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EUROPEAN CENTRE FOR
PRESS & MEDIA
FREEDOM



EUROPEAN CENTRE FOR
**PRESS & MEDIA
FREEDOM**

Conference e-book

Introduction, presentations and conclusions

Promoting dialogue between the European Court of Human Rights and the media freedom community. Freedom of expression and the role and case law of the European Court of Human Rights: developments and challenges.

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1. INTRODUCTION

On March 24, 2017 the European Centre for Press and Media Freedom with the support of Council of the Europe (CoE) organised the conference "Promoting dialogue between the European Court of Human Rights and the media freedom community. Freedom of expression and the role and case law of the European Court of Human Rights: developments and challenges". The conference took place in Strasbourg.



Flutura Kusari

It was a follow-up activity to the 2008 seminar to the European Protection of Freedom of Expression organised by Strasbourg University Robert Schuman, Ghent University and the Open Society Justice Initiative, which also took place in Strasbourg.

The initial idea was to organise a seminar with 50 to 60 people, but ultimately due to enormous interest, the ECPMF and CoE hosted around 300 people at the Palais de l'Europe Building.

The three key themes of this conference were: (1) defamation, privacy and the

processing of personal data, (2) investigative journalism in relation to newsgathering, access to official documents and the importance of the protection of sources and whistleblowers, as well as (3) the right to protest and the role of the media during protests.

The conference resulted in fruitful discussions of the ECtHR's recent case law relating to freedom of expression, media and journalism. The keynote speakers, the moderators, the speakers and participants played a crucial role on the productive dialogue between judges and civil society.

These discussions have been collected and presented in this conference e-book in form of conclusions. In addition, unedited speeches and presentations of the speakers are incorporated in this publication. The conference was broadcast live and video links to all speakers' presentations are included as well. Lastly, a summary of social media coverage is also integrated.

ECPMF is grateful to the Council of Europe especially, the European Commission, Open Society Foundation, Media Foundation of Sparkasse Leipzig, the Free State of

Saxony and the City of Leipzig who recognise the importance of our work and gave us the means to accomplish it.

We highly appreciate ARTICLE 19, Access Info, the European Federation of Journalists, Ghent University Human Rights Centre, Index on Censorship, the Institute of European Media Law, the International Federation of Journalists, the International Press Institute, the Media Legal Defence Initiative, the Mass Media Defence Centre, PEN International and Reporters Without Borders for endorsing our conference.

This e-book contains the proceedings of the conference, including the introduction, the presentations by the keynote speakers and the text of some of the presentations from the panel sessions. It also contains the conclusions presented at the end of the conference, which not only summarize the discussions, but also formulate additional reflections and suggestions on the dialogue between the ECtHR and the media freedom community. The conference was live-streamed (conference stream [part1](#) and [part2](#)) and the links to the speakers' powerpoint presentations are included as well. Lastly, a summary of the social media coverage of the conference is also provided, together with a short presentation of the ECPMF.

The conclusions reflect some of the main themes discussed at the conference. They also branch out into wider conceptual discussions, like how the multi-media ecosystem is evolving and how law and society are responding - or should be responding - to technological changes. A central focus of this wider discussion is the important role that dialogue between the ECtHR and the media freedom community can play in understanding and engaging with all these changes. The dialogue is already characterised by cooperation, a shared sense of purpose and a mixture of encouragement and constructive criticism. The same qualities will be needed to sustain the dialogue in the future. Regular, structured occasions for interaction and exchange will also be crucial as the ECtHR and the media freedom community continue to examine such fast-evolving topics as:

- how States can devise measures to fulfil their positive obligation to enable free speech and foster public debate;
- how to give more careful consideration to the complex relationship between rights, duties and responsibilities of the different actors who contribute to public debate and thereby avoid over-emphasis on "responsible journalism" which could have a chilling effect on freedom of expression;
- how to deal with intermediary and gate-keeping roles vis-a-vis online content, and
- how to align the protection of privacy and data protection rights and reputational and other legitimate interests with the right to freedom of expression and access to information so that there is no chilling effect on the latter rights.

2. KEYNOTE SPEECHES

András Sajó

I recall a conference about six or seven years ago that was held at the Court on freedom of expression where distinguished experts claimed that the standards of the Court in matters of speech protection were in decay, partly because of deferentialism to the panic resulting from terrorism (*Leroy c. France* was and still is mentioned as the paradigmatic example).



András Sajó

Today, in an age when backlash is the buzzword, I would not be surprised to hear voices murmuring (at best) that the Court's protection of freedom of expression is less robust than even ten years ago. However, the problem lies elsewhere, to a considerable extent. It concerns the changing public attitudes towards freedom of expression in Europe and globally. This shift is also intimately related to the prevailing attitude regarding the possibility and scope of supranational judicial protection of human rights.

I would first like to refer to the substantive challenge freedom of expression is facing. A new logic of mass communication has emerged. Citizens are no longer passive recipients of news and views developed by journalists or other opinion makers. With the coming of the internet and social media there was a rather realistic hope that the production and management of information would be replaced with a decentralized system where individuals would become more active partners in generating information. It was hoped that all this would enhance democracy. Undeniably, there are positive developments in this respect, but pain is the sister of progress. Instead of creating a common space for democratic deliberation the internet and social media enabled fragmentation and segmentation. Discourse is limited to occur within self-selecting groups and there are tendencies of isolation. Views are more extreme and less responsive to external arguments and facts, resulting in polarization around alternative facts.

The new possibilities of personal interaction have liberating effects, but the liberation includes the waking up of otherwise repressed negative moral and emotional characteristics of human beings. Communication also means freedom to fake news, a freedom enjoyed and abused by individuals, political movements and governments.

More and more people ask: what is so special about speech which is just one of many human interactions? Free speech's sacred nature is questioned. Even if the values of free speech are still relevant and justifiable, the background conditions of free exchange of ideas seem to be absent in many respects. Citizens live in self-imposed selective worlds of alternative truth, where their rational capacities are paralyzed by externally reinforced wishful thinking.

Political communication is about lying, a competition to find the most attractive alternative truth.

Are democratic states not called to intervene to restore political communication by setting the conditions of communication right by limiting potentially harmful expression? May be. But how to trust the democratic process with this task? This very process is expressing the very bias that concerned people would like to rectify! What if all the calls to responsible speech are but another attempt to determine governmentally or politically what is right or wrong and to impose a new political correctness upon dissent that is labeled fake?

Today electors are influenced not just by unrealistic promises but by statements of facts which are simply and plainly untrue. Nevertheless, they are attractive as they satisfy the expectations of identity politics. Should not the government interfere and rectify? But the reliance on lies is not the cause but the consequence of identity politics. So if identity politics is the root problem, how can one hope that governmental speech regulation will be the remedy?

Of course, there is no social value in false statements of fact. Even the notoriously speech friendly Supreme Court of the United States recognizes that (*Gertz v Robert Welch*). False statements mislead the audience and, at least to some extent, deter the speakers to make true statements since their power is unfairly limited.

Is this a good enough reason to punish false statements in politics with the force of law?

Not necessarily. There are interesting arguments in favor of allowing some level of error in speech. Otherwise, the search for truth will suffer. Moreover, the difference between opinion and fact is not clear cut and opinions are powerful because they are often fact related. To call a prime minister corrupt can be related to facts but factually still wrong in terms of criminal law. In a simplistic logic of regulation, fake information is to be oppressed (and states today would like to outsource this policy imposing duties of censorship on intermediaries). Those who would like to curtail speech to improve communication must answer important legal questions: for example, what is the appropriate level of responsibility and also who is responsible. There will be different answers to these questions in different democracies. And in case one would like to legislate against alternative truth in politics the standard problem arises: who will determine what is true and how?

But you came here to discuss, under the Convention, what kind of reaction to expect and generate to the new communication paradigm. Is the Court going to

allow governments to hold people responsible for honestly held but apparently untrue statements of fact? Is it going to accept or even require punishment for what is held in some jurisdictions to be harassment in the social media? Would it be permissible under the Convention to ban foreign sponsored broadcasting that seems to report on alternative truth? What kind of protection may citizens expect where the alternative truth comes from the government including their government and government sponsored media?

The Court's case law of the last ten years offers interesting clues. In search of an answer some of the colleagues present here would read the tealeaves of *Pentikäinen v. Finland* which introduced the concept of responsible journalism although the cases referred to, like *Bladet Tromsø and Stensaas v. Norway*, dealt with journalistic "good faith to provide accurate and reliable information in accordance with the ethics of journalism". This would imply that, contrary to *Bladet Tromsø* and its progeny, where as a rule newspapers in their reporting on statements of others had no absolute duty to verify the truth of a critical factual statement, such duty would be found acceptable or even necessary. Combined with the emerging idea of intermediary liability this idea, transferred from journalism to all speakers would facilitate a government led fight against false private and public statements of fact. This is a genuine possibility. But in my view the developments which are relevant for the Court's future position are not intimately related to the substantive understanding of the applicable free speech principles, although some of the judgments reflect the victory of the narcissistic personality cult that is dressed up in the best ball gown of dignity. The new developments may not occur under the spell of the responsibilities and duties clause of para 2 Article 10. It is more likely that the Court's position will not be determined on grounds of freedom of expression considerations at all. It depends already on the self-perception of the Court. Likewise, in the future, it will be decisive how the Court (under the pressure or encouragement of the Member States) will understand its own role in human rights adjudication.

Let me illustrate how competence issues (expressed in terms of margin of appreciation and subsidiarity) determine substantive law. In a case against the UK (concerning Naomi Campbell, called *MGN Ltd.*) the Court embarked on the re-reading of Article 10 (2). It gave equal weight to reputation rights and freedom of expression. Of course, the Convention recognizes the right of others, in particular the right to protection of reputation as a ground for rights restriction. Such an interference to protect reputation has been considered as falling under standard proportionality analysis, the restriction being the exception. In *MGN*, however, reputation was considered a matter of right to private life and, contrary to the text of the Convention, the case was construed as a matter of a conflict between two conventional rights where balancing applies. Hence, subsidiarity and a lower level of scrutiny prevailed to the detriment of freedom of expression. This approach reflects a new hierarchy of values compared to earlier years, perhaps more in tune with narcissistic times.



András Sajó

Another development that can favor a new restrictive (or, for others a better balanced) regulation has emerged in two more cases concerning again the United Kingdom. *Animal Defenders* was, strictly speaking, a proportionality case concerning political speech (speech on matters of public interest). A majority of nine held the relevance of parliamentary proceedings with extensive debate when conducting the proportionality analysis of a blanket ban on political speech. The blanket ban was anointed by parliamentary democracy. Later on, in *R.M.T.*, an Art. 11 case concerning the United Kingdom, one of the elements which led the Court to disregard the international law as developed by ILO was *national democracy*. In this right to secondary strike case democratic consensus in support of a restriction was considered a matter resulting in a wide margin of appreciation. More importantly, contrary to many judgments which state the opposite, here the Court observed that regardless of proportionality analysis the question "is rather whether, in adopting the general measure, the legislature acted within the margin of appreciation afforded to it." (para. 103). This localism recalls the Court's emerging case law which claims respect to deeply held moral beliefs and sensitivities even in the presence of overwhelming European consensus pointing to the existence of a right. Of course, national sensitivities and national democratic consensus are not very promising to universal and regional, certainly supranational, human rights which are recognized by the Convention. After all, this human rights Court was established to promote greater unity among member states through a common understanding and further development of human rights.

Part of these developments can be explained by changes in judicial attitudes towards judicial deference. As late as 2012 Richard Posner could write about the fall of judicial self-restraint. Today, under the pressure of anti-elitism that celebrates the alleged reinvigoration of popular democracy we observe the rebirth of judicial self-restraint.

An international court, especially if isolated within an international bureaucracy; under the pressure of increasingly isolationist and sovereignty-driven governments; and without public support will easily conclude that it has a limited role in this world and favor the primacy of national cultural differences. Let me quote *Animal Defenders*: "it is for each State to mould its own democratic vision."

There is, of course, another possibility for judges in a world that seems to be little interested in the values that animate the Convention and that are foundational to the very democracies whose democratic process seems to be out of synch with said values. Here the role of the judge is that of the prophet who reminds her errand people of the higher values, even if those are disregarded. But is there still place for legal prophets who are aliens in national popular democracies? This is a freedom of expression conference and there can be only an indirect answer to this question. But even if this is the proper role for the judge in times of fundamental challenge, the prophet should know what she is defending and what for. This takes us back to my fundamental question: how to justify speech in a communication sphere where communication and communicators apparently do not satisfy fundamental expectations of rational discourse. The judge prophet cannot find the answer: it is the free speech community that shall raise its eyes and critical voice from the gritty nitty of specific cases.

Silvia Grundmann

Good morning, ladies and gentlemen,

A very warm welcome to you on behalf of the Council of Europe which is supporting this conference, and thank you for having joined us in Strasbourg.

We are happy to host such an important event which brings together many different actors in the field of freedom of expression to explore and discuss the recent case-law of the European Court of Human Rights in this area.



Silvia Grundmann

Let me focus on the interplay between the Strasbourg Court's case-law and the standard-setting activities of the Committee of Ministers.

It is the responsibility of the Committee of Ministers to provide a policy framework for the protection of freedom of expression and media freedom in Europe through the adoption of recommendations to its member states.

This policy framework would not be possible without the Court's case law.

When the Steering Committee on Media and Information Society (CDMSI)

develops draft recommendations to member states for the Committee of Ministers, it embraces the case law of individual judgments and translates it into concrete guidance for all member states.

Therefore, the system of negative and positive obligations arising from Article 10 of the European Convention on Human Rights, as spelled out by the Court, is reflected in these recommendations. Likewise, the underlying requirements of legality, legitimacy and proportionality of restrictions imposed on freedom of expression, as well as those of procedural fairness.

A good illustration of this interplay is the recent Recommendation on the protection of journalism and safety of journalists and other media actors which was adopted last year.

This recommendation maps out the principles based in the Court's case law pertaining to prevention mechanisms, protection of journalists' safety and prosecution of crimes committed against them. It then goes beyond, by providing

policy and practice indicators for the member states including guidance on how to promote the recommendation and raise awareness about its content.¹

The interaction between the case-law and standard setting is a two-way process. Our recommendations (and other regulatory instruments) are considered by the Court as an important source for the development and refinement of its case-law.

For example, in the recent Grand Chamber case of *Magyar Helsinki Bizottság v. Hungary* (Nov 2016), the Court ruled on whether, and under what conditions, Article 10 includes the right of access to public documents. Among the instruments on which it relied in its reasoning, it referred to the 2002 Recommendation of the Committee of Ministers on access to official documents which guarantees such right.

In the case of *Delfi AS v. Estonia* (June 2015), the Court referred to the 2011 Recommendation on a new notion of media in its interpretation of duties and responsibilities for internet news portals.

In another Grand Chamber case, *Centro Europa 7 S.r.l. and Di Stefano v. Italy* (June 2012), the Court relied on several standard-setting instruments of the Council of Europe on media pluralism, in particular the 2007 Recommendation on media pluralism and diversity of media content, to set out the positive obligation for member states to adopt an appropriate legislative and administrative framework to guarantee effective pluralism.

The consideration that the Court and the Committee of Ministers show for each other's work mutually reinforces their respective contributions and builds a coherent approach to the protection of freedom of expression.

As regards our standard-setting side of the coin, the Court's interpretation and application of various standards enhances our sensibility for issues of controversy in the exercise of freedom of expression.

It also provides valuable feedback on how our instruments may be understood. This, in turn, is helpful in our reflection as to whether further standard setting should be elaborated in certain areas.

This desired effect of the continuous interplay between the Court's case-law and standard setting is to create a system of principles and guidelines that helps the member states to implement rights and responsibilities related to the right to freedom of expression and other rights that may complement it or come into conflict with it.

We all see how digital development is profoundly affecting the way information and ideas are being imparted, expressed and shared. This technological evolution enables access to more and more information from different sources, but also raises many concerns.

¹ Council of Europe recommendations in the field of freedom of expression and information and media freedom, are also implemented in the context of cooperation activities, for more information see <http://www.coe.int/en/web/freedom-expression/co-operation-activities>

Consequently, the so-called classical topics of freedom of expression that will be addressed in the first panel "Defamation, privacy and processing of personal data" have acquired new dimensions. The wide reach of the internet means that comments made online – including those with defamatory content – may have a much bigger impact than those published in the legacy media.

The emergence of a vast range of new actors who act as intermediaries for the internet raises a number of questions on their respective roles, rights and responsibilities. In

the Council of Europe, we are currently working on a new recommendation on internet intermediaries which will hopefully be adopted early next year.

We see that in journalistic work, digital communication may help to protect the anonymity and confidentiality of journalistic sources, provided that journalists are sufficiently trained in digital safety. It has also facilitated the activities of whistleblowers.

Yet, whistleblowers' sharing of critical information is sometimes perceived as political action, rather than disclosure of

information in the public interest which can benefit society as a whole.

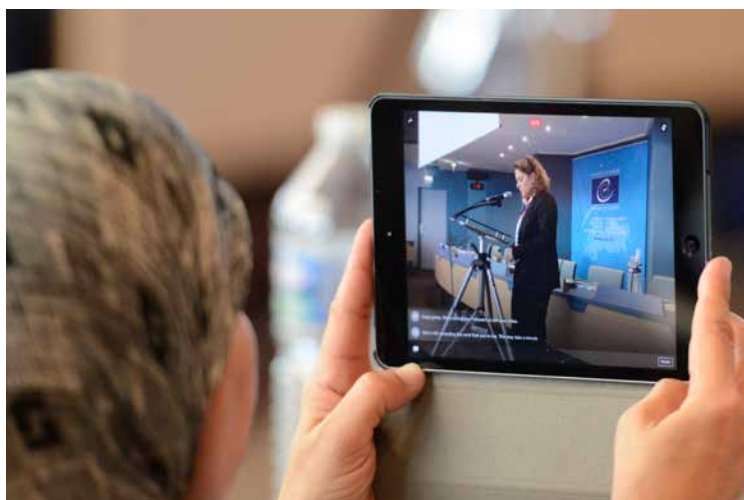
Transparency of legislation and too broad powers of authorities are key concerns here which we have the opportunity to discuss in the second panel "Investigative journalism, access to information, protection of sources and whistleblowers".

The third and last panel in today's conference will address "the right to protest and the role of the media during protests", that is when journalists – and often also subjects of their reporting – are at their most vulnerable.

Due to the enormous quantity of available information which remains often unchecked and is uncritically reproduced, the watchdog function of journalists and other media actors is more important than ever.

New technologies have brought immense advantages and no lesser concerns. These concerns materialise/are addressed in the Court's case law as well as in the standard setting instruments of the Committee of Ministers and I am particularly delighted that judges of the Court participate to this event.

And now our conference will embark on an in-depth discussion starting with its first panel on defamation, privacy and processing of personal data. I thank you for your attention and I am looking forward to hearing your views and follow your interesting exchange.



Silvia Grundmann

3. FIRST PANEL: Defamation, privacy and processing of personal data

Gill Philips

Introductory remarks

I am an in-house lawyer with the Guardian newspaper in London and I look after their editorial legal issues. In recent years I have dealt with wikileaks and Edward Snowden and the Panama Papers.

Before we hear from our panellists, I wanted to take the opportunity to make a few introductory remarks of my own and raise some current concerns from my perspective. I have 8 points and I will be very short with them, just to raise them in your consciousness as the audience to inform the interventions we will hear.

1. What I shall call the problems of subjectivity and how the court deals with it

On one level it's simply about the margin of appreciation but it goes beyond that. As we all know, freedom of expression is not an absolute right, and it is important to acknowledge that there can and indeed should be some restrictions and balancing to protect:

the rights or reputations of others

National security

Ordre public (which means not only public order, but also general public welfare)

Public health or morals

Territorial integrity or public safety

Confidentiality of information received in confidence

Authority and impartiality of the judiciary.

The ECtHR has addressed the distinction between the internet, as an information and communication tool, and the printed media (see, among other authorities, *Delfi AS v. Estonia*, § 133, cited above, *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, § 58, 16 July 2013, *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, no. 33014/05, § 63, ECHR 2011 (extracts) and *Times Newspapers Ltd v. the United Kingdom* (nos. 1 and 2), nos. 3002/03 and 23676/03, § 27, ECHR 2009).

Hate speech is an area where I think most people would agree as a matter of principle that where it is unlawful (which can be a source of argument and disagreement, and may depend on context as much as on actual content) it should be removed and restricted. As I have said, what constitutes hate speech is very subjective and in the wrong hands can cause very serious chilling and censorship of a journalist's words. On a practical level – as for example in the *Delphi v Estonia* case – in the digital age it is difficult to manage and prevent hate speech. (See also *MTE v Hungary* and the recent Swedish case of *Pihl*.)



Gill Philips

Another area where this can be seen is in the increasing and understandable tendency of states to criminalise terrorism. But this is done using very wide definitions of terrorism, and so as has been seen in Turkey for example, allows anyone who speaks against or criticises a government to be arrested and detained, including journalists, academics and the lawyers defending them.

2. Practicalities and impacts

On a practical level – as for example in the Delphi case – in the digital age it is difficult to manage and prevent hate speech. Care has to be taken that an over restricted approach is not adopted – and courts need to think through the practical consequences as much as the legal principles. For example, in a different judicial arena, we have seen the many problems caused by the European Court of Justice's [CJEU] decision in what we all now know as the Google Spain case, where Article 10 issues were not it appears considered and nor were the practical ramifications of the decision. Likewise in the Salihu v Sweden case last, year upholding the criminal conviction of a journalist who had purchased an illegal weapons, but where there was a very strong public interest and editorial justification for doing so, which the ECtHR just did not seem to understand or appreciate.

3. data protection issues

I am aware there has been consideration by the ECtHR of data protection from a criminal justice sense – i.e. gathering and retention of data by the state and of course there has been the Satamedia v Finland case, which was recently in the Grand Chamber and where judgment is awaited, but the initial section decision offered a worrying and very narrow interpreting of journalism and journalistic activities and a very strict interpretation of data protection laws.

I would be very interested to hear how does the ECtHR view the use of Data Protection laws in a journalistic context – in the UK for example we are seeing the creeping use of DP instead of defamation and / or privacy as a cause of action – the only defence available is the public interest which relies on the establishment of the special position of journalism. It is also unclear how this applies before / after publication. In the UK, the use of data protection is underlining some of the hard fought concessions that were included in the Defamation Act 2013.

4. Muddying of the test in Art 10 cases

In recent years, the ECtHR has understood reputation as an Article 8 issue, for example in Sipos v. Romania, Application No. 26125/04, Judgment of 5 May



Barbara Trionfi

2011. More particularly "honour and reputation" is now seen as a substantive right contained within Article 8 (as if the wording of that Article were the same as Article 17 of the ICCPR): even though reputation was expressly omitted from Art 8 when the convention was originally drawn up. The Court considers that a person's reputation, even if that person is criticised in the context of a public debate, forms part of his or

her personal identity and psychological integrity and therefore also falls within the scope of his or her "private life". Article 8 therefore applies. (*Lingens v. Austria*, Judgment of 8 July 1986, Series A no. 103 28 *Pfeifer v. Austria*, Application No. 12556/03, Judgment of 15 November 2007, para 35. Some slight modification of approach may be seen in 2009 in *A v Norway*). But it seems to be a battle long lost in the court. In *A v Norway*, it acknowledged that Article 8 did not "expressly" provide for a right to reputation. In this case it concluded that: In order for Article 8 to come into play, the attack on personal honour and

reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life. In *Karako v. Hungary* the Court underlined this by saying that the defamation must constitute "such a serious interference with his private life as to undermine his personal integrity."

In order for Article 8 to come into play, an attack on a person's reputation must attain a certain level of seriousness and its manner must cause prejudice to personal enjoyment of the right to respect for private life. The criteria which are relevant when balancing the right to freedom of expression against the right to respect for private life are: the contribution to a debate of general interest; how well known is the person concerned and what is the subject of the report; his or her prior conduct; the method of obtaining the information and its veracity; the content, form and consequences of the publication; and the severity of the sanction imposed (see, for example, *Axel Springer AG v. Germany* [GC], no. 39954/08, §§ 83 and 89 to 95, 7 February 2012 and *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, §§ 108 to 113, ECHR 2012).

There has been considerable concern in some quarters over what seems to be an apparent merging by the ECtHR of the traditional Art 10 v Art 8 balancing act into cases which are actually Art 10(1) v Art 10(2) – so where there is no privacy aspect - where it should not be a balancing test but a *Sunday Times v UK* type approach. This also seems to be creeping in to potential Art 11 cases. For example, from memory, there were three defamation cases in 2013 when the ECtHR adopted and applied



privacy criteria: 1st section case of *Print v Austria*, 4th section *Ristamaki v Finland* and a 2nd section case *v Hungary*.

5. The continuing problem of criminal defamation.

Criminal defamation laws represent a potentially serious threat to freedom of expression because of the sanctions that often accompany conviction. It will be recalled that a number of international bodies have condemned the threat of custodial sanctions, both specifically for defamatory statements and more generally for the peaceful expression of views. Yet defamation continues to fall within the criminal law in a majority of states, too many, although in many instances criminal defamation has fallen into disuse.

Defamation as a tort, or civil wrong, continues to be very widespread. The United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression is among a number of international and regional mechanisms that have been arguing that "criminal defamation laws should be repealed in favour of civil laws as the latter are able to provide sufficient protection for reputations".

Penalties should not include imprisonment – nor should they entail other suspensions of the right to freedom of expression or the right to practice journalism. There should not be resort to criminal law when a civil law alternative is readily available: See for example *Amorim Giestas and Jesus Costa Bordalo v. Portugal*, app. No. 37840/10, para. 36.

Barbara Trionfi is going to present the findings of the recent OSCE IPI research on Defamation and Insult Laws in the OSCE Region: A Comparative Study <http://www.osce.org/fom/303181?download=true>

6. Religion and freedom of expression

Many European states have laws prohibiting defamation of religions, while in the common law there exists the crime of blasphemous libel. Because of the doctrine of



Sanne Terlingen

the "margin of appreciation," the ECtHR has been very reluctant to find against states in matters of blasphemy and defamation of religions. Because this falls within the area of "public morals," the Court often declines to interfere in decisions made at the national level: the absence of a uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions broadens the state's opportunity to rely on the margin of appreciation when regulating freedom of expression within the sphere of morals or religion. In cases involving

political speech, a small margin is allowed, because this is regarded as being a common value of great importance. But the margin is much greater for cases involving "public morals" because this is an area of greater cultural difference between European countries. (*Giniewski vs. France*, Application no. 64016/00, Judgment of 31 January 2006, para 44.)

