

RIGHT TO FREEDOM OF EXPRESSION V. REPUTATION PROTECTION (BASED ON ECTHR PRACTICE MATERIALS)

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Abstract: The urgency of the study is stipulated by the necessity to clarify the criteria allowing courts to determine a balance between the right to freedom of expression and the right to reputation protection as part of the right to privacy. The purpose of the article is to elucidate, through the European Court of Human Rights practice, the provisions allowing defamation cases to be resolved and additional criteria that can be used to consider such cases to be formed. The article clarifies that the criteria for finding a balance between the right to freedom of expression and reputation protection are the following: the content of the publication; degree of public interest in disseminated information, the behavior of the interested party to the publication; as additional criteria for determining the balance, it is suggested to use the purpose of the publication, as well as the results of linguistic examination.

Keywords: ECHR, ECtHR practice, freedom of expression, reputation protection, right to privacy.

Summary: 1. INTRODUCTION. 2. THE RIGHT TO FREEDOM OF EXPRESSION CONTENT AND LAW ASPECT OF BUSINESS REPUTATION PROTECTION. 3. THE HUMAN RIGHT TO DEFEND THE REPUTATION AS PART OF THE RIGHT TO RESPECT THE PRIVATE LIFE. 4. POSITIVE OBLIGATIONS OF THE STATE TO PROTECT THE RIGHT TO PRIVACY. 5. CRITERIA FOR RESTRICTING THE RIGHT TO FREEDOM OF EXPRESSION IN THE CONTEXT OF REPUTATION PROTECTION. 6. CONCLUSIONS AND RECOMMENDATIONS.

1. INTRODUCTION

Freedom of speech is a crucial component of a democratic system, without which democracy is hardly possible in general. From the second half of the twentieth century, when the international system of human rights protection was formed, the right to freedom of speech was enshrined in all international acts related to the field of human rights. These are the Universal Declaration of Human Rights (United Nations, 1948), the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950), and the International Covenant on Civil and Political Rights (United Nations, 1966). In international law, freedom of expression of thoughts and ideas is considered important

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both at the individual level, as it contributes to the full development of a person and at the global one - it is the foundation of a democratic society (Howie, 2018). According to A. Bhagwat and J. Weinstein (2021), freedom of political expression is a indispensable component to democracy performing informational and legitimizing functions.

However, it is clear that freedom of speech cannot be unlimited. Thus, for example, the ability of people to criticize public authorities, some of their actions is a part of the democratic process however, authority is empowered to limit the possibility of free speech. For example, democratic governments have restricted freedom of speech in the case of hate speech (Weinstein & Hare, 2009; Reid, 2020). The principle of scientific knowledge objectivity necessitates the essentiality to note the desire of some scientists to draw attention to both the positive aspects of the hate speech prohibition and the manifestation of human personality through this phenomenon (Asogwa & Onwuama, 2021), the necessity to divide the discussion on the hate speech prohibition into separate analytical stages determining whether this phenomenon is part of the realm of law and the moral aspect of freedom of expression (Howard, 2019), the principle of proportionality as a criterion for verifying the legitimacy of restrictions on freedom of expression is criticized and a justifiable approach is suggested as a criterion (Gunatilleke, 2021).

We would like to add that the issue of the correlation between the right to freedom of expression and the necessity to protect business reputation is the least covered in the legal literature. At the same time, there is a well-established approach that provides for the possibility of restricting freedom of expression in legal practice and, in particular, in the European Court of Human Rights practice today. The right to freedom of expression is relative, and not absolute. The ECtHR decisions' analysis shows that the most ambiguous are the judgments of this Court in cases concerning freedom of expression.

Decisions are not taken unanimously and quite often such judgements are accompanied by dissenting opinions of judges of the ECtHR. We should agree with D. Voorhoof and H. Cannie (2010) on the authority of the ECtHR practice under Art. 10 of the ECHR as an international standard for the protection of freedom of expression, however, certain trends in this Court's activity raise serious concerns about the future level of this right protection. The abovementioned allows us to put forward a position being the hypothesis of our study: the criteria of determination of the legitimacy of restrictions on the right to freedom of expression and proportionality with other rights formulated by the ECtHR require additional separation of criteria. Thus, the purpose of our study is to analyze the ECtHR practice under Art. 10 of the ECHR to clarify the Court's established approach to determining the correlation between the right to freedom of expression and the business reputation protection (Susi, 2019).

It should be noted that today there are no comprehensive studies on this issue. Therefore, in this paper we present the results of our perception of the subject of knowledge through the prism of the ECtHR practice determining mainly the descriptive nature of the article. However, it should be emphasized that this is due to the need to clarify the criteria identified by the Court for finding the balance. And on this basis, we have identified two additional criteria, the use of which will allow making

a fair decision in the case, which will not be accompanied by a significant number of dissenting opinions. This goal determines the methodology of this study: first, we will clarify the content of the right to freedom of expression and outline law aspect of the business reputation protection. Then we will analyze some decisions of the ECtHR under Art. 10 of the ECHR. After that, we will formulate criteria allowing to make more unambiguous decisions when finding a balance between the right to freedom of expression and reputation protection.

The study is based on the perception of human rights as natural, inalienable and equal human opportunities that are universal in nature but may have a regional content (which is why the ECtHR analyzes national legislation, international instruments, finds out the presence or absence of consensus at European level to solve the issue and takes this analysis into account when making a decision). Which allows us to talk about the social and cultural nature of law in general. The study takes into account the implicit nature of the ECHR provisions, which enshrine the relevant human rights, respectively, it is through the decision of the ECtHR there is “filling with the content” of these rights. This takes into account the principle of dynamic interpretation of the Convention’s norms by the Court, which ensures the effectiveness of human rights institutions and modern understanding of the protected rights content.

