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PROTECTING THE FREEDOM OF CORPORATE COMMERCIAL EXPRESSION AND ADVERTISING

"Corporations have neither bodies to be punished,
nor souls to be condemned; they therefore do as they like"
Edward Thurlow, 1st Baron Thurlow

Introduction

The topic of Business and Human Rights is relevant in the context of providing maximum guarantees to protect a person from abuse by corporations of their dominant position. Now exist the first universally recognized global international standard for human rights and business is The Business Guidelines for Human Rights (Guidelines) which include 31 principles created by the United Nations that govern the corporate responsibility to respect human rights and access to legal remedies for victims of business abuse.

These Guidelines, which apply to all states and to all business enterprises, both transnational and other, regardless of their size, sector, location, ownership and structure, are based on the recognition of: (a) the state's obligation to respect, protect and exercise human rights and fundamental freedoms from violations by third parties, including business entities (Section I of the Guidelines); (b) the obligation of businesses to comply with the law and respect human rights (Section II of the Guidelines).

According to these Guidelines, the state, in order to fulfill its obligation to ensure the protection of human rights from violations by business, must: 1) ensure compliance with laws that require companies to respect human rights and periodically assess the adequacy of such laws and eliminate any gaps; 2) ensure that the rules of corporate law, did not restrain, but, on the contrary, promoted respect for human rights by business; 3) provide business with effective guidance on ensuring respect for human rights in business; 4) require undertakings to provide information on how in this way they solve the problem of their impact on human rights.

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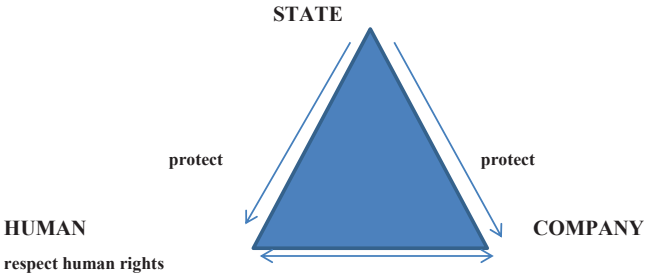
In turn, companies should avoid realizing or promoting the negative impact on human rights caused by the activities of enterprises, and eliminate the consequences of such influence and seek to prevent or mitigate adverse effects on human rights that are directly related to the activities of the enterprise, its products or services, or due to the business relationship of the enterprise, even if they did not contribute to the occurrence of such consequences.

Ultimately, the individual must be provided with effective and appropriate judicial and extrajudicial mechanisms for the legal protection of human rights by the state, and businesses must establish procedures to ensure due diligence on human rights and ensure adequate redress. But what if corporations also need to protect their human rights? It sounds unusual, but it seems to have become a serious topic for philosophical and legal research.

This crystallizes a very interesting architecture for building human rights protection: the state-man-business. On the one hand, the state has a positive obligation to protect human rights from violations by third parties, including business, so how can the state balance this obligation with the protection of the "human rights" of business. On the other hand, business has a duty to respect human rights, but at the same time it can become vulnerable to both human activity and the state.



In our opinion, the concept of human rights protection of a company is perceived more clearly if we think about the fact that the activity of any company in any business is based on human activity. In essence, business is a form of human activity. Since one person can harm another person, so a person can harm a certain form of human activity – the company, encroaching on, for example, business reputation in order to destroy the company, so companies also have the right to protect human rights.

Or, for example, restricting the company's freedom of speech (freedom of speech to certain people acting in the form of a company).

The topic of Business and Human Rights is multifaceted and has many aspects. It has been covered in scientific articles and monographs such as Angelica Bonfanti,[1] Marius Emerald,[2] Andreas Kulick, Adam Winkler and others.

[1] Angelica Bonfanti, Business and Human Rights in Europe International Law Challenges (London: Routledge, 2020).

[2] Marius Emberland, The Human Rights of Companies: Exploring the Structure of ECHR Protection (Oxford: Oxford University Press, 2006).

Within the framework of this article, the human right of corporation to freedom of expression will be considered in the context of the practice of the ECHR.

The European Convention on Human Rights in its first article says that, "the High Contracting Parties shall secure to 'everyone' within their jurisdiction the rights and freedoms defined in this Convention."

