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Right to Privacy and Freedom of Expression in the Digital Era in Relation to Elected Public Figures

- **ABSTRACT:** *Within the human rights protection system at both international and national system, there are several rights that might be and usually get into a clash of interaction if applied at the same time. One of the common examples is a clash between the right to privacy and freedom of expression. Both are important in relation to the protection of personal identity and autonomy and both concern development of every human being. Nevertheless, if there is a clash, one has to decide which one is given priority. This study aims to analyse the protection of these two rights in case of such a clash between them occurs. Since there has already been a lot of studies dealing with this clash, this study therefore limits its focus on two issues, namely first, specificities of the digital era and second, elected public figures have been identified as a particular subject of research because of a chosen specific case that has been under judicial scrutiny in Slovakia during the period of analysis of the research topic of the right to privacy in digital age. Striking a balance in which both these fundamental rights are protected is challenging, especially in the digital era. The focus is therefore given to the background and case-law of the European Court of Human Rights and Constitutional Court of the Slovak Republic when necessary to point out some specific features because of the stimulating case-law and the influence that these judicial authorities have in relation to the Slovak Republic. Finally, it is submitted that the online human rights protection should meet the same conditions as the offline one, keeping in mind all the circumstances that are typical for the digital world.*
- **KEYWORDS:** right to privacy, freedom of expression, public figures, digital age

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1. Introduction

The terms ‘right’ and ‘freedom’ are used in human rights protection systems at the national and international levels. In this area, they refer to an entitlement inherent to any person simply because they are human beings and possess human dignity. The aim of human rights protection is therefore to meet the basic needs of every person while respecting the human dignity of every individual concerned. Nevertheless, human rights are not absolute.¹ During their exercise, a person can encounter various obstacles, such as the clash of different human rights and fundamental freedoms. This does not mean that their protection is not possible: quite contrary, it must be realized with consideration for all the aspects of protected values and factors that influence their mutual coexistence.

This study aims to analyze the protection of two fundamental rights – the right to privacy and freedom of expression – within specificities of the digital era and in relation to elected public figures. The focus is given to the background and case-law of the European Court of Human Rights (hereinafter, the Court) and Constitutional Court of the Slovak Republic (hereinafter, the Constitutional Court) when necessary to point out some specific features because of the inspiring case-law and the importance of these judicial authorities for the Slovak Republic. Striking a balance in which both of these fundamental rights are protected is challenging, especially in the digital era. Nevertheless, the continuous specification of the limits of both rights if they are protected concurrently within the case-law of selected courts has already provided basic guidance for the gradual limitation of both rights for politicians’ online activities.

The first chapter analyzes the right to privacy and its peculiarities in relation to the digital era and the necessity of its protection in the case of public figures with a narrower scope. The second chapter similarly focuses on the freedom of expression and its specificities in the digital era and in relation to elected politicians, with an in-depth analysis of the issue of proportionality. The third chapter reflects the latest case that resonated in the public sphere in Slovakia, which was a lawsuit in case of the right to privacy protection of the president of the Slovak Republic vis-à-vis the freedom of expression of the Member of Parliament who was a member of the political opposition and was very active online. The question raised here is what the hypothetical decision of the Court might be.

Acknowledging that the right to privacy and freedom of expression have been the subject of numerous analyses,² this publication focuses first on elected

1 The only absolute right is the right not to be tortured. See Art. 3 of the European Convention on Human Rights and Fundamental Freedoms that does not allow any exception.

2 See Guide on Article 10 of the European Convention on Human Rights. Freedom of Expression. European Court of Human Rights. 31 August 2022. See also Reid, 2008, pp. 342 et seq.; Walker, 2012, pp. 61–68.

public figures and second on the specificities of the digital era. This study's aim is thus to find the balance by analyzing the basis and *raison d'être* of both examined fundamental freedoms and to specify that crossing the borders of the freedom of expression might be materialized in the institute that is called abuse of rights, although this exceptional tool is now not typically used, as the limitation clause is preferred. Nevertheless, freedom of expression in the digital era, when misused, has a greater negative impact and consequences than originally when it was misused within a limited space, time, and toward a limited amount of people. There is a strange power present in the online world that is stimulated by the crowd effect and anonymity. Online spaces lack the attributes of interaction among people that used to form and influence the substance of human rights protection. However, although without limited space, time, or amount of people, human rights protection in the digital world must guarantee the same level of protection as in the real world.

2. Elected public figures' right to privacy in the digital era

There is no legal definition of the term privacy in the Slovak legal order nor at the international level.³ However, the very concept of the right to privacy is based on the idea that individuals have personal autonomy and identities that deserve protection by the State from outside interference. Every person has a certain space in which they realize their potential and live, and a personal space about which they can make their own decisions. The point here is that individuals decide what they want to make available to others. Nevertheless, even without a legal definition as such, the Constitution of the Slovak Republic serves as the basic legal framework for Slovakia (hereinafter, the Constitution) at the national level that includes the right to privacy protection. Similarly, several legal norms regulate the protection of the right to privacy, either at the universal or regional levels, such as the Universal Declaration of Human Rights,⁴ the International Covenant on Civil and Political Rights,⁵ the European Convention on Human Rights and Fundamental Freedoms, or the Charter of Fundamental Rights of the European Union.⁶ The selected example, Article 17 of International Covenant on Civil and Political Rights, is a good example stating that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home, or correspondence, nor to unlawful attacks on their honor or reputation. Finally, case-law is also very helpful, including the definition of the Supreme Court of the Slovak Republic

3 There are many definitions of the term privacy, but no legal definition. See Albakjaji and Kasabi, 2021, pp. 1–10.

4 See Art. 12 of Universal Declaration of Human Rights.

5 See Art. 17 of International Covenant on Civil and Political Rights.

6 See Art. 8 of quoted international treaties, respectively.

according to which it is the right of a person to decide independently, at their own discretion, whether and to what extent the facts of their private life should be disclosed to others or made public.⁷