7. The burden of proof

On the burden of proof, the ECtHR has been completely unpersuaded by arguments to shift the burden of proof. While it has been influenced by other aspects of the evolving US jurisprudence on defamation, it has explicitly set its face against importing the rule from *New York Times v Sullivan* and subsequent American cases. In *McVicar*, the Court was asked to adjudicate on the Sullivan rule, as part of the claim by a British journalist that he should not have been required to prove the truth of allegations about drug use by a well-known athlete. It concluded: the Court considers that the requirement that the applicant prove that the allegations made in the article were substantially true on the balance of probabilities constituted a justified restriction on his freedom of expression under Article 10 § 2 of the Convention.

8. Enforcement

How does the Council of Europe ensure that courts judgments are acted upon by individual states. This is important as it impacts on the court's authority. There are political solutions but are there, should there be, others?

Appendix

Dr Akdeniz was, I think, intending to talk about the competing rights issue within the context of Turkish cases especially with regards to defamation cases involving the President of Turkey (see report on the issue within the context of monitoring the ECtHR decision in Artun and GÜvener v. Turkey at http://www.aihmiz.org.tr/files/Artun_Guvener_Monitoring_Report.pdf).

He was also going to talk about an ongoing case (No: 41139/15) involving a media ban on the work of a Parliamentary Investigation involving allegations of corruption and 4 former ministers. The Government argued that the ban is acceptable to protect the ministers from being labelled as criminals!

Another big issue that he was going to highlight are problems caused by:

1. the very wider definition of the term "terrorist" that is used by the Turkish government to justify clampdowns on journalists and activists - a problem that is not just Turkey's
2. and that in Turkey, they are now making applications directly to the European Court because the Turkish constitutional court is effectively acting as a block on cases proceedings – such that they are arguing that the availability of appeal via the CC no longer provides an effective legal remedy. This is particularly of concern for detained journalists who are yet to see indictments as well as for academicians (and others of course) who have been thrown out of public service with state of emergency decrees.

Yaman said they have made two applications to the European Court for two journalists who were arrested in late August. They applied to the constitutional court on behalf of them in November but the court did not even give an application number, wouldn't even decide on the temporary measure issue. So, they waited 3 weeks and then lodged applications with the European Court. So far, he tells me "they are sitting on them" but Yams bets the European Court will decide before the constitutional court on the issue.

They are also starting to bring in article 18 into their applications. Art 18 states that any restrictions permitted under the ECHR to any stated rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed. So, will be interesting to see what the European Court says about these.

Conclusion

Some of the things I would be interested to hear about from our panellists and from our very well informed audience would be:

- What is the biggest / most serious future challenge we face in international human rights law at the moment in a freedom of expression context?

- What do people think about cross-border issues – what standards are / should be applied in these cases – it is difficult for Journalists if they have to have a gasp and comply with several differing standards and norms.
- what about the rights for families of dead people – the European Court has not ruled out the possibility that they might sue, saying: the reputation of a deceased member of a person's family may, in certain circumstances, affect that person's private life and identity, and thus come within the scope of Article 8 see *Putistin v. Ukraine*, Application No. 16882/03, Judgment of 21 November 2013, para 33.
- False news - careful distinction needs to be made between facts and value-judgements. The existence of facts can be demonstrated, whereas the truth of value-judgements is not susceptible of proof. ... As regards value judgements this requirement [to prove their truth] is impossible of fulfilment and it infringes freedom of opinion itself *Lingens v. Austria*, Judgment of 8 July 1986, Series A no. 103.

Robert Spano

1. Issues to be addressed: (1) The nature of the methodological approach adopted by the ECtHR when dealing with defamation issues. (2) Positive obligations of Member states under Article 10 to protect journalists and prevent impunity.
2. As to **Point no. 1**, three remarks:
3. First, the principle of equal respect requires that the right to reputation under Article 8 of the Convention, on the one hand, and freedom of expression, on the other, be given equal weight. Under this approach, the balancing of interests becomes an inevitable methodological starting point.



Robert Spano

4. It can be argued that the Court's development of the symbiotic relationship between Article 8 and 10 and the balancing of interests takes account of the rapid developments in the area of free speech as manifested in the modern online dissemination of ideas and information and the harms this development can pose for privacy rights. In this regard it is important to recall that the European tradition of free speech protections is not analogous to the American approach of very robust, and in some situations absolute, protections of freedom of expression, as provided for by the First Amendment to the US Constitution.
5. Second, the ECtHR continues to apply its fundamental principles that a "high level of protection" is to be accorded to freedom of expression with a correspondingly narrow margin of appreciation, namely in two fields: (1) political speech and (2) in matters of public interest.
6. Third, freedom of expression under Article 10 is subject to explicit textual limitations under Article 10 § 2 of the Convention. The "duties and responsibilities" component of the second paragraph is the normative basis for the condition, or "proviso", for Article 10 protection of journalists, which is manifested in the concept of "responsible journalism", see in particular two recent Grand Chamber judgments, *Pentikäinen v Finland* (2015), § 90, and *Bédat v Switzerland* (2016), § 50.
7. In the assessment of whether a measure, interfering with a journalist's free speech rights under Article 10, is justified under the second paragraph the Court looks to the so-called *Stoll-criteria* (*Stoll v Switzerland* (GC) (2007), namely: (1) the interests at stake, (2) the review of the measures by the

domestic courts, (3) the conduct of the journalist and the content of the publication, (4) and the proportionality of the penalty imposed. As to this latter criteria, the Court has not categorically excluded the use of criminal law provisions in defamation cases, although imprisonment, as a sentencing option, will almost always lead to a finding of disproportionality in traditional defamation cases.

8. As to **Point no. 2**, two remarks:
9. First, Article 10 of the Convention not only protects against Governmental interference, but also may contain a positive duty for Government to promote and protect free speech, even in horizontal relations between private parties and entities.
10. Second, the Court has furthermore held that States are required to create a favourable environment for participation in public debate by all persons concerned, enabling them to express their opinions and ideas without fear. The State must not just refrain from any interference with the individuals', including journalists', freedom of expression, but is also under a "positive obligation" to protect his or her right to freedom of expression against attack, including by other private individuals.
11. In conclusion.
12. It is not realistic to expect the European Court of Human Rights to provide bright line rules or solutions in the field of defamation and the right to privacy. The formulation of Article 10 of the Convention, with its limitation clause in the second paragraph, and its symbiotic relationship with Article 8, necessitates by definition that a case-by-case factual analysis takes place in such cases. It follows that the Court's role is limited to providing a framework of principles that should guide domestic authorities in their decision-making and to be a safety valve in cases where courts at national level have not fulfilled their Convention obligations. The Court must therefore continue to "embed" these principles and adjudicatory methodologies into the domestic legal orders, by enforcing the principle of subsidiarity and fostering a "culture of human rights", as it is in the Member states that Convention rights are, first and foremost, to be protected and secured.

Galina Arapova

Defamation remains one the main issues in the Freedom Of Expression related court cases on both the domestic level and in the European court's case-law under Article 10 of the Convention. Even though the European court's jurisprudence is



Galina Arapova

quite far-reaching and well-developed on this issue, practising lawyers still face difficulties in trying to apply international principles at the domestic level. I am not going to criticise here a certain lack of knowledge of ECtHR case-law and principles among legal practitioners, including domestic judges, or the many times when there is a lack of capacity or will to implement those principles in practice. This is a matter for some other discussion. But the very fact that the number of cases brought before the European court under Art. 10, is still very high, shows the importance of professional discussion and further

development of legal knowledge in this field and requires common understanding and a unified approach in dealing with these cases on both domestic and international levels.

1. I am going to focus on just a few controversial issues, which I find of current interest in many countries of Europe. My presentation will rather raise issues for further discussion with the audience than provide answers and recipes. Those recipes we, as practising media lawyers, are mainly expecting to learn from the European court. The comments and reflections by Judge Spano, as a speaker in this panel, can therefore be very helpful.

I will start from criminal defamation, which remains an active provision in the legislation of many European countries. Russia is not an exception and is probably the only country in the world which decriminalised defamation and then introduced it back just 6 months later. And even though there is no possibility to use imprisonment as a sanction, the provisions are quite vague and that opens a door for misuse. For instance, the new provision (art. 128.1 of the Criminal Code) provides harsh financial penalties even in comparison with the previous legislation. Libellous public statements or remarks reproduced by media outlets will be punished by a fine of up to 5 million rubles (just over 80.000 Euro). The complete new ground for criminal defamation is "Libelling a person by claiming that he/she suffers from a disease that could be dangerous to others" (the penalty is a fine of up to 50.000 euro). The Russian Criminal Code provides legal grounds to prosecute for "libel against judges, jurors, prosecutors, and law enforcement officials," punishable by

a fine of up to 2 million rubles (33.000 euro), and insult of public officials. The main sanction could be accompanied by prohibition to practise the profession, which to my mind constitutes a serious threat to media freedom and the role of journalists in a democratic society, causing a serious chilling effect, as no-one wants to find himself in jail, or bankrupt, or not being able to support his family. If we allow the possibility of such sanctions to be imposed on journalists, we have to justify that it is necessary in a democratic society. But could that be proportionate when we talk about using criminal convictions in order to protect reputations?

We all know there's been a long-time campaign around Europe for decriminalisation of defamation and the media community and media lawyers still didn't win this campaign. I hope that ECtHR could contribute more to this by developing a stronger position towards criminal defamation and a set of clearer criteria of proportionality of criminal sanctions in defamation cases when there is a question on violation of FOE.

The ECtHR case law on this issue differs from case to case which gives the authorities arguments to refuse to decriminalise defamation and go ahead and prosecute journalists and bloggers for defamation under criminal proceeding. In some case, like in *Cumpănă and Mazăre v. Romania*, ECtHR found violation of Art.10 in criminal conviction of journalists quite rightly pointed out that "criminal sanction and the accompanying prohibitions to practise profession imposed on them had been manifestly disproportionate in their nature and severity to the legitimate aim pursued".

It also stated that "in regulating the exercise of FOE so as to ensure adequate protection by law of individuals' reputations, States should avoid taking measures that might deter the media from fulfilling their role of alerting the public to apparent or suspected misuse of public power. In addition, investigative journalists were liable to be inhibited from reporting on matters of public interest if they ran the risk ... of being sentenced to prison or to a prohibition on the exercise of their profession".

The Mass Media Defence Centre that I lead provided legal defence in a similar case in Russia, where journalist and blogger Sergey Reznik was convicted under several accusations, including insult of public officials in his critical articles for calling a female commercial court judge a "crocodile" and calling a prosecutor by his nickname, given to him by his colleagues, not the media, for not wearing a tidy clothing - "a tractor driver". The blogger served 3 years of imprisonment and now is deprived of possibility to practise journalism for 2 more years based on criminal sanction.

If position of the ECtHR would be more direct, consistently criticising application of criminal defamation, like in *Cumpănă and Mazăre* case and other criminal defamation cases, that might help to promote and strengthen arguments for decriminalisation of defamation in Europe. But there are still many other cases, where ECtHR considered

imposing criminal sanctions for defamation proportionate and didn't find violation of Art.10 in those cases (*Mihaiu v. Romania*)

2. Another issue that I would like to raise is a conflict between two rights – the right to FOE and the right to reputation (as an element of the right to privacy, including liability for publishing personal data) which also effects implementation of Art.10 on domestic level and puts under question prior ECtHR case-law on defamation . This question was raised at the similar conference in 2008 by Prof. Dirk Voorhoof and it still remains active.

At some point the Court reassessed the question of whether the notion of "private life" should be extended to include reputation and concluded that the Court's prior case law had only recognised the existence of such a right sporadically, and mostly in cases involving serious allegations which had an inevitable direct effect on the applicant's private life. The evolution of this interpretation culminated with *Chauvy v. France*, a case in which the Court for the first time identified the existence of a conflict between two ECtHR rights in defamation cases.

This case and others like it, by confirming that the right to reputation is protected under Article 8, opened the door for defamation plaintiffs, who had failed to obtain satisfaction in domestic proceedings, to claim a violation of Article 8 at the ECtHR. And those claims were successful in many occasions.

In some cases, the Court identified a tension between Article 8's guarantee of protection of right to private life and reputation, and Article 10's guarantee of FOE, categorising the tension as a conflict between rights, competing interests or values, so the fair balance between Article 8 and Article 10 rights has to be found. (*Petrina v. Romania*, *Pfeifer v. Austria*, *Romanenko v. Russia*, *Mahmudov v. Azerbaijan*, *Kwiecień v. Poland*)

According to the Court's defamation case law neither right is granted absolute preference. The Court advocates finding a middle ground between both rights because the FOE is not an absolute right and does not provide an unlimited right to make statements that affect another's reputation, and because the right to reputation does not warrant a complete protection against all critical statements.

But it is rather difficult to combine this approach with all the previous Court's jurisprudence on defamation cases, even though legally speaking it might be considered by some lawyers as an interesting theoretical thought. In practice it creates more complications in implementation of the classical Art.10 principles, even the obvious one such as the one about public figures who should tolerate a higher level of criticism.

3. and the last issue I was going to raise is about personal data protection in light of the Art.10 guarantee for freedom of imparted information.

Personal data protection is a relatively new area in human rights protection, but under the ever-growing influence of globalisation trends and swift development of

information technology it develops rapidly. One of the results of this development of Internet and information technologies is an increased flow of personal data. And of course journalists work with a lot of personal information on a daily basis.

There is a strong tendency that we observe lately where individuals who are subject to legitimate criticism in traditional press, online or in social media use a "protection of personal data" remedy to put pressure on the publisher and punish him\her, and request to delete the information.

What is happening in practice, is that having no grounds to bring defamation claims, individuals whose activity or personality is a subject of legitimate discussion in the media, complain in the state control body that their personal data was disclosed in media. And when it comes to disclosure of personal data, public interest as an argument, doesn't work as there is no preference under domestic law to publish individual personal data in the public interest.

Thus authorities prefer to formally apply Personal data protection law rather than the complex of principles of law on mass media and ECtHR case law concerning public interest, the right to impart and receive information, the watchdog role of the media, etc. One of the cases where the European Court tried to strike a balance between personal data protection and traditional freedom to receive and impart information, guaranteed by Art.10 is Magyar Helsinki Bizottság v. Hungary 8 November 2016 (Grand Chamber). It is an important step to further develop this new area of the Court case-law and clarify how personal data protection should be balanced with the Art.10 rights and public interest.

4. SECOND PANEL: Investigative journalism, access to information, protection of sources and whistleblowers

Lawrence Early

I will focus on the significance of the Court's recent judgment in the case of *Magyar Helsinki Bizottság v. Hungary* for the rights and freedoms of media professionals and public interest campaigners when it comes to access to information held by officialdom. It is a significant judgment. Up to that point, the Court had, arguably, taken the view that Article 10 of the Convention covered only the freedom to receive and impart information and not the freedom to seek information. According to the Court's 1987 judgment in *Leander v. Sweden* and as confirmed in later judgments:

"The "right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not ... embody an obligation on the Government to impart such information to the individual" (*Leander v. Sweden*, § 74)



Lawrence Early

While the Court did not recognise a separate right of access to official information as such in its judgment in the *Magyar Helsinki Bizottság* case, it "clarified" the *Leander v. Sweden* principles accepting that, in certain circumstances, a right of access could be drawn from the right to freedom of expression. It set out the criteria for determining in a particular case when an access right could arise under Article 10 and, if refused, whether that refusal would amount to an interference with the right to freedom of expression and fall to be justified from the standpoint of

the requirements of lawfulness, legitimacy of aim and necessity.

1. The facts of the case

The applicant NGO wished to have access to police files concerning the appointment of public defenders. The applicant was researching the manner in which the police selected public defenders with a view to demonstrating that the police largely rely on the same lawyers, with the unfortunate consequence that lawyers become dependent on the assignments and are unlikely to challenge police investigations in order not to be overlooked for further appointments. Two police departments refused to provide the information on the ground that the information sought was of a personal nature. The Hungarian Supreme Court upheld their refusal observing

that the information sought was personal data within the meaning of the Data Act and did not fall within the public domain nor within any exception envisaged in the Data Act.

In the Convention proceedings the applicant claimed that by denying it a right of access to the information the authorities had hindered the performance of its "watchdog" function to express views on the adequacy of the system used for the appointment of public defenders. The applicant relied on Article 10 of the Convention.

2. An applicant NGO and not a media organisation before the Court – relevance?

Is it significant that the applicant was not a media organisation, but a non-governmental body? What has the Court said regarding the role of non-governmental organisations and how do its statements on the "public watchdog" role of media professionals compare with its analysis of that of non-governmental organisations from the standpoint of Article 10 freedom.

The press and audio-visual sectors have been at the forefront of litigation in Strasbourg which has tested the scope of the right to freedom of expression and developed and shaped the classic principles on the importance of media freedom for sustaining democracy. We know them by heart:

"The duty of the press is to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog' (*Bladet Tromsø and Stensaas v. Norway* [GC], §§ 59 and 62)."

The Court has also begun to give prominence to the role of non-governmental organisations in terms of their watchdog functions. It has acknowledged that the function of creating various platforms for public debate is not limited to the press but may also be exercised by, among others, non-governmental organisations, whose activities are an essential element of informed public debate. The Court has accepted that when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press (see *Animal Defenders International v. the United Kingdom* [GC], § 10) and may be characterised as a social "watchdog" warranting similar protection under the Convention as that afforded to the press (*Youth Initiative for Human Rights v. Serbia* § 201).

I highlight both the press and NGOs in this context given that questions may be asked as to the scope of the Court's judgment in the instant case. Who benefits from the Court's judgment in this case when it comes to the exercise of a right of access to official information, just the media and NGOs operating as watchdogs? Or others?

3. The essence of the arguments before the Court

The Hungarian Government, supported by the United Kingdom Government which had been granted leave to intervene in the proceedings before the Court, invited the Court to find that Article 10 could not be relied upon to ground a request to seek information. The intervening Government expressed the opinion that if the Court were to recognise a right of access to information held by the State, this would far exceed a legitimate interpretation of the Convention and would amount to judicial



Helen Darbishire

legislation. The "Leander case-law" was in their favour. The omission from Article 10 of a right to seek information, in contrast to other international instruments such as Article 19 of the ICCPR, also weighed in the respondent Government's favour. Interestingly, the respondent Government contended that the Committee of Ministers had adopted a separate, specific, Convention on the right of access to official documents, thus indicating that the drafters of Article 10 had not intended to include in the Human Rights Convention the right to seek information from public authorities.

The applicant essentially maintained that access to information was a *conditio sine qua non* for the effective exercise of the right to freedom of expression. In its view, access to information was inherent in the right to freedom of expression, since refusing a request for access to data impeded the realisation of that freedom. The applicant also pleaded that the Court's *Leander v. Sweden* judgment did not place a brake on the development of the scope of the Article 10 right. It drew attention to a series of recent cases in which the Court has clearly taken the view that the right of access to information held by public authorities came within the ambit of Article 10 (for example *Sdruženi Jihočeské Matky v. the Czech Republic* (dec.) (2006), *Társaság a Szabadságjogokért v. Hungary* (2009)), *Youth Initiative for Human Rights v. Serbia* (2013), and *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria* (no. 39534/07, 28 November 2013). Constraints of time do not permit me to address these case-law developments in detail.

4. The intervening non-governmental organisations

The Court also had before it the written submissions of the Media Defence Initiative, the Campaign for Freedom of Information, Article 19, the Access to Information Programme and the Hungarian Civil Liberties Union. Their submissions to the Court can be summarised as follows:



(left to right) Helen Darbshire, Antoine Deltour, Lucy Freeman, Lawrence Early, Dirk Voorhoof

- the wording of Article 10 expressly supported a conclusion that a right of access to information fell within the scope of Article 10, since the right to impart information and the right to receive information were two distinct rights. Seeking information from the State was an expression of the wish to receive it.
- free speech was integral to the discovery of "truth". An individual was unable to reach a view of truth if he or she could not have access to potentially relevant information held by the State
- freedom of expression was essential to allow informed participation in a democracy, and such participation was ensured by access to State-held information
- the Court was not bound to follow its previous judgments such as *Leander v. Sweden*, but ought to interpret the Convention as a living instrument in the light of present-day conditions.

What value does the Court attach to Third Party interventions? Today we are speaking about "promoting dialogue between the Strasbourg and the media freedom community". Can their interventions in the case at hand be described as dialogue with the Court? An intervening Third Party is not a party to the proceedings. The Third Party is not expected to make submissions on the facts of a particular case nor on the admissibility or merits of the case. Strictly speaking this is not dialogue. However the Court derives immense benefit from the views expressed by the media freedom community when it acts as amicus in the adversarial proceedings before. The Court's adjudication on the circumstances of a particular case can only be enriched when it is exposed to informed comment on the broader picture, for example a comparative law perspective on the specific issue before it or on the state of health of media freedom in a respondent State, or the particular challenges, risks and opportunities thrown up by the digital media environment.

As to the case of *Magyar Helsinki Bizottsag* I will leave it to you to gauge from the Court's judgment the extent to which its reasoning may have been shaped by the submissions of the third party intervenors.

5. The Court's response to the parties' arguments

As I noted at the outset, the Court found for the applicant. Its complaint of denial of access fell within the scope of Article 10 and there had been an interference with the right guaranteed by that Article. What considerations led the Court to find that there existed a need to recognise an individual right of access to State-held information in order to assist the public in forming an opinion on matters of general interest?

It noted that the 'standard jurisprudential position', set out in *Leander* and confirmed in a series of later judgments was that Article 10 neither conferred a right of access to State-held information nor embodied a corresponding obligation on the authorities to provide it. That did not, the Court found, exclude the existence of such a right or obligation in particular circumstances.

The Court examined whether a right of access could be gleaned from Article 10 in the circumstances of the applicant's case. It had particular regard, among other things, to:

- the drafting history of Article 10
- the development of its case-law in this area over the years
- comparative and international law on the matter of freedom of information including the EU Charter of Fundamental Rights and other EU provisions as well as various Council of Europe instruments

It reasoned as follows:

"From the survey of the Convention institutions' case-law (...), it transpires that there has been a perceptible evolution in favour of the recognition, under certain conditions, of a right to freedom of information as an inherent element of the freedom to receive and impart information enshrined in Article 10 of the Convention.

(...) Moreover, it is of paramount importance that according to the information available to the Court nearly all of the thirty-one member States of the Council of Europe surveyed have enacted legislation on freedom of information. A further indicator of common ground in this context is the existence of the Convention on Access to Official Documents.

(...) In the light of these developments and in response to the evolving convergence as to the standards of human rights protection to be achieved, the Court considers that a clarification of the *Leander* principles in circumstances such as those at issue in the present case is appropriate.

(...) As is clearly illustrated by the Court's recent case-law and the rulings of other human-rights bodies, to hold that the right of access to information may under no

circumstances fall within the ambit of Article 10 of the Convention would lead to situations where the freedom to "receive and impart" information is impaired in such a manner and to such a degree that it would strike at the very substance of freedom of expression. For the Court, in circumstances where access to information is instrumental for the exercise of the applicant's right to receive and impart information, its denial may constitute an interference with that right. The principle of securing Convention rights in a practical and effective manner requires an applicant in such a situation to be able to rely on the protection of Article 10 of the Convention."

6. What was the Court's conclusion on the scope of the right?

"(...) The Court (...) considers that Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However, (...) such a right or obligation may arise, (...) in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right."

"Whether and to what extent the denial of access to information constitutes an interference with an applicant's freedom-of-expression rights must be assessed in each individual case and in the light of its particular circumstances. (...)"

7. The guiding principles

What are the guiding principles for determining whether a denial of a request for access to information held by public bodies, including requests lodged by media professionals, amounts to an interference?

Here I will summarise the Court's considerations in paragraphs 158-170 of its judgment. Those considerations are:

- the purpose of the information request – was it a relevant preparatory step in journalistic activities or other activities serving public interest goals; was it necessary for the exercise of freedom of expression?
- the nature of the information sought – does it relate to a matter of public interest?
- the role of the applicant – does the person seeking access to the information in question do so with a view to informing the public in the capacity of a public "watchdog"?
- was the information ready and available – or would its disclosure prove particularly cumbersome for the authorities?

Applying those criteria, the Court found that the failure to provide the information sought by the applicant NGO constituted an interference with its rights protected by Article 10 of the Convention. It ruled that the information sought by the applicant

NGO from the relevant police departments was necessary for the completion of the survey on the functioning of the public defenders' scheme being conducted by it in its capacity as a non-governmental human-rights organisation, in order to contribute to discussion on an issue of obvious public interest. By denying it access to the requested information, which was ready and available, the domestic authorities impaired the applicant NGO's exercise of its freedom to receive and impart information, in a manner striking at the very substance of its Article 10 rights. There had therefore been an interference.

8. The finding of a breach

Was there a breach of Article 10?

The Court's inquiry was based on its typical approach to the application of the second paragraph of Article 10. Was there a lawful basis for the interference, did the interference pursue a legitimate aim and finally was the interference necessary in a democratic society. I will concentrate on the necessity test as applied in the applicant's case. The Court observed that the information sought was in the form of personal data, the names of public defenders and the number of times the police departments in question had given them assignments. The Hungarian Supreme Court had ruled that such data were not subject to disclosure under the domestic data protection legislation and did not fall within any of the exceptions to the non-disclosure rule. However, the Court found that this rigid approach excluded any meaningful analysis of the weight to be given to the applicant's Article 10 right. Although the information sought admittedly concerned personal data, it did not involve information outside the public domain. The information sought consisted only of information of a statistical nature about the number of times the individuals in question had been appointed to represent defendants in criminal proceedings within the framework of the publicly funded national legal-aid system. There was nothing to show that the privacy rights of the public defenders would have been negatively affected had the applicant's request been granted.

9. What are the implications of the judgment for the work of media professionals?

I will leave this point for discussion.

I should point out that the judgment was not unanimous. In their dissenting opinions, two Judges were firmly of the view that Article 10 could not be construed as conferring on individuals a right to seek information.

Dirk Voorhoof

Introduction

The concept note² to this conference refers to developments in the Court's case law that impact the expectations regarding the role of the European Court of Human Rights (ECtHR, or: the Court) as the "*ultimate watchdog over the right to freedom of expression and information for media and journalists in Europe*". Over the last decades and particularly the last ten years the Court has delivered significant, even remarkable jurisprudence in support of the right to freedom of expression and information.³ But the Court, including the Grand Chamber, has also delivered some judgments that neglect crucial aspects of journalists' and civil society's rights to freedom of expression.⁴



Dirk Voorhoof

This presentation will focus on all four issues mentioned in the title of this panel. Due to the Court's case law Article 10 ECHR guarantees (1) protection of acts of newsgathering and investigative journalism, (2) an enforceable right of access to official documents, (3) far-reaching protection of journalistic sources, and (4) protection of whistle-blowers based on the right to freedom of expression.⁵ Although the wording of Article 10 ECHR does not contain any reference to any of these specific aspects, the ECtHR succeeded in incorporating them in the protection

system of the right to freedom of expression as guaranteed by Article 10 ECHR, only accepting interferences with these rights when they meet the strict test of Article 10 § 2 ECHR. This approach by the ECtHR has undoubtedly created higher European standards, obliging the member states to increase substantially and effectively the level of protection of the right to freedom of expression and information which must be applied and secured in each of these four domains.

