Vilnius University Faculty of Law
Department of Private Law

Bogdan Kryklyvenko,
II study year, International and European Law Student

Master's Thesis

Grounds for limiting freedom of expression in the case-law of the ECtHR

Saviraiškos laisvės ribojimo pagrindai EŽTT praktikoje

Supervisor: Dr. Donatas Murauskas

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ANNOTATION

This work provides a description of the practice of the European Court of Human Rights (ECtHR) in cases involving interference with the right to freedom of expression enshrined in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). It is important to determine the balance between the right to express one's own views and the rights of third parties whom such an expression may concern. The existing criteria for the analysis and assessment of such a balance can best be learned through specific examples, given the circumstances of each case.

KEYWORDS: freedom of expression, non-absolute rights, rights restriction, freedom of media, balance of rights, court practice, ECHR, ECtHR

INTRODUCTION

"If liberty means anything at all, it means the right to tell people what they do not want to hear"

George Orwell

The relevance and importance of the master thesis topic is extremely high from the point of view on the situation in my country, which has an unconditional influence on the whole Europe. For example, with the beginning of implementing of the martial law, television channels stopped working, and instead, there is a single media marathon where the content is clearly coordinated and moderated. This has led to the fact that freedom of information, including the access to information, and freedom of expression are limited.

The main objective of my master's thesis is to analyze the practice of the ECtHR regarding the legality and justification of the limitation of the freedom of expression as one of the fundamental human rights.

During the preparation of master thesis the main method which was used is generalization and analysis of the practice of the ECtHR, citing specific examples in its case-law.

The originality of master thesis in its research combination of dozens of ECtHR judgements along with theoretical aspects of freedom of expression, such well-known personalities as Pujol J. and Harrison N., and practical tools of the activists from NGO "Article 19".

Before proceeding directly to the analysis of the practice of the ECtHR its necessary to focus attention on the universal provision. The Article 19 of the Universal Declaration of Human Rights (UDHR) provision states that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". This right was balanced by Article 29 which says that "in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

Freedom of opinion and expression is the linchpin of the human rights system, vital for the enjoyment of a range of economic, social and cultural rights as well as civil and political rights. It is as essential for education as it is for environmental protection, for empowering the poor as well as for ensuring free and fair elections.[1]

[1] Irene Khan, 23 October 2020, Statement to the 75th Session of the UN General Assembly (Third Committee) UN Special Rapporteur on freedom of opinion and expression.

In Europe, freedom of expression is protected in foundational instruments from the Council of Europe, and at the European Union level. Additionally, it receives protection at the national level through freedom of expression provisions in national constitutions.

Compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is overseen by the European Court of Human Rights (ECtHR) in Strasbourg, which can issue binding rulings for the member states and has through its case law had a major impact on freedom of expression in Europe. The Council of Europe also adopts soft law recommendations. The ECHR is a "living instrument," meaning that the ECtHR takes account of new conditions affecting the exercise of freedom of expression. According to ECtHR doctrine, all rights guaranteed by the ECHR must be "practical and effective" and not merely "theoretical or illusory." All countries in the European Union are signatories of the ECHR. Under the European Union, Article 11 of the Charter of Fundamental Rights of the European Union (2000) (EU Charter) protects freedom of expression in the context of EU law. It provides: (1) 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. (2) The freedom and pluralism of the media shall be respected. The Charter is a relatively new instrument. It applies exclusively to matters of EU law, as opposed to purely national law in EU Member States. EU law includes important areas for freedom of expression such as intermediary liability and illegal content online. Notably, the EU Charter states that its safeguards are, at a minimum, equivalent to those of the ECHR. As a result, the case law of the ECtHR is also relevant for interpreting the EU Charter. National constitutions also include provisions on freedom of expression and may add to the protection afforded by the ECHR or the EU Charter[2].

The freedom of expression is not an absolute right[3]. The paragraph 2 of Article 10 of the ECHR establishes duties and responsibilities related to the implementation of freedom of expression. Similarly, Article 19 of the International Covenant on Civil and Political Rights mentions "special duties and special responsibilities" arising in the exercise of freedom of expression. All this makes such a right subject to certain limitations, which are also defined by Article 10 of the ECHR.

The paragraph 2 of Article 10 of the ECHR contains a long list of possible grounds for restrictions, including the interests of national security, territorial integrity or public order, to prevent riots or crimes, to protect health or morals, to protect the reputation or rights of others, to prevent disclosure of confidential information or maintain the authority and impartiality of the court. The listed reasons reflect the interests of the era of the 1950s, when the Convention was adopted. But only if the restrictions are in fact "prescribed by law" and are "necessary in a democratic society" to achieve

2 Wolfgang Kleinwächter, A history of the Right to Freedom of Expression, Oct 26, 2022.
3 Nicholas Harrison, Freedom of Expression in History and in Theory, 1996.

those aims, will the Court consider them not to violate the guarantees of the Convention.

It is necessary to apply a three-step test, which involves the compliance of the restrictions with the criteria of legality, legitimacy and necessity, the last of which contains an element of proportionality.

In times of rapid development of digital platforms, where information, statements, publication of thoughts and photo illustrations are transferred every second, it is important to have an understanding of the legal boundaries and grounds for restricting freedom of expression, which are permissible from the point of view of the practice of the ECtHR.

PART I

Choosing the topic of my master's thesis, I deliberately focused on the study of freedom of expression. For me, this direction of research is relevant from the point of view of the urgency of the issue of freedom of expression in a warring country, because Ukraine has been waging a full-scale defensive war with Russia for almost 2 years.

In the conditions of significant restrictions on human rights and freedoms during the period of martial law, such fundamental rights as freedom of speech, freedom of expression, the right to criticize the actions of the government and the right to receive reliable information about the current situation in the defense sector are very important. For example, with the beginning of martial law across the country, television channels stopped working, and instead, there is a single media marathon where the content is clearly coordinated and moderated. This has led to the fact that freedom of information and freedom of expression have largely moved to social networks.

Coverage of events by media representatives is carried out in conditions of danger and threat to life and health.

1.1. The principle of legality for restrictions of non-absolute rights

The principle of legality, also known as the "lawfulness principle," is a fundamental principle in the European Convention on Human Rights that governs the limitation of non-absolute rights. The ECHR recognizes that certain rights are not absolute and can be subject to limitations, but these limitations must be prescribed by law.

In practice, the ECtHR plays a crucial role in interpreting and applying these principles. The ECtHR examines whether the interference with a right is based on a clear and foreseeable legal basis and whether it is proportionate to the legitimate aim pursued. If a state restricts a non-absolute right without a proper legal basis or if the restriction is not proportionate to the legitimate aim, it may be found to violate the principle of legality under the ECHR.

Some of the rights guaranteed by the Convention are absolute and interference with them in itself constitutes a violation of the Convention. Some rights, such as, for example, the right to respect for private and family life (Article 8), the right to freedom of expression (Article 10), the right to freedom of peaceful assembly (Article 11), may be interfered with and such interreference may even be found compatible with the Convention, if such interference meets the following requirements:

- being provided by law;
- pursue legitimate aim, which is specified in the relevant national legislation;
- is necessary in a democratic society.

Cases of interference from the point of view of analysis of their compliance with the legitimate

aim and necessity in a democratic society will be given later, and in this section we will talk about the principle of legality of interference.

In essence, this principle requires that the interference has a legal basis. If the interference is in accordance with the law, the impugned action may be consistent with the Convention, although on further analysis the Court may come to a different conclusion. If there are no legal grounds for certain actions/inactions of state bodies that constitute an interference with one of the specified rights, the Court could normally stop the analysis and establishes a violation of the relevant convention guarantee.

Thus, in particular, the following requirement for interference can be found in the decisions of the European Court: "the wording "in accordance with the law" requires that the measure contested in the case has certain grounds in national legislation and corresponds to the principle of the rule of law, which is directly mentioned in the preamble of the Convention ".

The ECtHR has developed a three-part test to determine whether an interference is compatible with national law: the existence of national legislation, the clarity and precision of the wording, and its purpose.

The reference to the principle of legality means that the interference must be based on the provisions of national law. At the same time, the Court takes into account the term "law" in its domestic interpretation. The justification for interference can be laid down in national legislation, as well as in other sources, such as professional rules of conduct, unwritten principles of common law, European Union regulations and international (multilateral and bilateral treaties).