Historically, although international human rights law as such began to be developed after WWII,⁸ it was already more than 100 years ago that the Harvard Journal published an article on The Right to Privacy by Samuel D. Warren and Louis D. Brandeis.⁹ That article proves that already in 1890, political, economic, and social changes justified the emergence and recognition of new approaches to rights that are tied to persons and their protection. The protection of individuals originally related to the protection of their homes, good name, and honor. However, under the influence of technological developments (such as the camera or newspapers at that time), it was justified that the protection of persons should expand from the physical level (i.e., the right to life) to the level that also includes the intellectual and emotional aspects of their personal lives. The current situation is similar. The digital sphere has multiplied the options that allow interference with individuals' privacy. At the same time, it has multiplied the options through which other human rights, especially freedom of expression, can be exercised.¹⁰

Consequently, this expansion is also present in the case-law of the European Court of Human Rights and other national judicial bodies that must also address the right to privacy protection in the digital age.¹¹ This right not only includes typical aspects of the protection of one's physical home and correspondence, but also the protection of data (its collection and storage)¹² and of metadata (data about data).¹³ Informational self-determination is now presented and analyzed,¹⁴ namely, the fact that part of the right to privacy protection includes the right to have personal information about oneself safely stored and protected from falling into the hands of others who are not authorized to access it.¹⁵ Moreover, the good

7 Order of the Supreme Court of the Slovak Republic No. 3 Cdo 137/2008 from 18 February 2010, p. 9.

8 Nevertheless, even before WWII minority rights systems had already been introduced. See Čepelka and Šturma, 2008, p. 443.

9 Warren and Brandeis, 1890, pp. 193–220.

10 For more about derived human rights, see Mathiesen, 2014, pp. 2–18.

11 See Guide on Article 8 of the European Convention on Human Rights. Freedom of Expression. European Court of Human Rights, 31 August 2022, paras. 175, 177, 181, 185 et seq.

12 See *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, 27 June 2017, No. 931/13, paras. 133 et seq.

13 See Guide to the Case-Law of the European Court of Human Rights. Data Protection. European Court of Human Rights, 31 August 2022.

14 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, 27 June 2017, No. 931/13, paras. 136 et seq.

15 For more detailed information see the Regulation itself: EU General Data Protection Regulation (GDPR): Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

name and honor of any individual is threatened very easily by the increased speed and extent of possible online interference.¹⁶

It must be emphasized that there are differences between the right to privacy in the digital age apart from the issue of the lack of space or time limitations (i.e., the fact that in a digital world, information published online is made public worldwide and can be accessed faster than ever possible in the ‘real,’ physical world).¹⁷ Another specific aspect must be kept in mind is the anonymity of the digital sphere compared to face-to-face contact in the real world.¹⁸ These factual differences have no consequences in the legal protection requirements of examined rights within the European human rights protection system, as has been confirmed by the Recommendation of the Committee of Ministers according to which the obligation of the Member States to secure for everyone within their jurisdiction the human rights and fundamental freedoms enshrined in the Convention involves the assurance that human rights apply equally offline and online.¹⁹ The main reason for the right to privacy is that everyone, including public figures, has a legitimate expectation that their private life will be protected.²⁰ However, in the digital world with so many informational inputs, one must consider the issue of seriousness and a reasonable reader concept. The seriousness issue includes several factors that should be considered, particularly the capability of constituting interference with the rights of the claimed victim.²¹ Reasonable reader elaborates on the same issue, nevertheless, from the point of view of the person whose freedom of expression is under scrutiny.²²

Keeping in mind that this study’s aim is to focus on the right to privacy in relation to elected public figures, it is exactly these two concepts that are relevant, as has been proven in cases such as that of *Egill Einarsson v. Iceland*.²³ Similar to the case from Slovakia examined in the third chapter, public figures should not have to tolerate being publicly accused of violent criminal acts when such statements are not supported by facts.²⁴ As is discussed in the following chapter, elected

16 Compare *McGonagle*, 2022, p. 26.

17 Compare *Delfi v. Estonia*, 16 June 2015, No. 64569/09, para. 65.

18 Compare *Kyberšikanovanie* [Online]. Available at: <https://www.zodpovedne.sk/index.php/sk/ohrozenia/kybersikanovanie> (Accessed 25 August 2022).

19 Recommendation CM/Rec(2014)6 of the Committee of Ministers to Member States on a Guide to Human Rights for Internet Users (adopted by the Committee of Ministers on 16 April 2014 at the 1197th meeting of the Ministers’ Deputies).

20 *Von Hannover v. Germany* (No.2), 7 February 2012, Nos. 40660/08 and 60641/08, paras. 50 et seq. and paras. 95 et seq.

21 *Tamiz v. UK*, 12 October 2017, No.3877/14, paras. 80–81. See also *Arnarson v. Iceland*, 13 June 2017, No. 58781/13, para. 37.

22 *Sousa Goucha v. Portugal*, 22 March 2016, No. 70434/12, para. 50.

23 In this case, a known person was offended on a social media platform when he was labelled as a rapist alongside a photograph of his likeness. All the circumstances created an understanding that could have been or was taken seriously by public.

24 *Egill Einarsson v. Iceland*, 7 November 2017, No. 24703/15, para. 52. See also *Jishkariani v. Georgia*, 20 September 2018, No. 18925/09, paras. 59–62.

public figures are open to wider criticism than private individuals. Nevertheless, especially if the freedom of expression is realized by another public figure, his words carry more weight.²⁵

Attacks in the digital world with an aim to humiliate can come anytime and anywhere. The only barrier is a lack of mobile or Internet access. Similarly, the dissemination is much quicker and broader in relation to the amount of people that are affected. Moreover, the distribution is uncontrollable.²⁶ It is much easier to put something online than to take it offline; digital traces always remain somewhere in the digital world despite the right to be forgotten.²⁷ Finally, on the Internet, it is easier to attack someone one would not have dared to attack in the real world because of the person's authority or position.²⁸ Thus, it is not only anonymity that differentiates the digital world from the physical world. Unlike the traditional requirements of good behavior, people interacting through social media are usually less aware of the fact that there is another human being on the other side of the screen, or they merely aim to make use of the speed and scope of their online activity and by doing so they at least subconsciously interfere with the dignity of another person in a way that is unacceptable not only from the perspective of human good behavior but also from the perspective of the legally settled limits of the exercise of individual human rights and fundamental freedoms, especially when a conflict exists between them.