This means, that the Convention extends its protection to the right of everyone, any natural person or legal entity. So, do corporations have human rights? Yes, they have.

Also, Article 1 of the Protocol 1 of the Convention speaks of a right to property for "every natural or legal person." In addition, various articles of the European Convention on Human Rights have been interpreted by the Court in a way that accommodates corporations and other legal persons as rights-holders.

Through the Court's jurisprudence, the Convention is a living instrument, interpreted in the light of present-day conditions and understandings.

Thus, the norms of the Convention are not some kind of "dry, strict theoretical provisions," on the contrary, as the European Court of Human Rights has repeatedly stated in its decisions, the norms of the Convention are a "living instrument" that should be interpreted in the light of modern conditions as required by the modern world.

As Andreas Kulick noted, we should take seriously the corporate form and the social reality of corporations. Through the corporate form, by creating an entity separate from human beings, corporations enable human activity that otherwise would not be possible and that in itself has a considerable impact on economic, social and political life. However, what should distinguish protecting human rights of corporations from protecting human rights of human beings is the underlying background justification why a law-maker bestows them with such status. While in the case of human beings such justification should be ontological – they are protected because they exist – in the case of corporations such justification can only be teleological: The law creates such social realities because they serve certain socio-economic functions. Consequently, the approach to determining the scope of corporate human rights must be functional.[3]

The fundamental value system of the European Convention on Human Rights is Democracy and the Rule of Law. The principles of effective and dynamic interpretation are the two main methods and interpretations by the Court of the Convention, aimed at bringing fundamental values to the fore and eliminating textualism and intentionalism.[4] The principle of effective interpretation, states that the Convention must be interpreted in such a way that its rights are "practical and effective" and not "theoretical or illusory."

[3] Andreas Kulick, "Corporate Human Rights?" *European Journal of International Law* 32 (2) (2021): 537–70, https://doi.org/10.1093/ejil/chab040.

[4] The theory of intentionalism holds that the laws of statutes are determined by the enacting legislators' subjective law-making intentions (author's note. – *M. L.*).

The principle of dynamic interpretation sees the Convention not as a static document, but as a "living instrument" that "should be interpreted in the light of modern conditions."[5]

Of course, not all articles of the Convention that proclaim the protection of human rights can be applied to the protection of corporate rights. For example, corporations don't have coequal rights as living, so they cannot claim the protection of rights under Article 2 of the Convention (Right to life), or Article 3 (Prohibition of torture). But, they can claim protection for such rights as free speech (Article 10 "Freedom of expression"), privacy rights (Article 8 "Right to respect for private and family life"), due process, equal protection, property rights – rights that corporations use to challenge laws regulating the economy and the marketplace.

The Court's acceptance of corporations as beneficiaries of human rights has not escaped criticism. The criticism ranges from conceptual incompatibilities (human rights can only be extended to human beings and not to corporations), to quid pro quo[6] assertions (if companies refuse to accept human rights obligations, they should not be able to benefit from their protection).[7]

This implies that in accordance with the existing legal science approach, according to which the responsibility for protecting human rights lies with the "vertical" obligations of the state, then corporations should also be responsible for protecting human rights. In other words, if corporations want to benefit from human rights protection, then they must respect human rights themselves.

Corporations can seriously interfere with the exercise by individuals of their rights. It is clear that the domestic legislation of individual states is not sufficient or effective to regulate corporate behavior concerning human rights. There are many initiatives now exploring ways to hold corporations accountable for interfering with human rights, such as the UN Guidelines on Business and Human Rights.[8] A central question in international human rights law is whether the issue of corporation's interference in human rights should be addressed through the international legal framework, or whether non-legal approaches can better protect people, whether we need to go beyond the existing legal framework to achieve a de facto "horizontal effect"?[9]

[5] Winfried H. van den Muijsenbergh and Sam Rezai, "Corporations and the European Convention on Human Rights," *McGeorge Global Bus. & Dev. L. J.* 25(1) (2012): 43–68.

[6] *Quid pro quo* – "something for something" is a phraseological unit used in English in the meaning of "one good turn deserves another" (author's note).

[7] Muijsenbergh and Rezai, "Corporations and the European Convention."