At the same time, it should be borne in mind that administrative regulations, orders, instructions and any other sources that are characterized by a high degree of generalization or that provide too much discretion, as well as those that do not have binding legal force, or are unavailable (secret, not to be published, etc.) do not constitute grounds for justifying interference in the sense of the principle of legality.

In order to assess the clarity and precision of a law, the Court must take into account its wording, scope, and the number and status of those to whom it is directed. Therefore, on the one hand, the legal norm must regulate the specific situation in question in the case, on the other hand, from a subjective point of view, a person must have sufficient references to the legal norms that can be applied in his/her case in the given circumstances.

The third aspect, directly related to the previous one, concerns the predictability of a person's behavior: everyone should be able to regulate their behavior according to the requirements of the law.

Of course, the search for certainty and predictability cannot lead to excessive rigidity in the wording of legal texts. Laws are more often than not formulated in terms that are more or less general,

and their interpretation and application is a practical matter[4]. In any case, the legislation and discretionary powers must indicate the goal to which the choice of a particular decision by the public authorities is aimed, so that each option can be examined and potentially recognized as "exceeding power" (ultra vires).

As the Court has repeatedly noted, in order for national legislation to meet these requirements, it must provide sufficient legal protection against arbitrariness and, accordingly, sufficiently clearly define the scope of discretion granted to competent authorities and the procedure for its exercise.[5]

The necessary level of detail in the provisions of the national legislation - and it cannot in any case predict all possible situations - depends significantly on the content of the relevant normative legal act, the envisaged scope of its application, as well as on the number and status of those to whom it is addressed[6].

States are compelled to justify any interference in any kind of expression. In order to decide the extent to which a particular form of expression should be protected, the Court examines the type of expression (political, commercial, artistic, etc.), the means by which the expression is disseminated (personal, written media, television, etc.), and its audience (adults, children, the general public, a particular group). Even the “truth” of the expression has a different significance according to these criteria[7].

1.2. The scope of admissibility of Article 10 of the ECHR

A comprehensive analysis of the guarantees of freedom of expression should be carried out by analyzing the norms of national legislation and international obligations. When studying specific cases of interference with freedom of expression, the ECtHR analyzes the norms of national legislation and the practice of their application from the point of view of the norms of the Convention.

Not only the ECHR contains provisions on the validity of restrictions on freedom of expression, as well as the provisions of paragraph 2 of Article 29 of the Universal Declaration of Human Rights of 1948, which state that in the exercise of their rights and freedoms, every person should be subject to only such restrictions as are established by law exclusively with with the aim of ensuring due recognition and respect for the rights and freedoms of others and ensuring the just requirements of morals, public order and general well-being in a democratic society.

[4] Hasan and Chaush v. Bulgaria (GC), 26.10.2000, №30985/96
[5] Malone v. the United Kingdom, 02.08.1984, № 8691/79, Rotaru v. Romania, № 28341/95
[6] Hasan and Chaush v. Bulgaria(GC), від 26.10.2000, №30985/96
[7] Bychawska-Siniarska Dominika, “A handbook for legal practitioners.”, CoE, 2017.

Article 10 of the Convention on the Protection of Human Rights and Fundamental Freedoms provides for the following:

1. Everyone has the right to freedom of expression. This right includes freedom to hold opinions, receive and impart information and ideas without interference from public authorities and regardless of frontiers. This article does not prevent states from requiring the licensing of radio broadcasting, television or cinematographic enterprises.

2. The exercise of these freedoms, as it is associated with duties and responsibilities, may be subject to such formalities, conditions, restrictions or sanctions as are established by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for to prevent riots or crime, to protect health or morals, to protect the reputation or rights of others, to prevent the disclosure of confidential information, or to maintain the authority and impartiality of a court.

Therefore, the right to freedom of expression is protected by Article 10 of the Convention, which promotes the independence and diversity of mass media, the safety of journalists and other stakeholders working in the media sphere. At the same time, the boundaries between the freedom to criticize and to harm a person's honor or reputation are not always clear. At the same time, the provisions of paragraph 2 of Article 10 establish grounds for limiting freedom of expression, which is neither absolute nor unlimited. Freedom of expression may not be a reason for actions that may destroy any right or freedom provided for in the Convention, or limit them beyond what is permissible.

But what exactly can the restrictions be, in what situations and under what conditions can their application be justified? We will answer these questions in this and the following sections of the present paper, as well as consider examples of legal positions of the European Court of Human Rights.

Over the decades of the existence Convention system, the following basic principles related to freedom of expression were formed, in particular:

1. Freedom of expression is one of the important foundations of a democratic society and one of the basic conditions for its progress and the self-realization of every individual. Subject to the limitations of Article 10(2), freedom of expression extends not only to "information" or "ideas" that have been obtained with consent or are regarded as inoffensive or of minor importance, but also to those likely to offend, shock or disturb Such are the requirements of pluralism, tolerance and openness of opinions, without which a "democratic society" is impossible. As provided in Article 10, this freedom has exceptions, which, however, must be clearly interpreted and the need for such limitations must be convincingly established[8].

2. The press plays an important role in a democratic society. Although it must not exceed certain limits, in particular with regard to the protection of the reputation and rights of others, as well

[8] Jersild v. Denmark, 23.09.1994

as the disclosure of confidential information, the duty of the press is nevertheless to disseminate information and ideas in a manner compatible with its duty and responsibility, on all matters of public interest, including matters of justice[9].

It is not only the task of the press to spread such information and ideas, the society also has the right to receive them. Otherwise, would the press be able to play this vital role of a "watchdog of democracy"[10]?

Freedom of journalistic expression also presupposes a certain degree of exaggeration or even provocation[11].

3. Freedom of the press provides the public with one of the best means of obtaining information, forming ideas, and relating to political leaders. The limits of acceptable criticism are accordingly wider when it comes to a politician than when it comes to an average citizen. Unlike the latter, every word and action of the former inevitably and consciously becomes the subject of careful scrutiny by journalists and the public and, therefore, it must show a higher degree of tolerance[12].

4. The limits of acceptable criticism in certain circumstances may be wider when it comes to a public official exercising his powers than when it comes to individuals. However, it cannot be argued that civil servants consciously subject their every word or action to the same degree of scrutiny as politicians do, and, accordingly, it cannot be argued that they should be subject to the same mechanisms as the latter, when it comes to criticizing their activities. Civil servants must enjoy public trust in conditions of calm performance of their tasks. Therefore, there may be a need to protect them from abusive verbal attacks while performing their duties[13].

5. Moreover, a clear distinction must be made between fact-finding and evaluative judgments. While the existence of facts can be demonstrated, the validity of value judgments cannot be proven. The requirement to prove the validity of value judgments cannot be fulfilled, such a requirement violates the freedom of opinion as such, which is a basic element of the right guaranteed by Article 10[14].

The nature and severity of punishment for certain statements are also factors that the European Court takes into account when determining the proportionality of interference[15].

Thus, even when the European Court agreed with the Government's right to initiate criminal prosecution for defamatory attacks or criticism by opponents or the media, it carefully examined the reasons set forth in the national court's decision and the punishment imposed. In the event that the

[9] De Haes and Gijsels v. Belgium, 24.02.1997
[10] Thorgeir Thorgeirson v. Iceland, 25.06.1992
[11] Prager and Oberschlick v. Austria, 26.04.1995
[12] Lingens v. Austria, 8.07.1986
[13] Nikula v. Finland, no. 31611/96
[14] Lingens v. Austria, 8.07. 1986
[15] Ceylan v. Turkey [GC], no. 23556/94, Tammer v. Estonia, no. 41205/98

punishment was disproportionate to the aim, the European Court established a violation of Article 10 of the Convention, even if the statements were unfounded or poorly worded[16].

It should be noted that the "freedom of expression" protected by Article 10 of the Convention is not limited to words, written or spoken, but extends to images [17] , photos[18], actions[19] and even cultural heritage[20], designed to express an idea or present information.

In addition, Article 10 protects not only the content of information and ideas, but also the form in which they are expressed. Therefore, printed documents, radio broadcasts, paintings, films, poetry, novels or electronic information systems are also protected under this article. The satirical expression also received special protection from the Court. Satire is a form of artistic expression and social commentary and, due to its inherent exaggerations and distortions of reality, naturally aims to provoke and agitate. Any interference with the artist's right to such expression must be considered with particular care. It follows that the means of production and communication, the means of transmission or dissemination of information and ideas are also covered by Article 10.