3. Elected public figures' freedom of expression in the digital era

In general terms, most conflicts concerning this fundamental freedom arise between the freedom of expression and the right to privacy.²⁹ Both of these basic rights are of the same importance and weight and are protected equally.³⁰ It is therefore not acceptable to decide normatively which right should be given priority. Even though there is a list both in the Convention and the Constitution, and one right precedes another in the text, this does not mean that the aforementioned right is given priority in cases in which they conflict. According to the Constitutional Court, such an interpretation is not acceptable, since any solution to a conflict of two rights guaranteed by the Constitution depends on the specific

25 *Mesić v. Croatia*, 5 May 2022, No. 19364/18, paras. 103–110.

26 Pollicino, 2020, p. 6.

27 See Court of Justice of the European Union (Grand Chamber), Case C-131/12, *Google Spain SL v Agencia Española de Protección de Datos*, 13 May 2014.

28 Anonymity might be considered a tool to promote freedom of expression free of fear, nevertheless, it might also be a tool to disrupt the legal system. See more in Maroni, 2020, p. 271.

29 Drgonec, 2004, p. 178.

30 Compare Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna 1993, para. 5.

circumstances of the case.³¹ It is up to the courts in each case to determine the need to give priority to one of the protected rights by examining the degree of importance of both in the conflict of existing constitutional values.³² This means that all fundamental rights and freedoms are protected only to the extent that the exercise of one right or freedom does not unduly restrict or deny another right or freedom.³³

The right to privacy is intended to protect personal identity and autonomy, and without outside interference to ensure the development of every person in the relations toward other human beings.³⁴ Freedom of expression is fundamental to the promotion of democracy and personal and social development.³⁵ Both of these concepts thus concern personal development. Moreover, freedom of expression includes the right to obtain and spread information. This is expressly mentioned in the Constitution, where the article regulating freedom of expression includes the prohibition of censorship. It might be considered as having a certain legacy because of the previous communist regime in which the prohibition of censorship was only formally a part of the legal framework. Nevertheless, especially in relation to the public sphere, the issue of the free sharing of information might be considered to be an essential part of political life. Furthermore, freedom of speech as a tool to promote a democratic culture might be exercised in a digital era more easily since the digital world mainly provides passive consumers with a better chance to interact.³⁶

Like the right to privacy, there is no legal definition of freedom of expression: there is no generally accepted definition of the term involving receiving and disseminating information and ideas as used in Article 10 of the Convention.³⁷ Nevertheless, compared to the right to privacy, freedom of expression is regulated in a unique manner since the notion of duties and obligations is involved expressly within the text of the Convention. The exercise of the freedom of expression is clearly accompanied by duties and responsibilities unique to the Convention, as there is no other such wording connected to other rights protected by the Convention.³⁸ This is especially a challenge in relation to the fact that the Court has explicitly ruled that Article 10 of the Convention protects all information or ideas, including those that are offending, shocking, or disturbing, since such are the demands of the pluralism, tolerance, and broadmindedness that are so essential

31 Constitutional Court, III. ÚS 673/2017 from 7 November 2017, decision, para. 23.

32 Constitutional Court, III. ÚS 193/2015 from 12 May 2015, decision, p. 11.

33 Ibid.

34 Compare *Von Hannover v. Germany* (no. 2), 7 February 2012, Nos. 40660/08 and 60 641/08, Grand Chamber, para. 95.

35 Compare *Handyside v. UK*, 7 December 1976, No. 5493/72, para. 48.

36 Balkin, 2004, pp. 8–10.

37 Compare *Groppera Radio AG et al. v Switzerland*, 28 March 1990, No. 10890/84, para. 55.

38 A different approach is typical for the African regional system, see African Charter on Human and People's Rights and Duties, adopted 27 June 1981.

for a democratic society.³⁹ However, as has been discussed, neither the right to privacy nor freedom of expression is absolute. Both can be limited in the same manner, namely, by applying the five-step methodology of the limitation clause. Finally, it is important to point out that the general principles applicable to offline publications also apply to online publications.⁴⁰ Nevertheless, there are certain circumstances that might mitigate the evaluation of the State body's decision, such as the extreme nature of the comments in question and the insufficiency of the measures taken by the online functioning company to remove without delay comments amounting to hate speech and speech inciting violence and to ensure a realistic prospect of the authors of such comments being held liable.⁴¹ However, these specific circumstances are examined within the scrutiny of application of the limitation clause.

The five-step-methodology of the limitation clause is a tool used to understand the aim of the protected rights, particularly in relation to the application of the last part of the five-step test, the test of proportionality *stricto sensu*. It is applied after proving the existence of an applicable scope of the protected rights, the existence of a relevant interference into the realization of the protected rights, the existence of the required legality, and the existence of an applicable legitimate aim the list of which differs from right to right and from the national to international levels.⁴²

Proportionality is analyzed individually on a case-to-case basis. The Convention uses the term of necessity in a democratic society that is approved if there is a pressing social need.⁴³ The contracting parties have a certain level of margin of appreciation for evaluating whether such a need exists. Nevertheless, it is up to the Court to decide whether a limitation of the freedom of expression is compatible with the freedom of expression protection as such.⁴⁴ It must be proved that every restriction imposed in this sphere is proportionate to the legitimate aim pursued. The restriction of rights and freedoms is necessary when it can be stated that the goal of the restriction cannot be achieved otherwise.⁴⁵

Apart from the limitation clause present in both Article 8 and Article 10 of the Convention, Article 17 of the Convention concerns the abuse of rights. It *de facto* means that the Convention allows limitation even beyond the scope of

39 Compare *Handyside v. UK*, 7 December 1976, No. 5493/72, para. 49.

40 Guide on Article 10 of the European Convention on Human Rights. Freedom of Expression. European Court of Human Rights. 31 August 2022, para. 651, more specifically the online publication of personal attacks which go beyond a legitimate battle of ideas are not protected by Article 10 para. 2 which has been confirmed in *Tierberfreier v. Germany*, 16 January 2014, No. 45192/09, para. 56.

