Determining Whether Freedom of Expression Restrictions on the Internet are Prescribed by Law[1]

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Abstract:

BALTRIMAS, Johanas: *Determining Whether Freedom of Expression Restrictions on the Internet are Prescribed by Law*. The paper focuses on newly developing trends in European Court's of Human Rights jurisprudence concerning freedom of expression. Analysis focuses on cases where disputes originated in digital space and a question was raised whether interference with the freedom of expression was prescribed by law. Examination of such cases led to a conclusion that for the latter question a number of factors might be relevant besides the wording of domestic law.

Key words:

Legal reasoning, European Court of Human Rights, freedom of expression

Introduction

Modern times give rise to all sorts of new phenomena and freedom of expression is not an exception in these transformations. Before the digital age it would have been inconceivable to punish an owner of a public advertisement board for some illegal note which was placed there by some other person, but today there are numerous instances where an internet website operator or a provider of other internet services has an obligation to oversee the content in their controlled digital space and sometimes can be held liable for failing to accomplish it. A famous example is the case of *Delfi AS v. Estonia*.[2] In the European Union law such obligation is also laid out and has been enforced in practise.[3]

However, European Court of Human Rights (hereinafter – ECHR) has repeatedly found that imposition of the aforementioned obligation violated the freedom of

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2 European Court's of Human Rights judgment in the case of *Delfi AS v. Estonia* no. 64569/09, 16.06.2015.

3 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market („Directive on electronic commerce").

expression because it was unprescribed by law. This paper focuses on the cases where this requirement was relevant and tries to distinguish the criteria which can be used to determine the limits for freedom of expression restrictions on the internet. This way newly developing trends can be identified which coincide with an endlessly growing significance of internet technologies.

The research sample includes cases where a question of legal certainty was raised in ECHR disputes regarding freedom of expression. Cases are select according to their relevance for the analysed issue. Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) requires that restrictions to the freedom of expression are prescribed by law. This requirement is thought provoking because at the thin line where legal acts transition to violations of human rights, some sort of law usually exists. Therefore, the most difficult question usually is, whether the law was formulated with sufficient precision which allowed to reasonably foresee the implemented legal measure. This perspective was selected for the analysis because contemporary technological advancements often stride with the pace which is faster than the lawmaker‘s reaction. Because of it, courts sometimes must deal with disputes which are not regulated by a definitive legal provision.

Approaching the issue

Freedom of expression is protected by the Article 10 of the Convention which was designed a long time before emergence of the internet. Although its wording was not intended to be applied for current kind of contemporary disputes in digital space, Article 10 is one of the most important foundations which guards the freedom of expression on the Internet in Europe. In the same way when the ECHR explains how the Convention protects freedom of expression on the internet, it is impossible to tell in what sort of new situations these interpretations will have to be applied. Legal research has been concentrating on symbiosis of internet and freedom of expression for a while now.[4]

4 BALKIN, J. M. The Future of Free Expression in a Digital Age. In *Pepperdine Law Review.* 2009, vol. 36, no. 2, p. 427-444; RORIVE, I. What Can Be Done against Cyber Hate - Freedom of Speech versus Hate Speech in the Council of Europe. In *Cardozo Journal of International and Comparative Law*. 2009, vol. 17, no. 3, p. 417-426; VOORHOOF, D. – CANNIE, H. Freedom of Expression and Information in a Democratic Society. In *The International Communication Gazette*. 2010, vol. 72(4–5), p. 407-423; LANE, G. Human Rights and the Internet in Europe. In *Human Rights and the Internet.* London: Palgrave Macmillan, 2014. p. 116-129; OOZER, A. Internet and Social Networks: Freedom of Expression in the Digital Age. In *Commonwealth Law Bulletin*. 2014, vol. 40, no. 2, p. 341-362; WAGNER, B. *Global Free Expression – Governing the Boundaries of Internet Content*. Frankfurt: Springer, 2016.; KEATS CITRON, D. – RICHARDS N. M. Four Principles for Digital Expression (You Won‘t Believe #3). In *Washington University Law Review*. 2018, vol. 95, no. 6, p. 1353-1388; RACOLTA, R. – VERTES-OLTEANU, A. Freedom of Expression. Some Considerations for the Digital Age. In *Jus et Civitas: A Journal of Social and Legal Studies*. 2019, vol. 6, no. 1, p. 7-16; BENEDEK, W. – KETTEMAN, M. C. *Freedom of Expression and the Internet*. Strasbourg: Council of Europe, 2020; WEAVER, R. L. Free Speech in an Internet Era. *University of Louisville Law Review*. 2020, vol. 58, no. 2, p. 325-348.

