Éditions Plon v. France

Closed

Mixed Outcome

Region and Country: France, Europe

Judicial Body: European Court of Human Rights, Second section

Type of law: Civil law, International law

Themes: Privacy, Data Protection and Retention

Tags: Book, public interest, reasonable expectation of privacy

Mode of Expression: Books/Play

Date of Decision: August 18, 2014

Outcome: Convention Articles on Freedom of Expression and Information violated

Case number: App no. 58148/00

**Summary and outcome**

The European Court of Human Rights (ECtHR) found that France violated Article 10 of the European Convention of Human Rights when its domestic courts banned indefinitely the book *Le Grand Secret* published by Éditions Plon. The book was coauthored by Dr. Gubler, a private physician to then President François Mitterrand, and gave a detailed account of the President’s illness, and subsequent treatment. The book was published shortly after the death of Mitterrand. Upon request from Mitterrand’s heirs, national French Courts banned the book indefinitely arguing that it breached medical confidentiality. For the ECtHR an indefinite ban on the book was a disproportionate measure not necessary in a democratic society.

**Facts**

On November 8, 1995, Éditions Plon acquired the publishing rights of the book *Le Grand Secret* (“The Big Secret”). Written by Mr. Gonod, a journalist, and Dr. Gubler, a private physician to president of France François Mitterrand, the book “gave an account of the relations between Dr Gubler and the President, describing how the former had organised a medical team to take care of the latter, who had been diagnosed with cancer in 1981, a few months after he had first been elected President of France” (par. 6).

Originally the book was to be published in mid-January 1996, while President Mitterrand was alive. However, due to the fact that Mitterrand died on 8 January 1996, Éditions Plon and the authors decided to postpone the publication.

On January 19, 1996, the newspaper *Le Monde* published an article “which revealed that President Mitterrand had been suffering from prostate cancer since the beginning of his first seven-year term of office and pointed out that the public had not been officially informed about his illness until 1992. The article also stated that President Mitterrand had dismissed Dr Gubler in 1994, choosing instead to be treated with medicine described by [Éditions Plon] as ‘alternative’” (par. 7).

In a book published in 1995, titled *L'Année des adieux*, a former cultural advisor to Mitterrand claimed that the president didn’t’ receive proper treatment. This opinion was echoed, shortly after Mitterrand’s death, by one of his brothers and by the head of the cancer treatment department at the Pitié-Salpêtrière Hospital, who considered that for years [President Mitterrand had been] given nothing but magical cures, and these techniques were completely ineffective in treating his illness” (par. 7).

The revelations received extensive media coverage and scrutiny, especially those referring to the “quality of the treatment received by President Mitterrand” (par. 7).

Dr. Gubler considered that his reputation was being questioned and decided to publish *Le Grand Secret* on January 17, 1996. The book gave a detailed account of Mitterrand’s illness, (including his symptoms and examinations) and subsequent treatment (describing side effects of the medical treatment and anxiety attacks suffered by the President), among other details related to the health of the President.

On January 18, 1996, after Mitterrand’s widow and children lodged an urgent application complaining “of a breach of medical confidentiality” and an “invasion of President Mitterrand's privacy” (par. 9), the Paris Tribunal de Grande Instance issued a provisional injunction prohibiting Éditions Plon and Dr. Gubler from distributing *Le Grand Secret*. The tribunal considered that the book breached “provisions that lay down a duty of professional confidentiality, all the more strictly where medical confidentiality is concerned” that “constitute a particularly serious intrusion into the intimate sphere of President François Mitterrand's private family life and that of his wife and children” (par. 9).

On March 13, 1996, the Paris Court of Appeal upheld the injunction and gave the claimants one month to apply to a court with jurisdiction to examine the merits of the case.

On July 16, 1997, the Court of Cassation upheld the injunction too, arguing that the measure, “valid for a limited period only, was the only means of putting an end to the infringement pending a decision on the merits” (par. 11).

Alongside the injunction, criminal and civil proceedings were carried against Mr. Gonod, Dr. Gubler, Mr. Olivier Orban, managing director of Éditions Plon, and the publishing company.

On July 5, 1996, a criminal court found Dr. Gubler guilty of breaching professional confidence, and “Mr Gonod and Mr Orban guilty of aiding and abetting the same offence” (par. 12). Dr. Gubler was convicted to four months imprisonment, while Mr. Gonod and Mr. Orban were fined 30,000 and 60,000 francs respectively. The judgement considered that the “publication of an entire book based on a breach of medical confidentiality amounted, on Mr. Claude Gubler's part, to a serious breach of his professional duties, calling for a stern reminder of the law” (par. 12).

In the context of the civil proceedings on October 23, 1996, the Paris Tribunal de Grande Instance ordered Dr. Gubler, Mr. Orban and Éditions Plon “to pay damages of FRF 100,000 to Mrs [Danielle] Mitterrand and FRF 80,000” (par. 14) to her three children. The tribunal also maintained the publishing ban on the book and made it indefinite. The tribunal considered that Dr. Gubler breached medical confidentiality, since the events described in “*Le Grand Secret* became known to Claude Gubler in the performance of his professional duties as physician to François Mitterrand or members of his entourage” (par. 14).