[8] UN, *The Business Guidelines for Human Rights* (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[9] Lane Lottie, "The Horizontal Effect of International Human Rights Law in Practice. A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies," European Journal of Comparative Law and Governance 5 (2018): 6, https://brill.com/view/journals/ejcl/5/1/article-p5_5.xml?language=en&body=citedBy-39140.

It should be noted that the history of the formation of corporate rights is not some kind of ultramodern approach.[10] It is known, for example, that in the USA there is such a concept as "corporate personhood" that means the legal notion that a corporation, separately from its associated human beings (like owners, managers, or employees), has at least some of the legal rights and responsibilities enjoyed by individual. In 1886 the first time that the Supreme Court holds the equal protection clause granted constitutional protections to corporations as well as to individuals in the case "Santa Clara County v. Southern Pacific Railroad Co."[11] The case arose when several railroads refused to follow a California state law that gave less favorable tax treatment to some assets owned by corporations as compared to assets owned by individuals.

This article is about protection of corporate rights to freedom of expression and advertising.

Protection of Corporate Rights to Freedom of Expression and Advertising

Article 10 of the European Convention on Human Rights states, that everyone has the right to freedom of expression.[12] This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[13]

The European Court first considered the right to freedom of expression in the case of De Becker v. Belgium, decided in 1962. In the 50 years since then, the Court has decided in the region of 1000 cases under Article 10, often along with other articles of the Convention. This impressive body of jurisprudence reflects a dynamic and evolving appreciation of the scope and nature of freedom of expression by the Court.

It is a fair assessment of the work of the European Court to say that the scope of protection afforded to freedom of expression has, in general, expanded during those

[10] Adam Winkler, "The Long History of Corporate Rights," Boston University Law Review Online 98:64 (2018), http://www.bu.edu/bulawreview/files/2018/11/WINKLER-4.pdf.
[11] *Reports: Santa Clara Co. v. South Pac. Railroad, 118 U. S. 394 (1886),* https://tile.loc.gov/storage-services/service/ll/usrep/usrep118/usrep118394/usrep118394.pdf.
[12] European Convention on Human Rights, https://www.echr.coe.int/Documents/Convention_ENG.pdf.
[13] See Monica Macovei, A Guide to the Implementation of Article 10 of the European Convention on Human Rights, 2nd ed. (Strasbourg: Council of Europe, 2004), https://rm.coe.int/168007ff48.

50 years, both due to its treatment of new freedom of expression issues and due to a more robust understanding of the nature of this right.[14]

The fundamental principles concerning freedom of expression are well established in the Court's case-law – case "Stoll v. Switzerland" and "Steel and Morris v. the United Kingdom:"

1. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society." As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

2. The adjective "necessary," within the meaning of Article 10 § 2, implies the existence of a "pressing social need." The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

3. The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient." In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts.

The ECHR formulated some principles for the protection corporate commercial expression and advertising in its practice. Consider some cases.

In case "Pablo Casado Coca v. Spain" (1994)[15] Mr. Pablo Casado Coca, a Spanish national, lives and practices as a lawyer in Barcelona. After setting up his practice in 1979, he regularly placed notices advertising it in the "miscellaneous advertisements" pages of several Barcelona newspapers. Notices giving details of the applicant's legal practice were published in the newsletter of the "Valldoreitx" Residents' and Property Owners'

[14] Toby Mendel, *A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights* (Strasbourg: Council of Europe, 2012), 4.
[15] *Casado Coca v. Spain* App no 15450/89 (ECHR, 24 February 1994).

Association. They took up approximately one-third of a page and gave the applicant's name, with the title "lawyer," and his office address and telephone number. The Barcelona Bar Council brought disciplinary proceedings against him four times on this account.

Mr. Casado Coca complained of the disciplinary sanction imposed on him by the Barcelona Bar Council for having published a notice about his practice in several issues of a local newsletter. He relied on Article 10 (art. 10) of the Convention.

The Government disputed the applicability of Article 10 (art. 10). They contended that the applicant's notices did not in any way constitute information of a commercial nature but were simply advertising. He had paid for them with the sole aim of securing more clients. Advertising as such did not come within the ambit of freedom of expression; an advertisement did not serve the public interest but the private interests of the individuals concerned. Applying the guarantees of Article 10 (art. 10) to advertising would be tantamount to altering the scope of that Article (art. 10).