There have been various opinions in the most optimal legal framework model, some even advocating for an "equal" internet where internet service providers do not block specific internet content at all (the idea of net neutrality).[5] The presented analysis shows how ECHR strives for a balanced approach while attempting to transition freedom of expression principles to the digital environment.

Perhaps the first step in human rights violation disputes is determining whether there was an interference with a human right (hence, the applicant can be granted the victim status). In jurisprudence of ECHR there have been a few illuminating instances of it in disputes regarding freedom of expression on the internet. Internet technology brings new nuances for the definition of victim status in this context and, accordingly, for the question what constitutes an interference with freedom of expression on the internet.

Prominent examples of this question are cases where applicants complained about Turkish authorities' decisions to block access to certain internet websites. In *Ahmet Yıldırım v. Turkey* case[6] domestic authorities blocked access to Google Sites because one of internet websites based on Google Sites contained some allegedly illegal material. Google Sites is a creation and hosting service and the applicant in this case owned a website on which he published his academic work and his views on various topics. After Google Sites was blocked the applicant was unable to access his website regardless that there were no allegations against his website – the charges were being brought against the owner of another website which also used Google Sites services.

Similar circumstances occurred in *Cengiz and others v. Turkey* case[7] where analogous blocking order was issued and implemented against YouTube. Applicants were users of this website and through their YouTube accounts applicants used the platform not only to access videos relating to their professional sphere, but also in an active manner, for the purpose of uploading and sharing files of that nature; some of the applicants also pointed out that they had published videos on their academic activities on the blocked website. Turkish authorities in this case also blocked the website not because of applicant's content on website, but because of content on another YouTube channel operated by a third person.

Kablis v. Russia case[8] concerned a decision to block the applicant's social network account on website VKontakte. The blocking order was based on an allegation that the applicant published illegal content calling for a public assembly. The government claimed that the account could have been unblocked if the applicant had deleted the unlawful content or he could also have created a new social networking account. ECHR

5 FRENCH, R. D. Net Neutrality 101. In *University of Ottawa Law and Technology Journal*. 2007 vol. 4, no. 1, p. 109-134; SHELL, M. Network Neutrality and Broadband Service Providers' First Amendment Right to Free Speech. In *Federal Communications Law Journal*. 2014, vol. 66, no. 2, p. 303-326; WITTEMAN, C. Net Neutrality from the Ground up. In *Loyola of Los Angeles Law Review*. 2022, vol. 55, no. 1, p. 65-144.

6 European Court's of Human Rights judgment in the case of *Ahmet Yıldırım v. Turkey* no. 3111/10, 18.12.2012.

7 European Court's of Human Rights judgment in the case of *Cengiz and others v. Turkey* no. 48226/10, 14027/11, 01.12.2015.