It is also necessary to pay attention to the fact that the freedom of expression extends not only to the prepared and published article or work, but also to the preparatory process of the investigative journalist. So, for example, in the decision on the case "Girleanu v. Romania"[21] the European Court analyzed the conviction of a journalist for collecting information related to national security and came to the conclusion that Article 10 applies including to journalistic preparation for publication.

1.3. Limits of application of Article 10 of the Convention

The media have rightly been described as the watchdogs of democracy, because journalists often highlight democratic deficits and demand accountability from elected and unelected officials. This is the fourth estate[22] but there are certain types of information to which the provisions of Article 10 of the Convention do not apply. Thus, in particular, incitement to violence falls outside the protection afforded by Article 10 when there is use of language to incite violence and when there is a real possibility that violence will occur.

In the case of Sürek v. Turkey (No. 3), the Court considered the conviction of the applicant, one of the owners of a newspaper, which published an article describing the Kurdish national liberation struggle as a "war directed against the forces of the Republic of Turkey" and asserting: "We want to wage a total liberation struggle." According to the Court, "the contested article is related to

[16] Castells v. Spain, 23.04.1992
[17] Müller and Others v. Switzerland, 24.05.1988.
[18] Chorherr v. Austria, 25.08. 1993
[19] Steel and Others v. the United Kingdom, 23.09.1998.
[20] Khurshid Mustafa and Tarzibachi v. Sweden, 16.12. 2008
[21] Girleanu v.Romania, 26.06.2018
22 Lord David Neuberger, Can Yeginsu, Catherine Amirfar and Baroness Helena Kennedy, Join Statemen May 3, 2023.

the Kurdistan Workers' Party (hereinafter - the KWP) and called for the use of armed resistance as a means of achieving the national independence of Kurdistan"[23].

The court also noted that the article was published during a period of serious clashes between the security forces and KWP members, which led to heavy casualties and the imposition of a state of emergency in large parts of southeastern Turkey. In this context, the content of the article should be considered as capable of inciting further violence in the region. Indeed, the reader is informed that resorting to violence is a necessary and justified measure of self-defense against an aggressor[24].

The Court recalled that the mere fact that "information" or "ideas" offend, shock or cause concern is not sufficient to interfere with the right to freedom of expression. However, in this case we are talking about incitement to violence. Accordingly, the Court found that the applicant's conviction did not contravene with Article 10.

The court reached similar conclusions in the case "Leroy v. France"[25]. In 2002, a French cartoonist was convicted of complicity in condoning terrorism through a cartoon published in the Basque weekly newspaper Ekaitza. On September 11, 2001, a cartoonist presented to the editorial board a drawing depicting the attack on the twin towers of the World Trade Center, with a caption that parodied the famous brand's advertising slogan: "We all dreamed it...Hamas did it."

This picture was published in the newspaper on September 13, two days after the terrorist attack. The court noted that the tragic events of September 11, 2001, which were the basis of the contested drawing, had led to global chaos and that the issues arising from this were to be discussed as a matter of public interest. The court concluded that the caricature was not limited to criticizing American imperialism, but supported and glorified its brutal destruction. It based this conclusion on the signature that accompanied the picture and noted that the applicant expressed his moral support for those he considered to be the perpetrators of the attacks on September 11, 2001, gave a positive assessment of violence and degraded the dignity of the victims.

According to the Court, another factor - the date of publication (recall that the publication took place two days after the terrorist attack) - was such as to increase the cartoonist's responsibility for his interpretation and even support of the tragic event, regardless of whether it was considered from an artistic or journalistic point of view. In addition, the Court took into account the place of distribution of the publication, in particular, the fact that it was a newspaper distributed in the Basque Country. According to the Court, the picture caused a significant public reaction, capable of provoking violence, and demonstrated a certain impact on public order in the region. Accordingly, in the Court's view, the grounds used by the domestic courts to convict the applicant were "relevant and sufficient". Taking into account the modest nature of the fine and the context of the publication of the

[23] Sürek v. Turkey (No. 3) (GC), 8.07. 1999
[24] Sürek v. Turkey (No. 1), 8 July 1999, paragraph 62.
[25] Leroy v. France, 2 October 2008

contested drawing, the Court found that the measure applied to the cartoonist was not disproportionate to the legitimate aim pursued. Accordingly, there was no violation of Article 10 of the Convention.

In contrast to this decision in “Sürek v. Turkey (No. 4)”, where the impugned articles described Turkey as a "genuine terrorist" and as an "enemy", the Court, after analyzing the context of the article, found that the harsh criticism of the Turkish authorities was rather a reflection of a harsh attitude of one party to the conflict, and not a call to violence. In general, the content of the articles cannot be interpreted as capable of inciting further violence. The court also stated that the public has the right "to be informed of a different perspective on the situation in southeastern Turkey, no matter how unpleasant that prospect may be for them."[26]. The Court concluded that the applicant's conviction and sentence violated Article 10.

In the case «Karataş v. Turkey»[27], which concerned the conviction of a poet for allegedly promoting separatism, the Court found that the applicant was a private individual expressing his views through poetry - which by definition is addressed to a very narrow audience - and not through the mass media, this is a fact that significantly limits their potential impact on "national security", "(public) order" or "territorial integrity". And although some passages from the poems appear very aggressive and call for the use of violence, the Court concluded that the fact that they were artistic in nature and of limited impact made them less a call to rebellion than an expression of deep suffering in the face of a difficult political situation. In this regard, the Court decided that the conviction of the author for the poems failed to meet the requirements of Article 10 of the Convention.

Likewise, hate speech directed at members of minorities is not protected by Article 10. In the case "Vejdeland and Others v. Sweden"[28] the applicants were convicted for distributing approximately 100 leaflets in a secondary school, which the courts found offensive to members of the homosexual community. The applicants distributed leaflets, leaving them in or on students' lockers. The letter included claims that homosexuality was a "deviant sexual orientation," had a "morally destructive effect on the essence of society," and was responsible for the spread of HIV and AIDS. The applicants claimed that they did not intend to express contempt for homosexuals as a group and stated that the purpose of their activity was to start a discussion about the lack of objectivity in education in Swedish schools. The applicants were convicted for such actions and appealed to the European Court with a complaint about the violation of their right to freedom of expression. The European Court, having analyzed the context of the said leaflets, came to the conclusion that the statements contained in them are serious and biased statements, even if they were not a direct call to hateful actions. The court emphasized that discrimination on the basis of sexual orientation is as serious as discrimination on the basis of race, origin or skin color. The Court concluded that there had

[26] Sürek v. Turkey (No. 4), 8 July 1999 (GC), paragraph 58.
27 Karatas v. Turkey, 08.07.1999, №23168/94
28 Vejdeland and Others v. Sweden, 9 February 2012.

been no violation of Article 10 of the Convention because the interference with the applicants' exercise of their right to freedom of expression was reasonably considered by the Swedish authorities to be necessary in a democratic society to protect the reputation and rights of others.

Views that promote Nazi ideology and deny the Holocaust cannot benefit from the protection of Article 10 of the Convention either. The interesting question of the use of images relating to the Holocaust in social campaigns from the point of view of Article 10 of the Convention was faced by the Court in the case "PETA Deutschland v. Germany[29], in which a civil order of the Berlin Regional Court in 2004 prevented the animal rights organization PETA (People for the Ethical Treatment of animals) to publish an advertising poster campaign called "Holocaust on your plate" with photos of destitute concentration camp victims and animals kept in pens. The photos were accompanied by short texts such as "the ultimate humiliation", "when it comes to animals, everyone becomes a Nazi" and so on. The European Court concluded that this case cannot be considered in isolation from its historical and social contexts, and that references to the Holocaust must be seen in the specific context of Germany's past. In this regard, the Court decided that the national courts had more power to assess the situation and, that they provided sufficient and appropriate grounds for prohibiting the publication of certain posters. At the same time, the Court noted that national courts of other jurisdictions can consider similar cases in a different way. But in the specific circumstances of this case, the Court decided that the interference with the applicant's right to freedom of expression was justified.

The Court came to a different conclusion in Annen v. Germany, which dealt with an anti-abortion campaign[30]. In this case, the leaflets mentioning Auschwitz and the Nazis were banned because they identified people who perform abortions and conduct stem cell research with the Nazis and their methods. Bearing in mind the historical context and its significance for Germany, the Court nevertheless concluded that there had been a violation of Article 10 in connection with such a prohibition, basing its conclusion on an analysis of the statement. In particular, it referred to the fact that in Auschwitz the killing of people was illegal, but allowed by the Nazi regime, which leads to another conclusion that law can diverge from morals. In addition, the issue of banning abortion was in the center of public attention. In this regard, in the opinion of the European Court, the national courts should have assessed all the nuances of the expression at stake and struck appropriate balance in assessments, and not ban leaflets only on the basis of a perceived violation of the right to respect for the private life of doctors who performed abortions.