² <https://rm.coe.int/16806fbf0f>

³ See Dirk Voorhoof, "Freedom of Journalistic Newsgathering, Access to Information and Protection of Whistle-blowers under Article 10 ECHR and the Standards of the Council of Europe", in Onur Andreotti (ed.), *Journalism at Risk: Threats, challenges and perspectives*, Council of Europe, Strasbourg, 2015, 105-143.

⁴ See e.g. Dirk Voorhoof, "The Grand Chamber strikes again: *Bédat v. Switzerland*. Criminal conviction of journalist for having published documents covered by investigative secrecy in a criminal case is no violation of Article 10 ECHR", *ECHR Blog* 7 April 2016; Dirk Voorhoof, "Delfi AS v. Estonia: Grand Chamber confirms liability of online news portal for offensive comments posted by its readers", *Strasbourg Observers Blog* 18 June 2015 and Dirk Voorhoof, "Journalist must comply with police order to disperse while covering demonstration", *Strasbourg Observers Blog* 26 October 2015.

⁵ The text of this article is the extended and updated version of the presentation at the Strasbourg conference on 24 March 2017, available at <http://vodmanager.coe.int/coe/webcast/coe/2017-03-24-2/lang> (minute 47:30-102:15).

The first part of this presentation will highlight the important contribution and the achievements by the ECtHR in guaranteeing, broadening and enforcing the right to freedom of expression and information regarding newsgathering and investigative journalism, access to official documents, source protection and whistle-blowing. The second part will focus on some shortcomings, loopholes or inconsistencies in (recent) judgments and decisions by the ECtHR with regard to these four domains.

Part 1: Positive achievements in the ECtHR's case law in support of Article 10 ECHR

Looking at the Court's case law since its first finding of a violation of Article 10 ECHR in the case of *Sunday Times v. the United Kingdom*, in 1979, one is confronted with an increasing number of judgments in which the ECtHR found violations of the right to freedom of expression.⁶ The Court's jurisprudence shows a dynamic interpretation of the Convention, also and especially in respect of applicants' claims referring to new dimensions of the right to freedom of expression. As a result, some aspects of journalistic practices, newsgathering, public debate, access to official documents and access to the Internet that were interfered with or lacked protection at national level found robust protection in the Strasbourg case law under Article 10 ECHR. The mere fact that the ECtHR in hundreds of judgments found violations of the right to freedom of expression shows the added value that the ECtHR has created, particularly in upholding high standards of protection for **media, journalists and civil society** in order to enable them to fulfill their public watchdog function in a democratic society.⁷

1.1. Protection of investigative journalism and acts of newsgathering

Since *Fressoz & Roire v. France* the ECtHR has reiterated on several occasions that journalists should not be prosecuted or sanctioned because of **breach of confidentiality or the use of illegally obtained documents**, when the disclosure of confidential information is related to journalistic reporting on a matter of public interest and the journalist has furthermore acted in accordance with the standards of journalistic ethics.⁸ The Court has accepted that the interest in protecting the publication of information originating from a source which obtained and retransmitted the information unlawfully may in certain circumstances outweigh those of an individual or an entity, private or public, in maintaining the confidentiality of the information. In a case where a media company was sanctioned for having broadcast information which someone else had obtained illegally, the Court stated that it was "*not con-*

6 Annual Report 2016, European Court of Human Rights, 202-203. See also Dirk Voorhoof, "Freedom of Expression, Media and Journalism under the European Human Rights System: Characteristics, Developments, and Challenges", in Peter Molnár (ed.), *Free Speech and Censorship Around the Globe*, Budapest - New York, Central European University Press, 2015, 59-104.

7 See also Dirk Voorhoof (et al.) and Tarlach McGonagle (Ed. Sup.), Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights, IRIS Themes, European Audiovisual Observatory, Strasbourg, E-book, 2016, 451 p.

8 ECtHR Grand Chamber 21 January 1999, *Fressoz and Roire v. France*; ECtHR 25 April 2006, *Dammann v. Switzerland*; ECtHR 7 June 2007, *Dupuis and Others v. France*; ECtHR 19 December 2006, *Radio Twist v. Slovakia* and ECtHR 28 June 2011, *Pinto Coelho v. Portugal*.

vinced that the mere fact that the recording had been obtained by a third person contrary to law can deprive the applicant company which broadcast it of the protection of Article 10 of the Convention".⁹ A newspaper that published emails between two public figures that had been gathered illegally, directly related to a public discussion on a matter of serious public concern, can be shielded by Article 10 ECHR against claims based on the right of privacy as protected under Article 8 ECHR.¹⁰ In a case concerning the conviction of four journalists for having illegally recorded and broadcast an interview using **hidden cameras**, the ECtHR found that the Swiss authorities had violated the journalists' rights protected under Article 10 ECHR. The ECtHR emphasised that the use of hidden cameras by the journalists was aimed at providing public information on a subject of general interest, whereby the person filmed was not targeted in any personal capacity but in a professional context. The Court found that the interference with the private life of the person concerned had not been serious enough to override the public interest on denouncing malpractice, *in casu* in the field of insurance brokerage.¹¹

In principle journalists are not above the law, but the interest of the public to be informed on matters of public interest can be more important than the enforcement of criminal law. The case law of the ECtHR shows that convictions of journalists for breach of professional secrecy (by others) or using illegally forwarded documents amounted to violations of the journalists' right to freedom of expression under Article 10 ECHR. On several occasions the ECtHR has emphasised that "*the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom*".¹²

The importance of **acts of newsgathering** being protected under Article 10 ECHR is also reflected in a judgment of 9 February 2017, in the case *Selmani and Others v. the former Yugoslav Republic of Macedonia*. The case concerns the forcible removal of journalists from the gallery of the national parliament where they were reporting on a parliamentary debate in the former Yugoslav Republic of Macedonia. In its reasoning the ECtHR referred to the crucial role of the media in providing information on the authorities' handling of public demonstrations and the containment of disorder, such as in the present case. It reiterated that the "watchdog" role of the media assumes particular importance in such contexts, since their presence is a guarantee that the authorities can be held to account for their conduct *vis-à-vis* the demonstrators and the public at large when it comes to the policing of large gatherings, including the methods used to control or disperse protesters or to preserve public order. Any **attempt to remove journalists from the scene of demonstrations** must therefore be subject to strict scrutiny, especially "*when jour-*

⁹ ECtHR 19 December 2006, *Radio Twist v. Slovakia*, § 62.

¹⁰ ECtHR (Decision) 16 June 2009, Case No. 38079/06, *Jonina Benediktsdóttir v. Iceland*. See also ECtHR Grand Chamber 21 January 1999, *Fressoz and Roire v. France* and ECtHR 19 December 2006, *Radio Twist v. Slovakia*.

¹¹ ECtHR 24 February 2015, *Haldimann and Others v. Switzerland*.

¹² ECtHR 17 February 2015, *Guseva v. Bulgaria*, § 37.

nalists exercise their right to impart information to the public about the behaviour of elected representatives in Parliament and about the manner in which authorities handle disorder that occurs during Parliamentary sessions".¹³ The ECtHR found that the government failed to establish convincingly that the journalists' removal from the gallery was necessary in a democratic society.

1.2. Toward a right of access to official documents by journalists, NGOs and other "public watchdogs".

For a long time, the ECtHR saw no reason to apply Article 10 ECHR in cases of denial of access to public documents. In the cases *Leander v. Sweden*, *Gaskin v. United Kingdom* and *Guerra and others v. Italy*, the Court pointed out "that freedom to receive information (...) basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion".¹⁴ In *Roche v. the United Kingdom* in 2005, the Grand Chamber referred to the *Leander*, *Gaskin* and *Guerra* judgments and it saw no reason "not to apply this established jurisprudence".¹⁵

In the spring of 2009 the Court however delivered a judgment in which it recognised, to some extent, **the right of access to official documents**. The ECtHR made clear that when public bodies hold information that is needed for public debate, the refusal to provide documents to those who are requesting access is a violation of the right to freedom of expression and information as guaranteed under Article 10 ECHR. In *TASZ v. Hungary* the Court's judgment mentioned the "censorial power of an information monopoly" when public bodies refuse to release information needed by the media or civil society organisations to perform their "watchdog" function. It also considered that the State had an obligation not to impede the flow of information sought by a journalist or NGO. The ECtHR recognized civil society's important contribution to the discussion of public affairs and designated the applicant association, which was involved in human rights litigation, as a social "watchdog". In these circumstances the applicant's activities as an NGO warranted Convention protection similar to that afforded to the press. Furthermore, given the applicant's intention to impart the requested information to the public, thereby contributing to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired and the ECtHR found a violation of Article 10 ECHR.¹⁶

¹³ ECtHR 9 February 2017, *Selmani and Others v. the former Yugoslav Republic of Macedonia*. Compare with ECtHR Grand Chamber 20 October 2015, *Pentikäinen v. Finland*, *infra*.

¹⁴ ECtHR 26 March 1987, *Leander v. Sweden*, § 74; ECtHR 7 July 1989, *Gaskin v. UK*, § 52 and ECtHR 9 February 1998, *Guerra and others v. Italy*, § 53.

¹⁵ ECtHR Grand Chamber 19 October 2005, *Roche v. UK*, §§ 172-173. See also Wouter Hins and Dirk Voorhoof, "Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights," *European Constitutional Law Review* 3 (2007): 114-126.

¹⁶ ECtHR 14 April 2009, *Társaság A Szabadságjogokért v. Hungary*.

Also in subsequent cases the ECtHR found **violations of Article 10 ECHR** because of **refusal of access to official documents**.¹⁷ In a judgment of 17 February 2015, in the case of *Guseva v. Bulgaria*, the Court held that *"the gathering of information with a view to its subsequent provision to the public can be said to fall within the applicant's freedom of expression as guaranteed by Article 10 of the Convention"*. And: *"by not providing the information which the applicant had sought, the mayor interfered in the preparatory stage of the process of informing the public by creating an administrative obstacle (...) The applicant's right to impart information was, therefore, impaired"*.¹⁸ This right, as has been demonstrated in *Youth Initiative for Human Rights v. Serbia*, can also include the right to have access to documents belonging to an intelligence agency and its surveillance activities. The ECtHR can even order the authorities of a member state an intelligence agency to provide a journalist or NGO with the information requested.¹⁹

While some countries and national authorities still tried to deny or even explicitly opposed this new development in the Court's case law since 2009, the Grand Chamber judgment in the case of ***Magyar Helsinki Bizottság v. Hungary***, left no doubt as to the applicability of Article 10 ECHR in cases of refusal of access to official documents in the context of an issue of public debate.²⁰ By denying access to the requested information the Hungarian authorities had impaired the applicant NGO's exercise of its freedom to receive and impart information, in a manner that strikes at the very substance of its Article 10 rights. The Court further concentrated on the **role of civil society and participatory democracy**, and emphasised that access to public documents by the press and NGOs can contribute to *"transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance"*. It considers *"that civil society makes an important contribution to the discussion of public affairs"*, and that *"the manner in which public watchdogs carry out their activities may have a significant impact on the proper functioning of a democratic society. It is in the interest of democratic society to enable the press to exercise its vital role of "public watchdog" in imparting information on matters of public concern ... just as it is to enable NGOs scrutinising the State to do the same thing. Given that accurate information is a tool of their trade, it will often be necessary for persons and organisations exercising watchdog functions to gain access to information in order to perform their role of reporting on matters of public interest. Obstacles created in order to hinder access to information may result in those working in the media or related fields no longer being able to assume their "watchdog" role effectively, and their ability to provide accurate and reliable information may be adversely affected"*. Before Article 10

¹⁷ ECtHR 26 May 2009, *Kenedi v. Hungary*; ECtHR 25 June 2013, *Youth Initiative for Human Rights v. Serbia*; ECtHR 28 November 2013, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria* and ECtHR 24 June 2014, *Roşianu v. Romania*.

¹⁸ ECtHR 17 February 2015, *Guseva v. Bulgaria*.

¹⁹ ECtHR 25 June 2013, *Youth Initiative for Human Rights v. Serbia*.

²⁰ ECtHR Grand Chamber 8 November 2016, *Magyar Helsinki Bizottság v. Hungary*.

ECHR can come into play, however, the information requested should not only be instrumental for the exercise of the right to freedom of expression: the information to which access is sought must also meet **a "public-interest test"** for the disclosure to be considered necessary under Article 10 ECHR. In addition, whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public "watchdog" and whether the information requested is "ready and available" are also important considerations for the Court. The Court does not restrict the notion of **public watchdog** "exclusively to NGOs



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and the press", as it reiterates "that a high level of protection also extends to academic researchers (...) and authors of literature on matters of public concern (...)". The Grand Chamber also emphasises *"that given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information (...), the function of bloggers and popular users of the social media may be also assimilated to that of "public watchdogs" in so far as the protection afforded by Article 10 is concerned"*.²¹ After finding that the denial to give the applicant NGO access to the requested information was an interference with the NGO's rights under Article 10, the ECtHR explained why this amounted to a violation of Article 10 ECHR. The Grand Chamber considered that the information requested by the NGO was "necessary" for it to exercise its right to freedom of expression and it found that no privacy rights would have been negatively affected had the NGO's request for information been granted.

interference with the NGO's rights under Article 10, the ECtHR explained why this amounted to a violation of Article 10 ECHR. The Grand Chamber considered that the information requested by the NGO was "necessary" for it to exercise its right to freedom of expression and it found that no privacy rights would have been negatively affected had the NGO's request for information been granted.

The Grand Chamber's judgment in *Magyar Helsinki Bizottság v. Hungary* is considered as an important victory for journalists, bloggers, academics, and NGOs, who rely on access to public documents in order to conduct investigations as part of their role as "public watchdogs". A consequence of the judgment in *Magyar Helsinki Bizottság v. Hungary* is that limitations or restrictions regarding access to official documents at national level cannot have an absolute character any more: the interests that eventually justify these **limitations or restrictions**, such as privacy or protection of personal data, or national security, **must be balanced with the right of access to information** and its contribution to the right of the public to be informed on matters of public interest. Most fundamentally, refusals at national level of requests of access to public documents that meet the criteria put forward in *Magyar Helsinki Bizottság v. Hungary*, can now be scrutinized by the ECtHR. This means that

²¹ ECtHR Grand Chamber 8 November 2016, *Magyar Helsinki Bizottság v. Hungary*, § 168.

the Strasbourg Court looks over the shoulder of the national authorities at the way they implement and effectively secure the right of access to public documents on request by journalists, bloggers, academics, NGOs and other "public watchdogs".

The Grand Chamber's approach in *Magyar Helsinki Bizottság v. Hungary* also reflects an **evolutive interpretation** of Article 10 ECHR, with references to the developments in its own case law since 2005 and to national and international sources of law recognising a right of access to public documents. The Grand Chamber notes that "*there exists a broad consensus, in Europe (and beyond) on the need to recognise an individual right of access to State-held information in order to assist the public in forming an opinion on matters of general interest*", and that therefore the ECtHR is not "*prevented from interpreting Article 10 § 1 of the Convention as including a right of access to information*". Continuing its dynamic approach, the ECtHR argued that "*to hold that the right of access to information may under no circumstances fall within the ambit of Article 10 of the Convention would lead to situations where the freedom to "receive and impart" information is impaired in such a manner and to such a degree that it would strike at the very substance of freedom of expression. For the Court, in circumstances where access to information is instrumental for the exercise of the applicant's right to receive and impart information, its denial may constitute an interference with that right. The principle of securing Convention rights in a practical and effective manner requires an applicant in such a situation to be able to rely on the protection of Article 10 of the Convention*".²²

1.3. A robust protection of journalistic sources, including important procedural safeguards

Another important characteristic of the protection of the rights of media and journalists is reflected in the Court's case law on **protection of journalistic sources**. According to the Court "*protection of journalistic sources is one of the basic conditions for press freedom, as recognised and reflected in various international instruments including the Committee of Ministers Recommendation (...). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest*".²³

²² ECtHR Grand Chamber 8 November 2016, *Magyar Helsinki Bizottság v. Hungary*, § 155. Compare the *dissenting opinion* by Spano en Kjolbro, opposing against the application of Article 10 ECHR in this matter and advocating more judicial self-restraint by the Court, and the *concurring opinion* by Sicilianos and Raimondi justifying the "*living instrument*" doctrine and the underlying evolutive approach, also emphasizing that far from creating new international obligations for the States, this approach "*corresponds in substance to what the parties to the Convention have already accepted for many years in ratifying the Covenant on Civil and Political Rights*".

²³ ECtHR Grand Chamber 27 March 1996, *Goodwin v. UK*.

Only with respect of strict substantial and procedural guarantees interferences with the right to protection of journalists' sources can be justified. The ECtHR can only accept a disclosure order or any other interference with a journalist's source in order to meet an "**overriding requirement in the public interest**", such as for instance preventing or investigating major crime or acts of (racist) violence, protecting the right to life or preventing that minors would be sexually abused and hence subjected to inhuman or degrading treatment.²⁴

In its 2010 Grand Chamber judgment in the case of *Sanoma Uitgevers v. the Netherlands*²⁵, the ECtHR referred to "*the vital importance to press freedom of the protection of journalistic sources and of information that could lead to their identification*" and it emphasised that "*any interference with the right to protection of such sources must be attended with legal procedural safeguards commensurate with the importance of the principle at stake*". It also noted that "*orders to disclose sources potentially have a detrimental impact, not only on the source, whose identity may be revealed, but also on the newspaper or other publication against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on members of the public, who have an interest in receiving information imparted through anonymous sources*". First and foremost among the **procedural safeguards** is "*the guarantee of review by a judge or other independent and impartial decision-making body*". The ECtHR went on clarifying that "*(t)he requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not*". The ECtHR concluded in *Sanoma Uitgevers v. the Netherlands* that the quality of the law in the Netherlands was deficient, in that there was no procedure attended by adequate legal safeguards for the applicant company in order to enable an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources. There had accordingly been a violation of Article 10 ECHR in that the interference complained of was not "prescribed by law". Incorporating the guarantee of an **ex ante review by a judge or other independent and impartial decision-making body** obviously has an enormous impact, as any interference with or access to journalists' sources by public prosecutors or police, without prior authorisation by a judge or independent and impartial decision-making body amounts *as such* to a breach of Article 10 ECHR. In situations of urgency, a procedure should exist to identify and isolate, prior to the exploitation of the material by the authorities, information that could lead to the identification of sources from information that carries no such risk. In such urgent

²⁴ ECtHR (Decision) 8 December 2005, Case No. 40485/02, *Nordisk Film & TV A/S v. Denmark* and ECtHR 31 May 2007, Case No. 40116/02, *Sečić v. Croatia*. See also ECtHR (Decision) 27 May 2014, Case No. 8406/06, *Stichting Oostde Blade v. The Netherlands*.

²⁵ ECtHR Grand Chamber 14 September 2010, *Sanoma Uitgevers BV v. The Netherlands*.

situations the ECtHR clarified that *"an independent review carried out at the very least prior to the access and use of obtained materials should be sufficient to determine whether any issue of confidentiality arises, and if so, whether in the particular circumstances of the case the public interest invoked by the investigating or prosecuting authorities outweighs the general public interest of source protection"*.²⁶



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On several occasions, the European Court was of the opinion that searches of media offices, or in the home and place of work of journalists amounted to a violation of Article 10 ECHR, disrespecting the subsidiarity principle or the proportionality principle in cases of protection of journalistic sources.²⁷ Searches and confiscations in the newsroom or in the journalist's private house, with the aim of identifying an alleged "leaking" civil servant or employee, such as in *Roemen and Schmit v. Luxembourg*, *Tillack v. Belgium* and *Nagla v. Latvia*, were considered as violations of Article

10 ECHR. In the case of *Tillack v. Belgium* the ECtHR clarified that a *"journalist's right not to reveal her or his sources could not be considered a mere privilege to be granted or taken away depending on the **lawfulness or unlawfulness** of their sources, but is part and parcel of the right to information, to be treated with the utmost caution"*.²⁸

The right of journalists to shield their sources shows in many cases the need to protect the leaking of information by **whistle-blowers**, as illustrated in the Court's case law in *Goodwin v. the United Kingdom*, *Roemen and Schmit v. Luxembourg*, *Voskuil v. the Netherlands*, *Tillack v. Belgium*, *Financial Times Ltd. v. the United Kingdom*, *Nagla v. Latvia* and most recently in *Görmüş and others v. Turkey*.²⁹ In the latter case the ECtHR held that a contested article published in a Turkish magazine, on the ba-

²⁶ ECtHR Grand Chamber 14 September 2010, *Sanoma Uitgevers BV v. The Netherlands*, §§ 91-100. See also ECtHR 16 July 2013, *Nagla v. Latvia*.

²⁷ ECtHR 23 February 2003, *Roemen and Schmit v. Luxembourg*; ECtHR 15 July 2003, *Ernst and Others v. Belgium*; ECtHR 22 November 2007, *Voskuil v. the Netherlands*; ECtHR 27 November 2007, *Tillack v. Belgium*; ECtHR 15 December 2009, *Financial Times Ltd. and Others v. UK*; ECtHR Grand Chamber 14 September 2010, *Sanoma Uitgevers BV v. the Netherlands*; ECtHR 12 April 2012, *Martin and Others v. France*; ECtHR 28 June 2012; *Ressiot and Others v. France*; ECtHR 22 November 2012, *Telegraaf Media Nederland Landelijke Media N.V. and others v. the Netherlands*; ECtHR 18 April 2013; *Saint-Paul Luxembourg S.A. v. Luxembourg* and ECtHR 16 July 2013, *Nagla v. Latvia*. See also Committee of Ministers of the Council of Europe, *Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information*, 8 March 2000 and *Parliamentary Assembly of the Council of Europe, Recommendation 1950 (2011) on the Protection of Journalists' Sources*, 25 January 2011.

²⁸ ECtHR 27 November 2007, *Tillack v. Belgium*, § 65.

²⁹ ECtHR Grand Chamber 27 March 1996, *Goodwin v. UK*; ECtHR 23 February 2003, *Roemen and Schmit v. Luxembourg*; ECtHR 22 November 2007, *Voskuil v. the Netherlands*; ECtHR 27 November 2007, *Tillack v. Belgium*; ECtHR 15 December 2009, *Financial Times Ltd. and others v. UK*; ECtHR 16 July 2013, *Nagla v. Latvia* and ECtHR 19 January 2016, *Görmüş and others v. Turkey*.

sis of confidential military documents, was capable of contributing to public debate, as it had been highly pertinent in relation to discussions on discrimination against the media by State bodies in Turkey. The ECtHR considered the seizure, retrieval and storage by the Turkish authorities of all of the magazine's computer data, with a view to identifying the public-sector whistle-blowers who leaked the document, as a disproportionate interference with the right to freedom of expression and information. The Court also held that the impugned interference by the Turkish authorities could risk deterring potential sources from assisting the press in informing the public of matters involving the armed forces, including when they concerned a public interest. In the Court's view, this intervention was likely not only to have very negative repercussions on the relationships of the journalists in question with their sources, but could also have **a serious and chilling effect** on other journalists or other whistle-blowers who were State officials, and could discourage them from reporting any misconduct or controversial acts by public authorities. Furthermore, the ECtHR noted that the reasons for which the contested documents had been classified as confidential were not justified, as the government had not shown that there had been a detrimental impact as a result of their disclosure.

1.4. Protection of whistle-blowers

Over and above the indirect protection of whistle-blowers through the recognition and application of the journalist's right to source protection, the ECtHR in its recent case law has added substantial **protection to whistle-blowers in a direct way**. Indeed while in most European countries there is no solid or effective protection of whistle-blowers for disclosing information of public interest, the ECtHR has tried to remedy this situation by securing whistle-blowers protection under Article 10 ECHR. In its judgment in *Guja v. Moldova* the Grand Chamber of the ECtHR considered the dismissal of a civil servant who had leaked information to the press revealing corrupt practices within politics and the administration of justice, to be an unjustified and disproportionate interference with his right to freedom of expression.³⁰ Most importantly, the Court noted that "*a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulcation or publication corresponds to a strong public interest*". The protection guaranteed by Article 10 ECHR is conditional, but also substantial. First of all, the ECtHR considered it necessary to examine whether or not the information could have been communicated in another, internal, way in order to reveal and remedy the wrongdoing at issue. However, the Court imposed the condition that an internal duty to report also has to be an effective mechanism to remedy the wrongdoing that one wants to uncover: "*In assessing whether the restriction on freedom of expression was proportionate, therefore, the Court must take into account whether there was available to the applicant any other effective means of remedying the wrongdoing which he intended to uncover*". Apart from the expectation that a whis-

30 ECtHR Grand Chamber, 12 February 2008, *Guja v. Moldova*.

tle-blower has in principle a duty to report wrongdoing internally before any public disclosure to media or journalists, there are also some more factors to be taken into account. Indeed, a public interest must be at issue; the information that has been leaked must be authentic and accurate; the damage the information can produce and the public interest will have to be weighed up; good faith must be the basis of the motives for uncovering the information; and the sanction imposed must be proportionate. Having regard to each of these criteria and factors the ECtHR concluded that Guja's dismissal amounted to a violation of his right to freedom of expression and especially his right to impart information, as guaranteed under Article ECHR.

Also in more recent cases the Court has found violations of Article 10 ECHR where whistle-blowers, both in the public and the private sector, had experienced interference with their right to freedom of expression, **including the disclosure of confidential information to the media**. The Court's case law, applying the six criteria in *Guja v. Moldova*, gave crucial protection to whistle-blowing by civil servants and government officials. Even whistle-blowing by magistrates and employees of military intelligence agencies is effectively protected pursuant to Article 10 ECHR.³¹ In *Bucur and Toma v. Romania* the ECtHR considered that the general interest in the disclosure of information to the media revealing illegal activities within the Romanian Intelligence Services (RIS) was so important in a democratic society that it prevailed over the interest in maintaining public confidence in that institution. While the Court was not convinced that a formal complaint to a Parliamentary Commission would have been an effective means of tackling the irregularities within RIS, it also observed that the information about the illegal telecommunication surveillance of journalists, politicians and businesses that had been disclosed to the press affected the democratic foundations of the state. The fact that the data and information at issue were classified as "ultra-secret" was not a sufficient reason to interfere with the whistle-blower's right in this case and the measures taken also risked creating a chilling effect. The conviction for the disclosure of information to the media about the illegal activities of RIS was therefore considered as a violation of Article 10 ECHR.³²

Part 2: Critical comments: shortcomings, loopholes and inconsistencies

The brief overview of developments in the Court's case law leaves no doubt about the enormous support the Court's jurisprudence has created in the last decade to the right to freedom of expression and information. But, as already mentioned in the introduction, the ECtHR has also delivered some decisions and judgments neglecting crucial aspects of journalists' and civil society's rights to freedom of expression.