8 European Court's of Human Rights judgment in the case of *Kablis v. Russia* no. 48310/16, 59663/17, 30.04.2019.

mentioned that the blocking of the applicant's social networking account amounted to "interference by a public authority" with the applicant's right to freedom of expression, of which the freedom to receive and impart information and ideas is an integral part; that the applicant could create a new social networking account or publish new entries on his blog has no incidence on this finding.[9]

In disputes regarding freedom of expression on the other side of the spectrum are the persons who might have been slandered, threatened or otherwise harmed by a publication on the internet. An internet publication might violate different human rights but, perhaps most often, it is the right to respect of private life. In the case of *Beizaras and Levickas v. Lithuania*[10] applicants were subject to offensive and threatening homophobic comments on internet. ECHR recognized there was a failure on the part of the relevant public authorities to discharge their positive obligation to investigate in an effective manner whether those comments constituted incitement to hatred and violence. The Court considered that the applicants suffered discrimination on the grounds of their sexual orientation and decided that there has been a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life) of the Convention. This case exemplifies that free speech on the internet is a two-way street and legal standing can be granted for persons complaining not only about unjustified restrictions but, also, about unjustified lack of restrictions (failure to protect their rights from slander, threats or other sort infringing actions).

In the cases against Turkey ECHR found that the freedom of expression was violated because the interference was not prescribed by law. A novel interesting notion there was that the applicants were granted victim status despite the fact that the government's actions were not directly addressed towards them. The blocking orders were issued against Google Sites and YouTube, therefore usually operators of these websites could be regarded as victims – the orders directly affected their rights. Similar implications might be found in the other presented cases as well. Legal standing can be granted even when impact for a person is indirect. In similar conditions it would have been usual to grant victim status to persons in a non-digital environment, for example, for someone who lost the ability to access a paper magazine, videotape rental service or others. The trend in digital environment can be characterized by ECHR's statement in *Cengiz and others v. Turkey* case that „the decision to block access to YouTube affected their right to receive and impart information and ideas even though they were not directly targeted by it".[11]

Prescribed by law – roots of the issue

ECHR has repeatedly emphasized that requirement for restrictions of human rights to be prescribed by law allows a certain level of vagueness in domestic laws, which can be resolved through case law: according to ECHR, many laws are inevitably

9 Ibid, par. 84.

10 European Court's of Human Rights judgment in the case of *Beizaras and Levickas v. Lithuania* no. 41288/15, 14.01.2020.

11 European Court's of Human Rights judgment in the case of *Cengiz and others v. Turkey* no. 48226/10, 14027/11, 01.12.2015, par. 55.

couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice; the criterion of foreseeability cannot be interpreted as requiring that all detailed conditions and procedures governing the application of a law should be laid down in the text of the law itself. A law which confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.[12] It is hard to disagree with the rationale of these points, but, perhaps, they can be specified further in the context of internet.

Savva Terentyev v. Russia case[13] is an example how the aforementioned jurisprudence was applied. In this case the applicant was punished for a comment on internet which contained hostile speech towards the police. Penalty was imposed on the basis of a law prohibiting incitement of hatred towards a "social group". In the assessment, whether the penalty was prescribed by law, ECHR observed that there was no practice of the national courts which would have given grounds to expect that applicant's actions would result in criminal liability. At the same time, ECHR noted that the domestic courts' interpretation of law, to regard the police as a "social group" which could benefit from the protection of the provision, did not conflict with the natural meaning of the words. Since there will always be an element of uncertainty about the meaning of a new legal provision until it is interpreted and applied by the domestic courts, this question related rather to the relevance and sufficiency of the grounds given by them to justify his conviction, and should be addressed in the assessment of whether the interference with the applicant's rights was necessary in a democratic society.

Although the law was vague, ECHR was of opinion that the impugned measure was prescribed by law. ECHR decided that the requirement was satisfied because the **impugned measure did not conflict with the natural meaning of the words laid out in the text of law**. However, violation of Article 10 was found because the measure was disproportionate.