Holocaust denial as a matter of public debate was also denied protection under Article 10 of the Convention.

In the case against Switzerland, Mr. Perincek[31], a Turkish politician, publicly expressed the opinion that the mass deportation and mass killing of Armenians in the Ottoman Empire in 1915 and

[29] PETA Deutschland v. Germany, 08.11. 2012.
[30] Annen v. Germany, 26.11.2015
[31] Perinçek v. Switzerland, 15.10.2015

the following years did not constitute genocide. The Swiss courts recognized, in particular, that his motives were racist and nationalistic and that his statements did not contribute to the historical debate. The applicant complained that his criminal conviction and sentence violated his right to freedom of expression. The court ruled that there had been a violation of Article 10 of the Convention. At the same time, the Court noted that it is aware of the great importance that the Armenian community attaches to the question of whether mass deportations and mass killings should be considered genocide. But at the same time, from the Court's point of view, the dignity of the victims and the dignity and identity of modern Armenians are protected by Article 8, which is a similar convention guarantee. Therefore, the Court had to establish a balance between the two rights of the Convention - the right to freedom of expression and the right to respect for private life. Taking into account the specific circumstances of the case and the proportionality between the means used and the aim to be achieved in the present case, the Court concluded that there was no need in a democratic society to subject the applicant to criminal punishment in order to protect the rights of the Armenian community.

Therefore, the right to freedom of expression includes the following components:

1. freedom to adhere to one's views;
2. freedom to receive information;
3. freedom to transmit information and ideas.

At the same time, Article 10 of the Convention will not protect:

1. incitement to violence;
2. condoning terrorism;
3. hate speech;
4. propaganda of Nazi ideology and denial of the Holocaust.

Freedom of expression refers to those rights and freedoms that are not absolute, that is, under certain circumstances, the state has the right to interfere with the enjoyment of this freedom. So let's try to figure out when the European Court considers that the interference is legitimate.

A) what constitutes an interference with the right to freedom of expression. From the point of view of the European Court, an interference is any formality, condition, restriction, sanction or penalty for the collection and dissemination of information, any obstacle in obtaining information, as well as any obstruction to the activities of an investigative journalist , in particular, during preparation for publication. In addition, impunity and numerous attacks and murders of journalists-authors of the relevant publication and distributors of print media can be recognized as an interference with the right to freedom of expression of mass media.[32]

B) conditions for the justification of interference - the interference must be provided for by law (see the section Principle of legality of interference with non-absolute rights). - interference must be aimed at protecting one or more such interests or values as national security; territorial integrity;

[32] Özgur Gundem v. Turkey, 16.03.2000

public security; preventing riots or crimes; protection of health or morals; protecting the reputation or rights of others; preventing disclosure of confidential information; preserving the authority and impartiality of the court; - interference must be necessary in a democratic society.

The European Court, assessing whether the interference with freedom of expression was acceptable, uses this three-fold test, and a negative answer to at least one of the questions of the test leads to the finding of a violation of freedom of expression. Using the examples of relevant judgments of the Court, we will analyze specific cases when the ECtHR considered the decisions of national courts to be well-founded and not.

At the same time, it should be borne in mind that the right to freedom of expression may be subject to the restrictions specified in paragraph 2 of Article 10, but this freedom refers not only to the "information" or those "ideas" that are obtained legally or considered insignificant, but also those that cause offense or indignation. Every "formality", "condition", "restriction" or "sanction" applied in this area must be proportionate to the legitimate aim pursued by them. From another point of view, any person, when exercising his freedom of expression, has "duties and responsibilities", the degree of which depends on the situation and the technical means he/she uses. The court cannot fail to pay attention to these "duties and responsibilities", each time trying to find out whether the "restrictions" or "sanctions" helped in a specific case, which would make them "necessary in a democratic society"[33]. The adjective "necessary" in the meaning of paragraph 2 of Article 10 implies the presence of "urgent social need". Contracting parties (states) have some discretion to assess whether there is a need to restrict freedom, but this goes hand in hand with European supervision, covering both legislation and decisions applying it, even those given by an independent court. The Court has the power to make the final decision on whether a "restriction" is compatible with the freedom of expression protected by Article 10.

PART II

Since one of the issues for the justification of the Russian war against Ukraine was the territorial claims of Russia, the manipulation of the opinions of the population of the eastern regions of Ukraine in matters of territorial integrity and the beginning of the temporary occupation of the territory of Ukraine in 2014, this section is important for understanding the consequences and restrictive measures in public open discussions on territorial integrity.

An important component of freedom of expression is the objective coverage of information about the state of military support, material support, conditions of service of mobilized persons, and all this information can be legitimately limited, because it concerns the sphere of national security and defense, that is why this section is important in research on understanding the limits of the right to freedom of expression and issues of national security.

[33] Handyside v. The United Kingdom, №5493/72, 07.12.1976.

Analysis of the practice of the European Court of Human Rights allows us to identify the following main criteria that are used to establish a balance between the right to freedom of expression and the interests of national security, territorial integrity and public safety:

1. the nature of the statement. In particular, the Court takes into account whether calls to violence were spread, whether hate speech was used, whether the ideas of terrorism were supported, whether violence, torture, capital punishment, etc. were justified;

2. the context in which the statement was made (it is necessary to analyze the entire publication as a whole, without taking words or phrases out of the context);

3. the context in which the interference took place (the presence of social tensions, riots, the existence of an armed conflict, etc.;

4. the existence of real or potential harm from the statement;

5. the influence of the person to whom the statement belongs;

6. a means of disseminating information and influencing the audience;

7. nature of punishment and its severity.

In addition, in its judgments, the ECtHR draws attention to the fact that the concepts of "national security" and "public order" as grounds for restricting freedom of expression should be interpreted narrowly. Reflecting on the meaning of the concept of "prevention of disorder", the European Court of Human Rights observed, in particular, that the best way to reconcile the expressions "défense de l'ordre" and "prevention of disorder" in the French and English texts of Article 10 § 2 of the Convention is to , to interpret them in the least broad sense, since the words used in the English text can be understood only in a narrow sense, the task of the press is not only to convey information and ideas on all matters of public interest; the public also has the right to receive them.

2.1. National security as a basis for interference with the right to freedom of expression

In cases where the statements made were aimed at violating rights enshrined in the Convention and were subject to sanctions by national authorities, the requirements of "national security", "public safety" and "rights of others" were considered by the Court to outweigh the interests of defending the freedom of expression. One of the most prominent cases where the grounds for restricting freedom of expression were the related to "national security" is the case of "Observer and Guardian v. United Kingdom»[34].

In 1986, two newspapers, the Observer and the Guardian, announced their intention to publish extracts from the book "Spycatcher" by Peter Wright, who had been dismissed from the ranks of the secret service. At the time of the announcement, the book had not yet been published. Mr. Wright's book contained information about the alleged illegal activities of the British intelligence and its agents. The Prosecutor General asked the court to grant a permanent ban on the publication of newspapers in order to prevent the publication of extracts from the book. In July 1986, the courts

[34] Observer and Guardian v. the United Kingdom, 26.11.1981, № 13585/88

issued a temporary injunction to prevent the newspapers from publication while the case for a permanent ban was pending. In July 1987, the book was published in the United States of America and was freely transported to the United Kingdom by interested readers. Despite this, temporary bans on newspapers remained in place until October 1988, when the House of Lords refused to grant the permanent ban sought by the Attorney-General. The applicants complained to the European Court about temporary bans on the publication of newspapers. The British government argued that at the time the temporary bans were put in place, the information Peter Wright had access to was confidential. If this information was published, the British intelligence service, its agents and third parties would suffer enormous damage from the identification of the agents; the relations with allied countries, organizations and other entities would also be damaged; and they would all lose confidence in British intelligence. In addition, the government argued that there was a risk that other acting or former agents would follow Mr. Wright's lead. In this case, the European Court found that temporary bans on newspapers were justified before the publication of the book, but not after. Once published in the United States, the information lost its confidential nature, and therefore an extension of the publication ban was no longer necessary.