³¹ ECtHR 13 November 2008, *Kayasu v. Turkey*; ECtHR 16 December 2008, *Frankovicz v. Poland*; ECtHR 19 February 2009, *Marchenko v. Ukraine*; ECtHR 26 February 2009, *Kudeshkina v. Russia*; ECtHR 21 July 2011, *Heinisch v. Germany*; ECtHR 18 October 2011, *Sosinowska v. Poland*; ECtHR 21 October 2014, *Matúz v. Hungary*. See also ECtHR 16 July 2009, *Wojtas-Kaletka v. Poland*; ECtHR 13 January 2015, *Rubins v. Latvia*; ECtHR Grand Chamber 23 April 2015, *Morice v. France* and ECtHR 28 March 2017, *Marunić v. Croatia*.

³² ECtHR 8 January 2013, *Bucur and Toma v. Romania*.

Some of the judgments in which the Court found no violation of Article 10 ECHR have been sharply criticised within the Court itself, showing a fierce disagreement expressed in dissenting opinions.³³ Paraphrasing the Grand Chamber in *Morice v. France*, the following critical comments are also meant as "constructive criticism"³⁴, in order to draw attention to what can be qualified as (potential) shortcomings in the Court's reasoning in applying Article 10 ECHR. They are also formulated in the spirit that was evoked by the former president of the ECtHR, Luzius Wildhaber: "(i)nstitutions (...) will perish, if those who love them do not criticise them, and if those who criticise them do not love them".³⁵ By highlighting some of the problematic findings by the ECtHR the dialogue can indeed be nourished between the judges and lawyers of the ECtHR and the community of freedom of expression gathered at this conference under the title "*Promoting dialogue between the European Court of Human Rights and the media freedom community*".

2.1. Challenges to protection of investigative journalism and acts of newsgathering

Two recent Grand Chamber judgments are especially worrying. The finding of no violation of Article 10 ECHR in the case of ***Pentikäinen v. Finland***³⁶ (arrest, detention and prosecution of a journalist for disobeying a police order to leave a demonstration) is discussed in the third panel of this conference, and therefore we refer to the excellent analysis by Daniel Simons and the reflections on this case by the other panelists.³⁷ The crucial question remains: how could Pentikäinen's detention, prosecution in a criminal court and final conviction be held necessary in order to protect public safety and prevent disorder and crime, bearing in mind that no allegation was made that he posed a threat to public order on account of violent behaviour nor was he taking any active part in the demonstration? It is also remarkable that the majority of the Court casts doubts whether Pentikäinen has acted in accordance with "responsible journalism", simply for disobeying a police order to leave the scene of a demonstration that he was covering as a journalist and was subsequently supposed to report on. The approach by the Grand Chamber that a journalist is not entitled to obtain "a preferential or different treatment in comparison to the people left at the scene"³⁸ obviously neglects the difference between the journalist executing his

33 Dirk Voorhoof, "Freedom of Expression, Media and Journalism under the European Human Rights System: Characteristics, Developments, and Challenges", in Peter Molnár (ed.), *Free Speech and Censorship Around the Globe*, Budapest - New York, Central European University Press, 2015, 59-104 and Dirk Voorhoof, "Judge Tulkens on the barricades of freedom of expression and information", *Strasbourg Observers Blog* 24 August 2012.

34 ECtHR Grand Chamber 23 April 2015, *Morice v. France*, § 167.

35 Luzius Wildhaber, "Criticism and case-overload: Comments on the future of the European Court of Human Rights", in Spyridon Flogaitis, Tom Zwart and Julie Fraser, *The European Court of Human Rights and its discontents: Turning criticism into strength*, Cheltenham, E. Elgar, 2013, 10. See also Marc Bossuyt, "Should the Strasbourg Court exercise more self-restraint? On the extension of the jurisdiction of the European Court of Human Rights to social security regulations", *Human Rights Law Journal*, n° 28, 2007, 321-332.

36 ECtHR Grand Chamber 20 October 2015, *Pentikäinen v. Finland*.

37 For a critical analysis, see also Dirk Voorhoof, "Journalist must comply with police order to disperse while covering demonstration", *Strasbourg Observers Blog* 26 October 2015.

38 ECtHR Grand Chamber 20 October 2015, *Pentikäinen v. Finland*, § 109.

task as member of the press playing its public watch-dog role and the demonstrators who were responsible for the event turning into a riot. The judgment in the case of *Pentikäinen v. Finland* has provoked the reaction that this is “a missed opportunity for the Court to reinforce, in line with its consistent case-law, the special nature and importance of the press in providing transparency and accountability for the exercise of governmental power by upholding the rights of journalists to observe public demonstrations or other Article 11 activities effectively and unimpeded, so long as they do not take a direct and active part in hostilities. Recent events in many European countries demonstrate, more than ever, the necessity of safeguarding the fundamental role of the press in obtaining and disseminating to the public information on all aspects of governmental activity. That is, after all, one of the crucial elements of the democratic ideal protected by the European Convention on Human Rights”. This is not a quote from an NGO advocating for freedom of expression, nor a statement from a press release by the European Centre for Press and Media Freedom or the European Federation of Journalists. It is the final conclusion by four dissenting judges of the Grand Chamber itself, firmly protesting against the approach and findings by the Grand Chamber’s majority in *Pentikäinen v. Finland*.

Another highly controversial judgment was delivered by the Grand Chamber on 29 March 2016 in the case of ***Bédat v. Switzerland***.³⁹ In its earlier decision the Chamber of the Court had found a violation of Article 10 ECHR in this case.⁴⁰ The Chamber considered the criminal sanction of Bédat, who had published confidential information about a criminal case, to be not necessary in a democratic society. The Grand Chamber overruled this finding by fifteen votes to two. The Grand Chamber is of the opinion that the Swiss authorities stayed within their margin of appreciation and that recourse to criminal proceedings and the penalty imposed on the journalist did not amount to a disproportionate interference in the exercise of his right to freedom of expression. The Grand Chamber emphasised that as a professional journalist Bédat must have been aware of the confidential nature of the information which he was planning to publish and that the publication of extracts from secret criminal files amounted to a criminal offence under Swiss law. The ECtHR also refers to the “sensationalist tone” of the impugned article and it considers that the journalist had failed to demonstrate that his article could have contributed to any public debate on the ongoing investigation. It agrees with the findings by the Swiss Courts that the records of interviews and the accused’s correspondence had been “discussed in the public sphere, before the conclusion of the investigation, before the trial and out of context, in a manner liable to influence the decisions taken by the investigating judge and the trial court”. According to the Grand Chamber, “(t)he risk of influencing proceedings justifies per se the adoption by the domestic authorities of deterrent

³⁹ ECtHR Grand Chamber 29 March 2016, *Bédat v. Switzerland*.

⁴⁰ For an extensive comment, see Dirk Voorhoof, “The Grand Chamber strikes again: *Bédat v. Switzerland*. Criminal conviction of journalist for having published documents covered by investigative secrecy in a criminal case is no violation of Article 10 ECHR”, *ECHR Blog* 7 April 2016.

measures such as prohibition of the disclosure of secret information".⁴¹ It found in the present case that the recourse to criminal proceedings and the penalty imposed on Bédât did not amount to a disproportionate interference in the exercise of his right to freedom of expression.

Two judges strongly dissented (López Guerra and Yudkivska). Yudkivska formulated a robust message at the end of her dissenting opinion, by pointing out that "(t)his Court had always regarded the press as the servant of an effective judicial system, granting little scope for restrictions on freedom of expression in such matters as the public interest in the proper administration of justice. In my view, the present judgment constitutes a regrettable departure from this long-established position".

The Grand Chamber's judgment in *Bédât v. Switzerland* is indeed highly controversial for several reasons. First, the Court refers to the **concept of "responsible journalism"**, including the expectation that a journalist in his or her actions of newsgathering shall not breach the law, even in cases where a journalist has acted in order to inform the public on important matters in society.⁴² In fact the Grand Chamber opts for a kind of circular reasoning. Indeed the starting point is that the journalist is prosecuted for committing a criminal offence, while the journalist's defence is that this criminal offence is justifiable in order to pursue his task as public-watchdog in society. Adding the condition that a journalist must act "*responsibly*" and by requiring that he shall not breach the law, the scope of the public interest defence of journalists is at risk of being substantially narrowed down, if not annihilated. Secondly, it is remarkable that the Court is not so much considering the pressing social need of the interference at issue, but is rather requesting from the journalist to give evidence that the content of the article has effectively contributed to a public debate. While emphasising that the journalist in this case "*failed to demonstrate*" that the article contributed to a debate on a matter of public interest, the Grand Chamber is of the opinion that the authorities do not need to demonstrate that the interference in the journalist's freedom of expression was effectively necessary. For the Grand Chamber it is enough that the article might "*in one or another way*" influence the investigation, the position of the victims or the objectivity of the trial court, ***without further specifying where precisely the impact or prejudice is or was to be situated***. For the Grand Chamber such influences are an "*inherent risk*" of making information public that is part of the secret criminal investigation. And while in other judgments the Court took into consideration whether or not the criminal court was composed of professional judges, in order to evaluate the impact of media coverage on the fair trial principle and presumption of innocence, now the Grand Chamber emphasises the risk of influencing the trial court "*irrespective of its composition*".

Finally, it is remarkable that the Grand Chamber expands its approach of balancing the competing interests of privacy protection (Article 8) and freedom of expression (Article 10) to the situation of conflicting interests between fair trial (Article 6)

41 ECtHR Grand Chamber 29 March 2016, *Bédât v. Switzerland*. §§ 70-71.

42 See also ECtHR Grand Chamber 10 December 2007, *Stoll v. Switzerland*.

and freedom of expression. The ECtHR indeed considers that analogous reasoning must apply in weighing up the rights secured under Article 10 and Article 6 § 1 respectively. Meanwhile there is no doubt that Article 8 has a horizontal effect and that the state has a positive obligation in order to ensure that other private persons do not interfere with the privacy of fellow citizens or data subjects, **Article 6 § 1 and the fair trial principle** is of another nature. Article 6 § 1 ECHR does indeed impose a direct obligation for the state authorities themselves to secure fair trial principles, including the presumption of innocence before independent and impartial judges and courts. Broadening the scope and enforcement of the presumption of innocence to be respected by private actors in society is a problematic extension of Article 6 § 1 ECHR, and it further weakens the right of freedom of expression being situated in the frame of conflicting rights, with consequently a wider margin of



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appreciation for the State authorities to interfere, even by way of criminal prosecution and conviction of journalists. Requiring media reporting about crime and court cases, including major crime and even acts of terrorism, to uphold **the presumption of innocence** as it is required from the judiciary, is a big step to take. Actually it is too big a step and it contrasts with the Court's viewpoint that *"it is inconceivable that there should be no prior or contemporaneous discussion of the subject matter of trials, be it in specialised journals, in the general press or amongst the public at large. Not only do the media have the task of*

imparting such information and ideas; the public also has a right to receive them". Furthermore, imposing on media and journalism the same or a similar obligation in upholding the presumption of innocence as it applies to the judiciary is not only a 'mission impossible', it also confuses the different roles and functions of the media and the judiciary. It is up to the authorities to guarantee within the administration of justice the highest possible level of ensuring the impartiality and independence of judges and to have the presumption of innocence respected by them. The duties and responsibilities of media and journalists should not be derived from Article 6 § 1 ECHR, but should be evaluated from the scope of Article 10 § 2 ECHR. There is no doubt that journalists and media are to bear in mind the presumption of innocence when reporting and commenting on pending criminal proceedings. It is certainly one of the basic principles of journalistic ethics and may induce their civil liability. Criminalising journalists and media because of the publication of (leaked) information from criminal investigations, because this kind of information as such, *in abstracto* and inherently risks affecting the rights guaranteed by Article 6 § 1 ECHR, creates a

new legal standard that limits substantially the actual practices of court and crime reporting in Europe. The new standard the Grand Chamber has introduced makes it possible that state authorities will develop a stricter policy and will prosecute, as part of their (alleged) positive obligations under Article 6 § 1 ECHR, media and journalists because of ***publishing leaked information from criminal files***, even in cases of media reporting about major crime.

Although extremely controversial, this approach by the Grand Chamber has been confirmed and even been reinforced in the case of ***Giesbert and others v. France***.⁴³ In a unanimous decision this time the ECtHR held that the French judicial authorities' orders sanctioning the editor-in-chief and a journalist of the magazine *Le Point* for publishing documents from a set of criminal proceedings before it was to be read out at a public hearing, in the high profile "Bettancourt" case, did not violate Article 10 ECHR. Given the public interest in the case, which was neglected or at least underestimated in the domestic proceedings, and the absence of reliance on privacy rights, the balance in this case could have been expected to have been struck in a different way. The Court noted that the applicant journalists could not have been unaware of the origin of the documents reproduced in their articles nor of the confidentiality of the information published, while the French law clearly punishes the mere fact that such documents have been published: "*Cela étant, les requérants devaient savoir que la publication littérale d'une partie des actes litigieux se heurtait à la prohibition de cette disposition*".⁴⁴ The ECtHR reiterates also that "*un simple risque d'influence sur les suites d'une procédure peut suffire*" to justify an interference or sanction caused by publishing documents relating to the secrets of criminal investigation. This refers to the consideration in *Bédat v. Switzerland* that "*an inherent risk of influencing the course of proceedings in one way or another*" can indeed be a sufficient reason for an interference with the journalist's right to freedom of expression: "*(t)he risk of influencing proceedings justifies per se the adoption by the domestic authorities of deterrent measures such as prohibition of the disclosure of secret information*".⁴⁵

It is most surprising that the ECtHR concludes that the domestic findings had met "*a sufficiently compelling social need*" to take precedence over the public interest in the freedom of the press. This formulation is indeed surprising, as until now the threshold to justify interference in the right to freedom of expression has been the presence of "*a pressing social need*". In the original French version of the judgment, it is formulated slightly differently, the Court finding that "*les condamnations répondaient à un besoin social assez impérieux pour primer l'intérêt public s'attachant à la liberté de la presse (...)*".⁴⁶ The judgment in *Giesbert and others v. France* therefore

⁴³ ECtHR 1 June 2017, *Giesbert a.o. v. France*.

⁴⁴ ECtHR 1 June 2017, *Giesbert a.o. v. France*, § 86.

⁴⁵ ECtHR Grand Chamber 29 March 2016, *Bédat v. Switzerland*, § 70.

⁴⁶ For a first comment, see Hugh Tomlinson, "Case Law, Strasbourg: *Giesbert v France*, Sanctions for publishing prosecution statements, no violation of Article 10", [Inform's Blog](#) 2 June 2017.

constitutes another regrettable departure from the Court's long-established position.

While instances of interference with **court and crime reporting** should be carefully scrutinised by the ECtHR along the lines of the criteria developed in the Grand Chamber judgment in the case of *Axel Springer AG v. Germany* of 7 February 2012⁴⁷, this approach is at least not obvious in a few recent decisions and judgments of the ECtHR. In *Salumäki v. Finland* the central issue was whether the title of a newspaper article that could be interpreted as damaging the reputation of a public person could justify the criminal conviction of the journalist who wrote the article, while the article itself was written in good faith and did not contain any factual errors or defamatory allegations.⁴⁸ The front page of the newspaper carried a headline asking whether the victim of a homicide had connections with K.U., a well-known Finnish businessman. A photograph of K.U. appeared on the same page and next to the article was a separate column mentioning K.U.'s previous conviction for economic crimes. Salumäki complained that her conviction amounted to a violation of Article 10 ECHR, arguing that the information presented in the article was correct and that the title of the article only connected K.U. to the victim and did not insinuate that K.U. had connections with the perpetrator, nor that he was involved in the homicide. First the ECtHR emphasised that the criminal investigation into a homicide was clearly a matter of legitimate public interest, having regard in particular to the serious nature of the crime : *"From the point of view of the general public's right to receive information about matters of public interest, and thus from the standpoint of the press, there were justified grounds for reporting the matter to the public"*. The ECtHR also recognised that *"the article was based on information given by the authorities and K.U.'s photograph had been taken at a public event"*, while *"the facts set out in the article at issue were not in dispute even before the domestic courts. There is no evidence, or indeed any allegation, of factual errors, misrepresentation or bad faith on the part of the applicant"*. Nevertheless the decisive factor in this case was that according to the domestic courts, the title created a connection between K.U. and the homicide, implying that he was involved in it. Even though it was specifically stated in the text of the article that the homicide suspect had no connections with K.U., this information only appeared towards the end of the article. The ECtHR is of the opinion that Salumäki must have considered it probable that her article contained a false insinuation and that this false insinuation was capable of causing suffering to K.U. The Court refers to the principle of presumption of innocence under Article 6 § 2 ECHR and emphasises that this principle may be relevant also in Article 10 contexts in situations in which nothing is clearly stated but only insinuated. The Court therefore comes to the conclusion that what the journalist had written was defamatory, implying that K.U. was somehow responsible for P.O.'s murder. Having regard to all the foregoing factors, and leaving a (very) wide margin of appreciation to the domestic authorities, the ECtHR considers that a fair balance had been struck

⁴⁷ ECtHR Grand Chamber 7 February 2012, *Axel Springer AG v. Germany* (no. 1).

⁴⁸ ECtHR 29 April 2014, *Salumäki v. Finland*.

between the competing interests at stake. There has therefore been no violation of Article 10 ECHR.

Also a recent decision by the ECtHR in which the rights of Article 8 and 10 were conflicting, illustrates that in certain cases of crime and court reporting the ECtHR left **a very broad margin of appreciation** to the judicial authorities of the defending state and discarded its own findings based on some of the crucial criteria of the Axel Springer-judgment. In *Barbara Van Beukering and Het Parool B.V. v. the Netherlands*⁴⁹ the ECtHR first makes clear that it sees no reason to doubt "*that the newspaper article – which announced the trial of R.P. for having stabbed three members of the staff of a shelter for the homeless in Amsterdam with a knife, killing one and seriously injuring the two others – was a matter of serious public concern. The same may be said about the violent subculture to which R.P. belonged and R.P.'s personal circumstances in so far as they were typical of members of that social group. Nor is there any reason to doubt that R.P. enjoyed a certain notoriety, which he had actively encouraged by giving his co-operation to the 2007 television documentary and a rap clip made available on YouTube; that the article published by the applicants in the newspaper Het Parool and on their web site was true and correct; and that adding the portrait image enhanced the article's expressive power*". After this findings and evaluation of the facts of the case, the ECtHR refers to the view of the domestic authorities' that "*these features of the case did not outweigh R.P.'s right to respect for his private life*", as "*in publishing portraits of persons suspected of criminal acts reticence [was], in principle, appropriate*". On this basis, without any more reference to its own findings regarding the other relevant characteristics of the case, the ECtHR considers that the domestic judicial authorities did not act "*unreasonably in deciding thus*". On this slim basis and taking an overly deferential position, the ECtHR finds the application ill-founded and declares it inadmissible, rejecting the claim of a violation of Article 10 ECHR.

A worrying trend for investigative journalism is also reflected in two recent decisions by the ECtHR dealing with "check it out"-journalism⁵⁰, namely in the cases ***Diamant Salihu and others v. Sweden***⁵¹ and ***Boris Erdtmann v. Germany***.⁵² Investigative journalism sometimes operates at the limits of the law and this is especially true for "check it out"-journalism: reporting in which a journalist tests how effective a law or procedure is by attempting to circumvent it. The decisions in *Diamant Salihu and others v. Sweden* and *Boris Erdtmann v. Germany* show that journalists who commit (minor) offences during this type of newsgathering activity cannot count on (major) support from the ECtHR.

49 ECtHR (Decision), 20 September 2016, Case No. 27323/14, *Barbara Van Beukering and Het Parool B.V. v. the Netherlands*.

50 See also Dirk Voorhoof and Daniel Simons, "European Court upholds criminal conviction for purchasing illegal firearm as a form of 'check it out' journalism in *Salihu ao v. Sweden*", [Strasbourg Observers](#) 29 June 2016.

51 ECtHR (Decision) 2 June 2016, Case No. 33628/15, *Diamant Salihu and others v. Sweden*.

52 ECtHR (Decision) 28 January 2016, Case No. 56328/10, *Boris Erdtmann v. Germany*.

In the Swedish case, journalists of the newspaper *Expressen* had undertaken to demonstrate the easy **availability of illegal firearms by purchasing one**. The Swedish courts were of the opinion that the editor and the journalists could not be exempted from criminal liability as they had wilfully breached the Swedish Weapons Act. In a unanimous decision, the ECtHR confirmed the necessity of the journalists' criminal conviction. It declared the application for alleged breach of the right of journalistic newsgathering under Article 10 ECHR manifestly ill-founded. Coming after the Grand Chamber's judgment in *Pentikäinen v. Finland* and *Bédat v. Switzerland*, the decision in *Diamant Salihu and others v. Sweden* can be perceived as a new step in downgrading the rights of journalists with regard to their newsgathering activities. The Court's ruling may also have a chilling effect on undercover investigative reporting. Referring to the Grand Chamber judgment in *Pentikäinen v. Finland*, the Court in *Diamant Salihu and others v. Sweden* reiterates that *"notwithstanding the vital role played by the media in a democratic society, journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that, as journalists, Article 10 affords them a cast-iron defence. In other words, a journalist cannot claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions"*. In contrast with the facts in *Mikkelsen and Christensen v. Denmark* on the purchasing and transport of illegal and dangerously explosive fireworks⁵³, the applicants in *Diamant Salihu and others v. Sweden* took a series of relevant safety precautions, and there is no suggestion any risk was created. The Swedish Supreme Court indeed explicitly recognised that there had been *"no risk that the firearm would be used and that it was for a journalistic purpose"*. The decisive argument, echoed by the ECtHR, was that the breach of law was not necessary for the story: *"the question if it was easy to purchase a firearm could have been illustrated in other ways"*. In the past, the ECtHR has stressed that judges should be careful not to *"substitute their own views for those of the press as to what technique of reporting should be adopted by journalists"*⁵⁴. Against this background, the Court's failure to explain its assertion that the journalists could have made their point in another way is at least deplorable, as it is not readily obvious that they could. The Swedish Supreme Court argued that the journalists' purpose had already been achieved when they received the offer to purchase the firearm. But this is not entirely convincing: at that point, there was still a possible doubt about the seriousness of the offer. Purchasing the firearm also allowed the journalists to take pictures proving and documenting their story. As the ECtHR has stated at earlier occasions: *"if the national courts apply an overly rigorous approach to the assessment of journalists' professional conduct, the latter could be unduly deterred from discharging their function of keeping the pub-*

⁵³ ECtHR (Decision) 24 May 2011, Case No. 22918/08, *Jacob Adrian Mikkelsen and Hendrik Lindahl Christensen v. Denmark*.

⁵⁴ ECtHR 23 September 1994, *Jersild v. Denmark*, § 31.

lic informed"⁵⁵. In this instance, the journalists were reporting on a matter of substantial public interest and appear to have acted in good faith, without causing the type of risk the Swedish Weapons Act aims to prevent. The journalists' criminal conviction and the fines imposed on them, while below the normal statutory level, may have a potential chilling effect on investigative journalism on issues of societal interest.

The case of *Boris Erdtmann v. Germany* concerned the conviction of a journalist for carrying a weapon on board an aeroplane. After the terrorist attacks of 11 September 2001 in New York, Erdtmann researched the **effectiveness of security checks at German airports** and he made a short television documentary about his investigation and findings, filmed with a hidden camera. The ECtHR found that the criminal conviction of the journalist was pertinent and necessary in a democratic society and that there was no appearance of a violation of the journalist's rights under Article 10 ECtHR. Again the ECtHR emphasises that the journalist "*must, or could, have known that his actions infringed ordinary criminal law*" and it accepts the reasoning by the domestic courts that Erdtmann could have revealed the security flaws at the airport without committing a criminal offence, for example by abandoning the attempted offence by disposing of the knife after the security check-points. Although it is recognised that Erdtmann's report "*had in fact increased airport security, that he was a television journalist reporting on an issue of general public interest, and that the knife had been securely stowed away and did not lead to any concrete threat for the other passengers*", still the criminal conviction of the journalist in the form of a warning and deferred fine, being the most lenient sentence possible to domestic law, was considered necessary in a democratic society. The ECtHR was of the opinion that the conviction of Erdtmann had no chilling effect discouraging the press from investigating a certain topic or expressing an opinion on topics of public debate.

To what extent **"check it out"-journalism** should enjoy the protection of Article 10 ECHR remains a thorny but important issue. By leaving a (very) wide margin of appreciation to the national authorities and especially by relying on the non-substantiated argument that other ways of journalistic reporting could also have demonstrated the easy availability of firearms or the lack of security in airports, the ECtHR has missed an opportunity in both decisions for a more in-depth examination about this form of investigative journalism, especially as in both cases the journalists did not create any security risk.

A third dimension with regard the protection of investigative journalism is related to **safety aspects for the journalists themselves**. At several occasions the ECtHR has emphasised the positive obligations doctrine such as in cases of violence against or assassinations of journalists. Physical violence against journalists can amount not only to a violation of Article 10, but also to a violation of the right to life (Article 2) or of the prohibition of torture or inhuman or degrading treatment (Article 3), in

⁵⁵ ECtHR 19 April 2011, *Kasabova v. Bulgaria*, § 55.

combination sometimes with the right to an effective remedy (Article 13)⁵⁶. In recent cases relating to killings of or violent attacks on journalists, the ECtHR reiterated that States, under their positive obligations of the Convention, are required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear⁵⁷. However, in some cases the Court only finds a violation of Article 2 or 3 ECHR under the procedural limb, because of lack of investigation of the violent attacks. After finding a violation of Article 2 or 3 ECHR, the Court considered that there was no need to examine the complaint under Article 10 ECHR⁵⁸. As the two dissenting judges in the case of *Huseynova v. Azerbaijan* pointed out “(t)he consequence of the approach the Court has adopted so far is that the motives behind the killing of a journalist are not given any prominence”. Therefore it is preferable to interpret the lack of an investigation into the killing of a journalist also in the context of Article 10 ECHR, as this could reveal the specific features of this fundamental human-rights violation, namely the potential motive behind the killing of a journalist, is aim of silencing a critical voice in a country. Such an approach would be able to take into consideration **the destructive effect of violent acts against journalists** and it would guarantee that the ECtHR is not turning a blind eye to the fact that murders of journalists are to be understood as “*the most extreme form of censorship*”.⁵⁹ By not examining these kinds of complaints under Article 10 ECHR the ECtHR risks neglecting a crucial dimension and the particular political context in which journalists and media workers are the victims of violence. As it is stated in the partly dissenting opinion in *Huseynova v. Azerbaijan*, if this “*is omitted, the central question of the case, which is of utmost importance for democracy, political pluralism and human rights in general, has not been addressed adequately*”.