The Paris Court of Appeal upheld the decision of the lower court on May 27, 1997, maintaining the ban on the book. On December 14, 1999, the Court of Cassation dismissed an appeal lodged by Mr. Orban and Éditions Plon arguing that “the exercise of freedom of expression could be subject to certain restrictions, in particular for the protection of the rights of others” (par. 16). The Court of Cassation thus considered “that discontinuing the distribution of the book was the only means of putting an end to the criminal offence and the damage sustained” (par. 16).

Éditions Plon lodged an application against the French Republic before the European Court of Human Rights (ECtHR) on June 9, 2000, alleging a violation of its right to freedom of expression under article 10 of the European Convention of Human Rights (ECHR).

**Decision Overview**

The European Court of Human Rights analyzed if the Republic of France violated the freedom of expression of Éditions Plon (the applicant) by banning, initially on a temporary basis and later permanently, the book *Le Grand Secret*. The main issue before the Court was whether the interference to the freedom of expression of the applicant was justified under International Law.

According to the applicant company, the interim injunction and general ban levied against the book had not been prescribed by law, didn’t pursue a legitime aim and were not necessary in a democratic society. For Éditions Plon, the amount of the damages it was ordered to pay was exorbitant and “had not been proportionate to the aim pursued” (par. 21).

The applicant argued that “President Mitterrand had officially released Dr Gubler from his obligation [of confidentiality] by asking him to publish health bulletins on him for years, had expressed the wish, more generally, to make public all matters pertaining to his health” (par. 24). Éditions Plon also considered “that medical practitioners who had come under attack were entitled to defend themselves, notwithstanding the duty of medical confidentiality by which they were bound” (par. 24).

The applicant also considered that the interference on their right to freedom of expression didn’t pursue a legitimate aim, since medical confidentiality “could not justify a ruling in favour of a person's heirs, and secondly, the protection of François Mitterrand's private interests could not be relied on since the right to institute civil proceedings had lapsed on his death” (par. 32).

Éditions Plon also considered that in a democratic society the measures against the freedom of expression of the company were not necessary. For the applicant the book “had raised issues of general interest; it had contributed both to the right of citizens – towards whom President Mitterrand had voluntarily assumed a duty of ‘medical transparency’ – to receive information” (par. 40). Furthermore, the applicant argued that in any case the book was widely disseminated and could be accessed through the internet. For Éditions Plon, both the blanket ban on the distribution of the book and the amount of damages paid to Mitterrand’s heirs were disproportionate measures.

On its part, the Government argued that the applicant could not have been unaware of the “extensive case-law concerning medical confidentiality, the rules of medical ethics and Article 226-13 of the Criminal Code [disclosure of confidential information]” (par. 25).

The State also considered that the interference on the freedom of expression of the applicant had a legitimate aim: “the measures taken had been intended to ensure medical confidentiality and hence to ‘protect the reputation or rights of others’ and to prevent ‘the disclosure of information received in confidence’” (par. 33). For the Government medical confidentiality benefits patients, since it allows them to confide in medical practitioners without fear of information disclosure related to intimate matters.

Regarding the necessity in a democratic society of the measures, the respondent acknowledged the “importance of a public debate on the right of the electorate to receive information about the physical and intellectual capacities of its leaders” (par. 37) but considered this did not justified “the publication of a book which essentially described the stages of President Mitterrand's illness, the treatment he had received […]” (par 37). For the State of France, the measures issued by domestic courts were proportionate: the ban on the book’s publication sought redress for the damage “caused by the breach of medical confidentiality” (par. 39). Likewise, the Government argued that the amount of the damages “should in any event be seen in relative terms, given that the applicant company had made a substantial profit through the sale of 40,000 copies of the book” (par. 39).

The ECtHR began its considerations by applying a three-part test on the interim injunction and the general ban issued against the publication of the book *Le Grand Secret*. For the Court it was clear there are several French laws which allowed the applicant to rationally foresee that by publishing a book describing “among other things, the progress of [Mitterrand’s] illness and contained information about the medical treatment and operations he had undergone and his conversations with medical practitioners, it was publishing disclosures likely to be covered by the rules of medical confidentiality” (par. 27). Thus, Article 4 of the Code of Conduct for Medical Practitioners states the duty “of professional confidentiality by which medical practitioners are bound” (par. 27). Article 226-13 of the French Criminal Code criminalizes breaching professional confidence. Similarly so, the Court notes, Article 1382 of the French Civil Code is the basis of civil liability for negligence. Finally, Article 809 of the New Code for Civil Procedure allows for judges to issue “such measures to preserve or restore the present position as are necessary either to prevent imminent damage or to put an end to a manifestly unlawful infringement” (par. 30).

Contrary to what was argued by the applicant, the Court opined that the law does not provide that a medical practitioner may be released from the duty of confidentiality by a patient or, in general terms, by a “legitimate interest” (par. 27).