41 *Delfi v. Estonia*, 16 June 2015, No. 64569/09, para. 162.

42 *Kmec et al.*, 2012, p. 998.

43 *Observer and Guardian v. UK*, 26 November 1991, No. 13585/88, para. 59.

44 Compare *Janowski v. Poland*, Grand Chamber, 21 January 1999, No. 25716/94, para. 30.

45 See Constitutional Court, Pl. ÚS 15/98, finding, p. 40.

any limitation clause enshrined in the second paragraphs of the relevant article. Although it might be applied to any protected right, it is typically applied to the freedom of expression, especially to cases of revisionism, communism, racism, or incitement to violence, since values are not compatible with the Convention as such.⁴⁶ Nevertheless, the limitation clause is now used more frequently, even in cases that were previously considered as not admissible according to Article 17 of the Convention.⁴⁷

Hence, the limitation clause and its five-step test are used instead. Considering this study's objective, only one of the legitimate aims enlisted in Article 10 of the Convention or in Article 26 of the Constitution is to be analyzed more deeply since the issue is the balance between the freedom of expression and the right to privacy. Therefore, protection of rights of others is at stake, namely, another value also protected by the Convention and the Constitution.

If the right to privacy, one of the rights of others, is claimed to be violated by realization of the freedom of expression, there are several issues that national and international courts consider in general, such as the form and content of the speech or the public interest involved in case of publicly known persons, especially politicians.⁴⁸ At the international level from the perspective of the European Court on Human Right, the usual approach is made not by abstract reasoning but individually, on a case-to-case basis. Nevertheless, when looking for a balance within a proportionality test, although there is no generally declared test, a pattern has been detected involving focusing on three fundamental issues that are frequently described as the factors 'what about who by whom.' More specifically, the five relevant criteria are as follows: contribution to a debate of public interest, degree of notoriety of the person affected, subject of the news report, prior conduct of the person concerned and finally the content, form, and consequences of the publication.⁴⁹

As for 'what' is concerned, one of the most important distinctions that should be made in deciding defamation cases is the distinction between information (facts) and opinions (value judgments). The Court has ruled that the existence of facts can be proved, but the truth of value judgments cannot.⁵⁰ However, apart from information that can be verified, opinions and criticism that cannot be subjected to truth inquiries are protected under Article 10 of the Convention. Moreover, value judgments, in particular those expressed in the political field, enjoy special protection because of their need for pluralistic democratic systems.

46 Kmec et al., 2012, p. 1016.

47 Ibid.

48 See Constitutional Court, III. ÚS 385/2012 from 21 January 2014, finding, p. 18.

49 *Von Hannover v. Germany* (no. 2), 7 February 2012, Nos. 40660/08 and 60 641/08, paras. 108 et seq.

50 *Jerusalem v. Austria*, 27 February 2001, No. 26958/95.

The distinction between opinions and information has been decisive in most of the well-known cases dealing with freedom of expression related to politicians. Starting with the *Lingens* case, the Court pointed out that the facts on which the applicant had founded his value judgments were undisputed.⁵¹ The Court has also emphasized that political fights often spill over into the personal sphere. Nevertheless, it considered this to be a hazard of politics and the free debate of ideas that is undoubtedly necessary for a democratic society.⁵²

Furthermore, even value judgments may be subjected to examination whether they are based on true information and whether their public presentation is proportionate, whether or not they are aimed at defamation itself.⁵³ The Court has expressly upheld that even a value judgment may be excessive if there is no factual basis to support it.⁵⁴ This means that even value judgments need at least some factual grounds.⁵⁵

Regarding form, Article 10 of the Convention includes the protection of all forms of expression without any specific limit in relation to the medium through which the speech or expression is realized in relation to its content. Nevertheless, this does not mean that there are no limitations; one is definitely the limitation clause and the concept of abuse of rights.

It was already ruled by the Court that Article 10 of the Convention also protects the freedom of expression realized through the Internet.⁵⁶ Moreover, it was pointed out in 2004 that audio-visual media has a more immediate and serious effect than the press media.⁵⁷ Consequently, such media are more likely to cause serious harm, especially in defamation cases.⁵⁸ Therefore, more restrictive measures may be acceptable in these cases, as will be pointed out while analyzing criteria that the Court considers regarding the impact that the realization of the freedom of expression might have upon the privacy of another individual.

Furthermore, if exercised excessively, freedom of expression may be used to incite violence, spread hatred, endanger public or state security, or to interfere excessively into the private lives of others.⁵⁹ It is therefore understandable that all case law aims to strike a proper balance between the conflicting interests of protected rights. This is especially challenging in the case of public figures since

51 *Lingens v. Austria*, 8 July 1986, No. 9815/82, para. 46.

52 *Lopes Gomes da Silva v. Portugal*, 28 September 2000, No. 37698/97, para. 34.

53 Constitutional Court of the Czech Republic, 1. ÚS 453/03.

54 *Feldek v. Slovakia*, 12 July 2001, No. 29032/95, para. 76.

55 *Shabanov and Tren v. Russia*, 14 December 2006, No. 5433/02, para. 41.

