

New Technologies and Freedom of Expression with the Reference to the Case Law of European Court of Human Rights

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Abstract

The right to freedom of expression is one of the basic human rights guaranteed by the European Convention on Human Rights. However, it should be borne in mind that the inviolability of this right is not understood in an absolute sense. This Convention prescribes several grounds for restricting the right to freedom of expression, among which the interest in conducting criminal proceedings stands out. This is especially important in the context of new technologies, the Internet and accompanying social networks, where the right to freedom of expression is massively abused through the commission of criminal acts. Therefore, the paper starts from the basic presumption that the need to conduct criminal proceedings is a legitimate basis for restricting the right to freedom of expression. In this sense, the paper considers the case law of the European Court of Human Rights in cases related to Article 10 of the European Convention on Fundamental Rights and Freedoms, where the legitimacy of restrictions of the right to freedom of expression is raised. In the concluding remarks, it is pointed out that the restrictions of the right to freedom of expression for the purposes of conducting criminal proceedings may represent legitimate ground only with respect to the principles of necessity, proportionality and restrictiveness.

Keywords: *freedom of expression, human rights, new technologies, proportionality*

I. Introduction

Everyday use of information technology and the establishment of a lot of different social networks have created new opportunities for exercising freedom of expression in a virtual environment. Although the primary function of establishing social networks is useful and necessary in modern society as it encourages the exercise of freedom of expression and exchange of opinions among people around the world, in many cases it can be observed that individuals abuse this freedom by endangering the human rights of others. Bearing in mind that such conduct often leads to the criminal liability of individuals for actions taken in a virtual environment, it was necessary to establish limits on freedom of expression. In this sense, the main task is to establish a balance between freedom of expression and the interests of national security, which in certain cases requires the restriction of this freedom in order to conduct criminal proceedings. Freedom of expression and its restrictions in certain cases are

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provided in the European Convention on Human Rights in Article 10 (hereinafter: the Convention)¹.

According to Article 10 of the Convention, everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. However, the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in 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. Therefore, in the following lines, the cases from the practise of the European Court of Human Rights (hereinafter: the Court) concerning the application of Article 10 will be analyzed in order to examine the conditions under which the Court finds that the conditions for restricting freedom of expression are met².

II. Freedom of expression and electronic data

In the context of freedom of expression and electronic data evidence, a particularly interesting issue is the position of the Court in the case of balancing the interest of the investigation in providing evidence and the right of journalists to freedom of expression, especially in situations where evidence is collected and stored electronically. The following case deals with the abovementioned issue.

In *Nagla v. Latvia* case concerned the search by the police of a well-known broadcast journalist's home and seizure of data storage devices. The applicant's home was searched following a broadcast she had aired in February 2010 informing the public of an information leak from the State Revenue Service database. The applicant complained that the search of her home meant that she had been compelled to disclose information that had enabled a journalistic source to be identified, violating her right to receive and impart information. The Court held that there had been a violation of Article 10 of the Convention. It emphasised that the right of journalist's not to disclose their sources could not be considered a privilege, dependent on the lawfulness or unlawfulness of their sources, but rather as an intrinsic part of the right to information that should be treated with the utmost caution. In this case, the investigating authorities had failed to properly balance the interest of the investigation in securing evidence against the public interest in protecting the journalist's freedom of expression³.

III. Freedom of expression and the use of internet as well as social networks

In the context of freedom of expression and the use of the Internet, a key issue concerns the credibility of information downloaded online. The question is whether

¹ European Convention on Human Rights, Council of Europe, 1950.

² European Court of Human Rights, Factsheet – New technologies, European Court of Human Rights, Strasbourg, 2020.

³ *Nagla v. Latvia*, application no. 73469/10, Judgement 16 July 2013.

this type of information provides legal possibilities for further permitted distribution or it is not the case. On the other hand, when it comes to the relationship between the right to freedom of expression and the use of social networks, the basic issue concerns making a difference between posting and sharing content electronically that meets all requirements and distribution of offensive nature content. The following cases provide solutions to raised dilemmas.

The applicant company, owner and publisher of the Times newspaper, in the *Times Newspapers Ltd v. the United Kingdom* case alleged that the rule under United Kingdom law, whereby a new cause of action in libel proceedings accrues each time defamatory material on the Internet is accessed, constituted an unjustifiable and disproportionate restriction on its right to freedom of expression. In December 1999 the applicant newspaper published two articles that were allegedly defamatory of a private individual. Both articles were uploaded onto The Times' website on the same day as they were published in the paper version of the newspaper. During the subsequent libel proceedings against the applicant newspaper, it was required to add a notice to both articles in the Internet archive announcing that they were subject to libel litigation and were not to be reproduced or relied on without reference to the applicant company's legal department. In the judgment the Court underlined that, in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general. In the present case, it found that there had been no violation of Article 10 of the Convention. Since the archives were managed by the newspaper itself and the domestic courts had not suggested that the articles be removed altogether, the requirement to add an appropriate qualification to the Internet version had not been disproportionate⁴.