The Grand Chamber's judgment in the *Perinçek v. Switzerland* case[14] concerned a penalty for public statements denying Armenian genocide of 1915. The law prohibited denying, trivialising or justifying „a genocide", but the applicant argued that there was no consensus whether the Armenian genocide happened. ECHR found that interference with the applicant's right to freedom of expression was prescribed by law. According to the Court, the salient issue in this case was not whether law was in principle sufficiently foreseeable in its application, but whether when making the statements in respect of which he was convicted the applicant knew or ought to have known that these statements could render him criminally liable under this provision. Although, there was an absence of more ample case-law on that point, the record of the applicant's interviews

12 European Court's of Human Rights judgment in the case of *Selahattin Demirtaş v. Turkey* no. 14305/17, 22.12.2020.

13 European Court's of Human Rights judgment in the case of *Savva Terentyev v. Russia* no. 10692/09, 28.08.2018.

14 European Court's of Human Rights judgment in the case of *Perinçek v. Switzerland* no. 27510/08, 15.10.2015.

with the prosecuting authorities showed that he knew that the Swiss National Council had recognised the events of 1915 and the following years as genocide, and had acted out of a desire to help it "rectify the error". Among other reasons, this supported the conclusion that the applicant, despite his protestations to the contrary, could reasonably have foreseen that his statements in relation to these events might result in criminal liability under that provision.

This draws focus from the text of legal provision to the context of each individual case. It is hard to define strict boundaries of relevant context, but the Court's wording could justify giving relevance to such factors as the potential victim's subjective perception, correspondence or documented statements indicating that the person realised (or could have) that there was a real possibility of legal liability for the actions in question.

In *Vladimir Kharitonov v. Russia* case[15] a decision to block access to an internet website by Russian authorities was examined. The blocking was based on a fact that another internet website published illegal material. Both websites shared the same IP address because of the service provider's technical arrangements, but the websites did not share common themes and were administered by different people. ECHR found that Russian law did not provide grounds for such measure. In this case Court found that the applicant did not commit any offence prohibited by law, but suffered legal consequences.[16]

This particular case is comparable to punishing the wrong person for an offence committed by somebody else. ECHR decided that intervention with the freedom of expression was not prescribed by law, which shows that such conclusion can be made in **cases where a person committed no offence or there was no law whatsoever, even a vague one**.

Additionally, ECHR pointed to a deficiency of Russian law – the lack of safeguards from such collateral consequences as in the instant case. A similar point of view can be noticed in the *Savva Terentyev v. Russia* case, where the domestic law had some qualities of vagueness, but, since they can be inevitable before national courts had the opportunity to provide interpretations of law, ECHR tolerated it and turned to the usual question of the necessity of interference with the human rights. This demonstrates that, **even when domestic law is vague, national authorities have the obligation to directly apply other requirements of the Convention**, such as tests of necessity of interference in a democratic society, proportionality and etc. Their application can be a decisive factor in determination whether human rights were violated.

The requirement of legal certainty in the context of freedom of expression was violated in a case of a Hungarian political party's punishment for certain innovative acts of political campaigning: *Magyar Kétfarkú Kutya Párt v. Hungary* case[17] concerned applicant's mobile phone app which was created for Hungarian citizens to

15 European Court's of Human Rights judgment in the case of *Kharitonov v. Russia* no. 10795/14, 23.06.2020.

16 Freedom of expression violations have also been found on similar grounds in other cases of wholesale blocking on internet: *Ahmet Yıldırım v. Turkey*, *Cengiz and others v. Turkey* cases.

17 European Court's of Human Rights judgment in the case of *Magyar Kétfarkú Kutya Párt v. Hungary* no. 201/17, 20.01.2020.

share photographs of their referendum voting ballots. This was a form of political campaigning encouraging to express voter's political will by casting an invalid ballot. The applicant was fined for infringement of the principle of the exercise of rights in accordance with their purpose. ECHR did not find this legal provision certain enough and concluded that the impugned measure was not reasonably foreseeable. However, reasons in this judgment were not restricted to analysis of vagueness of law – judgment also emphasized the importance of context which regarded political party's freedom of expression in referendum; the conclusion made by domestic courts that the MKKP's conduct had had no material impact on the fairness of the national referendum and etc.