Thus, given the quarantine restrictions in a number of states around the world, in particular, the prohibition of mass gatherings and the necessity to maintain distance between people, pickets have become the only available form of public expression of one’s opinion. At the same time, as P. Malkova and O. Kudinova (2020) emphasize, the question arises: what if citizens use a single picket as an opportunity to unite (for example, standing at a certain distance from each other, forming a ‘group one-person picket’), should this be seen as freedom of expression or as freedom of peaceful assembly? The ECtHR judgments were studied using the hermeneutic method and the method of content analysis, which allowed to take into account the social and cultural context of the cases under consideration, as well as to draw a line from the legal regulation of the right to freedom of expression at the national level and at the level of the states-parties to the ECHR.

It should be noted that the analysis of the ECtHR practice provides information on the state and trends of public relations legal regulation at the level of 47 member states of the Council of Europe (based on the principle of compliance with the provisions reflected in the fixed practice by the ECtHR). In the course of the study 75 decisions of the ECtHR in cases under Art. 8, 9 and 11 of the ECHR (25 decisions under each article) and 50 decisions under Art. 10 of the Convention were analyzed. Using logical methods, provisions concerning additional criterion for finding a balance between freedom of expression and reputation protection were formulated. Logical methods allowed clarifying the correlation between freedom of expression and other human rights, in particular the right to freedom of peaceful assembly and the right to freedom of thought, conscience and religion (it is especially crucial to understand this connection within the information society) (Cameran, 2020). as well as under conditions of quarantine restrictions (Malkova & Kudinova, 2020).

2. THE RIGHT TO FREEDOM OF EXPRESSION CONTENT AND LAW ASPECT OF BUSINESS REPUTATION PROTECTION

When considering cases of reputation protection, the ECtHR checks the balance between the rights enshrined in Art. 10 and Art. 8 of the ECHR. Freedom of expression, as well as the right to privacy, are the foundations of a democratic society. These rights deserve equal respect. Acceptable criticism is a crucial component of democracy. Criticism that does not aim to humiliate a person and is based on factual grounds is acceptable.

The right to reputation protection is asserted as a component of the right to privacy. However, in order to apply Art. 8 of the Convention, an attack on reputation must reach a certain level of gravity in order to affect a person's personal or psychological integrity and limit the right to respect for private life. The criteria for finding a balance between the right to freedom of expression and the reputation protection are the following: the content of the publication (it is necessary to clearly distinguish between statements of fact and value judgments. The concept of responsible journalism, which includes the following provisions: the obligation of journalists to inform about issues of public interest requires them to:

- a) act in good faith;
- b) act on an accurate factual basis (it is important how reasonably they can consider their sources to be reliable);
- c) provide "reliable and precise" information;
- d) act in accordance with journalistic ethics;
- e) rely on an acceptable assessment of the relevant facts has been formed within this criterion.

It is important to determine the degree of public interest in the information disseminated. If the information disseminated relates to a topic of public interest, states have a limited scope. If the published information about a person is of great interest to society, then the restriction of the right to privacy of such a person is justified and the balance of rights in such cases is shifted towards freedom of expression. The degree of publicity of the person concerned is used as a criterion for finding a balance between the reputation protection and freedom of expression. The sphere of privacy of public figures is much smaller than that of private individuals, so in public affairs the balance of rights is shifted towards freedom of expression. The form and consequences of publication, the method of obtaining information, and the behavior of the interested party to the publication are used as the criteria for determining the balance in some cases.

A clear understanding of the nature and content of the right to freedom of expression and the right to reputation protection is a prerequisite for the sound balance between these rights. It should be noted that in the ECtHR practice in cases on the issues mentioned by us, the statements concern violations of either Art. 10 of the ECHR (if the applicant considers that his right to freedom of expression has been violated), or under Art. 8 of the Convention (if a person considers that his right to privacy has been violated, in particular in the context of reputation protection; the person considers that he has been defamed). It should be emphasized at once that the ECtHR did not consider the right to reputation

protection as a separate right for a long time, reputation protection was considered only as a legitimate purpose of restricting other rights. Both the analysis of the Court's practice and the architectonics of the ECHR point to the correctness of this conclusion.

Thus, the abovementioned Art. 8 of this Convention (1950) contains a provision that corresponds to Art. 12 of the Universal Declaration of Human Rights (1948), which provides for the human right to protection from interference or encroachment on privacy and family life, inviolability of home, secrecy of correspondence, honor and reputation. Although, as we see, the fathers of the ECHR deliberately excluded the reputation protection out of the Art. 8. At the same time, the reputation protection and prevention of confidential information disclosure is enshrined in Art. 10 of the Convention only as a basis for restriction on the right to freedom of expression.

Both the right to privacy and the right to freedom of expression are values of a democratic society, without which democracy is hardly possible. "Reputation is an inherently social and relational concept that serves a significant signaling function in society" (Cheung & Schulz, 2018). Studying the peculiarities of the exercise of the right to reputation protection by the police, the team of authors notes that the reputation is manifested in public relations. In this area, the possibilities of reputation protection are limited by the necessity to ensure freedom of speech, and by the constitutional right to appeal to public authorities. Freedom of speech in these cases possesses priority provided it is used in good faith (Barbin et al., 2019).

In the case of "Dyuldin and Kislov v. Russia" (Application No. 25968/02), the ECtHR has once again emphasized that freedom of expression is one of the most crucial foundations of a democratic society and one of the basic conditions for its progress. At the same time, it concerns not only "information" or "ideas" that are accepted positively or considered non-offensive or not of interest, but also to those that offend, shock or disturb. These are the demands of pluralism, tolerance and freedom of opinion, without which there is no "democratic society"¹. It is these rights that under conditions of the information society are most affected. Although online publications are considered by courts as traditional publications in a number of cases, the question of who should be responsible for digital forms of defamation is controversial. It is time to think differently about defamation and consider its correlation to privacy and data protection (Joyce, 2017).