Editorial Board of Pravoye Delo and Shtekel v. Ukraine case mainly concerned the lack of adequate safeguards in Ukrainian law for journalists' use of information obtained from the Internet. In particular, defamation proceedings had been brought against a local newspaper and its editor-in-chief following their publication of a letter downloaded from the Internet alleging that senior local officials were corrupt and involved with the leaders of an organised criminal gang. The domestic courts ruled against the applicants and ordered them to publish an apology and pay 15,000 Ukrainian hryvnias, eventually waived via a friendly settlement. The Court held that the order to the editor-in-chief to apologise had not been done in accordance with the law, and had, therefore, been in violation of Article 10 of the Convention. It further held that there had been a violation of Article 10 because of the lack of adequate safeguards for journalists using information obtained from the Internet. Notably, "having regard to the role the Internet plays in the context of professional media activities ... and its importance for the exercise of the right to freedom of expression generally ..., the Court considered that the absence of a sufficient legal framework at the domestic level allowing journalists to use information obtained from the Internet without fear of incurring sanctions seriously hinders the exercise of the vital function of the press⁵.

Delfi AS v. Estonia was the first case in which the Court had been called upon to examine a complaint about liability for user-generated comments on an Internet news

⁴ *Times Newspapers Ltd v. the United Kingdom* (nos. 1 & 2), application nos 3002/03 and 23676/03, Judgement 10 March 2009.

⁵ *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, application no.33014/05, Judgement 5 May 2011.

portal. The applicant company, which runs a news portal run on a commercial basis, complained that it had been held liable by the national courts for the offensive comments posted by its readers below one of its online news articles about a ferry company. At the request of the lawyers of the owner of the ferry company, the applicant company removed the offensive comments about six weeks after their publication. The Court held that there had been no violation of Article 10 of the Convention, finding that the Estonian courts' understanding of liability against the applicant company had been a justified and proportionate restriction on the portal's freedom of expression, in particular, because the comments in question had been extreme and had been posted in reaction to an article published by the applicant on its professionally managed news portal run on a commercial basis. The steps taken by the applicant to remove the offensive comments without delay after their publication had been insufficient and the 320 euro fine had by no means been excessive for the applicant, one of the largest Internet portals in Estonia⁶.

Cengiz and Others v. Turkey case concerned the blocking of access to YouTube, a website enabling users to send, view and share videos. The applicants complained in particular of an infringement of their right to freedom to receive and impart information and ideas. The Court held that there had been a violation of Article 10 of the Convention, finding in particular that the applicants, all academics in different universities, had been prevented from accessing YouTube for a lengthy period of time and that, as active users, and having regard to the circumstances of the case, they could legitimately claim that the blocking order in question had affected their right to receive and impart information and ideas. The Court also observed that YouTube was a single platform which enabled information of specific interest, particularly on political and social matters. The Court further found that there was no provision in the law allowing the domestic courts to impose a blanket blocking order on access to the Internet, and in the present case to YouTube, on account of one of its contents⁷.

Kalda v. Estonia case concerned a prisoner's complaint about the authorities' refusal to grant him access to three Internet websites, containing legal information, run by the State and by the Council of Europe. The applicant complained in particular that the ban under Estonian law on his accessing these specific websites had breached his right to receive information via the Internet and prevented him from carrying out legal research for court proceedings in which he was engaged. The Court held that there had been a violation of Article 10 of the Convention. It found in particular that contracting States are not obliged to grant prisoners access to Internet. However, if a State is willing to allow prisoners access, as is the case in Estonia, it has to give reasons for refusing access to specific sites. In the specific circumstances of the applicant's case, the reasons, namely the security and costs implications, for not allowing him access to the Internet sites in question had not been sufficient to justify the interference with his right to receive information. Notably, the authorities had already made security arrangements for prisoners' use of Internet via computers specially adapted for that purpose and under the supervision of the prison authorities and had borne the related costs. Indeed, the domestic courts had undertaken no detailed analysis as to the possible security risks of access to the three additional

⁶ *Delfi AS v. Estonia*, application no. 64569/09 Judgement 16 June 2015.

⁷ *Cengiz and Others v. Turkey*, application nos. 48226/10 and 14027/11, Judgement 1 December 2015.

websites in question, bearing in mind that they were run by an international organisation and by the State itself⁸.

Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary case concerned the liability of a self-regulatory body of Internet content providers and an Internet news portal for vulgar and offensive online comments posted on their websites following the publication of an opinion criticising the misleading business practices of two real estate websites. The applicants complained about the Hungarian courts' rulings against them, which had effectively obliged them to moderate the contents of comments made by readers on their websites, arguing that that had gone against the essence of free expression on the Internet. The Court held that there had been a violation of Article 10 of the Convention. It reiterated in particular that, although not publishers of comments in the traditional sense, Internet news portals had to, in principle, assume duties and responsibilities. However, the Court considered that the Hungarian courts, when deciding on the notion of liability in the applicants' case, had not carried out a proper balancing exercise between the competing rights involved, namely between the applicants' right to freedom of expression and the real estate websites' right to respect for its commercial reputation. Notably, the Hungarian authorities accepted at face value that the comments had been unlawful as being injurious to the reputation of the real estate websites⁹.

Savva Terentyev v. Russia case concerned the applicant's conviction for inciting hatred after making insulting remarks about police officers in a comment under a blog post. The Court held that there had been a violation of Article 10 of the Convention. It found in particular that while the applicant's language had been offensive and shocking that alone was not enough to justify interfering with his right to freedom of expression. The domestic courts should have looked at the overall context of his comments, which had been a provocative attempt to express his anger at what he perceived to be police interference, rather than an actual call to physical violence against the police¹⁰.

Magyar Jeti Zrt v. Hungary case concerned the applicant company being found liable for posting a hyperlink to an interview on YouTube which was later found to contain defamatory content. The applicant company complained that by finding it liable for posting the hyperlink on its website the domestic courts had unduly restricted its rights. The Court held that there had been a violation of Article 10 of the Convention. It underscored in particular the importance of hyperlinking for the smooth operation of the Internet and distinguished the use of hyperlinks from traditional publishing – hyperlinks directed people to available material rather than provided content. Updating its case-law on these issues, the Court set down elements which need to be considered under Article 10 when looking at whether posting a hyperlink could lead to liability and said that an individual assessment was necessary in each case. In the present case, the Court found that the Hungarian domestic law on objective liability for disseminating defamatory material had excluded the possibility of any meaningful assessment of the applicant company's right to freedom of expression in a situation where the courts should have scrutinised the issue carefully. Such objective liability for using a hyperlink could undermine the flow of information

⁸ *Kalda v. Estonia*, application no. 17429/10, Judgement 19 January 2016.

⁹ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, application no. 22947/13, Judgement 2 February 2016.

¹⁰ *Savva Terentyev v. Russia*, Application no. 10692/09, Judgement 28 August 2018.

on the Internet, dissuading article authors and publishers from using such links if they could not control the information they led to. That could have a chilling effect on freedom of expression on the Internet. The Court therefore found that, overall, the applicant company had suffered an undue restriction of its rights¹¹.

IV. Freedom of expression and smartphone applications

With regard to freedom of expression and the use of smart applications, a special issue concerns the limits of this right of individuals in the face of election events. In other words, the question is in which cases and for what purposes political parties can use smartphone applications. The following case can provide response to this question.

Magyar Kétfarkú Kutya Párt v. Hungary case concerned a political party's mobile application which allowed voters to photograph, anonymously upload and comment on invalid votes cast during a referendum on immigration in 2016. The applicant party complained about a violation of its rights under Article 10 of the Convention. The Grand Chamber found in particular that the provision of domestic election law relied on by the authorities, a breach of the principle of the exercise of rights in accordance with their purpose, had not allowed the applicant party to foresee that it could be penalized for providing such an app, which had been an exercise of its freedom of expression. It concluded that the considerable uncertainty about the potential effects of the provision had exceeded what was acceptable under the Convention and that the lack of sufficient precision in the law to rule out arbitrariness and allow the applicant party to regulate its conduct had led to a violation of Article 10 of the Convention¹².

V. Freedom of expression and secret tapping

When it comes to freedom of expression and secret tapping and monitoring, it should be pointed out that the basic issue is to establish a balance between the public interest which requires restriction of this right and freedom to express thoughts and ideas without interference by public authorities. The following two cases stressed out that problem.

Haldimann and Others v. Switzerland case concerned the conviction of four journalists for having recorded and broadcast an interview of a private insurance broker using a hidden camera, as part of a television documentary intended to denounce the misleading advice provided by insurance brokers. The applicants complained that their sentence to payment of fines had amounted to a disproportionate interference in their right to freedom of expression. In this case, the Court was for the first time called on to examine an application concerning the use of hidden cameras by journalists to provide public information on a subject of general interest, whereby the person filmed was targeted not in any personal capacity but as a representative of a particular professional category. The Court held that, in the applicants' case, there had been a violation of Article 10 (freedom of expression) of the Convention, considering in particular that the interference in the private life of the broker, who had turned down

¹¹ *Magyar Jeti Zrt v. Hungary*, application no. 11257/16, Judgement 4 December 2018.

