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ON

"THE ANONYMITY REQUIREMENT IN PUBLISHING COURT DECISIONS"

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REPORT

"THE ANONYMITY REQUIREMENT IN PUBLISHING COURT DECISIONS"

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What exactly is the issue we are talking about at this meeting? We can say that it is the issue of how judgments handle personal information, when the judgments are open to worldwide publicity. In this short introductory presentation, I would like to show what kind of interests are at stake, and how the courts in Europe balance between these interests.

Public interest of open justice

The principle of open justice is a cornerstone of democratic societies. It ensures public scrutiny of the functioning of the judiciary. As a general rule, proceedings are open to the public; therefore the identity of participants in trials is a matter of public record. However, judgments that are publicly pronounced in a small courtroom present a very different situation from when judgments are made accessible to the public on court websites. Trial publicity does not entail necessarily to make court decisions without anonymisation available for everyone on the internet. Worldwide publicity of court decisions over the internet raises new privacy concerns that must be addressed by the courts. For example some data which are otherwise confidential (say, on family life) might be useful to refer to during the trial. It is also important that court hearings can disclose personal data of people with only incidental involvement in cases. However, in the case of further use of this information, the privacy right often overrides the right of access to information.

Privacy concerns

The main argument in favour of the anonymity requirement is privacy, which includes everyone's right to control of her personal data. This may be required to protect the confidentiality of some personal data, since publication of information, even on real facts (unnecessary details about, say, someone's identity or a family's personal life) may cause adverse consequences to interested parties, for their reputation. But is there a right not to be identified in court judgments? In other words, is there a right to withhold the use of one's name, for instance?

Where threats to life or safety are involved, the right of access to information obviously has to yield: no one has the right to publish information at the known potential cost of an individual being killed, maimed, or injured. However, it happens more often that there are no such potential threats. The participants in legal proceedings usually fear that publication of their name would cause serious damage to their reputation. But can a potential threat to someone's reputation be a sufficient reason for anonymity?

At this point let me refer to the Karakó judgment of the European Court of Human Rights.[1] According to this, the right to privacy was designed to protect personal integrity and self-esteem, and some attacks on a person's reputation could be of such a seriously offensive nature as to have an inevitable direct effect on the victim's personal integrity. However, the right to privacy does not extend to harm to reputation that primarily affects one's social standing ('the external evaluation of the individual').
I should mention though that the Karakó case concerned politicians. How different is the situation where a private person is concerned, and not a public figure?

[1] Karakó v. Hungary, Appl. 39311/05, Judgment of 28 April 2009. The case involved a flyer distributed during an election campaign in which the applicant, a politician standing in the elections, was accused of having exercised his parliamentary functions to the detriment of his country of origin. The ECtHR took the view that, in the given case, the applicant had not shown that the publication in question had constituted such a serious interference with his private life as to undermine his personal integrity.

Public figures v. private persons

Individuals can sometimes act as public figures, and sometimes they are just private persons. In the former case, the citizens' right to have access to information of public interest usually take precedence over the protection of the personal records of persons in key public offices. The term "public interest" presumes that the information (sometimes even very private ones, on salaries, private relationships, illnesses, etc.) could be key factors in evaluating their suitability for public offices.

When individuals are just private persons, then they have a strong interest in protecting their own personal information from being made public without good reason. It should also matter how private or intimate the personal information is. Special care must be taken to ensure the protection of highly confidential information (such as medical records, or data on sexual habits) related to the physical and moral integrity of the person.

But when we are talking about publicity of judgments, then usually it's not the highly confidential data, but the average data that are at stake, such as personal identification information (such as name, sex, address, date of birth) which are supposed to be necessarily disclosed in a person's social life to a certain scope of other persons.[2]

Therefore the question is always whether a fair balance can be struck between the public interest in having access to court judgments, and the interest of the individual in protecting privacy.

Publicity and anonymity in Europe

Courts across Europe have developed a variety of different solutions to protect the privacy of those involved in litigation. In many systems, steps were taken to anonymise judgments of matrimonial disputes and disputes relating to children. Apart from that, however, what is striking is the variety of approaches.

German and Austrian courts do not release names of people involved. The courts and the official reports refer to the parties by the initials of their surnames.[3] Names of political parties, constitutional organs, and lawyers are not deleted. Personal data that are indispensable for understanding a decision are not anonymised (e.g. in a copyright case). The anonymisation is carried out autonomously by the Court. The practice in Austria is broadly similar; the decisions refer to parties by initials, and only anonymised versions of the Constitutional Court decisions are published on the website. In *France,* the *Conseil Constitutionnel* also gives the initials of the parties' surnames in the headings and the text of the judgment.