The court in this case indicated that the first point out that Article 10 (art. 10) guarantees freedom of expression to "everyone." No distinction is made in it according to whether the type of aim pursued is profit-making or not. Article 10 (art. 10) does not apply solely to certain types of information or ideas or forms of expression, in particular those of a political nature; it also encompasses artistic expression, information of a commercial nature and even light music and commercials transmitted by cable. In the instant case the impugned notices merely gave the applicant's name, profession, address and telephone number. They were clearly published with the aim of advertising, but they provided persons requiring legal assistance with information that was of definite use and likely to facilitate their access to justice. Article 10 (art. 10) is therefore applicable.

Further, the ECHR established the main criteria, which the court evaluates when judging the legality of the national authorities of states in restricting freedom of expression and advertising, these are:

– "prescribed by law" (The Court interprets that a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his or her conduct and that he or she must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail);

– "legitimate aim" (The Court may find that an interference does not serve to advance the legitimate aim relied on);

– "necessary in a democratic society" (The Court has developed in its case-law the autonomous concept of whether an interference is "proportionate to the legitimate aim pursued," which is determined having regard to all the circumstances of the case using criteria established in the Court's case-law and with the assistance of various principles and interpretation tools);

Thus, the court carries out "so-called" the three "tests:" the lawfulness of the interference, its legitimacy, and its necessity in a democratic society. The Court then analyses whether the

interference was "prescribed by law" and whether it "pursued one of the legitimate aims" within the meaning of Article 10 § 2, and lastly whether the interference was "necessary in a democratic society:" in the majority of cases, this is the question which determines the Court's conclusion in a given case.[16]

For example, the Court also applied such a three-step test in the case "VgT Verein Gegen Tierfabriken v. Switzerland"[17] where as a reaction to various television commercials of the meat industry, the applicant association prepared a television commercial lasting fifty-five seconds and consisting of two scenes. The first scene of the film showed a sow building a shelter for her piglets in the forest. Soft orchestrated music was played in the background, and the accompanying voice referred, inter alia, to the sense of family which sows had. The second scene showed a noisy hall with pigs in small pens, gnawing nervously at the iron bars. The accompanying voice stated, inter alia, that the rearing of pigs in such circumstances resembled concentration camps, and that the animals were pumped full of medicaments. The film concluded with the exhortation: "Eat less meat, for the sake of your health, the animals and the environment!"

The applicant association, wishing this film to be broadcast in the programs of the Swiss Radio and Television Company sent a videocassette to the then Commercial Television Company responsible for television advertising which informed the applicant association that it would not broadcast the commercial in view of its "clear political character."

The ECHR found a violation of Article 10 of the Convention.

For example, case of "Sekmadienis v. Lithuania."[18] The Lithuanian clothing company Sekmadienis ran an advertising campaign introducing a clothing line by designer R. K. The campaign featured three visual advertisements which were displayed on twenty advertising hoardings in public areas in Vilnius and on R. K.'s website ("the advertisements"). The first of the three advertisements showed a young man with long hair, a headband, a halo around his head and several tattoos wearing a pair of jeans. A caption at the bottom of the image read "Jesus, what trousers!"

The second advertisement showed a young woman wearing a white dress and a headdress with white and red flowers in it. She had a halo around her head and was holding a string of beads. The caption at the bottom of the image read "Dear Mary, what a dress!"

The third advertisement showed the man and the woman together, wearing the same clothes and accessories as in the previous advertisements. The man was reclining and the woman was standing next to him with one hand placed on his head and the other on his shoulder. The caption at the bottom of the image read "Jesus [and] Mary, what are you wearing!"

[16] Guide on Article 10 of the European Convention on Human Rights Freedom of expression (Council of Europe/European Court of Human Rights, 2020), 19, https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf.
[17] Case of VgT Verein Gegen Tierfabriken v. Switzerland App no 24699/94 (28 June 2001).
[18] *Sekmadienis v. Lithuania* App no 69317/14 (30 January 2018).

The State Consumer Rights Protection Authority ("the SCRPA") received four individual complaints by telephone concerning the advertisements. The individuals complained that the advertisements were unethical and offensive to religious people. Then, the SCRPA received a complaint from a law firm in Kaunas concerning the advertisements. The complaint stated that the advertisements degraded religious symbols, offended the feelings of religious people and created "a danger that society might lose the necessary sense of sacredness and basic respect for spirituality." Sekmadienis was fined for this and challenged it all the way to the highest European court, the ECHR.