The ECtHR has emphasized that guarantees given to the press are of particular importance, as it is obliged to impart information and ideas of public interest. In turn, the public has the right to receive such information and ideas "were it otherwise, the press would be unable to play its vital role of "public watchdog"². In *Jersild v Denmark* (Application No. 15890/89) the Court noted that although the above applies primarily to printed media, these principles also apply to audiovisual media. Herewith audiovisual

¹ ECtHR. (2007). Case of Dyuldin and Kislov v. Russia (Application No. 25968/02). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-82038>

² ECtHR. (1994). Case of Jersild v Denmark (Application No. 15890/89). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-57891>

media often have a much more direct and powerful effect than print media³. In “Handyside v the UK” (Application No. 5493/72), the ECtHR noted the link between the right to freedom of expression and the responsibility of the individual: “From another standpoint, whoever exercises his freedom of expression undertakes “duties and responsibilities” the scope of which depends on his situation and the technical means he uses”⁴.

3. THE HUMAN RIGHT TO DEFEND THE REPUTATION AS PART OF THE RIGHT TO RESPECT THE PRIVATE LIFE

Back in 2000, the ECtHR did not consider the right to the reputation protection as such that is protected by the ECHR, in particular, in the context of the right to privacy. Thus, in *Marlow v the UK* (Application No. 42015/98) the applicant complained, inter alia, of a violation of Art. 8 of the Convention by the State, as the decisions of the domestic courts contained derogatory statements. However, it was decided in this part that the complaint was incompatible *ratione materiae* with the provisions of the Convention, given that “the applicant’s complaint relates to a perceived affront to his dignity and reputation caused by statements made by the trial judge when handing down the sentence and by the Court of Appeal when upholding that sentence. This is not a matter which falls within the protection guaranteed by Article 8 of the Convention”⁵.

However, already in 2004 in the case of *Chauvy and Others v. France* (Application No. 64915/01) the ECtHR has changed the established practice, noting that freedom of expression may conflict with the right of a person to defend his or her reputation, as enshrined in Art. 8 of the Convention (in the circumstances of the case it was a publication that affected the applicant’s reputation). Therefore, it is important to find a balance between the rights enshrined in Art. 8 and in Art. 10 of the ECHR⁶.

In the case of *Abeberry v. and Leempoel & SA ED. Ciné Revue v. Belgium* (Application No. 64772/01) the ECtHR has indicated its duty to verify whether the national authorities have reached a fair balance between the protection of freedom of expression enshrined in Article 10, on the one hand, and the right to a reputation of the accused as an element of privacy and protected by Article 8 of the Convention, on the other hand⁷. In the case of *White v. Sweden* (Application No. № 42435/02) the Court also examined the issue whether the right to privacy had been violated by the exercise of the right to freedom of expression because of the publication of statements and photographs. Having established that the national courts have balanced conflicting interests, they have correctly determined

³ ECtHR. (1994). Case of *Jersild v Denmark* (Application No. 15890/89). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-57891>

⁴ ECtHR. (1976). Case of *Handyside v the UK* (Application No. 5493/72). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-57499>

⁵ ECtHR. (2000). Case of *Marlow v the UK* (Application No. 42015/98). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-22833>

⁶ ECtHR. (2004). Case of *Chauvy and Others v. France* (Application No. 64915/01). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-61861>

⁷ ECtHR. (2006). Case of *Abeberry v. ta Leempoel & SA ED. Ciné Revue v. Belgium* (Application No. 64772/01). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-7792>

that the public interest in the publication of the information in question outweighs the applicant's right to protection of his reputation⁸.

In 2007, in the case of *Pfeifer v. Austria* (Application No. 12556/03) the ECtHR states that a person's right to protection of his or her reputation is covered by Article 8 as part of the right to respect for private life is recognized in court's practice⁹. The European Court's of Human Rights clear conclusion is in the case of *Karakó v. Hungary* (Application No. 39311/05) on the correlation between reputation and the right to privacy enshrined in Art. 8 of the Convention: "personal integrity rights falling within the ambit of Article 8 are unrelated to the external evaluation of the individual, whereas in matters of reputation, that evaluation is decisive: one may lose the esteem of society - perhaps rightly so - but not one's integrity, which remains inalienable"¹⁰.

However, the ECtHR refers reputation to the sphere of private life in most cases. Thus, the analysis of the above cases shows that in general the ECtHR takes the position that a person's reputation (even when a person is criticized in public debate) is part of the individual, his psychological integrity, and therefore falls within his "private life" sphere. In addition, it should be noted that in the case of *Sanchez Cardenas v. Norway* (Application No. 12148/03) the Court attributed honor to the sphere of private life¹¹.

Similar provisions are set out in the case of *Petrina v. Romania* (Application No. 78060/01). The ECtHR has once again stated that it should determine whether the state has attained a fair balance in protecting the applicant's right to a reputation, that is an integral part of the right to protection of privacy and freedom of expression, guaranteed by Article 10 of the Convention, in the context of the positive obligations under Article 8 of the Convention¹². In the case of *A. v. Norway* (Application No. 28070/06) the ECtHR noted itself that in recent cases under Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, it recognized reputation and honor as components of private life. However, the Court emphasized that in order for the case to be heard under Art. 8 of the Convention, encroachments on honor and reputation must reach a certain level of gravity, detrimenting the right to respect for private life¹³.