The *Hungarian* legal system copies the German solution in the sense that the Constitutional Court does not disclose the names of the petitioners. However, the Court does not use initials, but names the complainants as "petitioners" in the published decisions. The judgments made by the Supreme Court and the Courts of Appeal, on the merit, are routinely published on the

[2] Juki-net case Supreme Court of Japan (2008) 403, 2007. Although decisions of lower courts held that the Juki-net resident registration network infringed the right to privacy in the absence of the consent of individuals to be included in it, the Supreme Court held otherwise.

[3] According to §35a of the Rules of Procedure of the Federal Constitutional Court (Geschäftsordnung des Bundesverfassungsgerichts), decisions of the Federal Constitutional Court are to be anonymised (the names are abbreviated to the first initial) before they are passed on to authorities, courts or private third parties.

internet. [4] The general rule is that personal details should be removed from judgments so that the identities of the parties are not revealed.[5]

In many countries, such a general anonymisation policy exists, which means that the policy apply in every case, not just in certain categories of cases (e.g. those involving children, sexual assault, HIV status, etc.) This is the situation for example in the *Czech Republic*, the *Slovak Republic,* and *Poland*.

There are courts where the anonymisation policy applies only in certain competences. For example, in *Croatia,* the names of the parties should be abbreviated only in the constitutional complaint proceedings (that is, in concrete cases). The applicant filing the complaint can request that the decision be published with her full name.[6] In abstract control cases, the names are revealed.

In the *United Kingdom,* the practice is much more pro publicity. The main rule is that judicial proceedings are held in public, and the parties are named in judgments. Their names would also be given in the law reports. In some situations, participants in legal proceedings, parties, or witnesses can ask for anonymity in order to help secure their privacy rights. Recently however, anonymisation became a habit; therefore, it is not a coincidence that the UK Supreme Court confronted its very first judgment concerning the issue of anonymisation. Let me cite the opening sentence of this judgment: "Your first term docket reads like alphabet soup." With these provocative words, counsel for a number of newspapers highlighted the situation, and the Supreme Court had to balance the applicant's privacy interest against a powerful general public interest in identification.[7]

The practices of the European courts are similar to the UK solution. In the case of the Strasbourg court, as a general rule, information about applicants or third parties are accessible to the public. Moreover, such information may appear in the Court's database on the Internet. If someone does not wish her identity to be disclosed to the public, she must inform the Court, giving reasons as to why. The President determines whether the request is justified. In exceptional and duly justified cases, the Court authorises anonymity.[8] The practice of the ECJ is broadly similar.

This seems to be a fair compromise that gives due weight to personal privacy, and to the interest of open justice. It allows the courts to publish decisions with the names of the parties to the case, unless the parties request for their names to be abbreviated.

My impression is that strict anonymisation policy makes identifying the facts of the case a real challenge. Too much anonymisation affects the clarity of the court's reasoning, and it does not serve to achieve the purpose of public scrutiny of the functioning of the judiciary. What's more, a general and strict rule on anonymity on domestic level is surely undermined when a case is

[4] Part 4 of the Act XC of 2005 on the Freedom of Information by Electronic Means regulates the publicity of ordinary court decisions.

[5] In certain categories of cases special rules apply. In matrimonial disputes and disputes relating to children the names shall not be disclosed when either party requests waiver of disclosure. And in sexual assault cases the names may be disclosed only if the injured party gives her consent to the disclosure. In these cases the individuals involved in the decision are indicated in accordance with their role played in the procedure.

[6] Article 56 of the Rules of Procedure of the Constitutional Court of the Republic of Croatia.

[7] Application by Guardian News and Media Ltd. & others, in HM Treasury versus Ahmed & others [2010] UKSC 1 (27 January 2010). The case involved A, K, M who were brothers subject to orders under terrorism legislation. Various freezing orders were in place and all of the individuals had been granted anonymity. M argued that publication of his or his brothers' name could cause serious damage to his reputation, and would affect his family life. The media applicants applied for the orders to be lifted. The judgment is available at: http://www.supremecourt.gov.uk/docs/uksc_2009_0015_judgment.pdf

[8] http://www.echr.coe.int/NR/rdonlyres/850CEB0E-3DC8-4E92-9F5D-7E6910C81A47/0/ENG_Po_pack.pdf

presented before the European Court of Justice or the European Court of Human Rights, where the names of the parties and the facts are revealed.

There is also force in the argument that anonymisation could have potentially stifling effects. Certainly, the public would be less interested in the disembodied reports of the court proceedings; therefore, journalists and editors would tend to give such reports a lower priority. In that way informed debate about court proceedings would suffer.

Let me conclude by saying that the various courts (already mentioned in this presentation) have tried to strike a balance between the competing interests of privacy and open justice in one form or another. For me that policy seems to be fair that aims to limit anonymisation to a minimum, uses initials when it is absolutely necessary to secure the individuals, but that does not go further.