2.2. The right of access to official documents: only instrumental, conditional and limited

The importance and impact of the support by the Court's case law in guaranteeing a right of access to official documents has been extensively explained in the first part of this analysis. The recent judgment in the case of ***Bubon v. Russia***⁶⁰ raises concerns, however, on how to apply the conditions and criteria developed in the Grand Chamber judgment in *Magyar Helsinki Bizottság v. Hungary* (cf. *supra* part 1), especially with regard to the condition that the requested information must be “**ready and available**”. In its judgment of 7 February 2017 the ECtHR accepts the Russian Government's arguments that the authorities did not have information or

⁵⁶ ECtHR 16 March 2000, *Özgür Gündem v. Turkey*; ECtHR 8 November 2005, *Gongadze v. Ukraine*. See also ECtHR 14 September 2010, *Dink v. Turkey* and ECtHR 7 May 2015, *Emin Huseynov v. Azerbaijan*.

⁵⁷ ECtHR 29 January 2015, *Uzeyir Jafarov v. Azerbaijan*.

⁵⁸ ECtHR 29 January 2015, *Uzeyir Jafarov v. Azerbaijan* and ECtHR 13 April 2017, *Huseynova v. Azerbaijan*. See also ECtHR 31 March 2005, *Adali v. Turkey*.

⁵⁹ Partly dissenting opinion by judges Nußberger and Vehabović in ECtHR 13 April 2017, *Huseynova v. Azerbaijan*.

⁶⁰ ECtHR 7 February 2017, *Bubon v. Russia*.

documents that were specifically sought by the applicant. The information the applicant was seeking “*was therefore not only not “ready and available”, but did not exist in the form the applicant was looking for*”. In this case the applicant is a lawyer who also writes articles for various Russian law journals and online legal information databases and networks. He obtained no access to statistical data in relation to his research on (the fight against) exploitation of prostitution in the Khabarovsk Region: the police and the Ministry argued that there were no data available on the number of criminal cases and the number of people found liable. According to the domestic authorities, the information Bubon was seeking did not exist in the form the applicant was looking for or was kept by another authority. The ECtHR essentially notes that the applicant “*did not seek access to the statistical data cards or even final statistical reports, which were ready and available. Instead he essentially asked the domestic authorities to process and summarise information using specific parameters*”. And it reiterates that Article 10 ECHR “*does not impose an obligation to collect information upon the applicant’s request, particularly when, as in the present case, a considerable amount of work is involved*”.⁶¹

Also in **Friedrich Weber v. Germany** the ECtHR held that the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own accord, particularly when, as in the present case, a considerable amount of work is involved.⁶² In this case an online journalist was refused access to public documents from the municipal budget of the city of Wuppertal, requesting a compilation of a list of payments from the city budget to political parties, parliamentary groups and political foundations, as well as a list of payments to political parties from holding companies that belong to the city. The ECtHR, sitting as a committee with three judges, decided that regardless of his possible status as member of the press, there had been no interference with the applicant’s right to receive and to impart information as enshrined in Article 10 § 1 ECHR. The ECtHR focused mainly on the fact that the documents were not directly available in the form the applicant had requested. The ECtHR noted that the applicant “*could have requested budgets, financial statements and balance sheets of the companies as such. Such information would have put the applicant in a position to carry out his research on the above mentioned topic or he could then have asked for further concrete information*”.

It is obvious that a rigid interpretation of the condition that the requested documents must be ready and available in the form the applicant requested, combined with a wide margin of appreciation for the member states’ authorities in this matter, risks limiting extensively the newly acquired right of access to public documents as recognised in *Magyar Helsinki Bizottság v. Hungary*.

2.3. Only protection of ‘lawful’ sources?

⁶¹ ECtHR 7 February 2017, *Bubon v. Russia*, §§ 43-48.

⁶² ECtHR (Decision) 29 January 2015, Case No. 70287/11, *Friedrich Weber v. Germany*.

In line with the criticism that was formulated regarding some of the Court's case law justifying interferences against illegal use or reproduction of secret or confidential information (see *Bédar v. Switzerland* (GC), *Giesbert and others v. France and Stoll v. Switzerland* (GC), *supra*), we also highlight that the judgment in the case in **Görmüş and others v. Turkey** (cf. *supra*) contains a worrying consideration in this regard.⁶³ The ECtHR acknowledged that the duties and responsibilities of journalists can include the duty not to publish information provided by whistle-blower State officials until such time as the latter had made use of the administrative procedures provided in order to draw their superiors' attention to potentially unlawful acts committed in their workplace. However, the Court noted that the Turkish legislation did not provide for such a procedure and therefore the journalists could not be criticised for having published the contested information without waiting for their sources to raise their concerns through the chain of command. In its original French version the Court considered that it could accept "*que les devoirs et les responsabilités qu'assument les journalistes qui exercent leur droit à la liberté d'expression puissent inclure le devoir de ne pas publier les renseignements que des fonctionnaires lanceurs d'alerte leur ont fournis, jusqu'à ce que ces fonctionnaires aient utilisé les procédures administratives internes prévues pour faire part de leurs préoccupations à leurs supérieurs*".⁶⁴ This consideration however, formulated as a general principle that journalists should only publish information obtained from whistle-blowers under the condition that they shall have first exhausted all internal procedures that are available to them, is certainly (too) far-fetched. The consideration also contrasts with earlier case law of the ECtHR in which the Court was of the opinion that a "*journalist's right not to reveal her or his sources could not be considered a mere privilege to be granted or taken away depending on the **lawfulness or unlawfulness of their sources**, but is part and parcel of the right to information, to be treated with the utmost caution*".⁶⁵

The outcome in another case related to the protection of journalistic sources, demands for a critical observation of another kind. In the case of the **Telegraaf Media (..) Van der Graaf v. the Netherlands**⁶⁶ the Government finally admitted at the end of long proceedings, that the applicants' right to have their sources protected had been violated by the authorities in the Netherlands. While the application before the Court was lodged on 6 May 2011, the Government wrote on 8 November 2013 to the Court : "*(t)he Government hereby wishes to express – by way of unilateral declaration – its acknowledgement that the requirements of Article 10 of the Convention were violated in respect of the applicants. Consequently, the Government is prepared to reimburse the applicants with any costs and expenses related to the proceedings before the Court, provided they were incurred necessarily and are rea-*

⁶³ ECtHR 19 January 2016, *Görmüş and others v. Turkey*.

⁶⁴ ECtHR 19 January 2016, *Görmüş and others v. Turkey*, § 61.

⁶⁵ ECtHR 27 November 2007, *Tillack v. Belgium*, § 65.

⁶⁶ ECtHR (Decision) 22 September 2016, Case No. 33847/11, *Telegraaf Media (..) Van der Graaf v. the Netherlands*.

sonable as to quantum, plus any tax that may be chargeable to the applicants. I look forward to the Court's decision in this respect."

On the basis of this unilateral declaration, and despite the applicants asking the Court to dismiss the Government's unilateral declaration, the ECtHR finally decided to strike the case out of the list. The Court said it was satisfied that the **unilateral declaration by the Government offered** a sufficient basis for finding that respect for Article 10 and the protection of journalistic sources did not require it to continue its examination of the application. By the decision the Court missed the opportunity to clarify the characteristics of the violation of the applicants' source protection and to put additional pressure on the Netherlands' Government in order to take steps to effectively guarantee protection of journalistic sources, after already being found three times in violation of Article 10 ECtHR in this matter.⁶⁷ Also the applicants had argued, *"that despite the Court's findings of violations of Article 10 in no fewer than three judgments against the Netherlands, no legislation capable of preventing the recurrence of the violation acknowledged was yet in place, and (...) that the guarantees of independent review provided by the Lawyers and Journalists (...) Temporary Review Order were insufficient"*.

Another peculiar aspect of the Court's decision in this case is the dismissal of the applicants' claim for **costs and expenses** in respect of the long and complex domestic proceedings and in respect of the proceedings in Strasbourg. The ECtHR drastically reduced the amount of the requested compensation, by excluding important parts of the costs in domestic (injunction) proceedings and especially by considering that *"the hourly rate charged by the lawyers who assisted the applicants in the domestic proceedings, namely EUR 375 per hour, goes well beyond what the Court is prepared to consider reasonable"*. One can wonder if the actual rate for law firms in large European cities such as Amsterdam, London, Brussels, Paris, Rome or Berlin, especially for cases involving complicated legal issues related to national security, intelligence and anti-terror policy inducing a diversity of legal proceedings against the government or other public agencies, would differ very much from the Amsterdam lawyers' rates in this case. Therefore it is somewhat surprising that the Court considered the applicants' claims based on the hourly rates charged by the lawyers as going well beyond reason. Couldn't one expect that a victory of principle for victims of human rights violations should also lead to adequate compensation in terms of costs and expenses?

A more general observation in this regard is that the Court could more often apply **direct measures against member states blatantly violating Article 10 rights** of journalists and other public watchdogs, as the Court did in *Fattulayev v. Azerbaijan* (ordering the immediate release from prison of a journalist convicted of defamation of the government)⁶⁸ and in *Youth Initiative for Human Rights v. Serbia* (order to

⁶⁷ ECtHR 22 November 2007, *Voskuil v. the Netherlands*; ECtHR Grand Chamber 14 September 2010, *Sanoma Uitgevers BV v. the Netherlands* and ECtHR 22 November 2012, *Telegraaf Media Nederland Landelijke Media N.V. and Others v. the Netherlands*.

⁶⁸ ECtHR 22 april 2000, *Fattulayev v. Azerbaijan*.

provide the applicant NGO with the information requested).⁶⁹ One may also wonder whether victims of violations of their right to freedom of expression will not lose their trust or abandon their hope in relying on the ECtHR as the ultimate guarantor of the fundamental rights, being confronted with **very long delays in the handling of their case before the Strasbourg Court**. The recent judgment in the case of *Milisavljević v. Serbia* is a striking example in this regard.⁷⁰ The case concerns the conviction of a journalist for insult of a well-known human rights activist, a case in which the ECtHR, completely in line with its settled case law, emphasises that criminal prosecution for insult of public figures is likely to deter journalists from contributing to the public discussion of issues affecting the life of the community. It took the Court more than 10 years to deliver a unanimous judgment to conclude that the Serbian authorities' reaction to the journalist's article was disproportionate to the legitimate aim of protecting the reputation of others, and was therefore not necessary in a democratic society, within the meaning of Article 10 § 2 ECHR.

2.4. Protection of whistle-blowers not always sufficiently guaranteed

Despite the crucial and substantial protection of whistle-blowers reflected in the Court's case law since *Guja v. Moldova*, the Court in some cases took a more deferential position, accepting far-reaching cases of interference with the rights of whistle-blowers or severe sanctions because of leaking public interest information.

In *Pasko v. Russia*⁷¹ for instance the applicant was a military journalist and researcher who disclosed information to the Japanese media about massive **dumping of nuclear waste** by the Russian navy. After being found in possession of **classified information** he was convicted for treason through espionage for having collected secret information with the intention of transferring it to a foreign national. The Court observed that the applicant was convicted "*as a serving military officer, and not as a journalist, of treason through espionage for having collected and kept, with the intention of transferring it to a foreign national, information of a military nature that was classified as a State secret*" and it considered "*that the domestic courts cannot be said to have overstepped the limits of the margin of appreciation which is to be left to the domestic authorities in matters of national security*". In *Pasko v. Russia* the ECtHR however failed to apply the *Guja*-criteria, while the information at issue concerned serious environmental issues, relating to massive nuclear pollution. The Court choose rather to emphasise that "*the applicant was bound by an obligation of discretion in relation to anything concerning the performance of his duties*" and that "*the information concerning military exercises which the applicant had collected and kept was capable of causing considerable damage to national security*". Most striking is the finding by the Court that the conviction of Pasko to **four years imprisonment** "*was very lenient*" (sic). The ECtHR explained its finding by referring to

⁶⁹ ECtHR 25 June 2013, *Youth Initiative for Human Rights v. Serbia*.

⁷⁰ ECtHR 4 April 2017, *Milisavljević v. Serbia*.

⁷¹ ECtHR 22 October 2009, *Pasko v. Russia*.

the fact that this sanction was "much lower" than the sanctions provided by law of twelve to twenty years' imprisonment and confiscation of property. Therefore the Court is of the opinion that there was no "*lack of a reasonable relationship of proportionality between the means employed and the legitimate aim pursued*", and that "*(t)here is nothing in the materials of the case to support the applicant's allegation that his conviction was overly broad or politically motivated or that he had been sanctioned for any of his publications*".

The case of **Langner v. Germany**⁷² concerns the accusation, uttered by a civil servant during a staff meeting in a municipal Housing Committee in the presence of some external participants, of "*perversion of justice*" by a deputy mayor. At the request of his superior Langner substantiated his intervention in writing, referring to some concrete allegations of misconduct in housing policy in relation to a demolition permit in which the deputy mayor (W.) was involved. A short time later Langner was dismissed. According to the letter of dismissal, Langner's accusations against W. had been unjustified. By making these accusations in front of a large number of staff members and representatives of the staff committee and of the trade union, Langner had damaged his superior's reputation and thus irrevocably destroyed the mutual trust which was necessary for effective co-operation. A few months later a local newspaper published a letter to the editor in which Langner expressed the opinion that the deputy mayor lacked any competence for resolving problems relating to housing issues. At two instances labour courts found that the employment contract had not been terminated by the dismissal since this could not be justified under section 1 of the Unfair Dismissal Act. The labour court did not find it necessary to decide whether Langner's allegations had been correct, as they were, in any event, covered by his right to freedom of expression. At a later stage in the domestic proceedings, however, the Labour Court of Appeal found that Langner's dismissal had been justified because Langner, in his statement at the staff meeting and in his subsequent written submissions, had seriously insulted and slandered the deputy mayor by accusing him of perversion of justice. Furthermore ***the allegations had turned out to be unfounded***. The ECtHR confirmed the justification of the interference with Langner's right to freedom of expression, considering *inter alia* that "*the unfounded allegation of a serious crime*" were "*rather a defamatory accusation than a criticism in the interest of the public*". Referring to the domestic authorities' findings, the ECtHR also held that Langner's statement "*was not aimed at uncovering an unacceptable situation within the Housing Office, but was rather motivated by the applicant's personal misgivings about the Deputy Mayor arising from the prospect of the impending dissolution of his subdivision*". Therefore the ECtHR is of the opinion that the current case has "*to be distinguished from cases of 'whistle-blowing', an action warranting special protection under Article 10 of the Convention, in which an employee reports a criminal offence in order to draw attention to alleged unlawful conduct of the employer*". One may wonder whether this kind of reasoning does

⁷² ECtHR (Decision) 17 September 2015, Case No. 14464/1, *Langner v. Germany*.

not hold the risk that in the future the protection of whistle-blowers on the basis of Article 10 ECHR and the right to freedom of expression in the employment relation might be substantially weakened in practice.

Most worrying from the perspective of freedom of expression of civil servants is the recent judgment in the case of **Karapetyan and others v. Armenia**, a judgment that became final on 24 April 2017, after the refusal by the Court's panel to refer the case, on request of the applicants, to the Grand Chamber.⁷³ In *Karapetyan and others v. Armenia* the ECtHR considered Article 10 ECtHR applicable with regard to the reaction and sanction by the public authorities because of **the expression of a political view in a public statement by civil servants of the Ministry of Foreign Affairs**. In that statement the applicants had expressed their concern with the situation created in Armenia and the alleged fraud of the election process (in 2008), which, according to the statement *"shadow the will of our country and society to conduct a civilised, fair and free presidential election"*. The statement continued: *"As citizens of Armenia, we demand that urgent steps be undertaken to call into life the recommendations contained in the reports of the international observation mission, as well as other prominent international organisations. Only by acting in conformity with the letter and spirit of the law can we create democracy and tolerance in Armenia and earn the country a good reputation abroad"*. The ECtHR found that the applicants' dismissal from their posts as a result of this statement *"clearly constituted"* an interference with their right to freedom of expression⁷⁴. The Court however found that the dismissal of the applicants did not amount to a violation of their rights guaranteed under Article 10 ECHR.

The judgment is highly controversial, as it seems to go against some of the principles and approach in the Grand Chamber's judgment in the case of *Baka v. Hungary*⁷⁵ and other case law of the Court on the right to freedom of expression in the employment relation.⁷⁶ In a dissenting opinion, judge Trajkovska emphasises that it does not emerge from the reasoning of the domestic courts what *"pressing social need"* existed to justify, as proportionate to the legitimate aim pursued, the protection of the Armenian State's interests over the applicants' right to freedom of expression. Moreover she notes that the Court has usually considered dismissal from employment to be a very harsh measure, particularly when other more lenient and more appropriate disciplinary sanctions could or should have been envisaged, while it appears that the domestic authorities did not consider the imposition of other sanctions, but instead proceeded instantly, as a result of applicants' actions, to their dismissal from office. Furthermore, the effects of the applicants' dismissal were severe, as they were de-

⁷³ ECtHR 17 November 2016, *Karapetyan a.o. v. Armenia*.

⁷⁴ ECtHR 17 November 2016, *Karapetyan a.o. v. Armenia*, § 36.

⁷⁵ ECtHR Grand Chamber 23 June 2016, *Baka v. Hungary*.

⁷⁶ See also Dirk Voorhoof and Patrick Humblet, "Human Rights and the Employment Relation. The Right to Freedom of Expression at Work", in X., *Proceedings of the International Conference on the European Convention on Human Rights and the Employment Relation, Actes du Colloque "La convention européenne des droits de l'homme et la relation de travail"*, CNRS and Strasbourg University, 30-31 January 2014, 33 p., <http://europa-cnrs.unistra.fr/publications/les-e-publi/e-publi-des-unites/>

prived of the opportunity to exercise the profession for which they had a calling, for which they had been trained and in which they had acquired skills and experience. Even taking into account the difficult political situation at the time and allowing the national authorities a certain margin of appreciation, to dismiss the applicants from their posts as diplomats was disproportionate to the legitimate aim pursued, according to the dissenting opinion.

Others⁷⁷ have criticised the judgment as the Court's emphasis on "*a politically neutral body of civil servants*" is troublesome, "*because it appears to reduce civil servants to mere lackeys of the executive, rather than potential defenders of democracy. Yet, there are good reasons to consider the alternative viewpoint*". The majority finding in *Karapetyan a.o. v. Armenia* is indeed "worrying", because it bars senior civil servants from speaking out in defence of democracy and the rule of law. The Court's decision also neglects to a large extent the content of the petition at issue, as the applicant's statements were manifestly of a peaceful nature. The petition indeed called for "*the preservation of stability in the country*" and for "*our compatriots and especially the representatives of all the structures in the country responsible for maintaining public order and peace to avoid the temptation of resolving problems by use of force*".

Conclusion

This analysis showed how the ECtHR has delivered significant support to securing the right to freedom of expression and information with regard protection of acts of newsgathering and investigative journalism, access to official documents, protection of journalistic sources, and protection of whistle-blowers based on the right to freedom of expression through its jurisprudence of the last decade. The second part of the analysis, however, exposed some weaknesses or inconsistencies in the Court's case law applying Article 10 ECHR in each of these matters. It also focused on some considerations by the Court that risk neglecting crucial aspects of journalists' and civil society's rights to freedom of expression and information.

It will undoubtedly be the Court's main challenge to remain extremely aware of its task as the ultimate guarantor to protect the right to freedom of expression in Europe. Therefore it will need to keep on **strictly scrutinising** all kind of interference with journalists', media outlets', NGOs' and other public watchdogs' rights, and hence to leave a narrow margin of appreciation to the member states in these matters. That is the actual and future task the Court is facing so as not to risk a diminution of the high standards of protection it has developed. In the actual political context in Europe it is the Court's task, more than ever, to reinforce freedom of expression and information as a key element in democracy: "*Au moment où les vents sont contraires, nous pensons que notre Cour doit plus que jamais renforcer la liberté d'expression qui, loin de constituer une protection ou un privilège, est un des éléments clés de la démocratie*".⁷⁸

⁷⁷ Stijn Smet, "*Karapetyan and Others v. Armenia: Senior Civil Servants as Defenders of Democracy or as Lackeys of the Executive*", *Strasbourg Observers Blog* 8 December 2016.

⁷⁸ Dissenting opinion of Tulkens, Popović, and Sajó in ECtHR 11 January 2011, *Barata Monteiro da Costa Nogueira and Patricio Pereira v. Portugal*.

5. THIRD PANEL: The right to protest and the role of the media during protests

Duygu Köksal

Ladies and gentlemen,

It is a great pleasure and honor to have the opportunity to participate at this conference on media freedom and to discuss a very important aspect, especially nowadays, of the freedom of expression the protection of which is fundamental for everyone.

Let me begin by asking this question: Why does democracy need free media?



Duygu Köksal

Because the press plays a very essential role in a democratic society. I will not repeat the basic case law of the Human Rights Court on freedom of expression that is the focus of this conference. I mean, everybody here is aware of the watch-dog role of the press.

So, I will specify my intervention on the role of the media during public events and especially one of the criteria used by the Court in its necessity test under Article 10 which is the conduct of the journalist.

Let me mention that as the press contributes in a democratic debate, the margin of appreciation of the public authorities concerning the restrictions on media, especially during a public event is limited. Because the press is the key element for public accountability. What does it mean?

At this point, I will start with § 75 of *Selmani Case* (n° 67259/14, 09/02/2017) which I consider like a reinforcement of the role of press during public events. In this paragraph, the Court reiterates that the presence of the press in a public event is a guarantee that *the authorities can be held to account for their conduct vis-à-vis the demonstrators and the public at large by keeping in order the protests or dispersing the demonstrators*. So, in the climate of policing, the Court concludes that any attempt to remove journalists from the scene of demonstration must therefore be subject to strict scrutiny.

It is worth to note that, prior to this judgment, the Grand Chamber's *Pentikainen case*, (n° 11882/10, 20/10/2015), as the dissenting opinion underlines, was considered a missed opportunity to reinforce the special nature and importance of the press in providing transparency and accountability for the exercise of policing powers of



(left to right) Duygu Köksal, Markus Pentikäinen, Peter Noorlander, Dragoljub Popović, Daniel Simons

public authorities during demonstrations (§ 14). As understood from this, earlier, the case law of the Court was deficient on the issue related to rights of the journalists during the protests.

Let's take a quick look at what we've seen earlier: The principle is the duty of the press to impart information and ideas on matters of public interest in respect of the responsible journalism. Well, what is an attitude compatible with responsible journalism in a protest? Indeed, by assessing the cases related to journalistic activity, among others, two important elements stand out: The nature of the conduct of the journalist and the proportionality of the sanction.

As a rule, as everybody, the journalists should respect the rules. For example, the Court decided inadmissible the cases *Erdtmann v. Germany* concerning the conviction of a journalist for taking weapon on board aircraft to expose security flows in decision (n° 56328/10, 05/01/2016). In the same way in *Salihu v. Sweden* admissibility decision (n° 33628/15, 10/05/2016), another conviction for purchasing a firearm to illustrate an article to be published on the local black market of weapons.

Or in the famous *Stoll v. Switzerland* case, the conviction of a journalist for publication of confidential diplomatic document has been found not contrary to article 10. In all those case, the nature of the conduct of the journalist was one of the elements in the center of the necessity test under article 10.

Let's go further. The Court considers that when individuals are involved in an act of violence, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of assembly and such acts aren't protected under article 10. In *Selmani* case, concerning the dispersal of journalists, the Court has taken into account this issue, whether the journalists take a direct and active part in disorder by assessing the interests at stake.

Similarly, in *Radio Twist v. Slovakia* (n° 62202/00, 08/11/2005) (publication of illegally obtained telephone conversations) or in *Haldimann v. Switzerland* (n° 21830/09, 24/02/2015) (broadcasting an interview provided by using a hidden camera), the crucial point of the assessment was whether the journalist was personally liable for an illegal activity and whether the guarantees were provided by the journalists for the publication in question in a manner compatible with journalistic ethics.

So, if I'm not mistaken, the journalist should act in compliance with the law. However, a question could arise: During a demonstration, *I'm a protester and you are a journalist*. As a citizen, I should obey to dispersal order but is there a special status for journalist who impart the information about the protest? Could we be in the same position about the police order? According to comparative law section (§§ 57-59) in *Pentikainen case*, there is no different special status accorded to the journalist mostly in European countries. It is worth to mention here OSCE Representative on Freedom of the Media, Special Report: Handling of the media during political demonstrations (adopted on June 2007) which provides that *law-enforcement officials have a constitutional responsibility not to prevent or obstruct the work of journalists during public demonstrations. Journalists have a right to expect fair and restrained treatment by the police. There is no need for special accreditation to cover demonstrations except under circumstances where resources, such as time and space at certain events, are limited. Journalists who decide to cover 'unsanctioned demonstrations' should be afforded the same respect and protection by the police as those afforded to them during other public events. Both law enforcement agencies and media workers have the responsibility to act according to a code of conduct. Media workers can assist by remaining outside the action of the demonstration and clearly identifying themselves as journalists.*

In *Gsell v. Switzerland case* (no 12675/05, 08/10/2009), which concerns journalist's inability, owing to general police ban, to gain access to Davos during World Economic Forum, the applicant had therefore been the victim of a general ban imposed by the cantonal police on all persons, including the journalists, wishing to travel to Davos. In view of the status of the journalist, the authorities' refusal to allow the applicant into Davos had therefore not been prescribed by law. So, nothing prevents us from discussing on the absence of the special guaranties provided for the journalists who impart information about the protest, without implicating in violent acts.

But, this discussion may lead to another one. Who will profit from this special status?

A simple journalist, a blogger or somebody else who contributes to a public debate? A journalist who is wearing a distinguishable clothing or having a press card? Or a simple verbal identification as a journalist is sufficient?

At first sight, *Göktepe v. Turkey* comes to my mind, despite it was an admissibility decision, in which the journalist has not been allowed to enter to the protest area because of the lack of yellow press card which amounted to his detention.

Indeed, this issue has been considered in detail in *Najafi v. Azerbaijan case* (no 2594/07, 02/10/2012) case, under article 10 and the Court indicated that the applicant was a journalist, as he was wearing a badge and had explicitly identified himself as a journalist to the police, the applicant had been subjected to ill treatment under article 3 during a demonstration. On the contrary, in *Pentikainen case*, the Court didn't consider separately the phases of the intervention even though the applicant identified himself as a journalist during the first step of the intervention (his apprehension).