Moreover, it should be added that the reputation of the family falls into the sphere of a person's private life in some cases. Indicative in this context is the case of *Putistin v. Ukraine* (Application No. 16882/03) in which the applicant complained of a violation of

⁸ ECtHR. (2006). Case of *White v. Sweden* (Application No. 42435/02). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-76894>

⁹ ECtHR. (2007). Case of *Pfeifer v. Austria* (Application No. 12556/03). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-83294>

¹⁰ ECtHR. (2009). Case of *Karakó v. Hungary* (Application No. 39311/05). Retrieved from <http://hudoc.echr.coe.int/fre?i=001-92500>

¹¹ ECtHR. (2007). Case of *Sanchez Cardenas v. Norway* (Application No. 12148/03). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-82560>

¹² ECtHR. (2008). Case of *Petrina v. Romania* (Application No. 78060/01). Retrieved from <https://strasbourgothers.com/category/cases/petrina-v-romania/>

¹³ ECtHR. (2009). Case of *A. v. Norway* (Application No. 28070/06). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-92137>

the right to protection of his and his family's reputation because of a newspaper publication containing a lie about his father and the refusal of the domestic courts to oblige the newspaper to correct defamatory information allowing to evaluate the actions of his father as cooperation with the Gestapo. In the circumstances of the case, the applicant is the son of a "Dynamo" football player, and the information relates to the events of 1942 related to the legendary "Death match" between FC Start and a team of pilots from the German Luftwaffe, air defence soldiers and airport technicians. ("Flakelf"). In the case, the Court noted that "a person's reputation forms part of his or her personal identity and psychological integrity and, therefore, also falls within the scope of his or her "private life"¹⁴.

Although in the case of *Dzhugashvili v. Russia* (Application No. 41123/10) the court did not find a violation of Art. 8 of the Convention. The applicant, Stalin's grandson, complained that publications in the press concerning his grandfather, which referred to his grandfather as, inter alia, "a bloodthirsty cannibal" (publications concerning the discussion of the events in Katyn and Stalin's role in them, as well as interpretations of the judgment) violate his right to privacy. The ECtHR noted that the rights guaranteed by Art. 8 of the Convention cannot be transferred to others, so the Court cannot consider the complaint to be in defence of the right to respect for Iosyf Stalin's private life (Stalin's grandson is not entitled to lodge such a complaint). And although under certain conditions personal life may be damaged by the reputation of the deceased member of his family, which makes it possible to refer to Art. 8 of the Convention, however, in this case the matter is about the reputation of a world-famous person. A distinction should be made between abusive attacks on individuals (their reputation is part of the reputation of their family members and remains protected by Article 8 of the Convention) and legitimate criticism of public figures that in leadership positions expose themselves to increased public attention¹⁵.

It should be emphasized that the ECtHR clearly draws the line between the reputation of a person and the reputation of a legal entity. Thus, in the case of *OOO Regnum v. Russia* (Application No. 22649/08) the court stated that the right to reputation protection is guaranteed by Art. 8 of the Convention as part of the right to respect for private life. The Court pointed to the broad discretion of States in regulating the private companies' reputation protection and emphasized that there was a difference between the reputational interests of a legal entity and the reputation of a person as a member of society. A person's reputation can have consequences for human dignity, and legal entities are deprived of this moral dimension¹⁶.

We should add that the legitimate purpose of "reputation's protection" does not cover cases of restriction of the right to freedom of expression because of the necessity to ensure the prestige of public authorities, the reputation of the state, and the honor of the nation.

¹⁴ ECtHR. (2013). Case of *Putistin v. Ukraine* (Application No. 16882/03). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-128204>

¹⁵ ECtHR. (2014). Case of *Dzhugashvili v. Russia* (Application No. 41123/10). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-150568>

¹⁶ ECtHR. (2020). Case of *OOO Regnum v. Russia* (Application No. 22649/08). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-204319>

Indicative in this aspect is the case of *Shvydka v. Ukraine* (Application No. 17888/12), under the circumstances of which the applicant during the celebration of the Independence Day of Ukraine, expressing her complete disagreement with the policy of the President of Ukraine (then V. Yanukovich), including harassment of the opposition, imprisonment of opposition leader Yulia Tymoshenko, restrictions for citizens related to the security of the President, tore the ribbon from the wreath laid by the President of Ukraine to the monument to the famous Ukrainian poet. Although the Government of Ukraine had officially stated that the aim of restricting the applicant's freedom of expression was to ensure public order (the Government insisted that she had been prosecuted not for disagreeing with President Yanukovich's policies or activities, but for tearing the ribbon from the wreath, laid by the president), more convincing is the position of Judge De Gaetano, expressed in a separate opinion. The judge argued that the applicant's conduct did not constitute a disturbance of the citizens (actual or prematurely warned) or a disturbance of public order and could not have caused even a minor disturbance¹⁷.

The political aspect of the case has not been analyzed by the ECtHR. From today's point of view, the case seems quite clear (in the context of the motives of the militia's actions to bring the applicant to justice), given the events of the 2014 Revolution of Dignity, aimed at overthrowing the Yanukovich's regime. "He never contemplated being voted out of office and serving only one term. The Mezhyhyria palace was a sign of the planned consolidation of a long-term authoritarian leader" notes T. Kuzio (2016), exploring the Orange Revolution and the Revolution of Dignity. "The rapid and dramatic expansion of civil resistance was due to the extremely critical attitude of the people about the policies that were being implemented by those in power, as well as the authoritarian use of power" (Shveda & Park, 2016).

This should be taken into account by national courts in defamation cases. At the same time, freedom of expression may be restricted in the interests of national security, territorial integrity or public security (however, this issue is beyond the scope of our study).

Therefore, it can be concluded that the right to freedom of expression provides for the possibility of expressing one's own opinion; opportunity to disseminate information and ideas; opportunity to receive information and ideas. The functioning of Art. 10 of the ECHR is disseminated:

- a) to any form of expression;
- b) to both per person and per group of persons or the media;
- c) to any content, except for certain restrictions, for example, hate speech is not protected for any content.

Freedom of expression cannot be used to abolish the rights and freedoms guaranteed by the ECHR. The legitimate aim of restricting the right to freedom of expression is the need to ensure the right to reputation protection. Therefore, it is crucial to find a balance

¹⁷ ECtHR. (2014). Case of *Shvydka v. Ukraine* (Application No. 17888/12). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-147445>

between these rights. Reputation is considered by the ECtHR as a component of human identity, his psychological integrity, and therefore when a person's reputation is damaged so much that it affects the privacy of a person, the reputation falls under the protection of Art. 8 of the ECHR.