Taking into consideration this legal framework, the Court concluded “that the interference in issue was ‘prescribed by law’within the meaning of the second paragraph of Article 10 of the Convention” (par. 31).

When analyzing if the interim injunction and the decision to keep the book ban in force, issued by national French courts, had a legitimate aim, the ECtHR considered that the aforementioned measures did indeed pursue a legitimate aim. The Court argued that the interference on freedom of expression was “intended to protect the late President's honour, reputation and privacy, and that the national courts' assessment that these ‘rights of others’ were passed on to his family on his death does not appear in any way unreasonable or arbitrary. Moreover, it is precisely because much of the information disclosed in the book was classified in law as secret, and was therefore *a fortiori* received in confidence, that it was capable in practical terms of infringing the rights of others” (par. 34).

Upon studying the necessity in a democratic society of the interim injunction and the permanent ban of the book, the ECtHR deemed important to make a distinction between these measures.

After explaining that freedom of expression “constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress” (par. 42), and that restrictions to this right “call for the most careful scrutiny on the part of the Court” (par. 42), the ECtHR considered that “ the French authorities had only a limited margin of appreciation to decide whether there was a ‘pressing social need’ to take the measures in question against the applicant company” (par. 44), which allows for a temporal ban, but not an indefinite or permanent one.

The Court considered that the book was published in a context of national public debate regarding the right to information of the public about “any serious illnesses suffered by the head of State, and the question whether a person who knew that he was seriously ill was fit to hold the highest national office” (par. 45), and the duty of transparency of political figures.

In light of this context, the ECtHR considered that the injunction was a necessary and proportionate interference on the freedom of expression of Éditions Plon. Its temporary nature, and reasonable time limit (ceasing “to have effect if no application for a decision on the merits was made within one month” (par. 47)), in the eyes of the Court, affirmed the validity of this measure since it allowed national courts to rule about whether the book “was compatible with medical confidentiality and the rights of others” (par. 47).

Regarding the indefinite ban issued by the Paris Tribunal de Grande Instance on October 23, 1996, the ECtHR was of the opposite opinion. According to the Court “the more time that elapsed, the more the public interest in discussion of the history of President Mitterrand's two terms of office prevailed over the requirements of protecting the President's rights with regard to medical confidentiality” (par. 53).

The ECtHR clarified that this does not mean that medical practitioners are released from their duty of confidentiality, which is general and absolute, rather that when this duty has been breached, and criminal sanctions have been imposed upon the person responsible “the passage of time must be taken into account in assessing whether such a serious measure as banning a book – a measure which in the instant case was likewise general and absolute – was compatible with freedom of expression” (par. 53).

The Court also took into account, in assessing the necessity of a permanent ban, the fact that over 40,000 copies of the book had been sold before its ban, and that the book was disseminated on the Internet and was subjected to considerable media attention. “Accordingly, by that stage the information in the book was to a large extent no longer confidential in practice. Consequently, the preservation of medical confidentiality could no longer constitute an overriding requirement” (par. 53).

Thus, the Court found a violation, under article 10 of the ECHR, of the freedom of expression of Éditions Plon, since “there was no longer a “pressing social need” justifying the continued ban on distribution of *Le Grand Secret*” (par. 55).

In regard to the complain of the applicant company, which argued that there was an infringement of its right to freedom of expression for being ordered to pay an “exorbitant” amount for damages, “the Court consider[ed] that it is not necessary to examine separately this aspect of the complaint, whose relevance, moreover, is not apparent” (par. 57).

**Decision Direction**

**Mixed Outcome**

This judgment expands freedom of expression by considering that a book can’t be subjected to indefinite bans, even when the publication is about confidential and intimate matters. Nevertheless, this decision argues that temporal interferences or restraints on freedom of expression can be valid under international law. The ECtHR didn’t find any merit to the applicant’s complain regarding the payment of monetary damages to Mitterrand’s heirs, thus failing to analyze if said measures could have a chilling effect on expression.

**Global Perspective**

**National standards, law or jurisprudence**

* ECtHR, Association Ekin v. France, App. 39288/98 (Jul. 17, 2001)
* ECtHR, Bladet Tromsø and Stensaas v. Norway, App. 21980/93 (May 20, 1999)
* ECtHR, Colombani and Others v. France, App. 51279/99 (Jun. 25, 2002)
* ECtHR, Hertel v. Switzerland, App. No. 25181/94 (Jan. 17, 2002)
* ECtHR, Sunday Times v. the United Kingdom, App. 6538/74 (Apr. 26, 1979).
* ECHR, art. 10
* **France, arts. 4, 72 and 73, Code of Conduct for Medical Practitioners**
* **France, art. 226-13 of the Criminal Code**
* France, art. 1382 of the Civil Code
* **France, art. 809 of the New Code of Civil Procedure**

**CASE SIGNIFICANCE**

**The decision establishes a binding or persuasive precedent within its jurisdiction.**

**Precedential effect**