How about the people other than journalists monitoring a protest? According to Venice Commission Guidelines on Freedom of Peaceful Assembly adopted on 4 June 2010, § 199, *freedom to monitor public assemblies should not only be guaranteed to all media professionals but also to others in civil society, such as human rights activists, who might be regarded as performing the role of 'social watchdogs' and whose aim is to contribute to informed public debate. (...)*. The Court is of the same opinion on this matter.

Last but not least, on the other side, even though the conduct remains sometimes questionable in the eyes of the Court, another important issue comes out:

What does it create a chilling effect on journalistic activity in any case? For example, *Dammann case* (n° 77551/01, 25/04/2006) concerns criminal conviction of a journalist for having obtained in breach of official secret information about a prosecution file. In this case as well, the conduct of the journalist was one of the criteria of assessment exercise. However, what I would like to underline in this case is the penalty imposed on the journalist. Indeed, according to the Court, the penalty was not very harsh and it had not prevented the journalist from exposing himself. However, the Court decided that the sole conviction itself had amounted to a kind of self-censorship and was likely to discourage a journalist from undertaking a search on matters of public interest. In a very recent case of last week, *Olafsson v. Iceland* (58493/13, 16/03/2017 § 61), the Court said that *"in the context of assessing proportionality, irrespective of whether or not the sanction imposed was a minor one, what matters is the very fact of judgment being made against the person concerned. Any undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing future media coverage of similar questions."*

But in *Pentikäinen*, the logic of the majority of the judges was different and they concluded that the aim was not the prosecution of the journalist because of his journalistic activities, and the freedom of press was not affected in this case. In my opinion, regardless of the fact whether the journalist reported the demonstration at the end of the day, we should not ignore that the applicant has been subjected to a restriction during the exercise of the journalistic activity.

In conclusion, as the Venice Commission underlines in several times, the measures taken by the authorities against journalists in connection with their journalistic activities, even if they pursue a legitimate aim, arises a question under article 10. The national authorities should examine those cases by applying the test under article 10 and should make a distinction between exercise of journalistic activity and implication in actions incompatible with law by assessing concrete and verifiable evidences. Likewise, in the cases related to the right to protest which implies the journalists.

I appreciate the conclusion of *Selmani* case, as this case focuses on the importance of the journalistic activity in a protest, and not only on the proportionality of the intervention. This is likely to reinforce the role of the press and the positive obligation of the state to ensure a secure professional environment for the journalists.

Daniel Simons

1. It's an honour to have been invited and to be able to contribute to this important discussion.
2. I'd like to start by making a few observations on one particular element in the ruling in Markus Pentikäinen's case. The Finnish Government argued, and the Grand Chamber (GC) seems to agree, that journalists are not entitled



Daniel Simons

"to preferential or different treatment in comparison to the other people" at the scene of a protest. If the police order the crowd to disperse, journalists should go too.

3. My first comment is that the approach of the majority in the GC actually seems to put journalists at a disadvantage compared to demonstrators.

4. Let me illustrate that with an example. Let's imagine that, while Markus Pentikäinen was taking pictures, there was a peaceful demonstrator next to him, waving a banner. They are

both arrested for ignoring the orders of the police to disperse, and are both convicted without any sentence. Mikko the protestor also applies to the ECtHR but invokes Article 11 (freedom of assembly) rather than Article 10.

I think Mikko's case might play out more favourably for him:

- a. First, the fact of ignoring the police order would be approached differently.
 - i. In Markus' case, the GC said that "journalists cannot be exempted from their duty to obey the ordinary criminal law solely on the basis [of] Article 10..."
 - ii. In Mikko's case, the GC would probably refer to its ruling in *Kudrevicius v Lithuania*, a case about protesting farmers who blocked three motorways and ignored the orders of the police to leave. There, the Court stated that: *"An unlawful situation ... does not necessarily justify an interference with a person's right to freedom of assembly ... [the] authorities are still restricted by the proportionality requirement of Article 11."* So the burden would clearly be on the Finnish authorities to explain why it was necessary to arrest and convict Mikko, rather than Mikko needing to explain why it was justifiable to ignore the dispersal order.

- b. Secondly,
 - i. In Mikko's case the Court would probably express reservations about the use of criminal law. In Kudrevicius the GC held: "Where the sanctions imposed on the demonstrators are criminal in nature, they require particular justification. A peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction."
 - ii. Contrast that to Markus' case where the GC states laconically that "a journalist has to be aware that he or she assumes the risk of being subject to legal sanctions, including those of a criminal character, by not obeying the lawful orders of ... the police."
 - c. Thirdly, the Court might evaluate the effect of the conviction differently.
 - i. In Markus' case, the GC felt a slap on the wrist was not a big deal: "The applicant's conviction amounted only to a formal finding of the offence committed by him and, as such, could hardly, if at all, have any "chilling effect" on persons taking part in protest actions."
 - ii. That sounds quite different from Kudrevicius, where the GC stated that: "freedom to take part in a peaceful assembly is of such importance that a person cannot be subject to a sanction – even one at the lower end of the scale ... so long as that person does not himself commit any reprehensible act."
5. The conclusion I would draw is the following. The Court has often said that Art. 11 must be interpreted in light of Art. 10, but it has not yet stated the reverse – that Art. 10 should be interpreted in light of Article 11. To my mind it should be a two-way street. The right to document during assemblies under Art. 10 should not be weaker than the right to participate in them under Art. 11.
6. There is a case currently pending before the Court – *Butkevich v. Russia* – which quite well illustrates the need for this approach. The applicant is a journalist who was detained while covering an "unauthorised protest" and sentenced to three days' detention for disobeying the orders of the police to disperse. According to the Court's case-law under Article 11, the mere fact that a peaceful demonstration is unauthorised is not a sufficient ground to disperse it. If, in this instance, the dispersal of the demonstration was not justified under Article 11, then surely the arrest and conviction of the journalist was not justified under Article 10.
7. My second comment is that, in my opinion, journalists *should* in fact enjoy a degree of preferential or different treatment compared to participants in an assembly.
- d. The presence of journalists at demonstrations is a key guarantee for the right to assemble, in two ways:

- i. The media help ensure that the message of the demonstrators reaches their target audience;
 - ii. The authorities are less likely to impose unreasonable restrictions on a demonstration or use excessive force against participants if they know they are being watched.
- e. The GC in the Pentikäinen judgment recognized this second aspect, stating that the media play a "crucial role ... in providing information on the authorities' handling of public demonstrations" and that their presence "is a guarantee that the authorities can be held to account for their conduct vis-à-vis the demonstrators..."
- f. As the dissenting judges further point out, that watchdog role of the press takes on particular importance when the police consider that demonstrators are acting illegally and decide to make arrests or disperse the crowd. There is a high public interest in ensuring that journalists are present when this happens.
- g. Of course it's a sound principle that journalists should keep a respectful distance to make sure the police can do their work. At the same time, to properly document events, a journalist will sometimes need to follow demonstrators when they trespass on private land, or stay near them if they are refusing to leave an area in response to a dispersal order. Photographers and videographers in particular need a good vantage point to make high-quality shots, which may be difficult from a distance or behind a police barrier.
- h. The GC does acknowledge this tension between professional and legal duties in such situations: "the Court accepts that journalists may sometimes face a conflict between the general duty to abide by ordinary criminal law ... and their professional duty to obtain and disseminate information." But then it goes on to say that journalists sometimes just need to choose between their professional duties and their legal ones at their own risk: "the concept of responsible journalism requires that whenever a journalist ... has to make a choice between the two duties and if he or she makes this choice to the detriment of the duty to abide by ordinary criminal law, such journalist has to be aware that he or she assumes the risk of being subject to legal sanctions ..."
- i. It seems a lot to ask of journalists to engage in civil disobedience in order to fulfil their public watchdog role at demonstrations. I agree with the dissenting judges and commentators who have argued that the fact that a journalist commits an offence under national law should not be the end of the matter and the question should be whether the measures taken in response are "necessary and proportionate". This is where the difference arises between demonstrators and journalists: while there

might sometimes be a pressing need to prosecute demonstrators who trespass onto private land or refuse to disperse, that is less likely to be the case for a journalist who is not taking any active part and is merely documenting events.

8. The third point I'd like to address is the position of observers who are not professional journalists. Should they, too, enjoy enhanced rights compared to participants in a demonstration?
 - a. There is quite a well-established practice in some countries of non-governmental organisations sending monitors to demonstrations to report on the interaction between participants and the police. The OSCE has published an extensive *Handbook on Monitoring Freedom of Peaceful Assembly* to guide such efforts.
There is also a growing trend of citizen journalism during demonstrations. For example, much of the coverage of the recent protests by Indigenous People in North Dakota against the construction of an oil pipeline on their land came from citizen journalists.
 - b. The case-law of the Court suggests that any privilege given to traditional journalists during demonstrations should also extend to these other "watchdogs". There is quite a long line of judgments recognising that NGOs which are involved in matters of public interest are entitled to similar protections as the press under Article 10. And the recent GC judgment in *Magyar Helsinki Bizottság v. Hungary* further expands this principle to include academic researchers, authors, bloggers and popular users of social media.
 - c. There is of course a practical concern about how the police can tell the difference between a participant in a demonstration and a person who falls in one of these categories of public watchdogs, especially if the situation is chaotic and fast-moving. But this is not really a basis for a distinction with traditional journalists, since they might be just as difficult to tell apart from the crowd (as illustrated by Pentikäinen's case).
 - d. So where does the solution lie?
 - i. First of all, journalists and other watchdogs can make the work of the police easier by wearing distinctive clothing such as a high-visibility vest. But this shouldn't be elevated to a requirement, because in some instances impartial observers can become targets of demonstrators. In the *Butkevich* case which I mentioned before, three NGOs have lodged joint written comments in which they point to various safety guidelines for journalists which recommend keeping a low profile during demonstrations.
 - ii. Secondly, the police should be required to release a person as soon as it becomes clear he or she was merely acting as an impartial

observer. Continuing the detention may delay the release of the person's recordings, and, as the Court has pointed out in several cases, "news is a perishable commodity and to delay its publication ... may well deprive it of all its value and interest".

- iii. Finally, I would like to point to one more area where the Court might draw inspiration from its case-law under Article 11. In *Frumkin v. Russia*, a case decided last year, the Chamber held that the authorities are under a positive obligation to communicate with the organisers of a demonstration to resolve any tensions that arise. I hope to see the Court recognise a similar obligation to engage in dialogue with the press and other watchdogs before major demonstrations, with the aim to agree on a process for identification, discuss the establishment of secure observation areas and so on.

6. CONFERENCE CONCLUSIONS

Tarlach McGonagle

Introduction

First, I would like to thank and congratulate all the organisers for this very important initiative. A lot of collaborative work has gone into the conceptualisation and organisation of the conference. Good dialogue has been well served by good *preparatory* dialogue. I am sure I speak on behalf of everyone when I say that this conference really has lived up to its billing. We have had a very rich and detailed



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dialogue today among real makers and shakers in the world of freedom of expression: people from the frontlines of journalism, whistle-blowing, judicial decision-making, civil society and academia. It has been a real privilege to be here.

Before offering some conclusions and reflections on the present conference, it is important to recall a forerunner conference organised by Dirk Voorhoof, Mario Oetheimer and Constance Grewe at the European Court of Human Rights in October 2008. True to its title, 'Seminar on the European Protection

of Freedom of Expression: Reflections on Some Recent Restrictive Trends',⁷⁹ that conference drew attention to, and explored, a number of emergent worrying trends. Several of those trends have persisted in the ever-evolving jurisprudence of the European Court of Human Rights (hereafter 'the ECtHR' or 'the Court'). The present conference⁸⁰ therefore picks up on relevant themes and trends and seeks to continue the discussion initiated in 2008. The continuation and re-focusing of that discussion is important for at least three reasons:

1. The European Convention on Human Rights (hereafter 'ECHR') is a living instrument and the Court's case-law shows clear evolutionary characteristics: it builds on, and often refines, earlier approaches as European societies and judicial insights develop over time. There is scope to consolidate strong freedom of expression principles and to correct or adjust weaker approaches taken in particular cases. Dialogue between the judiciary and other actors enhances this developmental process.

⁷⁹ See also the concept note of today's conference, with annex: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806fbf0f>

⁸⁰ See the conference website: <http://www.coe.int/en/web/freedom-expression/ecpmfcthr2017>

2. The Council of Europe has elaborated a dynamic system for the protection of freedom of expression. The system comprises principles and rights, as enshrined in treaty law and developed in case-law; political and policy-making standards, and State reporting/monitoring mechanisms. It is shaped by the interplay between norms, institutions and actors.⁸¹ Sustained dialogue and other forms of engagement with civil society actors are essential for the effective operation of the system.
3. We must always guard against complacency when it comes to the protection of human rights, including the right to freedom of expression. Threats from increasing populism, extremism and terrorism, as well as the repressive political responses they often elicit, call for us to be “eternally vigilant” regarding any attempts to impose checks on freedom of expression.⁸²

Specific pixels and broader patterns

The conference demonstrated complementarity between very specific focuses



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on individual experiences and single cases on the one hand, and comparative perspectives on the other hand. It is important to focus on the individuals, individual cases and individual judgments as they are the specific pixels which ultimately create the bigger pattern of principles. They determine the colours that we see in the jurisprudence and standard-setting.

In terms of the more individual focuses and particular judgments, Lawrence Early gave a very detailed exposition of *Magyar Helsinki Bizottság v. Hungary* (hereafter *MHB*),⁸³ a Grand Chamber

judgment with important ramifications for the right to freedom of information in general and the right of access to State-held information in particular. Judge Popović gave an in-depth analysis of the *Selmani and Others v. the former Yugoslav Republic of Macedonia* case,⁸⁴ which involved the forcible removal of accredited journalists

⁸¹ See further: Tarlach McGonagle, ‘Freedom of expression: still a precondition for democracy?’, *Conference report*, Strasbourg: Council of Europe, 2015, pp. 4-8.

⁸² Paraphrase of Holmes, J., dissenting, in *Abrams v US*, 250 US 616 (1919), at p. 630, and referenced in the title of the edited volume: Lee C. Bollinger & Geoffrey R. Stone, Eds., *Eternally Vigilant: Free Speech in the Modern Era* (Chicago & London, University of Chicago Press, 2002). The parting message of Dunja Mijatović as OSCE Representative on Freedom of the Media was: “Never give in; never give up. Eternal vigilance is the price of a free press”: OSCE RFOM, Regular Report to the [OSCE] Permanent Council for the period from 2 December 2016 through 9 March 2017, Doc. No. FOM. GAL/2/17/Rev.2, 9 March 2017, p. 4.

⁸³ *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, 8 November 2016.

⁸⁴ *Selmani and Others v. the former Yugoslav Republic of Macedonia*, no. 67259/14, 9 February 2017.

from the national Parliamentary gallery. In both cases, the ECtHR found violations of Article 10 ECHR. In reaching those findings, it attached great importance to public debate in democratic society – and the crucial public watchdog role carried out by journalists, the media, NGOs and, increasingly, other actors such as academics and bloggers.

There were also several testimonies from individuals at the frontline of freedom of expression, whether journalism or whistle-blowing. Drawing on first-hand experiences, Dutch journalist Sanne Terlingen spoke about the vulnerabilities of journalists in particular situations, for instance when facing financial constraints as they try to defend themselves against legal action, and also the intimidation of journalists as a result of their reporting.

Antoine Deltour, reflecting on his own experiences as a whistleblower in the so-called *LuxLeaks* case, pointed out that some ECtHR case-law and Council of Europe standard-setting texts had proved useful in his legal defence. There is an important lesson here: the Council of Europe's system for the protection of freedom of expression has provided a range of resources – some legal, others more political in character – which are important tools that we can use as advocates and proponents of freedom of expression.

A somewhat different message was delivered by Markus Pentikäinen, whose own case culminated in a finding by a majority of the Grand Chamber that his right to freedom of expression had not been violated as a result of his arrest, detention and criminal prosecution because he refused to obey a police order to leave the area while covering a public demonstration as a photo-journalist.⁸⁵ In line with the dissenting opinion in that judgment, and subsequent judgments by the Court, several commentators took the view that in the *Pentikäinen* judgment, the Grand Chamber gave the right to freedom of expression the short end of the stick.

While it is important to subject individual cases to critical scrutiny, it is equally important to position them in broader, comparative perspectives. There is, as Judge Sajó reminded the conference, an onus on the free speech community to "raise its eyes and critical voice from the [nitty-gritty] of specific cases". That wider jurisprudential context was explored by a number of speakers. Galina Arapova and Barbara Trionfi highlighted some of the Court's case-law on (criminal) defamation, for instance. Dirk Voorhoof surveyed developments and trends in the Court's case-law dealing with a number of inter-related themes: protection of investigative journalism/newsgathering; access to information/public documents; protection of journalists' sources, and protection of whistleblowers. Duygu Köksal prised open and compared some recent ECtHR case-law dealing with the right to protest and the role of the media. In a similar vein, Daniel Simons compared and contrasted approaches under Articles 10 and 11 ECHR – two articles which often dove-tail in practice.

⁸⁵ *Pentikäinen v. Finland* [GC], no. 11882/10, § 90, 20 October 2015.

This report will now set out some of the overarching and recurrent themes explored during the conference, as captured in and triggered by the keynote speeches by Judge András Sajó and Silvia Grundmann. Their keynotes focused on the challenges facing the ECtHR and the Council of Europe's standard-setting activities, respectively.

The report will then re-engage with the themes mentioned above in the context of each of the conference's panels:

1. Defamation, privacy and processing of personal data;
2. Investigative journalism, access to information, protection of sources and whistleblowers, and
3. The right to protest and the role of the media during protests.

The report will conclude with some personal reflections on the nature of the dialogue between the ECtHR and the media freedom community and on how to sustain and structure that dialogue in the future. A number of thematic priorities from the conference will be identified for that purpose.

The overarching issues

In the first keynote speech, Judge Sajó shared a very probing personal reflection on the paradigmatic changes that have come over the communications environment in recent years. Due to technological advances and how society has embraced those advances, it has become possible for a growing range of actors to participate effectively in public debate. In the past, such a privileged position was more or less limited to professional journalists and traditional media. A wider public space has now opened up, offering great potential for individual participation and inclusive deliberation. This development came with the prospect of a tightly controlled system for "the production and management of information" being "replaced with a decentralized system where individuals would become more active partners in generating information". The European Court of Human Rights has repeatedly underlined how important it is for a diversity of specific actors to be able to contribute meaningfully to public debate.

However, as Judge Sajó rued, "pain is the sister of progress" and the hope of democratic debate being enhanced has not been (fully) borne out in practice. Technological developments have also led to the possibility, and indeed tendency, for people to retreat into groups where there is a predominance or an exclusivity of like-minded opinions and they become trapped in so-called filter bubbles. All of this can result in citizens living in "self-imposed selective worlds of alternative truth, where their rational capacities are paralyzed by externally reinforced wishful thinking", he said.

Society's increasing reliance on the Internet and social media is clearly impacting on the already complex and ambiguous relationship between freedom of expression

and democracy. The fundamental question at the heart of Judge Sajó's keynote asks "how to justify speech in a communication sphere where communication and communicators apparently do not satisfy fundamental expectations of rational discourse"? What are appropriate responses to self-selecting groups and their self-serving alternative facts and the rise of identity politics? Should the State be required to set "the conditions of communication right by limiting potentially harmful expression"? Or would that be a first regressive step on the slippery slope towards State censorship? Who is to say that calls for "responsible speech are but another attempt to determine governmentally or politically what is right or wrong and to impose a new political correctness on dissent that is labelled fake"? If truth were to be afforded regulatory protection, who would determine what is true ... and how?

These thorny questions can best be answered by paying attention to matters of substance and matters of perception. Freedom of expression is, after all, increasingly being shaped by changing public and political attitudes to the content and scope of the right and to the nature of the supranational judicial protection it is afforded.

In terms of matters of perception, Judge Sajó suggested that much rides on how the Court is perceived and how it perceives itself. Is the Court buoyed by public political support and (inter)national commitment to its mandate and mission, or is it dragged down by the pressure of increasingly isolationist and sovereignty-driven governments? Does it see itself as deferring to national visions of democracy or does it aspire to higher values, even when they are out of favour in national visions of democracy?

Matters of substance and perception also come together when one considers the role of the ECtHR as it tries to steer its way through the changed communications environment and reflects on the kind of principles that should guide it. Judge Spano subsequently explained that it is the task of the Court to develop a framework of principles, which need to be applied sensitively to factual realities. In other words, the important statements of principle formulated by the Court still need to overcome the challenges of operationalisation. Due to its framework character, this framework of principles does not cover all eventualities specifically: there remain unanswered questions and missed opportunities, as the panel discussions revealed. Nevertheless, as Peter Noorlander pointed out, when - as now - "the media are under fire like never before", there is a particular onus on the Grand Chamber of the Court to clarify concepts and to provide journalists with the clear guidance that they need on the parameters for their important work. The Court will continue to develop and refine its principles in future case-law and other bodies of the Council of Europe will continue to operationalise the Court's principles in their political standard-setting activities.

Whereas the first keynote dwelt on the role of the Court, the second keynote, delivered by Silvia Grundmann, Head of the Council of Europe's Media and Internet Division, focused on another dimension of the Council of Europe's broader system for the protection of freedom of expression, i.e., political standard-setting activities

by the Committee of Ministers (hereafter, the CM).⁸⁶ The CM has the responsibility to develop and maintain a policy framework for the protection of freedom of expression and media freedom through the adoption of standard-setting texts, such as Declarations and Recommendations to Council of Europe Member States.

The interplay between the Court's case-law and the CM's standard-setting activities is becoming increasingly frequent and increasingly important.⁸⁷ Principles developed by the Court can provide a starting-point for political standard-setting, with the latter operationalising the former, for example, by applying them to a variety of scenarios. The Court may – and often does – resort to standard-setting texts for inspiration when its existing case-law does not (adequately) deal with particular issues or scenarios. For instance, as Grundmann mentioned, the Court has referred to Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media,⁸⁸ in its *Yildirim*⁸⁹ and *Delfi*⁹⁰ judgments.⁹¹ Shortly after the conference, on 13 April 2017, the Court referred for the first time in a judgment to Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and the safety of journalists and other media actors⁹² – a central focus of Grundmann's speech.⁹³

Recommendation CM/Rec(2016)4 calls on States to urgently raise their game when it comes to guaranteeing the protection of journalism and safety of journalists and other media actors. It urges States to regularly review relevant national laws – and their implementation – to ensure that they are in conformity with the legal obligations created by the Convention. It seeks to develop themes that have only received limited attention in relevant European and international standards. One such theme is the gender-specific dimension to violence, threats and abuse targeting female journalists and commentators, especially online. Another is the digital security of journalists, including confidentiality of communications and freedom from surveillance.

⁸⁶ For an overview and analysis of the Council of Europe's system for the protection of freedom of expression, see: Tarlach McGonagle, Conference report, 'Freedom of expression: still a precondition for democracy?', Strasbourg: Council of Europe, 2015, pp. 4-8.

⁸⁷ Declaration of the Committee of Ministers on measures to promote the respect of Article 10 of the European Convention on Human Rights, 13 January 2010.

⁸⁸ Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media, 21 September 2011.

⁸⁹ Ahmet Yıldırım v. Turkey, no. 3111/10, 18 December 2012.

⁹⁰ Delfi AS v. Estonia [GC], no. 64569/09, 16 June 2015.

⁹¹ For further discussion of the added value of standard-setting texts for the Court's decision-making, especially on Internet-related issues, see Judge Spano's presentation at Internet freedom: a constant factor of democratic security in Europe, Conference, Council of Europe, Strasbourg, 9 September 2016, via: <http://www.coe.int/en/web/freedom-expression/internetfreedom2016>

⁹² Recommendation CM/Rec(2016)4 of the Committee of Ministers [of the Council of Europe] to member States on the protection of journalism and safety of journalists and other media actors, 13 April 2016.

⁹³ Huseynova v. Azerbaijan, no. 10653/10, 13 April 2017. See also the interesting partly dissenting opinion by Judges Nußberger and Vehabović, which points at the shortcomings in the Court's approach to the lack of an investigation into the killings of the journalist and the need to interpret procedural violations of Article 2 (right to life) in the light of Article 10 ECHR.

The Recommendation is firmly grounded in relevant principles developed by the ECtHR in its case-law. It sets out those principles explicitly and in detail. This makes the Recommendation's key political recommendations traceable to hard legal obligations and therefore difficult to contest. This also provides a solid basis for teasing out the practical implications of those State obligations. This is particularly true of relevant positive obligations of States which, as Judge Spano pointed out, have enormous potential for ensuring enhanced level of protection for freedom of expression and participation in public debate.⁹⁴

The Recommendation explores what States' obligations mean in practice in various specific situations, such as during election periods and at public demonstrations.



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In both contexts, members of the public have a clear interest – and a right – to be informed and it is paramount for journalists and others to be able to inform them. The *Pentikäinen* case illustrates very well the issues that can arise when journalists and photo-journalists endeavour to cover public demonstrations where there is an element of unrest or violence. The Recommendation encourages dialogue between State authorities and journalists' organisations when demonstrations are due to take place, in order to minimize friction and avoid clashes between the police, demonstrators and the

media.⁹⁵ In its *Frumkin* judgment, the Court held that State authorities have a duty to communicate with the organisers of an assembly, which is "an essential part of their positive obligation to ensure the peaceful conduct of the assembly, to prevent disorder and to secure the safety of all the citizens involved".⁹⁶ The Recommendation goes one step further. It seeks to use this general positive obligation as a logical basis for developing a more specific positive obligation for dialogue that would also include members of the media. As Daniel Simons elaborated, such dialogue could prioritise reaching agreement on a process for identification of journalists or other media actors covering an assembly and establishing secure observation zones, etc.

Another relevant reason to focus on Recommendation CM/Rec(2016)4 is its scope. There was an ongoing discussion throughout the conference, triggered by Gill Phillips' early calls for clarification: who are we trying to protect and who deserves

⁹⁴ In this connection, he referred to: Tarlach McGonagle, 'Positive obligations concerning freedom of expression: mere potential or real power?', in Onur Andreotti, Ed., *Journalism at risk: Threats, challenges and perspectives* (Strasbourg, Council of Europe Publishing, 2015), pp. 9-35.

⁹⁵ Ibid., para. 14.

⁹⁶ *Frumkin v. Russia*, no. 74568/12, § 129, 5 January 2016 (extracts).

protection? How these questions are answered can have important, sometimes far-reaching, implications for the nature and scope of protection for freedom of expression. For instance, regulatory provisions for journalistic privileges or exceptions regarding data protection, access to information and particular forums, etc., can be drawn widely or narrowly – with positive or negative consequences for freedom of expression. Daniel Simons later re-engaged with these questions by advocating preferential or differential protection for journalists or others contributing to public debate, given the importance of their task for democratic society.