In its ruling, the ECHR repeated the principle that there was more scope available for restricting freedom of expression in commercial publications, but also held that this scope had its limits. The Court held that the adverts had not patently gone too far and went on to find that the Lithuanian authorities had not provided convincing reasons why the posters were in breach of public morality. The ECHR felt the arguments were too vague and general:

> Court concluded that the domestic authorities failed to strike a fair balance between, on the one hand, the protection of public morals and the rights of religious people, and, on the other hand, the applicant company's right to freedom of expression. The wording of their decisions – such as "in this case the game has gone too far," "the basic respect for spirituality is disappearing," "inappropriate use of religious symbols demeans them and is contrary to universally accepted moral and ethical norms" and "religious people react very sensitively to any use of religious symbols or religious persons in advertising" – demonstrate that the authorities gave absolute primacy to protecting the feelings of religious people, without adequately taking into account the applicant company's right to freedom of expression.[19]

The Sekmadienis v. Lithuania decision makes it clear that there have to be logical and comprehensible reasons for restricting commercial freedom of expression. Generalizations are not enough.

According to the factual circumstances of another case "Mouvement Raëlien Suisse v. Switzerland"[20] – according to constitution non-profit association "Raël," its aim is to make the first contacts and establish good relations with extraterrestrials. According to the information available on the applicant association's website at the time of the adoption of the present judgment, the Raelian Movement's doctrine is based on Raël's alleged contact with the "Elohim," extraterrestrials with "advanced technology," who are said to have created life on earth and a number of world religions, including Christianity, Judaism and Islam. The Raelian Movement's followers believe that scientific and technical progress is of fundamental importance and that cloning and the "transfer of conscience" will enable man to become immortal. In that connection the Raelian Movement has expressed opinions in favour of human cloning.

[19] *Sekmadienis v. Lithuania* App no 69317/14 (30 January 2018).
[20] *Mouvement Raëlien Suisse v. Switzerland* App no 16354/06 (13 July 2012).

"Raël," requested authorization from the police administration for the city of Neuchâtel (the "police administration") to conduct a poster campaign, featured in the upper part the following wording in large yellow characters on a dark blue background: "The Message from Extraterrestrials;" in the lower part of the poster, in characters of the same size but in bolder type, the address of the Raëlian Movement's website, together with a telephone number in France, could be seen; at the very bottom was the phrase "Science at last replaces religion." The middle of the poster was taken up by pictures of extraterrestrials' faces and a pyramid, together with a flying saucer and the Earth. The police administration denied authorization, referring to two previous refusals. It had been indicated in a French parliamentary report on sects, dating from 1995, and in a judgment of the president of the Civil Court for the district of La Sarine (Canton of Fribourg), that the Raëlian Movement engaged in activities that were contrary to public order (*"ordre public"*) and immoral. In a decision of 19 December 2001 the municipal council of the city of Neuchâtel dismissed an appeal from the applicant association, finding that it could not rely on the protection of religious freedom because it was to be regarded as a dangerous sect. The interference with freedom of expression had been based on Article 19 of the Administrative Regulations for the City of Neuchâtel (the "Regulations"); its purpose was to protect the public interest and it was proportionate, since the organization advocated, among other things, human cloning, "geniocracy" and "sensual meditation."

The ECHR in this case ruled that the very purpose of Article 10 of the Convention is to preclude the State from assuming the role of watchman for truth and from prescribing what is orthodox in matters of opinion. The State must strictly adhere to the principle of content-neutrality when it decides how to make a public space available; refraining from banning a campaign on the pretext that authorization could imply approval or tolerance of the opinions in question. Such prohibitions are not compatible with the pluralism inherent in democratic societies, where ideas are freely exchanged in a public space and truth and error emerge from an unrestricted confrontation of ideas. As John Stuart Mill put it, "The peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."

In the instant case, having regard to the State's negative obligation to refrain from interfering with the applicant association's freedom of expression, the mixed nature of the association's speech, the legality of the speech, the association's website and statutory purposes at the material time, the inexistence of any clear and imminent danger resulting from this speech and the contradictory and arbitrary scope of the poster ban, and after examining the decisions given by the competent authorities in the light of the narrow margin of appreciation applicable to the case, the court cannot but conclude, that the

reasons on which the impugned ban was based were not sufficient and that the interference did not correspond to a pressing social need.