4. POSITIVE OBLIGATIONS OF THE STATE TO PROTECT THE RIGHT TO PRIVACY

The ECtHR established practice contains a number of criteria used to determine the balance between the right to freedom of expression and reputation protection of as a component of the right to privacy.

First, as it was abovementioned, reputation can be seen as a component of privacy provided that the information disseminated about the individual (the person's actions) goes beyond acceptable criticism¹⁸. It is under these circumstances that the state should fulfill its positive obligations to protect the right to privacy by restricting the right to freedom of expression. Every member of a democratic society can be criticized. At the same time, the constituent values of a democratic society are pluralism, breadth of views (and if we talk about public authorities, then openness and transparency, and public control). Recognition of the individuality of each person and the possibility of manifestation of person's individuality is possible only within a democratic society; the prohibition of the right to freedom of expression, and its excessive restriction are inherent in an undemocratic society and violate the essence of law itself. As an example, we note that "right to ridicule" is being discussed in Brazil (Ronaldo, 2017).

At the same time, the state should balance the right to freedom of expression with the necessity to protect minorities from incitement to discrimination, hostility or violence. This provision forms the basis of the international human rights law (George, 2015). This criterion is quite clear seen in the perception of freedom of expression in the American legal system and in a number of the post-soviet states. It is a well-known fact that US law prohibits Congress from passing laws restricting freedom of speech, conscience, the press, and the right to petition (Bhagwat, 2020). Accordingly, all laws passed in this state are designed to protect freedom of expression. And let's remember detention of the blogger Raman Pratasevich in Belarus. "In arresting of Raman Pratasevich, the Belarusian authorities have breached the international right to press freedom, which they ferociously trample underfoot every day" said RSF Secretary General Christophe Deloire (2021).

However, the question arises: what is the limit of acceptable criticism and what criticism is acceptable? It should be noted at once that it is hardly possible to give an unambiguous answer to this question, even at the national level. Otherwise, there would be no complaints to the ECtHR. We emphasize that the acceptability of criticism should be determined in each case, taking into account a number of circumstances. Thus, we can agree with the team of authors who, studying the criticism of The Madurese community in

¹⁸ ECtHR. (2008). Case of Petrina v. Romania (Application No. 78060/01). Retrieved from <https://strasbourgobservers.com/category/cases/petrina-v-romania/>

Situbondo, which was not familiar with social networks, note the following. The chosen language code for criticism, which is determined by a person's identity, ethnic group, psychological and cultural factors, is crucial. The model of criticism using sarcasm contains expressions of hatred, insults pride, social status, family and feelings of interlocutors. Expressive criticism can also be dangerous and unacceptable to people because it can be misunderstood. Although some acceptable criticism is the model of criticism, expressed in subtle language and expressed in humor, figurative, subtle satire and lyrical and poetic expressions (Sofyan et al., 2020).

Criticism involves focusing on person's certain details (his character, behavior, language style, etc.). At the same time, criticism is a kind of feedback: criticism is expressed about something or someone important (otherwise there would be no criticism) and aims to change the behavior, personality of the person being criticized (otherwise there would be acceptance and no criticism). However, it should be emphasized that for criticism, a person should be competent in the aspect that is criticized. Related to this is the fact that the one who criticizes will not aim to humiliate or offend a person. That is why the ECtHR systematically reproduces the basic principle: "Freedom of expression is one of the basic foundations of a democratic society and one of the fundamental conditions for its progress and every person's self-realization"¹⁹.

However, this is why criticism can be associated with, first and foremost, not with the ideas and behavior that are perceived by a person, but with those ideas and behaviors that offend, even shock. But the purpose of criticism should be important in the evaluation process: we emphasize that the critic does not intend to offend a person. Thus, in the case of *Balaskas v. Greece* (Application No. 73087/17) the ECtHR noted that the national courts had used the applicant's words "well-known neo-Nazi headmaster" and "theoretician of the entity 'Golden Dawn'" to conclude that the applicant intended to offend Director, however, according to the ECtHR, the domestic courts did not transfer the impugned remarks to the general context of the case, examined them in isolation from the context of the publication to conclude that the expressions used were not necessary to pursue legitimate interests and that he could use other phrases²⁰.

Note that, in our opinion, it is at this stage of finding a balance between freedom of expression and reputation protection as a component of a person's private life, it is necessary to have a clear understanding of the content of the publication. Both the Council of Europe member states national courts' practice and the ECtHR practice have developed a well-established understanding of two types of publications (statements):

a) when facts are published (put into words), it is clear that in this case the information communicated to the public, no matter how unacceptable to the person it is, will outweigh the right to privacy. For example, let us indicate the possible publication of a

¹⁹ ECtHR. (2016). Case of *Bédat v. Switzerland* (Application No. 56925/08). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-161898>

²⁰ ECtHR. (2020). Case of *Balaskas v. Greece* (Application No. 73087/17). Retrieved from <http://hudoc.echr.coe.int/rus?i=001-205545>

crime committed by some person. Thus, a person cannot challenge an infringement of his reputation which is a presumed consequence of his own actions, as stated in the judgment of the ECtHR in *Axel Springer AG v. Germany* (Application No. 39954/08): Article 8 cannot be relied upon to challenge the loss of reputation that is a predictable consequence of one's own actions, such as the commission of a criminal offense, for example²¹.

Herewith a number of circumstances must be taken into account. Thus, in the case of *Sidabras and Džiautas v. Lithuania* (Application nos. 55480/00 and 59330/00) the ECtHR has examined whether Lithuania has violated a number of articles of the ECHR. The applicants, by the circumstances of the case, were "former KGB officers" (the Lithuanian branch of the Soviet Security Service (the KGB)) and, in accordance with the "KGB Act", were dismissed and complained that the current ban on employment in various fields of the private sector violates Art. 8 and 14 of the Convention, and as a result of the negative publicity caused by the enactment of the "KGB Act" and its application to them, they have been constantly embarrassed by their past.