56 *Times Newspapers Ltd (No. 1 and 2) v. UK*, 10 March 2009, No. 3002/03 and 23676/03.

57 *Pedersen and Baadsgaard v. Denmark*, Grand Chamber decision, 17 December 2004, No. 499017/99, para. 79.

58 Compare *Murphy v. Ireland*, 10 July 2003, No. 44179/98, para. 74.

59 Compare *Féret v. Belgium*, 16 July 2009, 15615/07, para. 78, *Willem v. France*, 16 July 2009, No. 10883/05, para. 38 et seq.

the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.⁶⁰

Legal practice in Slovakia concerning politicians was once completely different and protected politicians more than it did private individuals. It was after a decision of the Court against Slovakia that the Supreme Court of Slovakia had to abandon its approach according to which public figures could be discriminated if information about them was spread for the benefit of public awareness.⁶¹ Moreover, the Court has also expressly declared compatibility with the Convention only in exceptional circumstances: if imprisonment is a sentence for an offense in the area of political speech,⁶² any national law protecting politicians by special penalties against insult or defamation would not fulfill the proportionality requirements. Examples of the Court's jurisprudence in this area are interesting for the third subchapter of this article. Therefore, French cases are important to mention since they include the defamation of a head of State. The Court noted that the law tended to confer an extraordinary privilege on heads of State not to be criticized, which was not necessary for obtaining the objective to maintain friendly relations with other States.⁶³ This interpretation of the limitations of the freedom of expression was upheld in 2013, again against France.⁶⁴ However, if compared to the case study presented in the following subchapter, the Slovak president has not asked for special protection not to be criticized at all but to be criticized properly within limits of proportionality, like any other individual.

Similarly, the Court clearly acknowledged that

... Article 10 para. 2 enables the reputation of others – that is to say, of all individuals – to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.⁶⁵

60 *Lingens v. Austria*, 8 July 1986, No. 9815/82, para. 42.

61 *Feldek v. Slovakia*, 12 July 2001, No. 29032/95.

62 *Otegi Mondragon v. Spain*, 15 March 2011, No. 2034/07, para. 59.

63 *Colombani and Others v. France*, 25 June 2002, No. 51279/99, para. 68.

64 *Eon v. France*, 14 March 2013, No. 26118/10. Nevertheless, these cases are to be distinguished from cases dealing with immunities of States and their representatives if access to court is at stake, fair trial protection under Art. 6 of the Convention, see *Al-Adsani v. UK*, 21 November 2001, No. 35763/97.

65 *Lingens v. Austria*, 8 July 1986, No. 9815/82, para. 42.

The Court also reaffirmed in its later decisions that although politicians must accept wider criticism, they also must be able to defend themselves when they think that a publication casting doubt on their person is untrue and might mislead the public as to their manner of exercising power.⁶⁶ This is especially important in the online arena, where there is a higher risk of harm.⁶⁷ Politicians can promote their views and ideas only if they have the trust of the public, and such a connection can threaten this trust. Public opinion is not a professional judge that firmly distinguishing between facts and value judgments, and its formation is not always governed by strict rules of interpretation. After its publication, any information can 'live a life of its own' and, within the framework of public discussion, possibly acquire a different meaning than those who published it attributed to it. The reaction of the public, especially when it comes to political issues in the broadest sense of the word, can often be harsh, exaggerated, or even unfair.⁶⁸

The last aspect that is considered concerns the person whose freedom of expression is at stake. As for elected public figures, opposition members must especially be protected, as ruled in the *Castells* case. Again, particular parts of the decision are important because of the case study presented in the third part of the article, namely, the importance of the opposition elected by the people and the higher level of criticism acceptable toward other politicians. The Court has pointed out that although the freedom of expression is important for everybody, it is especially so for elected representatives of the people.⁶⁹ Moreover, the Court stressed that the Member of Parliament did not express his opinion in the Parliament where he could have been protected, but decided to use printed media where he might have expected refusal or sanction.⁷⁰ Finally, it referred to the dominant position of the government and upheld that limits of permissible criticism are wider with regard to the government than for a private citizen or even a politician.⁷¹ However, it is important to emphasize that this case concerns criticism of the government, an abstract entity that cannot be covered by the legitimate aim 'rights of others' that concerns individuals. Moreover, the sanction was very serious since it concerned a criminal sentence despite the appeal of the Court not to apply criminal proceedings,⁷² because such sanctions endanger the substance of the freedom of expression. Although the Court already also criticized the deletion of relevant articles published online and proposed a supplement to the

66 See *Sanocki v. Poland*, 17 July 2007, No. 28949/03, para. 61.

67 *Delfi v. Estonia*, 16 June 2015, No. 64569/09, para. 133, *Węgrzynowski and Smolczewski v. Poland*, 16 August 2013, No. 33846/97, para. 98, Editorial Board of *Pravoye Delo* and *Shtekel v. Ukraine*, 5 May 2011, No. 33014/05, para. 63.

68 Constitutional Court, IV. ÚS 492/2012-67 from 18 April 2013, finding, p. 21.

69 *Castells v. Spain*, 23 April 1992, No. 11798/85, para. 42.

70 *Ibid.*, para. 43.

71 *Ibid.*, para. 46. Nevertheless, this case concern criminal prosecution and conviction of the MP.

