Kadi-Ell Tähiste

**Individual's constitutional rights versus public interest. Right to be forgotten or right to remember?**

Hello and thank you for the opportunity to speak for you today. My name is Kadi-Ell Tähiste and in the next approximately 20 to 25 minutes we are going to take a closer look on a question that seems to be more and more pressing these days - how to protect an individual's constitutional rights while maintaining the normal functioning of rights pertaining to the public interest.

In the first part of the speech I'm going to give a general overview of the issue at hand and what I mean by an individual's constitutional rights and rights pertaining to public interest. I am then going to shortly introduce some examples from the Estonian practice. In the second part of my presentation I am going to talk about Personal Data Protection and the issue of consent. And finally, we're going to take a look at how the Internet has influenced the questions regarding the right to privacy. I am going to base my speech on the example of the Estonian constitution and legal system but the outline of the issues at hand is generally applicable to most democratic legal systems worldwide.

The main question that I am going to address today has very much to do with the right to privacy and how this right often seems to be at loggerheads with rights such as freedom to dispense information to general public or the right to create artworks. Conflicts between these rights may arise especially when information about a person is published in a media outlet or an artist has based his or her artwork on another person's life, for instance using that person as a prototype. It is important to recognize that freedom of speech and freedom of arts are in this context to be seen not solely as individual rights of the person exercising them. Freedom of speech and freedom of artistic expression are to be viewed as a characteristic of a free democratic society and are as such generally regarded as collective rights or rights pertaining to and protecting public interests. So the question really boils down to measuring individuals' rights against collective interests.

Each and every one of us has their individual personality rights that are protected by the constitution. Examples of these include but are not limited to right to privacy, right to the inviolability of the family life, right to the protection of their good name and so on. As individuals we probably all agree that we would like to be in charge of whatever our rights protect as much as possible. That includes controlling the information regarding us and relating using it to our clear and informed consent. At the same time, as members of society, we also value free press and quick, unhindered dispense of information. We also enjoy great artwork, books, films and theatre and are constantly looking for relatable stories based on human experience. So the question is would the press still function and the stories depicted in artwork be as powerful if every journalist or author should ask permission before including anyone in their story? Probably not. So what can be done in order to best reconcile the rights of an individual and the interests of the greater public?

Let me tell you in advance, a spoiler alert if you may, that there is no clear answer to this question. Conflicts between "opposing" constitutional rights are inevitable and a normal part of a functioning democratic legal ecosystem. So it is

not a question of how to resolve this issue once and for all, it is much more about finding ways to best balance conflicting rights. The key to resolving these issues is in the principle of proportionality. According to that principle when resolving a conflict one needs to find a measure that would effectively guarantee the protection of an individual's rights to the maximum extent while at the same time refraining from excessively limiting the rights of the opposing party. Well, here comes another spoiler alert – it is often easier said than done.

One thing that I feel we should get out of the way for the sake of my following arguments is the issue of censorship. When I speak of the need to sometimes limit the freedom of speech or freedom of arts then I am speaking of a constitutional and legal limiting of these rights. It is true that censorship is not constitutionally allowed but it is important to recognize that censorship in the constitutional sense should be understood as unlawful limiting of all forms of freedom of expression. Limiting the aforementioned freedoms is lawful when the grounds for it come from the need to protect the rights of others or the general public.

Under the Estonian law, the conflicts between personality rights and the freedom of speech and arts are usually resolved in the civil court. Though the issue of constitutional rights and limitations thereof usually surfaces when it comes to the so called vertical legal relations between state and a person, the basic constitutional rights also have an effect on the legal relations of two individuals, be it private persons or companies. This understanding is called the concept of horizontal or third party effect. This means that when deciding civil cases the court needs to take into consideration the constitutional nature of conflicting values and the general constitutional obligation to weigh such values in collision cases. So the principle of proportionality needs to be taken into consideration here as well.

In our civil law there are norms in place, which limit the freedom of speech and artistic expression in cases of excessive infringement or clear violations of personality rights of others. This means that a person whose rights have been damaged can turn to civil court and demand not only that he or she should be compensated by the plaintiff but can also demand that the damaging action be stopped. For example, if a person's right to privacy has been seriously infringed by publishing personal information about her in a book, it is possible to stop any kind of distribution of that book by court order.

An important distinction between an infringement and a violation needs to be made at this point: infringement of another person's right might be allowed to some extent while a violation of a clear constitutional prohibition is always unlawful. Let me bring an example – writing that "Mary Johnson has two children: Charlie and Kate" – may strictly speaking already constitute an infringement of Mary's right to privacy. The information published, however, is quite neutral and probably does not infringe her rights in an excessive way. Writing, however that "Mary Johnson is the worst mother in history of mankind" probably already constitutes a violation of the clear constitutional rule that "No one's honor or good name may be defamed."