By referencing journalists and other media actors, the title of Recommendation CM/Rec(2016)4 reflects the growth that has taken place within public debate and acknowledges that nowadays a range of actors contribute to public debate. To protect journalism, it is therefore vital to guarantee the safety of all those actors who wish to participate in public debate and to ensure that they may express their ideas and share information without fear. This principle was laid down by the Court in its *Dink v. Turkey* judgment.⁹⁷ More specifically, the Court stated:

States are obliged to put in place an effective system of protection for authors and journalists as part of their broader obligation to create a favourable environment for participation in public debate by everyone and to enable the expression of opinions and ideas without fear, even when they are contrary to those held by the authorities or by a significant section of public opinion and even if they are annoying or shocking for the latter.⁹⁸

Recommendation CM/Rec (2016)4 takes a broad, forward-looking view of what journalism entails and underlines its importance in a democratic society. It acknowledges the valuable contributions that bloggers, whistle-blowers and a growing range of other actors can make to public debate and stresses the need to guarantee their safety and freedom of expression, as the ECtHR has repeatedly recognised. This is consistent with leading international standards, such as the United Nations Human Rights Committee's General Comment No. 34⁹⁹ and the approach taken by UNESCO. This is both a principled *and* a pragmatic approach. All rights guaranteed by the ECHR have to be practical and effective – not merely theoretical or illusory.¹⁰⁰ To determine whether the right to freedom of expression is effective for a journalist, a photo-journalist or a whistleblower, one has to look at the specific set of circumstances that obtain. Particular circumstances may require particular measures in order to protect those persons' efforts to contribute to public debate, and thereby ensure that their right to freedom of expression is effective in practice.

⁹⁷ *Dink v. Turkey*, nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, § 137, 14 September 2010.

⁹⁸ Author's translation of *ibid*.

⁹⁹ Human Rights Committee, General Comment 34: Article 19 (Freedoms of Opinion and Expression), UN Doc. CCPR/C/GC/34, 12 September 2011.

¹⁰⁰ *Airey v. Ireland*, no. 6289/73, § 24, 9 October 1979.

The operational autonomy that allows journalists to carry out their functions is, however, neither unlimited nor unconditional. In accordance with Article 10(2), the exercise of the right to freedom of expression "carries with it duties and responsibilities". This vague phrase has never been fully unpacked by the Court. Indeed, according to a clear strand in the conference discussions, it is maybe just as well that the phrase has never been fully unpacked – due to the chilling effect arising from the Court's increasingly heavy emphasis on "responsible journalism".¹⁰¹ As Judge Sajó underscored, it is very difficult to determine the appropriate levels of responsibility for a variety of actors. Moreover, while the exercise of the right to freedom of expression is governed by duties and responsibilities, those duties and responsibilities should not, of themselves, restrict the exercise of the right.

The Court has, however, clarified that the scope of those "duties and responsibilities" varies, depending on the "situation" of the person exercising the right to freedom of expression and on the "technical means" used.¹⁰² Different technical means may be appropriate in different circumstances. In this regard, Dirk Voorhoof warned against "turning Article 10 upside down" by stating that a particular technique is "not necessary" in circumstances of a particular case. This warning is consistent with an important principle established by the Court in its *Jersild v. Denmark* judgment.¹⁰³ In that *locus classicus* for journalistic and media freedom, the Court held that it is not the task of a judge in Strasbourg, a national judge – or even (I dare to venture), a "judge prophet" of the kind referred to by Judge Sajó – to determine for a journalist what the most appropriate technique is.¹⁰⁴ This is a judgment call that has to be made by the journalist him-/herself in accordance with the ethics of the profession.

The Court has explained that "the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism".¹⁰⁵ Or, as Carl Bernstein of Watergate fame has put it, journalism is all about a commitment to provide "the best obtainable version of the truth".¹⁰⁶ In relevant ECtHR case-law, i.e., "Bladet Tromsø and its progeny", newspapers did not "as a rule" have an "absolute duty to verify the truth of a critical factual statement", as Judge Sajó pointed out. However, if one were to "read the tea-leaves of the *Pentikäinen* judgment", such a duty "would be found acceptable or even necessary", he stated. In *Pentikäinen*, the familiar phrase, "the ethics of journalism", has been replaced by the phrase, "the tenets of responsible journalism".¹⁰⁷

¹⁰¹ *Pentikäinen v. Finland* [GC], op. cit., § 90.

¹⁰² *Fressoz and Roire v. France* [GC], no. 29183/95, § 52, 21 January 1999.

¹⁰³ *Jersild v. Denmark*, no. 15890/89, 23 September 1994.

¹⁰⁴ *Ibid.*, § 31.

¹⁰⁵ *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 65, 20 May 1999.

¹⁰⁶ Carl Bernstein, "The Idiot Culture: Reflections of post-Watergate journalism", *The New Republic*, 8 June 1992, pp. 22-28, at p. 24.

¹⁰⁷ *Pentikäinen v. Finland* [GC], op. cit., § 90.

One of the main criticisms of the Court's growing reliance on "responsible journalism" is that however well-intentioned it may be, such an approach has the practical effect of unduly limiting freedom of expression. The term is taken to cover "the contents of information which is collected and/or disseminated by journalistic means" and "*inter alia*, the lawfulness of the conduct of a journalist, including, [...] his or her public interaction with the authorities when exercising journalistic functions".¹⁰⁸ In *Pentikäinen*, the majority of the Court stated that the "fact that a journalist has breached the law in that connection is *a most relevant, albeit not decisive*, consideration when determining whether he or she has acted responsibly".¹⁰⁹ However, the majority did not build on this statement to set out a convincing case as to why the public interest in the reporting (which was acknowledged elsewhere in the judgment) did not prevail. The upshot of this - and of other cases in which "responsible journalism" has a central place¹¹⁰ - is that the room for journalists' ethical and professional autonomy is restricted by turning ethical considerations into legally-binding criteria, while downplaying the public's right to be informed about matters of importance to society.

Defamation, privacy and processing of personal data

Moderator Gill Phillips (Director of Editorial Legal Services, Guardian News & Media) opened this panel session with a reminder of the numerous sources of limitations on freedom of expression and the chilling effect they can have: anti-terrorism, national security and hate speech laws, especially when definitions of key terms are not tightly drawn, and uncertainty about levels of liability for online content, especially when it is posted by third parties on the websites of Internet intermediaries. The three grounds for limitations on freedom of expression mentioned specifically in the title of the panel session are a mix of old and new challenges for public debate. Defamation laws, designed to protect individuals' reputations, can have a restrictive effect on freedom of expression when they are inappropriately calibrated. The severe chilling effect of *criminal* defamation laws on freedom of expression is well-documented and it featured centrally in the panel discussions. The protection of privacy - as guaranteed by Article 8 ECHR - is increasingly being used to limit freedom of expression. This trend has been facilitated by the ECtHR's willingness to consider reputational rights under Article 8 instead of under the limitations envisaged under Article 10(2). Whereas privacy is increasingly invoked as potentially limiting freedom of expression, it appears that the protection of personal data is really "the new black". Data protection laws - at the European and national levels - offer individuals, especially public figures, new possibilities to try to restrict reporting and commentary on their (public) activities.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid. (emphasis added).

¹¹⁰ E.g. *Stoll v. Switzerland* [GC], no. 69698/01, 10 December 2007.

During the session, Barbara Trionfi, Executive Director of the International Press Institute (IPI), presented her organisation's recent study on defamation and insult laws throughout the OSCE.¹¹¹ A key general finding of the study is that criminal defamation and insult laws exist in 42 of the 57 OSCE Participating States and these laws are applied regularly. These laws "commonly" do not require the defamatory content to be false and there is provision for a sanction of imprisonment in "the vast majority of cases". A particularly controversial feature of criminal defamation laws is the focus that they often contain on insulting public figures and/or (domestic and/or foreign) heads of state. According to the study, 15 OSCE States provide for criminal liability for insulting public officials and nine OSCE States punish defamation "more harshly" if the victim is a public official. Nearly half of OSCE States offer special protection for the reputation and honour of the head of state and 18 OSCE States have special laws protecting foreign heads of state.

These findings are very worrying from a freedom of expression perspective (even allowing for the fact that the OSCE region is wider than the Council of Europe region) as they go very much against the grain of relevant principles that have been developed by the ECtHR. The IPI study neatly summarises the ECtHR's main principles on criminal defamation as follows:¹¹²

- Penalties for criminal defamation should not include imprisonment
- Convictions for defamation should only be secured when the allegedly defamatory statements are false, or made with reckless disregard as to whether they were true or false
- Public officials must be more, not less, tolerant of criticism and scrutiny
- Elected and non-elected heads of states (including foreign ones) should tolerate greater scrutiny and criticism
- Government bodies, state institutions, state symbols such as flags and anthems, should never be protected by defamation laws

These principles should be read in the context of the Court's overall approach to defamation.¹¹³ Although the Court has not unequivocally called for the decriminalisation of defamation, it has repeatedly "further observe[d] that the Parliamentary Assembly of the Council of Europe in its Resolution 1577 (2007) urged those member States which still provide for prison sentences for defamation, even if

¹¹¹ Scott Griffen/International Press Institute, *Defamation and Insult Laws in the OSCE Region: A Comparative Study* (Commissioned by the OSCE Representative on Freedom of the Media), March 2017, available at: <http://www.osce.org/fom/303181>.

¹¹² Source: Barbara Trionfi, Powerpoint presentation of *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, 24 March 2017.

¹¹³ Tarlach McGonagle, *Freedom of expression and defamation: A study of the case law of the European Court of Human Rights*, Strasbourg, Council of Europe Publishing, 2016.

they are not actually imposed, to abolish them without delay".¹¹⁴ Having said that, the Court has consistently held that prior restraint and criminal sanctions clearly have a chilling effect on freedom of expression and public debate, and should be used with great restraint, if at all. In *Cumpănă and Mazăre v. Romania*, the Court held that "the circumstances of the instant case – a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest – present no justification whatsoever for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect ...".¹¹⁵ At the end of the day, the Court looks at the severity of the consequences of an interference for the individual in question, Judge Spano explained. Thus, for instance, a public prosecution for criminal defamation would be considered a more serious interference than a private one.

Notwithstanding these strong words about the chilling effect of criminal defamation and prison sentences, the Court does not always find criminal sanctions to be disproportionate interferences with the right to freedom of expression.¹¹⁶ Galina Arapova therefore called on the Court to be more consistent and more direct in its criticism of the use of criminal defamation to restrict freedom of expression.

Panelists and participants identified attempts by public figures to restrict reporting about them and their activities as a worrying trend. Starting with its *Lingens* judgment in 1986, the Court has developed robust standards for reporting on public figures.¹¹⁷ The so-called *Lingens*-line of case-law may be summarised as follows. Politicians (including (foreign) heads of state and government and members of government), public officials or public figures (including business people and even celebrities) must tolerate higher levels of criticism than other individuals. By deciding to enter public life, they knowingly lay themselves open to close scrutiny of their words and actions. While they are entitled to protection of their reputation, even when they are not acting in a private capacity, the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.

Relevant principles also apply *mutatis mutandis* to business persons: there is a public interest in knowing how business is conducted and because they consciously enter into commercial activities, business persons must expect that their actions and words will be subjected to public scrutiny. This does not mean that they relinquish their right to privacy or data protection (just like other public figures). However, it does clarify the legal parameters within which any alleged violation of their right to privacy or data protection will have to be judged. In the following panel, Helen Darbishire observed a tendency on the part of authorities to invoke the sensitivity of

¹¹⁴ See, for example, *Mariapori v. Finland*, no. 37751/07, § 69, 6 July 2010; *Niskasaari and Others v. Finland*, no. 37520/07, § 77, 6 July 2010; *Saaristo and Others v. Finland*, no. 184/06, § 69, 12 October 2010 and *Ruokanen and Others v. Finland*, no. 45130/06, § 50, 6 April 2010. See, for details of relevant case-law, Tarlach McGonagle, *Freedom of expression and defamation*, op. cit. p. 18.

¹¹⁵ *Cumpn and Mazre v. Romania* [GC], no. 33348/96, § 116, 17 December 2004. See also *Mariapori v. Finland*, op. cit., § 68.

¹¹⁶ *Mihaiu v. Romania*, no. 42512/02, 4 November 2008.

¹¹⁷ *Lingens v. Austria*, no. 9815/82, 8 July 1986.



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the private data of owners of companies as a reason not to disclose data. However, the Court's relevant jurisprudence, as just described, seems to challenge the underlying premise of such a tendency.

In a rapidly developing communications environment, the potential for reputational harm that can be caused to individuals is unprecedented in human history, Judge Spano explained. This is the context in which the Court has to operate. Various speakers and participants expressed concern at how the Court has dealt with reputational rights and interests in a number of cases. Article 10(2) ECHR includes "the protection of the reputation or rights of others" as one of the grounds on which it may be permissible to restrict the right to freedom of expression. To approach reputation from this angle – as the Court traditionally did – requires a standard proportionality analysis of a restriction on a right. However, in a series of cases, a shift in the Court's approach – described as a "re-reading of Article 10"¹¹⁸ and as a "re-drawing" of the relationship between freedom of expression and privacy¹¹⁹ – has been observed. In those cases, including *Chauvy*,¹²⁰ *Pfeifer*,¹²¹ *Petrina*,¹²² *Lindon*,¹²³ and *MGN*,¹²⁴ the Court established that "the scope of private life in Article 8 encompasses or extends to reputation".¹²⁵ This shift had far-reaching implications as it required that two Convention rights of equal value be balanced instead of performing a standard proportionality analysis. Judge Sajó described this as "contrary to the text of the Convention" and a reflection of "a new hierarchy of values compared to earlier years, perhaps more in tune with narcissistic times". In more recent case-law, the Court

¹¹⁸ Judge Sajó's keynote at this conference.

¹¹⁹ Marie McGonagle, 'Privacy – Confusing Fundamental Values and Social Traditions' [2010] 1 Irish Human Rights Law Review, 143-175, at 168.

¹²⁰ *Chauvy and Others v. France*, no. 64915/01, 29 June 2004.

¹²¹ *Pfeifer v. Austria*, no. 12556/03, 15 November 2007.

¹²² *Petrina v. Romania*, no. 78060/01, 14 October 2008.

¹²³ *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, 22 October 2007.

¹²⁴ *MGN Limited v. the United Kingdom*, no. 39401/04, 18 January 2011.

¹²⁵ Marie McGonagle, 'Privacy – Confusing Fundamental Values and Social Traditions', op. cit., at 168.

has pointed out that "In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life".¹²⁶ The Court has set out criteria to guide the balancing exercise: (i) contribution to a debate of general interest; (ii) how well known is the person concerned and what is the subject of the report?; (iii) prior conduct of the person concerned; (iv) method of obtaining the information and its veracity; (v) content, form and consequences of the publication, and (vi) severity of the sanction imposed.¹²⁷ The challenge for the Court is now to ensure consistency when applying these criteria.

A further worrying trend, described above as "the new black", is the increasing use of data protection laws to silence journalists and prevent them from writing about particular individuals, especially public figures. The already frictional relationship between the right to privacy and the right to freedom of expression is coming under increased strain in new communications environment. Friction between the two rights is at the core of the *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* case on data journalism, in which a much-anticipated Grand Chamber judgment is pending.¹²⁸ More specifically, the case concerns whether the publication by the media of bulk taxation information about individuals constitutes a journalistic activity - a status that would exempt it from data protection rules. The taxation information in question was accurate and publicly available, so there was no suggestion that the information had been obtained by underhand or illegal methods. Notwithstanding the public interest in the published data, the Court accepted the argument of the national authorities that the extent of the data (concerning 1.2 million individuals) involved meant that the publication should be classed as processing of personal data rather than journalistic activities. There is a wider relationship to be explored here, bringing together the publication, analysis and contextualisation of data and statistics as a contribution to public debate. It is to be hoped that the pending Grand Chamber judgment will clarify some of the legal complexities involved.

During the panel session, attention was also drawn to the alarming situation for freedom of expression in Turkey, in particular the extent of arrests of journalists and others and of the wide-ranging measures clamping down on the media, academia and civil society. It was mentioned that applications are being lodged with the ECtHR in which Article 18 ECHR is being invoked in conjunction with other rights guaranteed by the Convention. Article 18 ('Limitation on use of restrictions on rights') reads: "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed". Article 18 tends to be invoked infrequently and the Court

¹²⁶ *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012.

¹²⁷ *Ibid.* See also *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, 7 February 2012.

¹²⁸ *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, no. 931/13, 21 July 2015. The case was referred to the Grand Chamber on 14 December 2015. For a critical comment, see Dirk Voorhoof, "ECtHR accepts strict application of data protection law and narrow interpretation of journalistic activity in Finland", *Strasbourg Observers Blog*, 12 August 2015.

has found a violation of the Article in very few cases.¹²⁹ According to the Court, this is because when an allegation is made under Article 18, it applies "a very exacting standard of proof".¹³⁰ This means that an applicant alleging that his or her rights and freedoms were "limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed or which could be reasonably inferred from the context".¹³¹ A mere suspicion of improper motives is not sufficient¹³² and when assessing whether improper motives existed, the Court must "base its scrutiny only on the concrete facts of the case".¹³³ Thus, it "cannot accept as evidence the opinions and resolutions of political institutions or non-governmental organisations, or statements by other public figures".¹³⁴

A typical situation in which Article 18 could be invoked is when there is an allegation of the *mala fide* implementation of legislation, e.g. criminal defamation laws, to muzzle dissent or criticism and thereby unduly restrict freedom of expression. In this connection, Recommendation CM/Rec(2016)4 tries to go the extra mile by insisting that "Member States must exercise vigilance to ensure that legislation and sanctions are not applied in a discriminatory or arbitrary fashion against journalists and other media actors. They should also take the necessary legislative and/or other measures to prevent the frivolous, vexatious or malicious use of the law and legal process to intimidate and silence journalists and other media actors".¹³⁵

*Investigative journalism, access to information,
protection of sources and whistleblowers*

This panel, moderated by Lucy Freeman (Chief Executive Officer, Media Legal Defence Initiative (MLDI)), continued many of the discussions that had been begun earlier in the conference. The legal protection of the range of actors who engage in public debate again proved a central topic of discussion. In its recent *MHB* judgment, the Grand Chamber of the Court recognised very candidly that a growing range of actors nowadays play the role of public watchdog and that they depend on access to information in order to be able to do so. A central question in the case was whether a general right of access to State-held information exists under Article 10 ECHR, notwithstanding the absence of a textual provision for such a right. The Court sought to determine the scope of such a right by distilling four 'threshold criteria' from its existing case-law: the purpose of the information request; the nature of the information sought; the role of the applicant, and the ready and available character

¹²⁹ *Merabishvili v. Georgia*, no. 72508/13, § 101, 14 June 2016. The case was referred to the Grand Chamber of the Court on 17 October 2016. See also *Navalnyy v. Russia*, no. 29580/12, 2 February 2017, which was referred to the Grand Chamber of the Court on 29 May 2017.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, para. 100.

¹³² *Ibid.*

¹³³ *Ibid.*, para. 103.

¹³⁴ *Ibid.*

¹³⁵ Recommendation CM/Rec(2016)4, op. cit., para. 13.

of the information.¹³⁶ In his meticulous examination of the judgment, Lawrence Early shed light on how the Court developed these criteria, drawing on underlying democratic values. The information-gathering exercise should thus constitute an "essential element" of public debate and there should be a public interest in the information sought. In the Court's own words:

Given that accurate information is a tool of their trade, it will often be necessary for persons and organisations exercising watchdog functions to gain access to information in order to perform their role of reporting on matters of public interest. Obstacles created in order to hinder access to information may result in those working in the media or related fields no longer being able to assume their "watchdog" role effectively, and their ability to provide accurate and reliable information may be adversely affected.¹³⁷

It can be seen from the above emphases that the Court recognised not a general, unconditional individual right of access to State-held information, but a more specific, qualified individual right of access to State-held information in order to assist the public in forming an opinion on matters of general interest. In reaching its ultimate position, the Court reflected long and hard about the original intent of the drafters of the ECHR, the living instrument doctrine and comparative and international law.

The evolution of the Court's case-law on access to (State-held) information has been slow and cautious and it is parsed in detail in the *MHB* judgment.¹³⁸ The slow up-take of the Council of Europe's first-of-a-kind treaty on Access to Official Documents¹³⁹ was also adverted to. It was opened for signature and ratification in 2009, but it still has to gain the requisite ten ratifications that it needs to enter into force. With this background in mind, Helen Darbishire noted that the shortcomings of existing freedom of information regimes are pointed up by a contemporary culture of (high-profile) leaks. If we live in a culture that is defined by leaks, she asked somewhat rhetorically, what does that say about the quality of the freedom of information regimes that are in place at the national level?¹⁴⁰

¹³⁶ *MHB v. Hungary*, op. cit., §§ 157-170.

¹³⁷ *Ibid.*, § 167.

¹³⁸ For academic chronicles and commentary, see: Wouter Hins & Dirk Voorhoof, 'Access to State-Held Information as a Fundamental Right under the European Convention of Human Rights', *EuConst* 3 (2007), p. 114-126; Dirk Voorhoof, 'Freedom of Journalistic News-Gathering, Access to Information and Protection of Whistle-blowers under Article 10 ECHR and the Standards of the Council of Europe', in Onur Andreotti, Ed., *Journalism at risk: Threats, challenges and perspectives* (Council of Europe Publishing, 2015), p. 105-143; P. Tiilikka, 'Access to Information as a Human Right in the Case Law of the European Court of Human Rights' (2013) 5 (1) *Journal of Media Law* 79-103.

¹³⁹ Council of Europe Convention on Access to Official Documents, CETS No. 205, 18 June 2009. At the time of the conference, it had nine ratifications.

¹⁴⁰ For extensive analysis, see: Helen Darbishire, 'Ten challenges to Right to Information in age of Mega-Leaks', in Tarlach McGonagle & Yvonne Donders, Eds., *The United Nations and Freedom of Expression and Information: Critical Perspectives* (Cambridge University Press, 2015), pp. 271-303.

Dirk Voorhoof's presentation spanned the full breadth of the panel's focuses.¹⁴¹ He presented samplers of the Court's approach to each of the four topics,¹⁴² before identifying and criticising selected developments in the Court's recent case-law that give rise to concerns for freedom of expression. One swallow does not, of course, make a summer, but the more numerous the examples of worrying practice, the more problematic the overall pattern becomes. Moreover, Voorhoof's analysis¹⁴³ reveals that some of the restrictive trends in the ECtHR's case-law that were identified in 2008 are still evident in 2017. Here is a summary of the topics and the threats/challenges they are facing:

Topics	Threats/Challenges
Protection of investigative journalism/newsgathering	Margin of appreciation is too broad Level of "responsible journalism" is too high in legal terms, in relation to confidential information, the presumption of innocence and journalistic techniques
Access to information/public documents	Emphasis on official documents having to be ready and available
Protection of journalists' sources	Uncertainty whether "illegal" leaks are still protected as journalistic sources
Protection of whistleblowers	Lack of enforcement/implementation at the national level Level of good faith required Requirement to exhaust internal channels of disclosure

In respect of investigative journalism/newsgathering, when the public watchdog is also a bloodhound, the Court has consistently held that journalists should ordinarily respect the criminal law,¹⁴⁴ but there have been occasions on which it has condoned the use of illegal techniques, e.g., recording with a hidden camera, when there is an overriding public interest in the topic and the journalists put various checks and balances in place in their reporting.¹⁴⁵ In other cases, however, the Court has taken a dim view of perceived ethical shortcomings in journalists' activities, e.g., use of sensationalist style or breaching the law in the course of 'check-it-out journalism' by illegally purchasing a fire-arm to demonstrate how easy it was to do so¹⁴⁶ and by illegally bringing a weapon into a plane to expose airport security flaws.¹⁴⁷ Such findings go against the key finding in *Jersild*

¹⁴¹ For extensive analysis, see: Dirk Voorhoof, 'Freedom of Journalistic News-Gathering, Access to Information and Protection of Whistle-blowers under Article 10 ECHR and the Standards of the Council of Europe', in Onur Andreotti, Ed., *Journalism at risk: Threats, challenges and perspectives* (Council of Europe Publishing, 2015), pp. 105-143.

¹⁴² Most of the cases discussed are summarised in: Tarlach McGonagle (ed.), Dirk Voorhoof et al., *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights*, IRIS Themes, Vol. III, new, updated edition, Strasbourg: European Audiovisual Observatory, 2016.

¹⁴³ For more detail and depth, see Dirk Voorhoof's conference presentation.

¹⁴⁴ *Fressoz and Roire v. France*, op. cit.

¹⁴⁵ *Haldimann and Others v. Switzerland*, no. 21830/09, 24 February 2015.

¹⁴⁶ *Diamant Salihu and others v. Sweden* (dec.), no. 33628/15, 10 May 2016.

¹⁴⁷ *Boris Erdtmann v. Germany* (dec.), no. 56328/10, 5 January 2016.

that journalists themselves should in principle have the freedom to choose the most appropriate reporting technique to tell their story.

As already mentioned, the Court has had a long, winding journey towards its Grand Chamber judgment in *MHB*. The right recognised in that case is not an autonomous right of access to State-held information as such, but a right that is contingent on being instrumental for freedom of expression, that meets a public-interest test, involves public watchdogs and documents that are ready and available. While an important milestone, *MHB* and other case-law emphasising that States are not under a positive obligation to collect and compile information that is not ready and available,¹⁴⁸ indicate that there is still some distance to travel before the Court's winding journey leads to a full-fledged right of access to information.

The Court has over the years developed a body of case-law giving strong protection to the confidentiality of journalistic sources as an essential component of press freedom. Voorhoof drew attention to some recent case-law continuing this trend. In *Görmüş and Others v. Turkey*, the Court found that searches in a newsroom as part of a criminal investigation into the leaking of a classified military document constituted a violation of Article 10 due to the serious chilling effect such measures could have on journalists or whistleblowers disclosing misconduct or controversial acts by public authorities.¹⁴⁹ The judgment did, however, imply that journalists should only publish leaked documents if whistleblowers procuring those documents have first exhausted all internal procedures to report the wrongdoing.¹⁵⁰ This begs the question of whether "illegal" leaks can be regarded as journalistic sources, Voorhoof said.

In a leading case on whistleblower protection, *Guja v. Moldova*, the Court formulated six guiding criteria, which can be summarised as follows: 1) no alternative channels for disclosure with effective protection for the whistleblower; 2) public interest in the disclosed information; 3) authenticity of the disclosed information; 4) justifiable damage; 5) expectation to act in good faith, and 6) severity of the sanction (including its consequences).¹⁵¹ Voorhoof cautioned that strict reliance on the exhaustion of internal procedures and channels and the good faith requirements could serve to weaken the protection of whistleblowers in certain cases.