72 *Ibid.*

article with a reference to the court judgment,⁷³ even though the Internet can serve as an archival space because of its boundless and spaceless qualities, one has a guaranteed right to be forgotten online.⁷⁴

To summarize this subchapter, politicians' rights to privacy is a special case of balancing privacy and public interests, which is also relevant in the digital world. In general, the more publicly known a person is, more interference into their privacy they must endure. Still, in these cases, one should distinguish between statements of facts and value judgments. The former does not result in a violation of the right to reputation, whereas for the latter, opinions must meet criteria of materiality, specificity, and proportionality.⁷⁵ In particular, the issue of proportionality may be at stake, since even opinions within exercise of the freedom of speech may have limits, although people who are active in public life are expected to accept critical comments more readily than ordinary people. In general, there are limits to the freedom of expression regarding attacks that are aimed to influence public persons in the performance of their duties and to damage public confidence in them and in the office they hold.⁷⁶ Finally, even their personal security must be considered if freedom of expression is realized in a manner that could threaten it.⁷⁷

4. Slovak case study

The online activities of politicians are generally very welcomed by the public. First, such activities make communication with voters more effective, and second, they can support the engagement of citizens within a democratic system. Nevertheless, even online political activities must meet the requirements of the protection of all relevant human rights. It was not the freedom to hold opinions that is regulated by Article 10 paragraph 1 of the Convention but the freedom to impart information and ideas as regulated by Article 10 paragraph 2 of the Convention that was *de facto* ruled upon by the District Court Bratislava I. (hereinafter, District Court). The present case is an excellent example of the presentation of Facebook (FB) status posts as exercises of freedom of expression. Nevertheless, slanderous and sometimes even vulgar statuses have been considered a part of the political fight, as discussed later. The case has not been decided by merits and the District Court has been asked to adopt an interim measure.⁷⁸ Therefore, the District Court

73 Compare *Węgrzynowski and Smolczewski v. Poland*, 16 August 2013, No. 33846/97, para. 45.

74 Court of Justice of the European Union (Grand Chamber), Case C-131/12, *Google Spain SL v Agencia Española de Protección de Datos*, 13 May 2014.

75 Constitutional Court, III. ÚS 193/2015 from 12 May 2015, decision, p. 9.

76 See *Janowski v Poland*, 21 January 1999, No. 25716/94.

77 Compare Constitutional Court, IV. ÚS 107/2010 from 28 October 2010, Decision, p. 23.

78 See Decision of the District Court Bratislava I, file No. 21C/12/2022-478, 22 March 2022.

first explained the basis of an interim measure since it is not a final decision and its purpose is only to temporarily adjust the relations between the parties.⁷⁹ This does not mean that it is possible to issue an interim measure only on the basis of a proposal without proving at least the basic facts necessary for the conclusion of the probability of a claim or of the danger of imminent damage that must be immediate and specific.

The lawsuit between the Slovak president and the well-known opposition Member of Parliament (MP) concerns online activity through social media, namely, FB. This MP has approximately 170,000 FB followers. The case involves finding a balance between the protection of freedom of expression and that of the right to privacy. The statuses that were challenged by the president were of a withholding nature, and the Court was asked to decide whether specified statuses should be deleted and whether the MP must refrain from calling the president a traitor, an American agent, or an agent of foreign powers.⁸⁰

To better understand the broader legal conflict, it is important to explain the facts in greater detail. The defendants' relevant online political activity started when a bilateral treaty was negotiated concerning greater cooperation between the Slovak Republic and the USA in the military area. The implications of this political activity may be seen in the selected statuses that were posted on two separate days and were ordered to be removed from the relevant social media. The first day was before the Russian invasion (1 February 2022) and the second was afterwards (26 February 2022).

In this regard, statuses from 1 February 2022 are as follows:

“Today, through her spokeswoman Zuzana Čaputová, American Ambassador Bridget Brinková announced the view of the United States of America on the situation in Ukraine.”

“The number of hoaxes that Čaputová uttered today is a Slovak record so far. If after today someone still doubts whether Čaputová is an American agent, they live on another planet.”

“Since Šaňo Macha, there has not been such a militaristic expression in Slovak politics as Čaputová gave today. She completely broke free from the chain.”

“There is no longer any doubt – an agent of a foreign power and a war-monger is sitting in the Presidential Palace. She is not our president; she is America's maid.”

“The General Prosecutor's Office should immediately launch an investigation into whether Zuzana Čaputová is committing the crime of treason. There can be no greater proof than today's intercession.”

79 See Supreme Court of the Slovak Republic, 6MCdo 5/2012 from 28 November 2012.

80 Decision of the District Court Bratislava I, file No. 21C/12/2022-478, 22 March 2022, para. 1.

The statuses from 26 February 2022 are as follows:

“And it is confirmed. It all comes from Zuzana Čaputová and her American friends. This whole lynching.”

“There is no more direct line to the Presidential Palace. Kubina is the gray eminence of Čaputová. It was he who advised her to cut the referendum, he whom she trusts without reservation. This is her show.”

“Zuzana Čaputová recently declared that Luboš Blaha must be stopped. Today her gangs of primitives are threatening me, calling my cell phone, today they came to ring my doorbell, they are intimidating my family.”

“In any normal country, the president would condemn such crazy attacks on the opposition. If she didn't have a hand in it herself. Kubin's statements today are clear proof – this is Čaputová's work.”

“And here we come to the point. This government is completely controlled by the American embassy. Čaputová was always just a spokesperson for Bridget Brink, who today is an extended arm of Washington in Ukraine.”

“They cut and chop like Šaňo Mach in 1944. They do not recognize the freedom of scientific research. They do not recognize other geopolitical views. They have no respect for democracy, for academic freedom, and certainly not for the opposition. Not even Hitler felt as much hatred for Russia as they did. And it goes directly from the Presidential Palace. Today it confirmed it. They close down alternative media, introduce censorship, and threaten with life imprisonment for different opinions.”

“People are in shock today. Because of the war in Ukraine. And every totalitarian in human history needs to feed on fear to control people more easily. This is exactly what the Čaputová totality is doing today.”

“Dear friends, no, this is no longer Čaputová's hopelessness. This is Čaputová fascism. And I publicly accuse President Zuzana Čaputová of the fact that she and her people are behind this insane attack on democracy and human rights. She is a murderer of democracy. This is how history will remember her.”