This seemingly simple rule and assessing the extent of an infringement hides a multilayered and complicated system. In order to find a proportional and just answer to the question of whether certain information is lawfully made public or not, be it in a newspaper, in a blog or an artwork such as a book, we

need to consider a myriad of aspects, starting from assessing the semantics and general tone of the publication and ending with asking whether there was public interest in the published information. We then need to measure it against the opposing freedom, for example freedom of artistic expression and ask which one of the rights should prevail? It is also important to notice that even if we decide that something needs to be done to protect a person's privacy, we also need to keep in mind the need not to limit the freedom of arts too excessively. In case of a book, for instance, ruling that a book in it's entirety should not be distributed is a very harsh measure to take from the author's perspective because the right to distribute and publish an artwork is an important part of exercising the author's freedom of arts to the fullest extent. This means that the court needs to consider whether there is a less restrictive measure that could have the desired effect, for example just omitting a page or two.

Another thing we need to consider when assessing an infringement and whether something needs to be done is the question of who is the information regarding. This is important because when it comes to depicting public personalities – that is simply put, famous people – or dispensing information about them, the limits of freedom of expression are wider. Especially when it comes to politicians. Politicians are usually deemed people who need to possess a wider level of acceptance when it comes to publicizing their personal information. They also need to be more accepting of critique whether it's done in a serious article, in the form of satire or in the form of political art. Political art, for example is recognized as a legitimate way to participate in the public political discussion and limiting political discussion is rarely ever warranted. These wider limits do not however mean that everything is allowed even when we talk about public figures and, according to the Supreme Court of Estonia, the right to depict public figures other than politicians should usually be confined to the topics that relate to the activities that brought the person into the public eye, for instance their profession. It is not allowed, be it politician or otherwise, to insult a public figure or depict the public figure's personal life in a manner that would entail disclosing details, which are in his or her intimate sphere.

This brings us to the next very important aspect that needs to be taken into account when accessing whether publishing a certain piece of information is to be deemed a mere lighter infringement or a serious violation of privacy. A person's sphere of personal information can generally be divided into three categories: individual, private and intimate, whereas the latter one needs to be protected on the highest level. This means that information belonging to the intimate sphere has to be, unless a person herself clearly states otherwise, kept private in all cases, no matter who is the person that information is regarding. Such information is for instance details of a person's sexual life, his or her religious beliefs, personal secrets, private letters and medical information and other similar information. Freedom of speech and freedom of arts can never prevail over a person's right to keep certain information to themselves. This rule should, at least in theory, refrain publications and/or artists from simply creating scandalous pieces.

When it comes to people not in the public eye, however, one must be even more careful. To best illustrate the issue, let me bring an example from the Estonian practice. In 2007, a film called "Magnus" was released. The film was based on true events and depicted actual people. The plot revolved around a

young man and his life, which was full of hardships and complicated family relations. The film included several very personal scenes from his life and the story ended, both in the film and in real life, with the main character committing suicide. The filmmaker had used the young man and his family as a prototype without getting consent from everyone involved and was consequently sued by the man's mother. The filmmaker said that she wanted to bring this story to the screen to encourage the society to discuss the issue of suicides and broken families.

The court decided to ban screening and distributing of this movie for 25 years. According to the court ruling, the freedom of artistic expression has some very clear limits when it comes to using prototypes – it cannot justify defamatory depiction and interference with the person's intimate sphere. Moreover, the right to depict events relating to other people needs to generally be justified by a pressing social need or public interest. Author's right to use prototypes is closely related to the author's own artistic stylization of the character – the freedom of artistic expression is wider in the cases where the prototype has been thoroughly artistically processed. Also, when depicting dead people the right of the artistic freedom widens accordingly to the passage of time from that person's death – the longer the time passed, the wider the artistic freedom to depict their life. Because the court found this film was problematic in all of the aspects described above and that the characters were easily recognizable to the people who knew them, it decided to ban this film for 25 years to allow the passage of time. It is debatable in my opinion whether the final solution and especially the timeframe of 25 years is necessarily proportional considering the filmmakers arguments but this court ruling certainly helped set the limits for the artistic freedom in the case of using real life prototypes.

What I'm trying to illustrate with these examples is the fact that finding a proportional and just answer in any particular case is very much dependent on several details of the case at hand. It is therefore impossible and probably even unnecessary to make the rules more detailed and clear than they already are. The underlying constitutional background demands there to be room for deliberation and finding a proportional answer case by case.

It is this exact reason why in my opinion it would be extremely problematic when the lawfulness of publishing any information about a person would be dependent on that persons clear consent. Surely, once you have consent you no longer need to worry about whether your artwork or article is in line with the law but would you be able to write or create as freely as before? I would argue that if there would be a rule in place that would demand that journalists and artists should always get the consent of each and every person involved it would without a doubt tip the scales heavily towards the person's right to privacy and would most likely have diminishing effect on the freedom of journalistic and artistic expression. It would make enforcing the principle of proportionality extremely difficult as judges would be bound by legislation which "by default" preferences the freedom to privacy.