So, in its practice, the Court defined, in particular, two important principles:

- the first principle absolutely logically assumes that after the publication of information containing content in the field of national security, it is impossible to withdraw such information or;

- the second principle prohibits states from unconditionally defining all information in the field of national security as secret and, accordingly, restricting access to such information. States must be prepared for the fact that the public interest will require the disclosure of such information, or that, over time or circumstances, there will no longer be a need to consider the information as secret.

According to the activists of the international non-governmental organization "Article 19"[35], the following topics cannot be subject to restrictions on the basis of justification by threats to national security:

- calling for a non-violent change of government or government policy;
- communicating information on human rights violations, or violations of humanitarian law;
- expression in a specific language, including minority languages.

2.2. Freedom of expression and territorial integrity

In the case of "Sürek and Özdemir v. Turkey", the applicants were sentenced by the national courts to 6 months imprisonment and a fine on charges of spreading separatist propaganda. In addition, printed publications were confiscated from them. The applicants published two interviews with a senior official of the Kurdistan Workers' Party (KWP), who condemned the policies of the

[35] NGO “Article 19”, Freedom of expression and national security: A summary, 2020.

Turkish authorities in the south-east of the country, which he described as aimed at displacing the Kurds from their territory and destroying their resistance. The publication also said that the war on behalf of the Kurdish people would continue "until the last man on our side." The applicants also published a joint statement issued by four organizations which, like the KWP, were banned under the Turkish law and which advocated for the recognition of the Kurdish people's right to self-determination and the withdrawal of the Turkish army from Kurdistan. Evaluating these publications, the European Court noted that "the limits of permissible criticism of the government are wider than those of a private citizen or even a politician."[36]. The court also noted that the fact that the interview was given by a leading member of a banned organization and that it contained harsh criticism of the official state policy and referred to a one-sided view of the situation, responsibility for the unrest in southeastern Turkey, had not been sufficient to justify the interference with the applicants' freedom of expression. In the opinion of the Court, the interviews were very important in terms of content, which allowed the public to form an idea of the psychology of those who are the driving force of the opposition to the official policy in south-eastern Turkey, and understand the causes of the conflict. In addition, the Court ruled that "the national authorities did not pay sufficient attention to the public's right to be informed of a different point of view regarding the situation in south-eastern Turkey, regardless of how unpleasant such information may be for them". The European Court also noted that the grounds on which the national courts prosecuted the applicants "cannot be sufficient to justify an interference with their right to freedom of expression." In view of this, the European Court established a violation of Article 10 in this case. The findings of the European Court in the case "Sürek v. Turkey" (No. 3) is very interesting. The newspaper owned by the applicant published an article in which the Kurdistan Workers' Party declared a war against the Turkish Government and called for a total liberation struggle. The court analyzed not only the meaning of the article itself, but also the context in which the publication took place, and concluded that the publication could cause further deterioration of the situation in Turkey, accordingly, in order to protect national security and territorial integrity, the restrictions on freedom of expression were proportionate. Thus, the contents of the publication and the context of the situation have crucial importance for the assessment of interference with freedom of expression by the European Court.

2.3. Freedom of expression and prevention of disorder or crimes

In order to prevent riots or crime, as well as to protect national security interests, the Austrian government applied restrictions on freedom of expression in the Saszmann v. Austria case. The applicant was sentenced to three months of imprisonment with three years of probation for inciting servicemen, through the press, to disobey and violate military laws. The court concluded that the applicant's conviction was justified for the maintenance of order in the Austrian Federal Army and for the protection of national security: "incitement to disregard the military laws constituted

[36] Sürek and Özdemir v. Turkey, 08.07.1999, №№ 23927/94, 24277/94

unconstitutional pressure aimed at repealing constitutionally enacted laws. Such unconstitutional pressure could not be allowed in a democratic society."[37]

The Court came to the opposite conclusion in the case of Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria, where the Austrian courts prohibited the distribution of magazines to soldiers in military barracks that encouraged soldiers to file lawsuits against the authorities. The Austrian government argued that the applicants' periodicals threatened the country's defense system, the effectiveness of the army and could lead to riots or crimes. The court disagreed with the Austrian government's submissions and opined that the magazine's content was mainly about legitimate appeals procedures, proposals for reform or encouraging readers to take legal action or appeal. However, despite its often polemical nature, the content of the publication did not exceed the limits of what is permissible in the context of a simple discussion of ideas, which should be tolerated in the army of a democratic state, as well as in the society served by such an army. Thus, the Court found a violation of Article 10 in connection with the interference with the applicant's right to freedom of expression[38].

2.4. Freedom of expression and morality

The conflict between "morals" and freedom of expression brought new interpretations of the principle of proportionality and was often considered by the European Court in the context of artistic freedom. As a rule, in such cases, the Court left the national authorities with a wider discretion, justified by the peculiarity of "morals" in each state or even in different regions within the same country. The conflict between "morals" and freedom of expression was addressed by the Court in Open Door and Dublin Well Woman v. Ireland. The applicants were non-profit organizations in Ireland, where abortion was prohibited. These organizations offered advice to pregnant women; one organization provided a wide range of services in the field of family planning, pregnancy, health, sterilization, etc. The organization also provided pregnant women with information about abortion options outside of Ireland, such as the addresses of some clinics in the UK. Both organizations limited themselves to providing counseling, and the decision of whether to have an abortion was left to women. In 1983, the applicant organizations published a pamphlet criticizing the changes to the Constitution introduced at the time, in particular, the introduction of the right to apply to the court to ban the dissemination of information about abortion outside Ireland. The amendments to the Constitution also gave anyone the right to sue and seek an injunction against travel abroad if there was reason to believe that there was an intention to travel outside of Ireland for the purpose of having an abortion. In 1986, following an appeal to the court by the Irish organization "Society for the Protection of Unborn Children", a national court ruled that the dissemination of information about

[37] Saszmann v. Austria, 27.02.1997, № 23697/94
[38] Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria, 19.12.1994, № 15153/89

abortion constituted a violation of the Constitution and other legislative acts. The national courts granted a permanent injunction against the applicant organizations to prevent them from disseminating information and preventing pregnant women from being assisted in obtaining abortions outside of Ireland. Both applicant organizations appealed to the European Court of Justice, claiming that their right to transmit and receive information had been violated. Four women, including victims of such bans, also joined the application to the European Court. Discussing the protection of "morals " as a legitimate aim, the European Court argued that the protection of unborn children rested on the deep moral values of the Irish people, and decided that although the discretion of national authorities was wider in relation to "morals", such freedom was not limitless. The Court then examined whether the interference met a "pressing public need" and whether it was proportionate to the legitimate aim pursued. The court was struck by the absolute nature of the injunctions granted by the Irish courts, which imposed an indefinite and general ban "regardless of age or health or other reasons for seeking advice on the termination of pregnancy". The court ruled that such a restriction was too broad and disproportionate. Concluding that the interference was disproportionate, the Court also noted that there were other available sources of information (magazines, telephone books, people living abroad) and the need for the restriction imposed on the applicant organizations was not urgent. The practice of national courts has shown that general and/or indefinite bans on freedom of expression are unacceptable even in such a morally sensitive area as abortion[39].

The scepticism of judicial bodies in referring to the legitimate aim of protection of morality as a justification for the interference into the rights and freedoms of individuals, even in matters that prima facie require some sort of moral judgment, is a circumstance that encourages more extensive research into the types of arguments used by the courts to replace or rationalize ethical judgments. The analysis of the above indicated ways of legal reasoning may lead to an answer of a question about the possibility of creation of a universal, supranational standard of public morality in the system of protection of human rights, relevant to principle of proportionality.[40]

2.5. Freedom of expression and reputation

Protecting the reputation and the rights of others is a legitimate aim most often used by national authorities to limit freedom of expression. It is this argument that is often used to protect politicians and civil servants from criticism by the media and society. The European Court has created an extensive case law in this area, which confirms the high level of protection of freedom of expression, in particular, in relation to the press. The privileged position of the mass media arises

[39] Open Door and Dublin Well Woman v. Ireland, 29.10.92, № 14235/88

[40] Dr Anna Młynarska-Sobaczewska, Assoc. Prof. Dr. Katarzyna Kubuj, Dr. Aleksandra Mężykowska “Public Morality as a Legitimate Aim to Limit Rights and Freedoms in the National and International Legal Order”, Polish Academy of Sciences, 2020.

from the central role played by political debate in a democratic society, both in relation to the electoral process and in relation to everyday matters of public interest.