Although the ECtHR found a violation of Article 14 of the Convention taken in conjunction with Article 8, the Court did not take into account the reputation aspect of the case but the disproportionate nature of the State's measures to restrict employment, and the duration of the "KGB Act". "I consider that the applicants' argument, that because of the publicity caused by the enactment of the KGB Act on 16 July 1998 and its application to them they have suffered constant embarrassment as a result of their past activities, does not deserve the Court's attention"²² - Judge Mularoni pointed out in a separate opinion.

In this context, the case of *Peck v. the United Kingdom* (Application No. 44647/98) deserves attention. The circumstances of the case are as follows. The applicant was walking on the central cheekbone at night with a knife in his hand and, being depressed, decided to commit suicide. At that moment, he was in the field of view of surveillance cameras installed by local authorities. The operator did not see the suicide act directly, but noticed a knife in his hand and reported it to the police. The applicant was assisted at the scene. He survived. A publication was soon made covering how surveillance cameras in public places help to prevent a potentially dangerous situation and the publication of a photo of the applicant from a surveillance camera. Later there was a broadcast of a video on this topic. The applicant complained of a violation of Art. 8 of the ECHR and the ECtHR recognized such a violation²³.

Although the applicant did not indicate that his reputation had been damaged, he noted the significant impact of the publications and video broadcasts on his family and his life. In general, it is worth of agreeing with the position of the Court, although the

²¹ ECtHR. (2012). Case of *Axel Springer AG v. Germany* (Application No. 39954/08). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-109034>

²² ECtHR. (2004). Case of *Sidabras and Džiautas v. Lithuania* (Application nos. 55480/00 and 59330/00). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-61942>

²³ ECtHR. (2003). Case of *Peck v. the United Kingdom* (Application No. 44647/98). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-60898>

place was public and the camera was installed lawfully, and video from this camera and photos from this camera were reproduced (issue of fact), based on the peculiarities of the phenomenon itself - failed suicide - but psychological state of the person after this act and efforts to re-establish ties with the outside world. When making a publication (video broadcast), it would be expedient to cover part of the applicant's face in order to avoid the possibility of his identification by relatives.

b) when value judgments are published (expressed).

The nature of value judgments determines their difference from the facts and makes it impossible to form a "standard" of value judgment. The prohibition against making value judgments denies the essence of the right to freedom of expression and the essence of democracy. Value judgments are not subject to refutation and proving their truth. As is well known, judgment is a mental act of an evaluative nature; it expresses the attitude of the speaker to the event, the person, the statement, and so on. We emphasize that defamation cannot be considered as a value judgment. Otherwise, there would be no problem of defamation and judicial protection of a person's reputation.

At the same time, this does not mean that value judgments are unrestricted and can go beyond acceptable criticism. On the contrary, it necessitates the clarification of a number of facts, factual statements, and their verification for the possibility of formulating a value judgment. A value judgment cannot be deprived of a factual basis at all. "Even where a statement amounts to a value judgment, the proportionality of the interference may depend on whether there exists a sufficient factual basis for the impugned statement. Looked at against the background of a particular case, the statement that amounts to a value judgment may be excessive, in the absence of any factual basis"²⁴.

In the case of the *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (Application No. 17224/11) the Court held that there had been no violation of Art. 10 of the Convention, stating that the applicants acted negligently, simply reporting the candidate's conduct as a civil servant, without making reasonable efforts to verify its accuracy²⁵. Value judgments are statements that do not contain factual data, it is an assessment of actions, opinions, beliefs, critical assessment of certain facts and shortcomings, for which the use of certain linguistic and stylistic means (use of hyperbole, allegory, satire) is characteristic and which are an expression of subjective opinions, views and which can not be verified for their relevance and refute.

In the case of *De Haes and Gijssels v. Belgium* (Application No. 19983/92) the European Court has ruled in this regard as follows. Statements constitute an opinion, the truth of which, by definition, cannot be proved. However, such an opinion may be excessive,

²⁴ ECtHR. (2005). *Case of Ukrainian Media Group v. Ukraine* (Application No. 72713/01). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-68648>

²⁵ ECtHR. (2015). *Case of Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (Application No. 17224/11). Retrieved from <http://hudoc.echr.coe.int/eng-press?i=003-5197557-6435495>

in particular in the absence of any factual basis²⁶. This allows us to formulate an answer to the question we mentioned above regarding the acceptability of criticism. Criticism that does not aim to humiliate a person and is based on factual grounds is acceptable.

However, it should be added that all significant circumstances must be taken into account in this category of cases. Thus, one cannot disagree with the ECtHR position on the importance of the journalists' obligation to provide the public with socially significant information, including information that will outrage part of society. At the same time, under certain circumstances, they (journalists) may resort to slight exaggeration or even provocation. "A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas"²⁷.

It is also worth noting the position of the ECtHR that the use of words such as "neo-fascist" and "Nazi" cannot automatically lead to a conviction for defamation, based on the stigma attached to them. This is the case in *Scharsach and News Verlagsgesellschaft Mbh v. Austria* (Application No. 39394/98)²⁸. Or such generally offensive expressions as "idiot" and "fascist" may be considered acceptable criticism in certain circumstances (*Case of Sbrodžić v. Serbia* (Application No. 32550/05))²⁹. National courts are obliged to find out to what extent the context of the case, the public interest and the intention of the publication author justify resort to a certain provocation or exaggeration – is stated in the case of *Koutsoliontos and Pantazis v. Greece* (Application nos. 54608/09 and 54590/09)³⁰.

The duty of journalists to report on matters of public interest requires them to a) act in good faith; b) act on an accurate factual basis (it is important how reasonably they can consider their sources to be reliable); c) provide "reliable and precise" information; d) act in accordance with journalistic ethics; e) rely on an acceptable assessment of the appropriate facts. This is stated in the cases of *Fressoz and Roire v. France* (Application No. 29183/95)³¹; of *Bladet Tromsø and Stensaas v. Norway* (Application No. 21980/93)³²; *Pedersen and Baadsgaard v. Denmark* (Application No. 49017/99)³³.