The District Court did not completely comply with the submission. Nevertheless, it ordered the defendant to delete specified statuses. It did not order the complete deplatforming of the MP, as it had not been asked to do so. The decision was reasoned by the aim that was claimed to be pursued by the MP, namely, that the statuses were not only offensive in nature (since freedom of expression also

protects offensive language), but that they first aimed to evoke and incite strong negative emotions, whereas rational argumentation was largely absent.⁸¹ The District Court pointed out expressly that in this case, two rights protected by the Constitution stand against each other, namely, the right of a natural person to have his personality protected, including civil honor and human dignity, and the political right to freedom of expression.

The decision of the First Instance Court did not include reference to the international judiciary.⁸² Nevertheless, procedurally, the District Court followed the usual approach of a limitation clause and balanced respective conflicting rights. By applying the methodological approach of ‘who said what against whom,’ it concluded that the defendant acted so rudely and at the same time without providing a factual basis or relevant evidence while interfering with the personal rights of the plaintiff that there was an urgent need for judicial intervention. Moreover, regarding ‘what,’ the statements of the defendant, in which he accuses the plaintiff of particularly serious crimes and other defamatory accusations and in which the defendant’s efforts to evoke strong negative emotions in his supporters toward the plaintiff are evident, cannot be defended by freedom of speech, as they lack objective, rational argumentation, or any effort to explain and prove the asserted facts. The District Court considered the urgency of the plaintiff’s proposal to be proven in view of the enormous impact of the defendant’s statements, the obvious polarization and division of the society characteristic of the current geopolitical situation and the related, directly threatening harm that the defendant’s statements to the plaintiff were capable of causing. It was therefore considered that the threatening harm in connection with the defendant’s statements was immediate and concrete, whereas the potential harm caused by the order of interim measures was insignificant in relation to the potential harming of the plaintiff.

In relation to ‘against whom,’ the District Court also considered higher levels of potential tolerance of violations of the personal rights of the plaintiff in connection with the performance of a public function, but as for ‘who,’ it points out that the demands for the verification of the truth of the statements are higher for the defendant than for ordinary citizens, both because of his social status and his considerable influence on the masses through social networks.⁸³

Moreover, the District Court analyzes the ‘what’ question more when it emphasizes that the defendant does not formulate his contributions on the social network as evaluative judgments, but as facts that enjoy a lesser degree of protection, since their veracity is verifiable.⁸⁴ To summarize this part of the

81 *Ibid.*, para. 6 of the Reasoning.

82 Nevertheless, it referred to some decisions of the Constitutional Court of the Czech Republic.

83 Constitutional Court of the Czech Republic, I. ÚS 453/03 as referred to in the Decision.

84 Decision of the District Court Bratislava I, file No. 21C/12/2022-478, 22 March 2022, para. 6 of the Reasoning.

interim measure, the District Court upheld that defamatory speech, formulated mainly as factual statements, many of which are demonstrably not based on the truth, and the aim of which is probably to defame a public figure, cannot enjoy a higher level of protection under the umbrella of freedom of speech than the right to preserve human dignity, personal honor, and good reputation and to protect one's name.⁸⁵

The District Court found the other parts of the decision problematic, considering that it was impossible to order that the defendant refrain from speech in which the defendant compares or associates the plaintiff with the words fascism and totalitarianism because of speech identification problems and especially because of the protected status of the public function the defendant holds.

Finally, in the part of the proposal in which the plaintiff demanded an apology, the District Court stated that in this case, the conditions for ordering the proposed interim measure were not met, since there was no danger of damage and no need for immediate adjustment; in case of the issuance of such an interim measure, the right to a fair trial would have been violated.

The defendant appealed and the lawsuit reached the Regional Court, which confirmed the decision of the District Court with more detailed reasoning that included case-law from the Court presented by both parties to the conflict.⁸⁶ The appeal was submitted on the basis of the claim that the First Instance Court incorrectly determined the factual basis and arbitrarily justified its decision. The biggest conflict lay in deciding whether the statuses were value judgments or factual statements. However, even the defendant admitted that value judgments are examined whether they are based on true information presented properly and whether the primary aim of the expression is not defamation or dishonor of a person.⁸⁷ According to the plaintiff, this is exactly what happened: it was submitted that the statements were intended to attack the plaintiff *ad hominem*. The relevant statements were not an invitation or part of a discussion. Furthermore, the plaintiff emphasized that the relevant statuses were fact statements, not value judgments, since the defendant used categorical expressions and declarative sentences while presenting his claims as clearly given, proven facts. Although the plaintiff acted in accordance with the national legal framework when signing a treaty approved by the Parliament, the defendant claimed she was a betrayer, even a war criminal. Furthermore, the defendant submitted that his statements were not objectively capable of interfering with the trustworthiness and good reputation of the plaintiff. Nevertheless, the Safety of President Report showed increased threats to the safety of the President as people came to demonstrate in front of her house who were persuaded that she had sold Slovakia to foreign

85 Ibid.

86 Decision of the Regional Court Bratislava, file No. 5Co/95/2022 – 749, 21 July 2022.

87 Constitutional Court of the Czech Republic, 1. ÚS 453/03 as referred to in the Decision.

powers. Moreover, although it was admitted that the status valid at the time of the adoption of the first decision was decisive, the plaintiff pointed out that a meeting in person on the occasion of the 1 May celebration included incitement by the defendant to declare what the District Court had forbidden him to do, namely, to state that ‘the President is an American ...’ (bitch, added by the excited and incited crowd several times).