From the findings of the Court, we see that with regard to critical publications directed against judges, the Court leaves a great deal of discretion to the state and stands more in the position of protecting respect for justice. If we analyze the approach of the Court regarding the balance between freedom of expression and protection of the reputation of private individuals and public figures (except politicians), we can conclude that the Court rather takes the position of protecting the reputation of such persons. The highest level of protection of freedom of expression concerns statements addressed to politicians and high-ranking officials, the criticism of the state, government and other state institutions is quite acceptable. The lowest level of freedom of expression protection (compared to criticism directed at politicians) is provided for insults or defamation of high-ranking officials or public servants (including police, officers, prosecutors and law enforcement officers) and all public employees. Thus, the Court expands the boundaries of critical/offensive speech on matters of public interest or part of political debate directed at public officials or public institutions.[41]

In the case "Wirtschafts-Trend Zeitschriften-Verlagsgesellscshaft M.B.H. v. Austria" (No. 3) the Court considered two articles published in the weekly magazine "Profil". The articles were illustrated with photographs and related to the flight from Austria with the subsequent arrest of a politician, a member of parliament, which is why the article called them "Bonnie and Clyde". The magazine was condemned by a national court under the criminal code for insulting the politician's roommate and comparing her to "Bonnie". According to the copyright law in Austria, Profil magazine was prohibited from publishing the photo without the consent of the person depicted in it. Regarding criminal liability, the European Court ruled that the applicant company did not exceed the limits of acceptable criticism by the press, which is allowed to use exaggeration and even provocation. Regarding the court ban on the publication of the photo, the Court noted that the photo did not reveal any details of the politician's roommate's personal life and that she did not object to her being photographed. The court concluded that there was a violation of Article 10 of the Convention in this case.[42]

In Thorgeir Thorgeirson v. Iceland, the Court upheld the freedom of the press in the context of criticism of public officials. The applicant (a writer) published two articles in a daily newspaper about police brutality. The first article was written in the form of a letter addressed to the Minister of Justice, in which the author urged to introduce a commission "to investigate rumors that gradually became public opinion that more and more brutality is recorded in the Reykjavik police, and the information about it is hidden." Apart from the journalist who was a victim of police brutality, the

[41] Tetiana Alforova, The Age of Human Rights Journal, June 2022.

[42] Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria (No. 3), Nos. 66298/01 and 15653/02, 13.12.2005

applicant did not specify the names of other victims. Following a television program in which the police denied the allegations of brutality, the applicant published a second article stating that "the behavior of the police is so typical that it is gradually becoming an image in the public eye of the police as defending itself and its actions such as bullying, falsifications, illegal actions, recklessness and incompetence." The applicant was sentenced to a fine for defamation of unidentified members of the police. The government argued before the European Court that the applicant's conviction was aimed at protecting the "reputation of others", in particular police officers, and, moreover, that the limits of acceptable criticism were wider only in relation to the political content of the views expressed. The court, however, observed that "there is no warrant in its legal positions for distinguishing, in the manner proposed by the government, between political discussion and discussion of other matters of public interest." Regarding the style (language) and content of the materials, the Court noted that “both articles contained very strong words. However, having regard to their purpose and the effect they were intended to have, the Court considers that the style used cannot be considered excessive. The Court concluded that the applicant's conviction and sentence were likely to impede open debate on issues of public concern and that the Government's justifications did not support the proportionality of the interference with freedom of expression. Thus, the conviction of the applicant was not "necessary in a democratic society".[43]

In Thoma v. Luxembourg, a journalist was ordered to pay damages for stating that all but one official in the Water and Forestry Commission was corrupt. The European Court found that there was a violation of Article 10 in this case, given the wide debate on the subject and the public interest in the matter. With regard to the admissibility of criticism of public officials, the Court ruled that public officials in their official capacity, like politicians, can be subject to broader criticism than private individuals. However, it cannot be said that civil servants consciously expose themselves to the scrutiny of their every word and deed to the extent that politicians consciously do, and therefore they should be put on an equal footing with the latter only when it comes to criticism of their conduct.[44].

In cases where the interests of "protecting the reputation or the rights of others" concern Article 10, which guarantees the right to freedom of expression, the Court may be required to examine whether the national authorities have struck a fair balance when protecting these two values guaranteed by the Convention.

The Court has repeatedly faced cases in which national courts limited the right to freedom of expression for reasons of the need to protect a person's reputation. It is clear that as a result, a certain "road map" was worked out, which constitutes a way for the national courts to follow in doing the balancing exercise.

[43] Thorgeir Thorgeirson v. Iceland, 25.06.1992, № 13778/88.
[44] Thoma v. Luxembourg, 29.03.2001, №38432/97

In particular, the case "Edition PLON v. France"[45] concerned the publication of the book "The Great Secret", the author of which was the personal physician of Mr. Mitterrand, who served as the President of France for two seven-year terms. In the book, it was stated that Mr. Mitterrand learned about his oncological disease six months after being elected to this post for the first time. It was decided not to inform the society about this and to keep both the fact of the disease and the treatment that was carried out a secret. The book was to be published ten days after the death of President Mitterrand. But at the request of the relatives of the deceased, on the day of publication the national court suspended any actions regarding the book until the issue of the distribution of medical information, as well as the possibility of such interference with the right to respect for the private life of the former president, his widow and relatives, is resolved. Some time later, in particular, 10 months after the death of the former French president, the book was banned, and the applicant publisher, as well as the author of the book, were ordered by the national courts to pay significant sums of non-pecuniary damages to the relatives of the former president following a civil action .

Considering this case, the European Court analyzed the context in which the book was to be published. In particular, it was established that at that time there had been an active discussion in the society about whether the fact of the president's illness should have been kept a secret, whether the treatment was appropriate, whether the treatment did not interfere with the performance of his duties as a state leader, etc.

In this regard, the Court agreed that the ban issued on the day of publication was sufficiently balanced as the aim was to further address the issue of medical confidentiality and respect for individual privacy.

The Convention’s privacy and freedom of expression rights can have a horizontal effect, which means that these rights are also relevant in disputes among citizens. The European Court of Human Rights says privacy and freedom of expression are equally important.[46]

But over time, the public interest in obtaining certain information began to outweigh the issue of respect for private life: "the more time passes, the more the public interest in President Mitterrand, who was in power for two seven-year periods, exceeds the requirements of protecting his rights in terms of confidential information nature of his medical history".

Accordingly, in this case, the permanent ban on the publication of the book and the amount of non-pecuniary satisfaction constituted an unlawful restriction of the applicant's rights to freedom of expression.

In another case mentioned above, Von Hannover v. Germany (№2)[47] the European Court considered the publication of the applicant's photographs, taken without her consent and against her

[45] Edition PLON v. France, 18.05.2004, № 58148/00
[46] Kulk S. Privacy, freedom of expression, and the right to be forgotten in Europe, January 2018
[47] Von Hannover v. Germany (№ 2) [GC] (nos. 40660/08 and 60641/08)

will. The domestic courts that considered the applicant's request to ban the publication of these photographs concluded that it was a priority for the public to know about her daily life, given the applicant's fame as a member of the royal family of Monaco. Therefore, in this case, the applicant complained not about the actions of the state, but rather about the insufficient protection of her private life and images by the state.

In connection with the contested publications, the European Court reiterated that although the purpose of Article 8 essentially consists in the protection of the individual against arbitrary interference by state authorities, it does not simply compel the state to refrain from such interference: in addition to this mainly negative obligation, a State may also have positive obligations in relation to effective respect for private or family life. Such obligations may include the application of measures aimed at ensuring respect for private life even in the relations between private individuals. This position also applies to the protection of the image of a private person from abuse by others.

The boundary between the positive and negative obligations of the state according to this provision cannot be precisely defined. The principles that apply, however, remain the same. In both cases, special attention should be paid to finding a fair balance between the competing interests of a private person and the society as a whole; in both cases, the state enjoys certain discretion.

The protection of private life must be correlated with the freedom of expression, which is guaranteed by Article 10 of the Convention. In this connection, the Court once again emphasized that freedom of expression is one of the main foundations of a democratic society. Subject to the requirements of Article 10, paragraph 2, it applies not only to "information" or "ideas" that are socially acceptable or regarded as neutral or unimportant, but also to those that shock, offend or cause anxiety in the state or part of the population. Such are the requirements of pluralism, tolerance and liberalism, without which there is no "democratic society".

