedom of expression in a democratic society is widely recongnised. On the other hand, one of the arguments for censoring free expression is deterred by the interest vested in respect to sphere of personal privacy.

The complexity of Article 8 is that the interests which it protects have been interpreted widely. At the same time the Court tends to be unwilling to elaborate precise definition of these values.

Therefore, in disputes relating to invasion on privacy, the Court has due regard to all the circumstances of each particular case. Issues of the public interest attached to the publication and the personality of the claimant are important factors influencing the judgment.

Due to the established broad approach to the content of expression and the forms it may take, the Court ascribes a hierarchy of value to different kinds of expression. Political expression, which covers expression relating to politicians, is given the highest priority. Specific functions of politicians give rise to a legitimate interest of the citizens to be informed about their representative's private life. The above does not mean that privacy of politicians is totally unprotected, but rather that standards applied for justification of the interference are less strict.

It is well recognized that a factor of significant importance in assessing whether the interference with the right to privacy was justifiable is the evidence of legitimate public interest in disclosing the private information. Additionally, in cases of this kind the Court will have regard to the personality of the claimant, the purpose of the dissemination, as well as the intention to make the limited use of the material or to make it available to the general public, the means of dissemination (delivered by a person, via television, press), the audience to which it is directed (adults,

[34] Ibid, paras. 61 – 63.
[35] Friedl v. Austria, judgment of 31 January 1995, Series A 305-B, opinion of the Commission, p. 21, paras. 49 – 52.

children, the public at large or specific group of recipients of information), the content and form of the publication and, finally, in case of disclosure of private photographs, the circumstances in which those were taken.

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СПІВВІДНОШЕННЯ МІЖ ПРАВОМ НА СВОБОДУ ВИРАЖЕННЯ ПОГЛЯДІВ ТА ПРАВОМ НА ПРИВАТНІСТЬ В ПРАКТИЦІ ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ

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В статті подається загальний аналіз співвідношення права на свободу вираження поглядів та права на приватність, і, зокрема, досліджуються випадки конфлікту вказаних прав та значення, яке при цьому надається інтересам захисту кожного з конкуруючих прав. Окрема увага зосереджена на особливій ролі ЗМІ в реалізації свободи вираження поглядів, та визначенні обставин, які мають перевагу над індивідуальним інтересом у захисті приватності і, таким чином, визнаються Європейським Судом з прав людини легітимними підставами обмеження права на приватність.

Ключові слова: свобода вираження поглядів, приватність, балансування, публічний інтерес, легітимні очікування

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СООТНОШЕНИЕ ПРАВА НА СВОБОДУ ВЫРАЖЕНИЯ МНЕНИЙ И ПРАВА НА ПРИВАТНОСТЬ В ПРАКТИКЕ ЕВРОПЕЙСКОГО СУДА ПО ПРАВАМ ЧЕЛОВЕКА

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В статье дается общий анализ соотношения права на свободу выражения мнений и права на приватность и, в частности, исследуются случаи конфликта указанных прав и значение, которое при этом придается интересам защиты каждого из конкурирующих прав. Отдельно рассматривается особенная роль СМИ в реализации свободы выражения мнений, и определяются обстоятельства, которые превалируют над частным интересом

в защите приватности и, таким образом, признаются Европейским Судом по правам человека легитимными основаниями ограничения права на приватность.

Ключевые слова: свобода выражения мнений, приватность, баланс, публичный интерес, легитимные ожидания