²⁶ ECtHR. (1997). *Case of De Haes and Gijssels v. Belgium* (Application No. 19983/92). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-58015>

²⁷ ECtHR. (2001). *Case of Thoma v. Luxembourg* (Application No. 38432/97). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-59363>

²⁸ ECtHR. (2003). *Case of Scharsach and News Verlagsgesellschaft Mbh v. Austria* (Application No. 39394/98). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-61441>

²⁹ ECtHR. (2009). *Case of Sbrodžić v. Serbia* (Application No. 32550/05). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-93159>

³⁰ ECtHR. (2015). *Case of Koutsoliontos and Pantazis v. Greece* (Application nos. 54608/09 and 54590/09). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-157370>

³¹ ECtHR. (1999). *Case of Fressoz and Roire v. France* (Application No. 29183/95). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-58906>

³² ECtHR. (1999). *Case of Bladet Tromsø and Stensaas v. Norway* (Application No. 21980/93). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-58369>

³³ ECtHR. (2004). *Case of Pedersen and Baadsgaard v. Denmark* (Application No. 49017/99). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-67818>

5. CRITERIA FOR RESTRICTING THE RIGHT TO FREEDOM OF EXPRESSION IN THE CONTEXT OF REPUTATION PROTECTION

As the criterion for finding a balance between reputation protection and freedom of expression in the ECtHR practice is the “contribution of the publication to the debate of public interest”, and it is found out whether the publication has contributed to the debate of public interest.

In general, information of public interest includes information indicating threats to national security, public order, human rights implementation and prevents human rights violations, harmful effects of individuals’ and legal entities’ activities, ensures awareness of the facts and phenomena that affect on the state and nature of human life, and on the welfare of the population. An analysis of the ECtHR practice allows us to formulate the following list of (non-exhaustive) information of public interest.

1. Case of *Guja v. Moldova* (Application No. 14277/04): information on the intervention of a government official in a criminal investigation³⁴.
2. Case of *Kudeshkina v. Russia* (Application No. 29492/05): information on the functioning of the justice system, on the pressure on judges. “The Court reiterates that issues concerning the functioning of the justice system constitute questions of public interest, the debate on which enjoys the protection of Article 10”³⁵.
3. Case of *Heinisch v. Germany* (Application No. 28274/08): information on poor patient care conditions. In societies where the proportion of older people is constantly increasing, institutional care provided by a state-owned company and who are often unable pay attention to the shortcomings in the provision of care due to particular vulnerabilities³⁶.
4. Case of *Társaság a Szabadságjogokért v. Hungary* (Application No. 37374/05): information on the discussion of public cases, in particular the constitutionality of criminal law on drug-related crimes³⁷.
5. Case of *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung Eines Wirtschaftlich Gesunden Land- und Forstwirtschaftlichen Grundbesitzes v. Austria* (Application No. 39534/07): information on the transfer of ownership of agricultural and forest land. In addition, the applicant further assisted in the legislative process by commenting on draft laws falling within his area of competence. In this case, he wanted to receive information on the Commission’s decisions on transfer or refuse the transfer of agricultural and forestry land under the Tyrolean Real Estate Act³⁸.

³⁴ ECtHR. (2008). Case of *Guja v. Moldova* (Application No. 14277/04). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-85016>

³⁵ ECtHR. (2009). Case of *Kudeshkina v. Russia* (Application No. 29492/05). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-91501>

³⁶ ECtHR. (2011). Case of *Heinisch v. Germany* (Application No. 28274/08). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-105777>

³⁷ ECtHR. (2009). Case of *Társaság a Szabadságjogokért v. Hungary* (Application No. 37374/05). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-92171>

³⁸ ECtHR. (2013). Case of *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung Eines Wirtschaftlich Gesunden Land- und Forstwirtschaftlichen Grundbesitzes v. Austria* (Application No. 39534/07). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-139084>

6. Case of *Stoll v. Switzerland* (Application No. 69698/01): information contained in a secret report by the Swiss ambassador to the United States on the strategy to be chosen by the Swiss government during negotiations between the World Jewish Congress and Swiss banks “in the context of a public debate about a matter which had been widely reported in the Swiss media and had deeply divided public opinion in Switzerland, namely the compensation due to Holocaust victims for unclaimed assets deposited in Swiss bank accounts”³⁹.
7. Case of *Fressoz and Roire v. France* (Application No. 29183/95): information on the remuneration of a large private company head. The publication took place during a major labor dispute and a strike at the company, the employees of which demanded higher wages, and in which they were denied by management. And the chairman of the company received a significant increase in his salary during this period. Therefore, the article contributed to the public debate on the general interest⁴⁰.
8. Case of *Romanenko and Others v. Russia* (Application No. 11751/03): information on public resource management reporting⁴¹.
9. Case of *Razevedo v. Portugal* (Application No. 20620/04): information on the historical and symbolic analysis of an important monument of the city⁴².
10. Case of *Tønsergs Blad AS and Haukom v. Norway* (Application No. 510/04): information on possible violations in the private sphere by public figures⁴³.

In general, it can be concluded that information is interpreted as having a significant public interest, provided that it directly affects the normal life of society to a large extent, so society shows a legitimate interest in it. In our opinion, when deciding whether the disseminated information is in the public interest, it is necessary to find out the purpose of such publication. Is the publication really aimed at creating a “platform” for discussion on an issue of public interest, contributing to this discussion, or it is used as a means of "black PR" or this is interest limited by unhealthy curiosity.