Delfi AS v. Estonia case is an example how abstract legal provisions can be recognized as consistent with the Convention. The applicant Delfi AS complained about Estonian court's decision to hold it liable for comments on applicant's website by the visitors. Comments were hostile towards another person. Domestic courts held Delfi AS liable based on the Estonian Civil Code's general provisions of civil liability.[18] Although it is not uncommon to apply such provisions for a various set of circumstances, in this case unusual novelty was that Delfi AS was not the author of unlawful comments. It provided a platform to publish them and did not efficiently control their content. Moreover, in an earlier case *K. U. v. Finland*[19] ECHR had reached a somewhat opposite conclusion by rejecting the Government's argument that the applicant (who suffered from malicious actions of anonymous internet website's users) had had the possibility of obtaining damages from the service provider.[20] It would be fair to assume that at the time Finland's law contained similar provisions like the Estonian, which established general grounds for civil liability. However, the Delfi AS case shows that a specific legal rule was not necessary to restrict internet website operator's rights by holding it liable for the website visitor's comments.

These examples further support the conclusion that in the assessment whether intervention with the freedom of expression was prescribed by law, the vagueness and certainty of legal provisions are not the only significant factors – additionally, the context is important. The presented cases show a number of factors which can be summarised **as a question "was the intervention was carried out in a manner consistent with the spirit of the Convention?"**. Analysis of these cases does not let us reject an assumption that the answer to this question in some cases has even more decisive power than the wording of the domestic legal provision, for the question whether intervention with the freedom of expression was prescribed by law.

18 Among them was the subsection 2 of section 134 of the Obligations Act which read as follows: „In the case of an obligation to compensate for damage arising from <...> a breach of a personality right, in particular from defamation, the obligated person shall compensate the aggrieved person for non-pecuniary damage only if this is justified by the gravity of the breach, in particular by physical or emotional distress".

19 European Court's of Human Rights judgment in the case of *K. U. v. Finland* no. 2872/02, 02.12.2008.

20 Ibid, par. 47-49.

Conclusions

With contemporary internet technologies, a trend has appeared to expand the definition of victim in the ECHR's jurisprudence in the light of Article 10. An internet website user can be recognised as a victim of an internet website's blocking order and, accordingly, has legal standing to appeal against such order. In the case of trend's continuity, a general principle could take shape that the victim status could be granted to a user of internet service when the government enacted legal measures against the service provider. Surely, the latter general wording would cover various situations and the service user could not be granted victim status in all of them. Currently it is impossible to clearly define the line where victim status could be extrapolated to, but a criteria to distinguish them could be the question, whether the legal measure affected the user's right to receive and impart information and ideas.

The discussed cases in the context of the internet show that in the assessment, whether a freedom of expression restriction was prescribed by law, the vagueness/certainty of law is usually the most important, but it may be not the only relevant factor. As long as the impugned measure did not conflict with the natural meaning of the words laid out in the text of law or the measure did not affect a person who committed no offence or there was no law whatsoever (even a vague one), other factors might have the decisive role for the question, whether freedom of expression restriction was prescribed by law. Depending on each individual situation, a potential victim's subjective perception on requirements of law can be relevant, as well as adherence to general requirements of the Convention (necessity of interference in a democratic society, proportionality, etc.). Some of relevant factors could be summarised as a question, whether the intervention was carried out in a manner consistent with the spirit of the Convention.

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Summary: Determining Whether Freedom of Expression Restrictions on the Internet are Prescribed by Law

European Convention on Human Rights requires that freedom of expression restrictions must be prescribed by law. Disputes in the context of digital space bring new shape for this requirement. New interesting cases show developments which would have been unusual in an era before internet. They regard expansion of the victim status,

internet website operator's liability for offences committed by other persons and others. Different cases regarding the question, whether domestic law was not too vague demonstrate how the text of a legal provision may be not the only relevant factor and a potential victim's subjective perception on requirements of law can be relevant, as well as adherence to general requirements of the Convention (necessity of interference in a democratic society, proportionality, etc.).

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