In this regard, the press plays the most important role in a democratic society. Although it should not cross certain boundaries, in particular, in relation to the reputation and rights of other persons, nevertheless, its duty is to report - in any way which does not contradict its duties and responsibilities - information and ideas on all matters of public interest.

Although freedom of expression extends to the publication of photographs, this is an area where protecting the rights and reputation of others is of particular importance. The case at hand is not about "ideas" but about an image that contains deeply private and even intimate "information" about a person. In addition, the photos appearing in the "yellow press" are often taken in a state of annoying attention, which causes the person concerned a very strong feeling of intrusion into his or her private life, and even persecution.

In cases where the Court had to balance the protection of private life and the freedom of expression, it always focused on the contribution that photographs or articles in the press make to the discussion of socially significant issues.

The court pointed out at the outset that the photographs of the applicant in various German magazines were scenes from her everyday life that are of a purely private nature - such as sports, walks in the fresh air, leaving a restaurant or vacationing in the mountains. The photographs in which the applicant is present alone or in company, illustrate a series of articles under titles such as "Simple Happiness", "Carolina... A Woman Comes Back to Life", "On the Way to Paris with Princess Carolina".

The Court also noted that the applicant, as a member of the family of the Prince of Monaco, represents the royal family at some cultural and charitable events. However, she does not perform any functions either in the state itself or on its behalf.

At the same time, the Court came to the conclusion that it is necessary to draw a clear distinction between the reporting of facts, even very controversial ones, capable of positively influencing the discussion in a democratic society of issues that concern, for example, political figures in the performance of their functions, and the reporting of details of the private life of a person who to everything else, as well as this case, does not engage in any official activity. Then, in the first case, the press fulfills its extremely important role as a "watchdog" of democracy in the matter of "informing society on issues of public interest" (see the "Observer and Guardian" case), in the second case, it does not play such a role.

And although the society has the right to receive information, which is an important right in a democracy, which, under certain special circumstances, can extend even to certain aspects of the private life of public figures, especially if it concerns political figures (see the aforementioned case "Edition PLON v. France"), however, this conclusion is not applicable to this case. The situation under consideration does not fall under the framework of political or public discussion, since the published photos and the accompanying comments related exclusively to the details of the applicant's private life.

As in other similar cases that have already been considered before, the Court decided that, despite the fact that the applicant is widely known to society, the publication of the photos and articles in question was intended only to satisfy the curiosity of a certain circle of readers in the details of the private life of the applicant, and this cannot be considered a contribution to the discussion over any issue of importance to society.

Among other things, the Court once again drew attention to the special importance of private life protection from the point of view of the development of each person's personality. As indicated earlier, such protection extends beyond family and private life, including a special social dimension. The court believes that everyone, even well-known people, "has the right to expect" protection and respect for their private life.

In addition, it is necessary to increase vigilance in the protection of private life in connection with the development of the latest communication technologies that allow storing and updating

personal data. The Court once again reminded that the Convention should guarantee not the rights that are theoretical or illusory in nature, but the rights that are practical and effective.

In another case, Vesseilnov v. Bulgaria[48] the ECtHR found no violation of Article 10 of the Convention as regards the applicant being found guilty for slander in respect of his nephew for the allegedly illegal reconstruction of the inherited house. The circumstances were that the applicant, who lived in the city of Vienna, after a visit to the city of Sofia in 2009, sent a letter to the local authorities in which he expressed his indignation that his nephew was renovating the house he had inherited from his parents, and also expressed doubts about the legality of the construction works. In particular, the applicant indicated that his nephew possesses "an illegal notarial document obtained on the basis of a forged notarial deed." The nephew, in turn, initiated criminal proceedings against the applicant in the form of a private accusation for slander and demanded compensation for the damage to his reputation. Subsequently, the criminal proceedings were terminated due to the expiration of the statute of limitations. However, the applicant was found guilty of slandering his nephew and was ordered to compensate him for non-pecuniary damage. The courts found, inter alia, that the applicant's complaints about illegal or forged notarial documents were untrue and that his nephew was the actual owner of part of the said property. The applicant was ordered to pay compensation for non-pecuniary damage in the equivalent of 2,557 euros. Relying on Article 10 of the Convention, the applicant alleged a violation of his right to freedom of expression due to his prosecution for defamation.

2.6 Freedom of expression and freedom of thought, conscience and religion

Freedom of expression is one of the most emblematic buildings on the skyline of democracy. By virtue of its visibility and centrality, it is more vulnerable than other such buildings to threats that take shape in every historical period in the form of restrictions (content censorship) or compulsions (the imposition of ideas). This building, made from liberal stones, is supported by the various philosophical, theological, and juridical pillars that sustain it, such as the separation between church and state and the creation of a secular public sphere where all beliefs are freely expressed without any one being particularly privileged.[49]

In the modern world, religion is one of the socially significant institutions. In this context, it must be remembered that along with the protection of the right to freedom of expression and dissemination of information that is shocking and may be negatively perceived by the public authorities or certain social groups, the provisions of Article 10 also impose responsibilities and duties. In the context of the dissemination of information about religious beliefs, events and phenomena of the religious world, there is an obligation to respect the rights guaranteed by Article 9

[48] VESSELINOV v. BULGARIA (Application no. 3157/16)
[49] Jordi Pujol, February 2023, The Collapse of Freedom of Expression. Reconstructing the Ancient Roots of Modern Liberty Catholic Ideas for a Secular World.

of the Convention, including the obligation, if possible, to avoid expressing views that are perceived as offensive and blasphemous by the relevant category of persons[50]. States can apply restrictive measures (prosecution, prohibition of the display of works of art, removal from circulation of a newspaper, blocking of distribution of Internet content, etc.) to the dissemination of information that is incompatible with respect for freedom of thought, conscience and religion.

Therefore, when covering information on religious issues, events and leaders, journalists should take into account the guarantees of Article 9 of the Convention, since their activities may violate the rights of others, which are protected by this provision. In the event of a dispute regarding the journalist's responsibility for offending the religious feelings of others, a balance must be established between the interests protected by Article 10 and the interests protected by Article 9. In order not to be held liable for violating the rights guaranteed by the Article 9, it is necessary at least at the basic level to know how the analysis of circumstances is carried out when determining whether there has been a violation of the religious rights of other persons.

The provisions of Article 9 of the Convention provide that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change one's religion or belief, as well as freedom to profess one's religion or belief in worship, teaching, performance and observance of religious practices and rituals, either alone or in association with others, whether in public or in private.

The freedom to practice one's religion or belief shall be subject only to such restrictions as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

According to established practice, individuals who choose to exercise their freedom to practice their religion have no reason to expect that any criticism will escape them, regardless of whether they belong to the majority who faithfully practice the religion prevalent in a certain territory, or to a minority. On the contrary, members of a religious community should be tolerant and understanding of the non-acceptance of their religious beliefs by others and even the promotion of other doctrines that are hostile to their faith.

Regarding the role of the state, the European Court has always emphasized that the duty of the state to be impartial and fair is incompatible with any power of the state to assess the legitimacy of religious beliefs or the way of expressing those beliefs, unless those beliefs are contrary to the values of a democracy as protected by the Convention. Accordingly, the role of the state is not to eliminate the cause of conflict through the destruction of pluralism, but to ensure that conflicting groups are tolerant of each other[51].

[50] «Klein v. Slovakia», 31.10.2006, № 72208/01
[51] «Serif v. Greece», 14.12.1999, № 38178/97

At the same time, it must be remembered that not all views are protected by Article 10. Expressions that are incompatible with the values proclaimed and guaranteed by the Convention are not protected by Article 10 in view of Article 17 of the Convention, which prohibits the abuse of rights.

For example, in the case "Pavel Ivanov v. Russia"[52] the applicant, the owner and editor of a newspaper, was prosecuted for publicly inciting ethnic, racial and religious hatred through the use of mass media. In his articles, he pointed out that Jews are the source of evil in Russia, calling for their exclusion from social life. He accused the entire ethnic group of conspiring against the Russian people and attributed fascist ideology to the leaders of the Jewish population. The European Court decided that the applicant could not benefit from the protection of Article 10 in the context of such an attack on one of the ethnic groups, an attack that undermined the values provided for in the Convention, namely tolerance, social peace and non-discrimination.