Conclusion

In author's opinion, the criteria developed by the court for assessing the protection of the right to freedom of corporate commercial expression and advertising are fair and effective. In view of the fact that the Convention is a living mechanism, interpreted in the light of present-day conditions and understandings, the emergence of new improved approaches in determining the degree and presence of a violation in this area is not excluded.

It is true that in today's marketplace, corporations have the right to defend their rights, including freedom of expression and advertising, to defend themselves, for example, from the unfair competition when a corporation is attacked by unfair accusations or is subjected to unfounded allegations that affect the business reputation of the corporation.

Together with that, corporations must also respect and not violate human rights. Creating a truly effective mechanism for monitoring corporate human rights compliance can balance the scales of "opponents" and "supporters" of recognizing the right of corporations to defending themselves by invoking the European Convention on Human Rights.

Bibliography

Bonfanti, Angelica. *Business and Human Rights in Europe International Law Challenges.* London: Routledge, 2020.

Emberland, Marius. *The Human Rights of Companies: Exploring the Structure of ECHR Protection*. Oxford: Oxford University Press, 2006.

Guide on Article 10 of the European Convention on Human Rights. Freedom of expression. Council of Europe/European Court of Human Rights, 2020. https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf.

Kulick, Andreas. "Corporate Human Rights?" *European Journal of International Law* 32 (2) (2021): 537–70. https://doi.org/10.1093/ejil/chab040.

Lane, Lottie. "The Horizontal Effect of International Human Rights Law in Practice. A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies." *European Journal of Comparative Law and Governance* 5 (2018): 5–88. https://brill.com/view/journals/ejcl/5/1/article-p5_5.xml?language=en&body=citedBy-39140.

Macovei, Monica. *A Guide to the Implementation of Article 10 of the European Convention on Human Rights*. 2nd ed. Strasbourg: Council of Europe, 2004. https://rm.coe.int/168007ff48.

Mendel, Toby. *A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*. Strasbourg: Council of Europe, 2012. https://rm.coe.int/16806f5bb3.

Muijsenbergh, Winfried H. van den, and Rezai Sam. "Corporations and the European Convention on Human Rights." *McGeorge Global Bus. & Dev. L. J.* 25(1) (2012): 43–68.

UN, *The Business Guidelines for Human Rights* (2011). https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

Winkler, Adam. "The Long History of Corporate Rights." *Boston University Law Review Online* 98:64 (2018): 64–69. http://www.bu.edu/bulawreview/files/2018/11/WINKLER-4.pdf.

Марія Лукань. Захист свободи корпоративного комерційного висловлювання та реклами

Анотація. Європейський суд з прав людини (ЄСПЛ, Суд) послідовно у своїй практиці визнає корпорації суб'єктами, що підпадають під сферу захисту Конвенції про захист прав людини і основоположних свобод (Конвенція.)

Сприйняття ЄСПЛ корпорацій "бенефіціарами" прав людини піддається критиці, пов'язаній із концептуальною несумісністю (права людини можуть поширюватися лише на людей), та звинуваченнями у тому, що поки компанії відмовляються приймати зобов'язання щодо дотримання прав людини, вони не повинні мати змогу отримувати вигоду від їхнього захисту.

У науковій літературі існує дискусія, пов'язана з філософським та юридичним обґрунтуванням надання корпораціям прав людини. Є зрозумілим, що права людини – для людини. Тому потребують філософського осмислення і теоретичного обґрунтування питання екстраполяції захисту прав людини на корпорації, оскільки корпорації мають певний вплив на економічне та соціальне життя людей, людина в цьому контексті є слабшою стороною. До яких наслідків це призведе?

У цій статті буде розглянуто підходи ЄСПЛ до захисту корпорацій на свободу вираження і реклами на підставі ст. 10 Конвенції.