The degree of publicity of the person whose privacy is being interfered with is used as a criterion for finding a balance between the protection of reputation and freedom of expression in the ECtHR practice. The established practice of the ECtHR assumes that the sphere of human privacy and the sphere of privacy, for example, of a civil servant, are different. “The Court notes that it was equally clear that the former Prime Minister

³⁹ ECtHR. (2007). Case of *Stoll v. Switzerland* (Application No. 69698/01). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-83870>

⁴⁰ ECtHR. (1999). Case of *Fressoz and Roire v. France* (Application No. 29183/95). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-58906>

⁴¹ ECtHR. (2009). Case of *Romanenko and Others v. Russia* (Application No. 11751/03). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-94843>

⁴² ECtHR. (2008). Case of *Razevedo v. Portugal* (Application No. 20620/04). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-85545>

⁴³ ECtHR. (2007). Case of *Tønsergs Blad AS and Haukom v. Norway* (Application No. 510/04). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-79659>

had been, at the time when the book was published, a public figure. He was thus expected to tolerate a greater degree of public scrutiny which may have a negative impact on his honor and reputation than a completely private person⁴⁴. Similar provisions are set out in the case of *Axel Springer AG v. Germany (No. 2)* (Application No. 48311/10). The case concerned Mr Schröder, head of the German Government⁴⁵.

In general, the ECtHR practice analysis in this category of cases leads to the conclusion that the more powers a person is endowed with, the better known he or she is the more his or her right to privacy may be restricted. At the same time, it should be noted that freedom of expression also has its limits. Therefore, although the sphere of privacy of public persons is smaller compared to private persons, however, this sphere is also protected. “In certain circumstances, even where a person is known to the general public, he or she may rely on a “legitimate expectation” of protection of and respect for his or her private life⁴⁶.

The form and consequences of publication, the method of obtaining information, and the behavior of the interested party to publication are used as a criterion for finding a balance between the protection of reputation and freedom of expression in the ECtHR practice. These criteria are discussed, in particular, in the case of *OOO Regnum v. Russia* (Application No. 22649/08)⁴⁷.

Given that these criteria have been covered above in one way or another, we will not disclose them in this part of the study. Non-unanimous decision-making in considerable number of cases analyzed above, the presence of dissenting opinions of the ECtHR judges, the complexity of the subject of analysis - value judgments, the importance of rights between which balance is established- these are the factors stipulating necessity of distinguishing additional criteria that might be used in judicial practice to consider the abovementioned category of cases.

In our opinion, the purpose of publication should be a separate criterion for determining the balance between these rights. The purpose of the publication is partially revealed when clarifying the issue of the publication’s contribution to the discussion, which is of public interest. However, it is so only partially. As we have noted, the purpose allows finding out whether the person wanted to offend the person being defamed or to bring important information to the public. The purpose of the publication may be a factor that distinguishes public interest from unhealthy curiosity.

⁴⁴ ECtHR. (2014). Case of *Ojala and Etukeno oy v. Finland* (Application No. 69939/10). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-139991>

⁴⁵ ECtHR. (2014). Case of *Axel Springer AG v. Germany (No. 2)* (Application No. 48311/10). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-145700>

⁴⁶ ECtHR. (2012). Case of *Von Hannover v. Germany (No. 2)* (Application No. 40660/08 and 60641/08). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-145700>

⁴⁷ ECtHR. (2020). Case of *OOO Regnum v. Russia* (Application No. 22649/08). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-204319>

In addition, it should be noted that the ECtHR (as well as national courts) can use the results of linguistic expertise in a number of cases. Of course, an expert opinion should not be a determining factor, as no evidence has a predetermined force for the court. However, it might serve as a guide for finding out, for example, the presence / absence of insults, and so on. In this context, we recall the study by Roger W. Shuy (2009), devoted to the issue of linguistic analysis of defamation cases. However, this topic needs a separate study and will be the subject of our next study.

6. CONCLUSIONS AND RECOMMENDATIONS

Thus, it can be argued that the cases, related to the establishment of balance between the right to freedom of expression and the right to privacy (in the context of reputation protection), are of the most complex ones. Although criteria for establishing such balance are developed in the ECtHR practice. These criteria include the following: the contribution of information to the discussion of public interest; the degree of publicity of the person; topic of publication, previous behavior of the person, method of obtaining information; form, content and consequences of publication, degree of punishment. Distinguishing between facts and value judgments is a crucial factor in resolving a dispute. The existence of facts can be proved, but the obligation to prove value judgments is a denial of the rights to freedom of expression essence. However, value judgments in defamation cases are considered as such when they are based on a factual component.

Debatability of decisions in cases of balance between the abovementioned rights stipulates the search for additional criteria for establishing a balance. The purpose of publication might be such a criterion. This criterion allows distinguishing information of public interest from defamatory, offensive information, as well as the publication the purpose of which is to promote public debate from the publication the purpose of which is to satisfy unhealthy curiosity. Depending on the circumstances of the case, the judiciary (as well as the ECtHR) may use linguistic expertise. The ECtHR practice's analysis in defamation cases (in the context of finding a balance between the reputation protection and the right to freedom of expression protection) allows us formulating the following suggestions.

1. There is a necessity to generalize the criteria for finding a balance between the reputation protection and the protection of the right to freedom of expression and promulgation of some kind of guidance to national authorities on the these criteria' application. The implementation of this recommendation at the national level provides for seminars and trainings with prosecutors and judges realization.
2. Within the first recommendation's implementation, attention should be paid to the peculiarities of the right to reputation protection interpretation, which in some cases can be considered as a component of the right to privacy (if the encroachment reaches such a level that affects the right to privacy implementation).
3. National courts, as well as the ECtHR, should use the following provisions (not yet identified by the ECtHR) as criteria for finding a balance between the right to reputation protection and the right to freedom of expression: a) the

purpose of disseminating information (this criterion will allow to distinguish information of public interest, as well as defamatory information; to determine whether the information brings something new to the public debate on a crucial issue or whether it satisfies unhealthy curiosity); b) in a significant number of cases involving allegations of defamatory and offensive language, it is appropriate to use linguistic expertise.

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