Not all expressions formulated by a person in public are expressions of opinion. In Rujak v. Croatia[53] the applicant was prosecuted for public abuse in the following terms: "I had your Baptist mothers", "This is not my country, I am not its citizen, I do not recognize (respect) you, your ranks or the Croatian Army." The European Court noted that certain types of speech, such as obscene and vulgar language, may not play a significant role in the expression of ideas. In this case, the European Court decided that it was not necessary to establish whether the applicant's statements were an attack on a religious or ethnic group or whether they contravened Article 17 of the Convention. Given that his statements were mostly profanity, the European Court expressed doubt that the applicant was trying to convey information or ideas. It was clear from the context that the applicant's sole aim was to offend those around him. Accordingly, the Court concluded that such statements do not fall within the scope of protection of Article 10, and declared the statement inadmissible *ratione materiae* in accordance with paragraph 3 (a) of Article 35 of the Convention.

If a person disputes information disseminated by a journalist (media) as offending religious feelings of believers, the court must establish whether the rights of that person have been violated by the journalist and, if the claim is justified, ensure their protection and hold the journalist accountable. In this way, the state fulfills its positive obligations under Article 9, which require it not only to refrain from unlawful interference, but also to protect the rights of others from unlawful interference. As for the journalist, imposing a penalty on him would be an interference with his right to freedom of expression.

As has been repeatedly noted, in order for the interference not to constitute a violation, it must be carried out "in accordance with the law", pursue a legitimate goal and be necessary in a democratic society.

[52] «Pavel Ivanov v. Russia», 20.02.2007, № 35222/04 (dec.)
[53] «Rujak v. Russia», 02.10.2012, № 57942/10

The application of the condition that every interference must be carried out in accordance with the law has no particularity in cases where the right to freedom of expression and the right to freedom of thought, conscience and religion are in conflict. Since other sections of this thesis were devoted to the principle of legality, in this section we will dwell in more detail on another condition that the interference must meet, namely the necessity in a democratic society.

We reiterate that state interference in the exercise of human rights is considered "necessary in a democratic society" to achieve a legitimate aim, if it corresponds to an "urgent social need" and, among other things, is proportionate to the legitimate aim being pursued, and if the grounds invoked by national authorities are "adequate and sufficient".

The questions of which arguments are relevant and sufficient and in the light of which aspects of the case they are analyzed, are answered by the practice of the European Court.

In its practice, the Court indicated that the need to protect the feelings of believers from humiliating insults can be a reason for the state to limit the right to freedom of expression, for example by prohibiting the public display of religious objects in a provocative manner[54]. In the case «Wingrove v. UK»[55] the applicant applied to the authorities for a permission to distribute a film "Ecstatic Visions" about the life of Saint Teresa, which showed her ecstatic visions related to Jesus Christ. The authorities refused to grant permission because the film offended the feelings of believers and showed an unacceptable attitude to the topic of holiness.

The European Court decided that the interference pursued a legitimate aim, namely the observance of the rights of others – the right not to be insulted in the context of one's religious feelings. The Court stated that the purpose of the restriction was to protect the religious subject from such an interpretation and depiction, which by means of "humiliating, offensive, rude and absurd tone and style, is capable of offending those who believe and support the ethics of Christianity".

In the first chapter of this thesis, we have discussed the issue of the state's discretion to decide whether an interference is really necessary in a democratic society, taking into account the specific circumstances of the case. As it has been repeatedly noted, in cases where it is a question of restricting the freedom of expression in the sphere of political discussions and discussions on socially important issues, the state has a very narrow discretion, which means that only exceptional circumstances of the case can justify the restrictions. In contrast, when it comes to restrictions aimed at protecting the rights of other persons, their private sphere, especially religious feelings, the state has a wide discretion. In the sphere of morals and to a greater extent in the sphere of religion, there are no generally recognized concepts of requirements for the protection of the rights of other persons in the event of an attack on their religious feelings. What can offend people in their religious feelings can change depending on the specific circumstances of the case, place and time, the state of affairs in a

[54] «Otto-Preminger-Institut v. Austria», 20.09.1994, № 13470/87
[55] «Wingrove v. UK», 25.11.1996, № 17419/90

state. That is why the European Court always emphasizes that in such cases the national authorities are in a more favorable position regarding the assessment of the need for interference, it is they, and not the international court, who are closer to what is happening in the society, therefore, the European Court to condemn the assessment given by the national authorities to it is necessary to have strong arguments.

However, the Convention would not be the most effective international act for the protection of human rights if it allowed unlimited state discretion. Accordingly, the European Court can disagree with the position of the national courts in cases where such a position is unfounded and arbitrary. In doing so the Court analyzes whether the national court took into account the following aspects: the content, the context, the audience among which the information was disseminated, the means of dissemination (audiovisual or print media, a performance in a theater or a publicly available video), the potential consequences of the disseminated information. All these aspects are not considered in isolation, but in a close relationship.

CONCLUSIONS

Freedom of expression is one of the important foundations of a democratic society and one of the basic conditions for its progress and the self-realization of everyone. The subject matter of the second paragraph of Article 10 applies not only to "information" or "ideas" that have been obtained with consent or are regarded as inoffensive or of minor importance, but also to those that may offend, shock or disturb. Such are the requirements of pluralism, tolerance and openness of opinions, without which a "democratic society" is impossible. As provided in Article 10, this freedom has exceptions, which, however, must be clearly interpreted and the need for such restrictions must be convincingly established.

The press plays an essential role in a democratic society. And although it cannot cross certain boundaries, in particular, with regard to reputation, the rights of others and the need to prevent the disclosure of confidential information, nevertheless, it is its duty to transmit, in a manner compatible with its duties and responsibilities, information and ideas from all issues of public interest, including those related to justice. It is not only her task to convey such information and ideas; the public also has the right to receive them. Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are provided. Journalistic freedom also includes the possibility of exaggeration or even provocation.

It is not only the job of the press to spread such information and ideas, but society has a right to receive them as well. Otherwise, would the press be able to play this vital role of "watchdog of democracy".

Article 10 of the Convention protects the right of journalists to disclose information of public interest, provided that they act in good faith and use a verified factual basis; and provide "reliable and

accurate" information as required by journalistic ethics. According to paragraph 2 of Article 10 of the Convention, freedom of expression is associated with "duties and responsibilities" that apply to mass media even on matters of great public importance. Moreover, these "duties and responsibilities" are of particular importance when it comes to defamation of the named person and violation of the "rights of others."

News reporting based on interviews or reproductions of the statements of others, edited or not, is one of the most important means by which the press can play its important role as the "watchdog of society." In such cases, a distinction should be made between situations when such statements belonged to the journalist and when they were a quotation of the statements of another person, since the punishment of a journalist for participating in the distribution of the statements of other persons will significantly prevent the press from contributing to the discussion of issues of public importance and should not be considered, unless there is an exceptional case for the other good reasons.

Freedom of the press provides the public with one of the best means of obtaining information and forming ideas and attitudes about political leaders. More generally, freedom of political debate is at the very heart of building a democratic society, which permeates the Convention. The limit of permissible criticism of such a public person as a politician is wider than that of a private person. Unlike the latter, the former inevitably and consciously goes to ensure that all his words and actions are the object of close attention from journalists and the general public, so he should show greater tolerance.

The limits of acceptable criticism in certain circumstances may be wider when it comes to a public official exercising his powers than when it comes to natural persons. However, it cannot be argued that civil servants consciously subject their every word or action to the same degree of scrutiny as politicians do, and therefore should be subject to the same mechanisms as the latter when it comes to criticism of their activities . Public servants must enjoy public trust in conditions free from extreme anxiety, which will enable them to perform their duties successfully. Therefore, it may be necessary to protect them from abusive verbal attacks while performing their duties.

Interference with freedom of expression (restriction) is permissible if it is established by law and is necessary in a democratic society. Thus, interference with an individual's right to freedom of expression would constitute a violation of Article 10 of the Convention, unless it falls within one of the exceptions set out in Article 10, paragraph 2, of the Convention. Accordingly, the Court must consider, in turn, whether the interference in the present case was "authorized by law", whether it pursued an aim(s) which are legitimate under Article 10 § 2, and whether it was "necessary in a democratic society" to achieve that goal.

The adjective "necessary" in the sense of paragraph 2 of Article 10 of the Convention implies the existence of "urgent public necessity". When assessing whether such a need exists, the Contracting States enjoy a certain discretion. However, this freedom is accompanied by European supervision,

which applies to both legislation and decisions on its application - even those made by an independent court. Accordingly, the Court is empowered to make a final decision on whether such a "restriction" is compatible with the freedom of expression guaranteed by Article 10 of the Convention.

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