Основними принципами захисту свободи корпоративного вираження поглядів та реклами є: 1) корпорація має право не лише на захист свободи вираження поглядів та реклами, що застосовується не лише до "інформації" чи "ідеї," які сприятливо (позитивно) сприймаються суспільством, а й на ті, що розцінюються як образливі чи шокуючі. Такими є вимоги плюралізму, толерантності та широкого мислення, без яких не існує "демократичного суспільства;" 2) захист свободи вираження корпорацій підлягає виняткам, які, однак, повинні тлумачитися суворо, а необхідність будь-яких обмежень повинна бути достатньо переконливою; 3) винятки із захисту свободи вираження поглядів передбачають існування "нагальної соціальної потреби," яка визначає, чи сумісне "обмеження" зі свободою вираження поглядів, яка захищена ст. 10 Конвенції; 4) завданням Європейського суду з прав людини під час здійснення правосуддя є визначення того, чи були обмеження "пропорційні законній меті, яка ставиться," і чи підстави, наведені національними органами влади для їх обґрунтування, є "актуальними та достатніми." Роблячи це, Суд повинен переконатися у тому, що національні органи влади застосовували стандарти, які відповідали принципам, закріпленим у ст. 10 Конвенції, і, крім того, що вони спиралися на прийнятну оцінку відповідних фактів.

На думку авторки, розроблені ЄСПЛ критерії оцінки захисту права на свободу корпоративного комерційного вираження та реклами є справедливими й ефективними. З огляду на той факт, що Конвенція є живим механізмом, який слід інтерпретувати в "світлі" сучасних умов, не слід виключати і появу нових вдосконалених підходів до визначення ступеня та наявності порушення в цій галузі. Це правда, що в умовах сучасного ринку корпорації мають право захищати свої права, включаючи свободу вираження поглядів та реклами, зокрема від недобросовісної конкуренції, коли корпорацію "атакують" несправедливі звинувачення або висуваються необґрунтовані звинувачення, що псують її ділову репутацію. Поряд із цим корпорації також повинні поважати і дотримуватися прав людини. На думку авторки, створення насправді ефективного механізму контролю за дотриманням корпораціями прав людини може збалансувати ваги "опонентів" та

"прихильників" визнання права корпорацій на захист, посилаючись на принципи Конвенції про захист прав людини і основоположних свобод.

Ключові слова: права корпорацій; захист прав корпорацій; право на свободу вираження та реклами; ЄСПЛ; ст. 10 ЄКПЛ.

Мария Лукань. Защита свободы корпоративного коммерческого высказывания и рекламы

Аннотация. Европейский суд по правам человека (ЕСПЧ, Суд) последовательно в своей практике признает корпорации субъектами, которые подпадают под сферу защиты Конвенции о защите прав человека и основных свобод (Конвенція.)

Восприятие Судом корпораций "бенефициарами" прав человека подвергается критике, связанной с концептуальной несовместимостью (права человека могут распространяться только на людей). И обвинениями в том, что пока компании отказываются принимать обязательства по соблюдению прав человека, они не должны иметь возможности получать выгоду от их защиты.

В научной литературе существует дискуссия, связанная с философским и юридическим обоснованием предоставления корпорациям прав человека. Является понятным, что права человека – существуют для человека. Поэтому требуют философского осмысления и теоретического обоснования вопросы экстраполяции защиты прав человека на корпорации, поскольку корпорации имеют определенное влияние на экономическую и социальную жизнь людей, а человек в данном контексте выступает слабой стороной. К каким последствиям это приведет?

В данной статье будут рассмотрены подходы Европейского суда по правам человека к защите прав корпораций на свободу выражения и рекламы на основании ст. 10 Конвенции.

Основными принципами защиты свободы корпоративного выражения и рекламы являются: 1) корпорация имеет право не только на защиту свободы слова и рекламы, применяется не только к "информации" или "идее," которые благоприятно (положительно) воспринимаются обществом, но и на те, которые расцениваются как оскорбительные или шокирующие. Таковы требования плюрализма, толерантности без которых не может существовать "демократическое общество;" 2) защита свободы выражения корпораций подлежит исключениям, которые, однако, должны толковаться строго, а необходимость каких-либо ограничений должна быть достаточно убедительной; 3) исключения из защиты свободы слова предусматривают существование "неотложной социальной потребности," которая определяет, совместное "ограничения" со свободой выражения мнений, которая защищена ст. 10 Конвенции; 4) задачей Суда является определение того, были ли ограничения, "пропорциональны преследуемой законной цели". А основания, приведенные национальными органами власти для их обоснования – "актуальными и достаточными." Делая это, Суд должен убедиться в том, что национальные органы власти применяли стандарты, которые соответствовали принципам, закрепленным в ст. 10 Конвенции, и, кроме того, что они опирались на приемлемую оценку соответствующих фактов.