¹² *Magyar Kétfarkú Kutya Párt v. Hungary*, application no. 201/17, Judgement 20 January 2020.

an opportunity to express his views on the interview in question, had not been serious enough to override the public interest in information on malpractice in the field of insurance brokerage. The Court further also asserted that the applicants deserved the benefit of the doubt in relation to their desire to observe the ethics of journalism as defined by Swiss law, citing the example of their limited use of the hidden camera¹³.

Brambilla and Others v. Italy case concerned the conviction of three journalists who intercepted radio communications between carabinieri in order to arrive quickly at crime scenes and report on them for their local newspaper. The Court held that there had been no violation of Article 10 of the Convention. Stressing the notion of responsible journalism and noting that the decisions of the domestic courts had been duly reasoned and had focused primarily on the need to protect national security and prevent crime and disorder, the Court found in particular that the Italian courts had made an appropriate distinction between on the one hand the duty of the three journalists to comply with domestic law, which prohibited in general terms the interception by any persons of communications not addressed to them, including those of the law-enforcement agencies, and on the other hand the pursuit of their journalistic activities, which had not been restricted per se. The Court also noted that the penalties ordered by the domestic courts, consisting in the seizure of the radio equipment and the imposition of custodial sentences, had not been disproportionate, as the sentences of the three journalists had been suspended and the authorities had not prohibited them from bringing news items to the public's attention¹⁴.

VI. Conclusion

The right to freedom of expression is guaranteed by Article 10 of the Convention as a basic human right related to the personal sphere of individuals. However, when it comes to the stated right, it should be borne in mind that it is not of an absolute nature, which is why its application does not apply in all cases. In that sense, regarding this freedom the Convention provides several restrictions that disable the absolute enjoyment of this right, as well as the conditions under which they are allowed. Precisely, restrictions of the right to freedom of expression are allowed under the following conditions. Firstly, the interference with the right to freedom of expression should be provided by law. Secondly, such restrictions should respect the fundamental substance of the rights of expression. Finally, the restrictions should represent a necessary and proportionate measure in a democratic society with the aim to prevent, investigate, detect or prosecute criminal offenses or execute criminal sanctions.

According to the case-law of the Court when restricting the right to freedom of expression, it should be taken into account the substance of given right, purpose of the restrictions, the nature and scope of the restriction and the relationship between the restriction and the purpose of the restriction as well. In other words, in cases concerning the application of Article 10 of the Convention, the right to freedom of expression may be limited under restrictive conditions, taking into account the principle of necessity in terms of the necessity of conducting criminal proceedings or protecting of national security, proportionality in terms of the goal to be achieved in a democratic society as well as restrictiveness in the sense that in this particular case

¹³ *Haldimann and Others v. Switzerland*, application no. 21830/09, Judgement 24 February 2015.

¹⁴ *Brambilla and Others v. Italy*, application no. 22567/09, Judgement 23 June 2016.

there is no other way to limit the rights of citizens. In this regard, it should be concluded that the restriction of the right to freedom of expression is possible under three conditions: a) for the purposes permitted by the Convention; b) to the extent necessary to satisfy these purposes in a democratic society and c) without interfering with the substance of the guaranteed right.

References

1. *Brambilla and Others v. Italy*, application no. 22567/09, Judgement 23 June 2016.
2. *Cengiz and Others v. Turkey*, application nos. 48226/10 and 14027/11, Judgement 1 December 2015.
3. *Delfi AS v. Estonia*, application no. 64569/09 Judgement 16 June 2015
4. *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, application no.3 3014/05, Judgement 5 May 2011.
5. *European Convention on Human Rights*, Council of Europe, 1950.
6. *European Court of Human Rights*, Factsheet – New technologies, European Court of Human Rights, Strasbourg, 2020.
7. *Haldimann and Others v. Switzerland*, application no. 21830/09, Judgement 24 February 2015.
8. *Kalda v. Estonia*, application no. 17429/10, Judgement 19 January 2016.
9. *Magyar Jeti Zrt v. Hungary*, application no. 11257/16, Judgement 4 December 2018.
10. *Magyar Kétfarkú Kutya Párt v. Hungary*, application no. 201/17, Judgement 20 January 2020.
11. *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, application no. 22947/13, Judgement 2 February 2016.
12. *Nagla v. Latvia*, application no. 73469/10, Judgement 16 July 2013.
13. *Savva Terentyev v. Russia*, application no. 10692/09, Judgement 28 August 2018.
14. *Times Newspapers Ltd v. the United Kingdom* (nos. 1 & 2), application nos 3002/03 and 23676/03, Judgement 10 March 2009.