The defendant has objected to the limitation of his freedom of expression. As it has already been proven, the use of vulgar language as such is not decisive since it may only serve only exaggerating purposes. The style might be considered a part of the expression itself and is therefore protected as well.⁸⁸ The Court found that Mr. Haider’ speech was itself provocative, and therefore the word ‘idiot’ used in the media did not seem disproportionate to the indignation knowingly aroused by Mr. Haider.⁸⁹ To point out other similar cases, the protection of the freedom of expression depends on the context and the aim of the criticism. In case of important public interests or during political debates, more is tolerated by a judicial authority that must decide. By doing so, the Court has already accepted the exaggeration or provocation.⁹⁰

Nevertheless, the exaggerated vocabulary and provoking expressions were not decisive in the present case. To summarize, systematic, long-term, and focused verbal and hate-inciting attacks are not protected by the freedom of expression. Even though public figures are expected to endure a higher level of criticism because of the importance of public interest, they are not obliged to endure speech that might be considered abuse of rights than an exercise of the freedom of expression.⁹¹

5. Conclusion

This study aimed to analyze the relationship between the right to privacy and freedom of expression in the digital era in relation to elected public figures. This analysis has focused on the legal framework and case-law within the Slovak and Council of Europe contexts.

The first chapter dealt with the right to privacy, acknowledging that there is no legal definition of the term privacy. Nevertheless, the right to privacy including honor and reputation is a right that is expressly protected by national and international judicial authorities. This right is protected in a more flexible manner for elected public figures, as they are expected to endure criticism. However, politicians must accept that violations of their right to privacy may take place

88 *Uj v. Hungary*, 19 July 2011, No. 223954/10, para. 20.

89 *Oberschlick v. Austria* (No. 2), 1 July 1997, No. 20834/92, para. 33.

90 *Dalban v Romania*, 28 September 1999, No. 28114/95, para. 49.

91 Decision of the Regional Court Bratislava, file No. 5Co/95/2022 – 749, 21 July 2022, para. 6.

more easily online. Online activities usually have a bigger impact in relation to the amount of people affected by them and the speed at which the news, even if it is false, may reach people and influence them since they usually consume information without fact-checking it.

The second chapter examined the freedom of expression. Neither the right to privacy nor freedom of expression are absolute rights. Thus, their exercise could be limited, especially in cases in which they conflict. Relevant restrictions are legally possible if there are requirements of legality, legitimacy, and proportionality fulfilled. Moreover, regarding sanctions, financial measures are preferred since imprisonment for exercise of the freedom of expression might be a signal of violation of principles of a democratic society and its pluralism. Another issue in relation to the online activities might be deplatforming. Overall, whether offline or online, the freedom of expression must be protected in a comparable way.

Although the aim of the freedom of expression is the same worldwide, the status of the freedom of expression is usually reflected in different ways within the legal framework of the United States of America, where it is constitutionally protected almost to an absolute level. Nevertheless, as has been experienced in the case of Donald Trump's deplatforming, this is not always the case. Even the USA has witnessed that there are limits to the freedom of expression. Although it has been suggested that this deplatforming is not a violation of the constitutional freedom of expression because this freedom is protected from restraint by government not by private companies,⁹² from the European legal point of view which has developed *Drittwirkung* theory,⁹³ the government is responsible for human rights protection within its jurisdiction, not only for action taken by State bodies.⁹⁴ Of course, this is within the limits of the reasonable expectations of positive obligations of a State.⁹⁵ Finally, in relation to online activities, despite its peculiarities, human rights protection is an obligation of a member State of the European Convention on Human Rights and Fundamental Freedoms even though it was adopted in the pre-Internet era.

Last, the presented case between the Slovak president and the MP in opposition might be a better example of searched proportionality since he was requested by the court that issued an interim measure to remove only the FB statuses in which he interfered with the right of privacy of the political opponent in an excessive manner. In contrast, deplatforming might be considered a tool used to completely take down a politician, thus ignoring the principle of proportionality. Although the Internet is considered a modern form of a public square and access to social media is protected by the First Amendment of the US Constitution,⁹⁶ various

92 See Rowen-Delson, 2021.

93 Kmec et al., 2012, p. 997.

94 See Art. 1 of the European Convention on Human Rights and Fundamental Freedoms.

95 Harris, O'Boyle and Warbrick, 2009, p. 446.

96 US Supreme Court, *Packingham v. North Carolina*, 19 June 2017.

interpretations oppose deplatforming as a violation of the First Amendment. Of course, private social media have their own rules and if these are not respected, users may be reported. Nevertheless, set limits is different from complete deplatforming, which finally occurred in the case of the Slovak opponent politician. It was not a judicial authority, though, that deleted the official and later also the personal FB account of the elected public figure, but the private company itself.⁹⁷ There is still ongoing discussion about Internet service providers' liability for information published on their servers since there are doubts concerning the effects of removing information before a judicial decision confirming defamation has been made.⁹⁸

Although the Slovak courts have not yet adopted a decision in merits,⁹⁹ but only an interim measure, it is considered that they have properly handled the conflict between the right to privacy and freedom of expression. Although the objected statuses have reached the intensity and scope of the abuse of rights institute because of their inciting nature, the decision treated them from the perspective of the limitation clause and focused on distinguishing between information and value judgments and on the principle of proportionality. It systematically reasoned its decision and not only examined not only the basis and aim of the concerned statuses but also against whom and who had published them, considering that both parties to the conflict were elected public figures. Moreover, the impact of the online activities of the MP was also examined since he was one of the most Internet-active politicians in Slovakia. It is therefore considered that the Slovak judicial authorities have examined and used all of the available means to find a balance between the right to privacy and freedom of expression in this very challenging case and that the European Court on Human Rights would not have found a violation of Article 10 of the Convention by the Slovak authorities if the case had reached Strasbourg.

97 See Hodás, 2022.

98 See Rowland, 2005, pp. 55–70.

99 Apart from the aforementioned decisions, the Constitutional Court of the Slovak Republic also adopted a decision related to the lawsuit between the Slovak president and the opposition member of Parliament who finally submitted a constitutional complaint asking the Constitutional Court to declare interference with his freedom of expression. Nevertheless, the Constitutional Court adopted a decision rejecting the submission because all the available remedies had not yet been exhausted. See decision IV. ÚS 534/2022-33 from 25 October 2022, paras. 33 et seq.

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