По мнению автора, разработанные ЕСПЧ критерии оценки защиты права на свободу корпоративного коммерческого выражения и рекламы справедливы и эффективны. Учитывая тот факт, что Конвенция является живым механизмом, который следует интерпретировать в "свете" современных условий, не следует исключать и появление новых усовершенствованных подходов к определению степени и наличия нарушений в этой области. Это правда, что в условиях современного рынка корпорации имеют право защищать свои права, включая свободу слова и рекламы, защищаться, например, от недобросовестной конкуренции, когда корпорацию "атакуют" несправедливые обвинения или выдвигаются необоснованные обвинения, которые портят ее деловую репутацию. Наряду с этим корпорации также должны уважать и соблюдать

права человека. По мнению автора, создание на самом деле эффективного механизма контроля над соблюдением корпорациями прав человека поможет сбалансировать веса "оппонентов" и "сторонников" признание права корпораций на защиту, ссылаясь на принципы Конвенции о защите прав человека и основных свобод.

Ключевые слова: права корпораций; защита прав корпораций; право на свободу выражения и рекламы; ЕСПЧ; ст. 10 ЕКПЧ.

Mariia Lukan. Protecting the Freedom of Corporate Commercial Expression and Advertising

Abstract. The European Court of Human Rights (ECHR) has consistently recognized corporations as entities falling within the scope of protection of the European Convention on Human Rights. The ECHR's perception of corporations as "beneficiaries" of human rights is subject to criticism for conceptual incompatibility (human rights can only apply to people) and accusations that as long as companies refuse to commit to human rights, they should not be able to benefit from their protection).

There is a discussion in the scientific literature about the philosophical and legal rationale for granting corporations human rights. It is clear that human rights are for man. Therefore, they need a philosophical understanding and theoretical substantiation of the issue of extrapolation of human rights protection to corporations; because corporations have a certain impact on the economic and social life of people, people in this context are the weaker sides. What are the consequences?

This article will consider the European Court of Human Rights' approaches to protecting corporations for freedom of expression and advertising under Article 10 of the Convention on Human Rights.

The main principles of protection of freedom of corporate expression and advertising are: 1) the corporation has the right not only to protect freedom of expression and advertising, which applies not only to "information" or "ideas" that are favorably (positively) perceived by society, but also those that are considered offensive or shocking. Such are the demands of pluralism, tolerance and broad-mindedness, without which there is no "democratic society;" 2) the protection of freedom of expression of corporations is subject to exceptions, which, however, must be interpreted strictly, and the need for any restrictions must be sufficiently convincing; 3) exceptions to the protection of freedom of expression presuppose the existence of an "urgent social need" which determines whether a "restriction" is compatible with freedom of expression, which is protected by Article 10 of the ECHR; 4) The task of the European Court of Human Rights in the administration of justice is to determine whether the restrictions were "proportionate to the legitimate aim pursued" and whether the grounds given by the national authorities to justify them were "relevant and sufficient." In doing so, the Court must satisfy itself that the domestic authorities applied standards which complied with the principles enshrined in Article 10 of the Convention and, in addition, relied on an acceptable assessment of the relevant facts.

According to the author, the criteria developed by the ECHR for assessing the protection of the right to freedom of corporate commercial expression and advertising are fair and effective. Given the fact that the European Convention on Human Rights is a living mechanism that should be interpreted in the "light" of modern conditions, the emergence of new improved approaches to determining the extent and existence of violations in this area should not be ruled out. It is true that in today's marketplace, corporations have the right to defend their rights, including freedom of expression and advertising, and to protect themselves, for example, from unfair competition, when a corporation is "attacked" by unfair accusations or baseless accusations that damage its business reputation. In addition, corporations must also respect and respect human rights. According to the author, the creation of a truly effective mechanism for monitoring the observance of human rights by corporations

can balance the weights of "opponents" and "supporters" of recognizing the right of corporations to protection by referring to the principles of the European Convention on Human Rights.

Keywords: rights of corporations; protection of the rights of corporations; the right to freedom of expression and advertising; ECHR; Art. 10 ECHR.

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