That brings us to the topic of the day – Personal Data Protection and the beloved GDPR. I must say that I am not an expert on Data Protection per se and therefore I will not go into any fine details regarding GDPR itself, I am sure that the experts gathered here today will give a sufficient overview of that regulation and the topics regarding it. What I would like to focus on, however, when it

comes to data protection, are the exceptions from the general rules. GDPR in short tries to give people back control over their personal information and enforce a much clearer policy of consent. Given that this is a European Union Regulation and therefore immediately enforceable in all member states, one might ask does this mean that as of last year we find ourselves in the situation where the scales have effectively tipped towards the right to privacy? Luckily, that is not the case. The regulation gives member states a green light to decide on their respective national levels the limits of the freedom of journalistic and artistic expression in relation . The idea behind such exceptions is ensuring the constitutional balance and making sure that journalists and artists can continue their work.

In Estonia, the exceptions from GDPR are stipulated in the Personal Data Protection Act, which passed in December last year. According to articles 4 and 5, personal data may be processed, particularly disclosed or made public, without the consent of the data subject if the data is processed for journalistic or artistic purposes. In cases of data processing for journalistic purposes, there needs to be public interest and principles of journalism ethics need to be considered. In both cases the law states clearly: "disclosure of personal data must not cause excessive damage to the rights of any data subjects". Now, when we think about the constitutional background we see that the law does not tell us anything new. It merely verbalizes the idea of proportionality and the need to balance the "opposing" rights by stating that the damage, or infringement of rights should not be excessive. So even though the new law caused a small storm in a teacup in the Estonian legal circles when some lawyers worried that the Personal Data Act somehow widens the scope of artistic expression, in my opinion we can continue as is and the scales are still in balance.

The principle of proportionality and the need to balance constitutional rights has been in our legal thinking almost as long as there has been such concept as constitutional rights. These principles allow us to find just and acceptable solutions in very different cases and are therefore an essential foundation of our legal thinking. However, in the recent years a certain phenomenon has penetrated our everyday lives and is creating more and more difficult questions and dilemmas in the legal sphere – the Internet. When it comes to personal data the Internet has created a perfect system of never letting any information be forgotten. The somewhat temporal nature of a newspaper article, for example, has now been replaced by it lingering around for seemingly an eternity and popping up whenever certain names or keywords have been typed into a search engine.

So it is no wonder that the right to be forgotten seems to be more and more established as a separate new human right. The right to be forgotten, in short, entails that a person can request a removal of some or all private information and personal data from the Internet. The cases when such request is warranted vary from instances when the data is unlawfully processed in the first place – a reasoning that is very much in line with the current constitutional background– to some which are potentially a little more problematic. For instance, data can be removed when it is "no longer needed for the original processing purpose".

When we think about journalistic and artistic expression then surely, we can argue that perhaps an article about a drunk driver from 10 years ago has lost

the “original processing purpose” if the person has served his or her punishment and the wrongdoing has legally been spent. But not all cases are as straightforward. For instance, in case of an artwork depicting real life stories, could we at some point argue that the stories could effectively be “spent” and therefore should no longer be public? Sure, one might argue that the original processing purpose never ceases to exist when we talk about art but it might nevertheless prove problematic for instance when we talk about artwork that is in the gray area between a journalistic expression and art, like documentaries or artwork based on documental material. And sure, another counterpoint might be that the right to be forgotten is currently linked solely with the Internet, but a lot of artistic expression has also moved to the Internet and is being distributed there regardless of originally being created in a different context. Thirdly, of course, one needs to keep in mind that the right to be forgotten and the obligation to remove certain information right now only extends to those data processers who are not exempt from the scope of the relevant legislation. But as nothing is carved in stone legislation and the list of exemptions are always subject to change. So we need to constantly keep in that every new right will inevitably affect the balance between the different constitutional rights.

As with any new human right or thought concept, a sufficient amount of arguing has to happen before we are able to see, describe and test the limits of the said right. The same goes for the right to be forgotten. The Internet will probably alter our legal framework to the extent yet to be seen today but as long as we stick to the principles that we have in place now and refrain from disturbing the balance between opposing rights, we should be still able to efficiently solve difficult cases. That is, of course, if we can determine the proper jurisdiction to apply to the case because that is also another great issue that arises with the Internet. But that’s a topic for a different time, I’m afraid.

For now I would like to thank you all for listening to me and hopefully sticking with me to the end. As I pointed out in the beginning of my speech, I’m afraid I am not able to give you a clear answer as to whose rights should prevail. What I can do is remind you all to keep in mind the need to ensure proportionality and always consider the rights of every party involved. Because keeping rights in balance is in all of our interest. Thank you!