Whether the Court will manage to overcome these threats and challenges in the future remains to be seen. The task will, in any event, require more than just engaging with the scope and substance of Article 10 ECHR. The

¹⁴⁸ E.g., *Weber v. Germany* (dec.), no. 70287/11, 6 January 2015; *Bubon v. Russia*, no. 63898/09, 7 February 2017.

¹⁴⁹ *Görmüş and Others v. Turkey*, no. 49085/07, 19 January 2016.

¹⁵⁰ *Ibid.*, § 61.

¹⁵¹ *Guja v. Moldova* [GC], no. 14277/04, 12 February 2008.

logic of the Convention, Judge Spano recalled, and indeed its ambition, is to contribute to ensuring that there is effective protection of human rights at the national level. This demands effective supervision by the Council of Europe's Committee of Ministers of the execution of the Court's judgments by ECHR Contracting Parties.

Voorhoof also made the point that the Court itself should endeavour to take proper account of the real-life contexts surrounding the cases that it adjudicates on. By way of illustration, he referred to a recent case against the Netherlands in which the applicants – a newspaper and a journalist – complained about the search of the journalist's house, the seizure of various documents and items, and the 'chilling effect' on potential sources. The case was struck off the list, following a unilateral declaration by the Government that the requirements of Article 10 ECHR had indeed been violated.¹⁵² When determining costs and expenses, the Court found that the applicants' lawyers' hourly fee of EUR 375 "goes well beyond what the Court is prepared to consider reasonable as quantum in the case".¹⁵³ Yet, it would appear that the going commercial rate for law firms in large European cities, especially for cases involving complicated legal issues – such as national security/counter-terrorism issues, as in the present case – would indeed be in this kind of financial bracket. The bigger point here is that a victory of principle for a victim of a human rights violation should lead to adequate compensation, otherwise the victory will feel like a very hollow one.

One message that seemed to emerge from this panel discussion was that the *Jersild* judgment remains a high-water mark for media and journalistic freedoms. We should not lose sight of that and we should reflect on how the *Jersild* principles could be rolled out and applied *mutatis mutandis* to other actors contributing to public debate. It is important for the Court to continue to embrace an expansive, evolutive concept of public watchdog. As Helen Darbishire noted, this, in turn, prompts the strategic question: how do we as a community work to advance these standards?

The right to protest and the role of the media during protests

This panel, moderated by Peter Noorlander (Director, Bertha Justice Initiative), examined a number of very pressing and topical challenges facing journalists, the media and other contributors to public debate; challenges that are evident in contemporary politics across Europe and that remain unresolved in the case-law of the ECtHR. The overarching challenge is to ensure effective access for journalists, the media and other public commentators to democratic institutions, forums and public events. It is well-established in the case-law of the Court that the public has

¹⁵² *Telegraaf Media Nederland Landelijke Media B.V. & Van der Graaf v. the Netherlands*, no. 33847 (struck off the list), 22 September 2016.

¹⁵³ *Ibid.*, § 57.

the right to receive information and ideas concerning matters of public interest and that the media have the task of imparting such information and ideas.¹⁵⁴ It is therefore very understandable that journalists, the media and other contributors to public debate need to be as close as possible to the action in order to be able to give first-hand accounts of what is taking place or discussed. The public's right to know can clearly be contingent on effective access rights for public watchdogs.

Journalists and the media are often referred to as public watchdogs or the Fourth Estate. Both terms underscore the role of journalists and the media in keeping checks and balances on State authorities. The latter term – a would-be fourth pillar in Montesquieu's tripartite division of State powers – is believed to have been coined by Edmund Burke in 1787 when members of the press were first admitted into the British House of Commons in order to facilitate their reporting on parliamentary debates.

Given the origin of the term, the Fourth Estate, it is ironic that denial of access to parliament for journalists and the media has recently become a problematic issue in a number of European countries. In Poland, on 17 December 2016, the Speaker of the *Sejm* (Lower Chamber of the Polish Parliament) issued an order banning all journalists from entering the parliamentary estate. The order was issued, as stated in the alert registered on the Platform to promote the protection of journalism and the safety of journalists,¹⁵⁵ "following large demonstrations in Warsaw and other cities in Poland, in protest at proposed changes to rules governing journalists' access to the Polish parliament".¹⁵⁶ The order was withdrawn on 9 January 2017; prior rules of access were reverted to, and the partner organisations of the Platform subsequently declared the case to have been resolved as it no longer posed a threat to media freedom. In the former Yugoslav Republic of Macedonia, when the Parliament building was stormed by demonstrators on 27 April 2017, 21 journalists were threatened or barred from reporting from the scene, according to the Association of Journalists of Macedonia (AJM-ZNM).¹⁵⁷

Journalists' access to parliament has also featured in recent case-law of the ECtHR. The *Selmani and others* case concerned the forcible removal of accredited journalists from the press gallery of the Macedonian Parliament by security guards after unrest broke out among MPs during a parliamentary debate.¹⁵⁸ The ECtHR

¹⁵⁴ *The Sunday Times v. the United Kingdom*, (no. 1), no. 6538/74, § 65, 26 April 1979.

¹⁵⁵ The Platform, which was launched on 2 April 2015, is a public space to facilitate the compilation, processing and dissemination of information on serious concerns about media freedom and safety of journalists in Council of Europe member States. It was developed and is run by the Council of Europe in cooperation with a number of civil society partners: Reporters Without Borders, the International Federation of Journalists, the European Federation of Journalists, the Association of European Journalists, ARTICLE 19, the Committee to Protect Journalists, Index on Censorship, International Press Institute, International News Safety Institute and the Rory Peck Trust.

¹⁵⁶ 'Poland – Journalists' access to Parliament restricted', 20 December 2016, available via: <http://www.coe.int/en/web/media-freedom>.

¹⁵⁷ "The former Yugoslav Republic of Macedonia" – Two Reporters Injured During Storming of Parliament', 5 May 2017, available via: <http://www.coe.int/en/web/media-freedom>.

¹⁵⁸ *Selmani and Others v. the former Yugoslav Republic of Macedonia*, op. cit.

found that the right to freedom of expression of the applicants had been violated, reasoning:

the applicants' removal entailed immediate adverse effects that instantaneously prevented them from obtaining first-hand and direct knowledge based on their personal experience of the events unfolding in the chamber, and thus the unlimited context in which the authorities were handling them [...]. Those were important elements in the exercise of the applicants' journalistic functions, which the public should not have been deprived of in the circumstances of the present case.¹⁵⁹

The Court drew a parallel with the importance of the watchdog role played by the media at public demonstrations where law enforcement authorities attempt to contain disorder. It specifically referenced the *Pentikäinen* judgment, in which the public interest in such information was acknowledged, but did not hold sway over Pentikäinen's refusal to comply with the police order to move away from the scene of the demonstration.

Another difference between the Court's approaches in the *Selmani* and *Pentikäinen* cases concerns the importance attached to the status of the applicant, either as a participant in a demonstration or a mere observer of a demonstration. In both cases, the applicants were observing the events with a view to documenting and reporting on the escalating unrest. In its *Selmani* judgment, the Court described the applicants as "passive bystanders who were simply doing their work and observing the events".¹⁶⁰ As such, they did not pose any threat to public safety or public order. The same could have been said about Pentikäinen, but the Court chose instead to emphasise that "the concept of responsible journalism requires that whenever a journalist – as well as his or her employer – has to make a choice between the two duties and if he or she makes this choice to the detriment of the duty to abide by ordinary criminal law, such journalist has to be aware that he or she assumes the risk of being subject to legal sanctions, including those of a criminal character, by not obeying the lawful orders of, *inter alia*, the police".¹⁶¹ In an earlier judgment, *Gsell v. Switzerland*, the Court had found that the state authorities had failed to distinguish between potentially violent individuals and peaceful demonstrators.¹⁶² In that case, the Court found a violation of the applicant journalist's right to freedom of expression when the application of a general police order prevented him from gaining access to Davos, where the annual World Economic Forum was to take place.

A further point of tension in the case-law surveyed by the panelists involves the question pondered by both Duygu Köksal and Daniel Simons: should journalists and the media enjoy a degree of preferential or different treatment compared to participants in a demonstration? And if so, how broadly should journalists and the

¹⁵⁹ Ibid., § 84.

¹⁶⁰ Ibid., § 80.

¹⁶¹ *Pentikäinen v. Finland* [GC], op. cit., § 110.

¹⁶² *Gsell v. Switzerland*, no. 12675/05, § 60, 8 October 2009.

media be understood? Should citizen journalists be included, following *Cengiz & others*,¹⁶³ or the range of actors envisaged in *MHB*: academic researchers, "authors of literature on matters of public concern", bloggers and "popular users of the social media"¹⁶⁴? Recommendation CM/Rec(2016)4 calls on law enforcement authorities to respect the role of journalists *and other media actors* covering demonstrations and other events. But how should such actors be identified for the purpose of guaranteeing them specific access rights?

In *Najafli v. Azerbaijan*, the applicant journalist "was subjected to the unnecessary and excessive use of force, amounting to ill-treatment under Article 3 of the Convention, despite having made clear efforts to identify himself as a journalist who was simply doing his work and observing the event".¹⁶⁵ This led the Court to find a violation of the applicant's right to freedom of expression. Both Duygu Köksal and Daniel Simons dwelt on the question of whether ID-cards, distinctive clothing, insignia or even oral explanations should suffice for the purpose of establishing someone's status as a journalist. Simons cautioned against an unnuanced approach, particularly in respect of distinctive clothing, which can in some situations draw unwanted attention to journalists and lead to them being targeted by intimidation, threats and violence.¹⁶⁶

Recommendation CM/Rec(2016)4 tries to spell out the obligations of states when it comes to identifying journalists and – significantly – other media actors covering public demonstrations. It states: "Press or union cards, relevant accreditation and journalistic insignia should be accepted by State authorities as journalistic credentials, and where it is not possible for journalists or other media actors to produce professional documentation, every possible effort should be made by State authorities to ascertain their status".¹⁶⁷ Thus viewed, State authorities (in particular, law enforcement authorities) should of their own accord seek to determine whether those present at public demonstrations are journalists or other media actors. This is another example of cross-fertilisation between the Court's case-law and the CM's standard-setting.

A final point of tension in this body of case-law concerns the extent to which journalists and other media actors covering public demonstrations should be subject to general criminal law. In *Pentikäinen*, the Court took the view that the applicant's conviction "amounted only to a formal finding of the offence committed by him and, as such, could hardly, if at all, have any "chilling effect" on persons taking part in protest actions".¹⁶⁸ This view seems out of synch with the Court's approach in other important judgments such as *Jersild* and *Olafsson*. In the former, the Court

¹⁶³ *Cengiz and Others v. Turkey*, nos. 48226/10 and 14027/11, 1 December 2015.

¹⁶⁴ *MHB v. Hungary*, op. cit., § 168.

¹⁶⁵ *Najafli v. Azerbaijan*, no. 2594/07, § 68, 2 October 2012.

¹⁶⁶ For an extensive discussion of this and related issues, see the OSCE Office for Democratic Institutions and Human Rights (ODIHR), Handbook on Monitoring Freedom of Peaceful Assembly, Warsaw, 2011, available at: <http://www.osce.org/odihr/82979?download=true>.

¹⁶⁷ Recommendation CM/Rec(2016)4, op. cit., para. 14.

¹⁶⁸ *Pentikäinen v. Finland* [GC], op. cit., §113.



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refused to accept the Danish Government's argument that the limited nature of the fine was relevant, holding that "what matters is that the journalist was convicted".¹⁶⁹ In the latter, it found that "in the context of assessing proportionality, irrespective of whether or not the sanction imposed was a minor one, what matters is the very fact of judgment being made against the person concerned, even where such a ruling is solely civil in nature".¹⁷⁰ Both findings show the Court's concern about the chilling effect of sanctions. As it stated in *Olafsson*: "Any undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing future media coverage of similar questions".¹⁷¹ By way of analogy with Article 11, in *Kudrevičius and Others v. Lithuania*, the Court held that "the freedom to take part in a peaceful assembly is of such importance that a person cannot be subject to a sanction – even one at the lower end of the scale of disciplinary penalties – for participation in a demonstration which has not been prohibited, so long as that person does not himself commit any reprehensible act on such an occasion".¹⁷²

In sum, the main axes of discussion in this panel were the status, rights, duties and responsibilities of journalists and other media actors when they perform a public watchdog role or otherwise contribute to public debate. The traditional jurisprudence of the Court on these issues is currently being stretched in apparently divergent directions. On the one hand, there is a growing emphasis on the "tenets of responsible journalism" and how journalists conduct their activities. On the other hand, the *Jersild* principles still stand tall and the Article 11 case-law discussed during the session seems to underscore the importance of free assembly and free expression for democracy.

¹⁶⁹ *Jersild v. Denmark*, op. cit., § 35.

¹⁷⁰ *Olafsson v. Iceland*, no. 58493/13, § 61, 16 March 2017.

¹⁷¹ *Ibid.*

¹⁷² *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 149, 15 October 2015.

Dialogue

I would like to conclude with a few reflections on the nature of the dialogue during the conference and how we could build on this. To be meaningful, a dialogue should have several characteristics or qualities. It should not be limited to once-off interaction. It should be an ongoing process that begins with two (or more) parties' shared intention to reach out to, and connect with, each other. It should be a communicative activity, involving speaking, listening, hearing and understanding each other. It should be about dialogical engagement across time and space. The previous conference seems like a long time ago – nine years, actually. One could quip that family conversations are often characterized by long pauses, but a more

serious observation is that dynamic subjects – like freedom of expression and media freedom – require dynamic scrutiny. Lengthy lapses rarely do dialogue much good.

To maintain momentum in the present dialogue, it is essential that we reflect on how to move forward with purpose. A great precedent has been set here today. The presence of several judges of the European Court of Human Rights, as well as all the speakers and participants who went to so much effort to attend is very heartening. This demonstrates clear communicative intent and a willingness



Dialogue at ECPMF-ECtHR

to engage with each other, both of which are crucial vectors for taking the dialogue forward. It will be important not only to sustain this dialogue, but also to ensure that it is *informed* dialogue. A range of resources, which are already well-established, such as specialised (academic) blogs on the ECHR, freedom of expression and media freedom,¹⁷³ as well as information resources,¹⁷⁴ should continue to be used and further developed for this purpose.

It is also very heartening to hear Lawrence Early, Head of Jurisconsult at the Court,¹⁷⁵ stating explicitly how much benefit the Court derives from third-party interventions in which so many of the conference participants are regularly involved. That benefit derives from the comparative perspectives, national media law perspectives,

¹⁷³ For example: [Strasbourg Observers](#), [the International Forum for Responsible Media \(Inform\) Blog](#), [ECHR Blog](#), [LSE Media Policy Project Blog](#) and news and analysis by organisations such as [ARTICLE 19](#), [Index on Censorship](#) and [Media Legal Defence Initiative](#).

¹⁷⁴ See, for example, the Fact sheets and Case-law research reports provided by the [European Court of Human Rights](#) and the resources provided by the [Media and Internet Division of the Council of Europe](#) and the [European Centre for Press and Media Freedom](#).

¹⁷⁵ "The Jurisconsult is responsible for ensuring the consistency of case-law and supplying opinions and information, in particular to the trial benches and the members of the Court (Rule 18)." – source: www.echr.coe.int.

technological perspectives and other perspectives provided by *amicus curiae* briefs. Such perspectives can supplement and enrich the Court's own judicial perspectives.

Third-party interventions are one – perhaps rather formal – form of dialogue. There are, of course, others. This conference, for instance, is a less formal and more fluid (or free-flowing, to use a familiar freedom-of-information metaphor) form. Conferences like this generate a networking dynamic that can carry dialogue towards action. They facilitate communication and engagement between members of different communities who are pursuing similar goals. This leads to contacts and cooperation way beyond the conference's conclusions.

During his presentation, Dirk Voorhoof usefully recalled the words of the former President of Court, Judge Wildhaber: "Institutions (...) will perish, if those who love them do not criticize them, and if those who criticize them do not love them".¹⁷⁶ This is the kind of tough love you also get and expect in families. There is a message here for the ECtHR and the media freedom community: be lovingly critical of one another; be constructively critical of one another. This begins with critical reflection by members of each community about how they should fulfil their respective roles and about the substantive focuses that they should prioritize.

A number of priorities may be distilled from the conference:

- Role of the Court and of the Grand Chamber of the Court in particular
- Operationalisation of the Court's principles and execution of its judgments
- Interplay and synergies between the Court and other organs of the Council of Europe's system for the protection of freedom of expression
- The Court and the media freedom community
- ECHR as a living instrument guaranteeing rights that are practical and effective
- Margin of appreciation
- Opportunities and threats in the evolving multi-media ecosystem
- Positive obligations of States to guarantee freedom of expression
- A favourable environment for freedom of expression and participation in public debate for everyone
- Rights, duties and responsibilities of the different actors who contribute to public debate: journalists, the media, NGOs, academics, citizen journalists, whistleblowers, bloggers, users of social media, etc.
- Intermediary and gate-keeping functions online and liability for third-party content

¹⁷⁶ Luzius Wildhaber, The Hague Conference 2012, cited by Dirk Voorhoof in his presentation.

- The "best obtainable version of the truth" versus "fake news"
- "Responsible journalism"
- Pluralistic public debate and tendencies towards self-selection of information and self-seclusion in filter bubbles and convenient or alternative "truths"
- (Criminal) defamation and reputation
- Privacy and data protection
- Access to information and leaks in the public interest
- Freedom of expression and freedom of assembly

There is certainly plenty to talk about!

7. POWERPOINT PRESENTATIONS

PPT are available online. Please click on the name to access presentations.

Barbara Trionfi



Duygu Köksal



Daniel Simons



Markus Pentikäinen



Dirk Voorhoof



Sanne Terlingen



8. VIDEO STREAMS

Part 1 [EN](#) / [FR](#)

Part 2 [EN](#) / [FR](#)

9. SPEAKERS



GALINA ARAPOVA

MASS MEDIA DEFENCE CENTRE, DIRECTOR, SENIOR MEDIA LAWYER

Galina Arapova has a law degree (graduated in 1994 from Voronezh State University) and post-graduate in world economy and international relations (Russian Academy of Sciences, graduated in 1998), graduated from Institute of European Law (University of Birmingham, UK, Human Right Law and practice program conducted in co-operation with Council of Europe, in 1999). She is a director and senior media lawyer at the Mass Media Defence Centre.

She has litigated over 400 and won majority of them. She takes cases to the European Court of Human Rights (case decided *Chemodurov v. Russia*, *Nadtoka v. Russia* and over 20 pending). In addition, she is teaching at the school of journalism at Voronezh State University. Galina Arapova is an author, co-author and editor of over 20 books. Galina is a trustee of an international human rights organization ARTICLE 19, vice-Chair since 2014; Board member of a European Center for Press and Media Freedom



HELEN DARBISHIRE

ACCESS INFO EUROPE, FOUNDER / EXECUTIVE DIRECTOR

Helen Darbishire is a human rights activist specialising in the public's right of access to information (freedom of information), and the development of open and democratic societies with participatory and accountable governments. Helen is founder and Executive Director of the Madrid-based NGO Access Info Europe, established in 2006 to promote the right of access to information in Europe and globally. Helen has worked for over 20 years as a human rights professional, focusing on issues of freedom of expression and information, media freedom, civil society development, and democratisation. She is a member of the Steering Committee of the Open Government Partnership.

Prior to setting up Access Info Europe, Helen worked as a campaigner and project manager at Article 19 (1989 to 1998) based in London and Paris, and for the Open Society Institute (1999-2005) where she directed programmes on freedom of expression and freedom of information, based in Budapest and New York. Helen has provided expertise to a wide range of non-governmental and inter-governmental organisations, including UNESCO, the Council of Europe, the OSCE, and the World Bank. She is a founder of the global Freedom of Information Advocates Network and served two terms as its chair (2004-2010). She holds a degree in History and Philosophy of Science and Psychology from Durham University, UK.



ANTOINE DELTOUR

Ex-PwC, WHISTLEBLOWER, LE

Antoine Deltour is the main whistleblower in LuxLeaks case. He worked as an auditor for PwC Luxembourg from 2008 to 2010. When he resigned, he copied hundreds of tax rulings that have lead, amongst other documents, to the so-called „Luxleaks scandal“. The disclosure of large-scale tax avoidance practices fostered several initiatives for better tax justice. He was convicted by Luxembourg criminal court in June 2016. He received a 12-months suspended sentence but decided to appeal the judgment. The appeal trial ended on the 12th of January 2017 and the judgement will be announced on the 15th of March.



LAWRENCE EARLY

EUROPEAN COURT OF HUMAN RIGHTS, JURISCONSULT – LAWYER/JURISCONSULT AT THE EUROPEAN COURT OF HUMAN RIGHTS



LUCY FREEMAN

MEDIA LEGAL DEFENCE INITIATIVE, CHIEF EXECUTIVE OFFICER

Lucy Freeman is MLDI's Chief Executive Officer. She joined MLDI from Amnesty International, where she worked for 8 years as Director of Gender, Sexuality and Identity, Director of Growth, Deputy Director in the Africa Programme and Researcher on Nigeria. During this time she led and managed work on issues including freedom of expression and association, safety and security of human rights defenders, discrimination, war crimes and crimes against humanity, extrajudicial executions, prisons and torture, forced evictions and the right to adequate housing. Lucy has an MSc in Human Rights from the London School of Economics and Political Science and a BSc from the same institution.



SILVIA GRUNDMANN

COUNCIL OF EUROPE, HEAD OF THE MEDIA AND INTERNET DIVISION

Silvia Grundmann works for the Council of Europe in Strasbourg as Head of the Media and Internet Division. She holds both German law degrees with distinction, a Master of Common Law from Georgetown University, Washington, D.C. and she passed the New York State Bar Exam. For her PhD thesis she analyzed competition laws. Silvia worked as a lawyer in private practice in Brussels, Washington D.C. and Düsseldorf and thereafter as a judge and professor at a University of Applied Sciences in Northern Germany until 2004, when she joined the Council of Europe's department for the execution of judgments of the European Court of Human Rights.

She then worked as an advisor for two Council of Europe's Commissioners for Human Rights prior to her current function.



DUYGU KÖKSAL

LAWYER

Duygu Köksal is a human rights lawyer based in Istanbul. She obtained her law degree from the Galatasaray University and her LLM in human rights from University of Strasbourg. She wrote her thesis on "Right to medical care in detention in the light of the ECHR's caselaw".

After her studies, she interned at the Council of Europe's Group of States against Corruption (GRECO) and worked mainly on the independence and impartiality of judges. Between the years of 2012 and 2016, she worked at the Registry of European Court of Human Rights as processing lawyer. She has wide experience as a lecturer and trainer on legal issues related to freedom of expression. She is acting also as an expert and a trainer to Council of Europe in its projects related to promotion of freedom of expression in Turkey. She is a member of the Istanbul Bar Association since 2009.



TARLACH MCGONAGLE

INSTITUTE FOR INFORMATION LAW (IVIR), SENIOR RESEARCHER

Tarlach McGonagle is a senior researcher/lecturer at the Institute for Information Law (IVIR) at the University of Amsterdam and a senior researcher at the Netherlands School of Human Rights Research. He specialises in, and has published widely on, a broad range of topics relating to international and European human rights law, media law and policy and journalism. He was awarded a Ph.D. by the University of Amsterdam for his thesis examining the interface between freedom of expression and minority rights under international law. He regularly does expert work for various branches of the Council of Europe and the Organization for Security and Co-operation in Europe. He was Rapporteur of the Council of Europe's Committee of experts on protection of journalism and safety of journalists (2014-15) and is currently a member of the Council of Europe's Committee of Experts on media pluralism and transparency of media ownership.



PETER NOORLANDER

BERTHA FOUNDATION, PROGRAM DIRECTOR

Peter Noorlander is a recognised expert on international human rights law and policy, particularly on issues of digital rights and freedom of expression, and Director of the Bertha Justice Initiative. He has worked in the human rights NGO sector for twenty years, during which he co-founded and led the award-winning Media Legal Defence Initiative, ran a global network of media and internet freedom lawyers and advised governments and NGOs on law reform. Peter is also a prolific writer. He has published widely in mainstream media as well as specialist publications, mainly on freedom of expression and media law.



MARKUS PENTIKÄINEN

SUOMEN KUVALEHTI, PHOTOJOURNALIST AND MEMBER OF EDITORIAL BOARD

Markus Pentikäinen, 36, is an award-winning photojournalist and member of editorial board at leading Finnish news magazine Suomen Kuvalehti. There he has been covering international and domestic political, cultural and economic topics since 2005. He has also lectured in different journalism and visual design faculties.



GILL PHILLIPS

GUARDIAN NEWS & MEDIA LIMITED, DIRECTOR OF EDITORIAL LEGAL SERVICES

Gillian Phillips is the Director of Editorial Legal Services for Guardian News & Media Limited (publishers of the Guardian and Observer newspapers and theguardian.com). She was educated at Selwyn College, Cambridge and qualified as a solicitor in 1984 with the law firm Coward (now Clifford) Chance. She joined the BBC as an in-house lawyer in 1987, later working for News Group Newspapers and Times Newspapers, where she advised on pre- and post-publication legal issues, including around defamation, open justice, contempt of court, privacy and national security. She moved to Guardian News & Media in May 2009 and has advised on phone-hacking, Wikileaks, the Leveson Inquiry, the NSA leaks from Edward Snowden and more recently the HSBC files and the Panama Papers. She also sits as a part-time Employment Tribunal Judge and co-authors the College of Law Employment Law handbook. She is a non-resident fellow of the Centre for Media, Data and Society at the Central European University School of Public Policy and holds an honorary law doctorate from London South Bank University.



DRAGOLJUB POPOVIĆ

THE EUROPEAN COURT OF HUMAN RIGHTS, FORMER JUDGE



ANDRÁS SAJÓ

THE EUROPEAN COURT OF HUMAN RIGHTS, JUDGE

- Law degree at the ELTE Law School of Budapest, 1972
- PhD and Habilitation at the Hungarian Academy of Sciences, 1977 and 1982
- Founder and spokesperson of the Hungarian League for the Abolition of the Death Penalty, Budapest, 1988-1994
- Legal Counsellor to the President of Hungary, 1991-1992
- Chair of Comparative Constitutional Law, University Professor, Central European University (Budapest), 1993-2007
- Recurrent Visiting Professor, Cardozo School of Law, New York, since 1990; Global Faculty, New York University Law School, since 1996
- Board of Directors of the Open Society Justice Initiative of New York, 2001-2007
- Judge of the European Court of Human Rights from 1 February 2008 to 31 January 2017
- Vice-President of Section from 1 January 2015 to 31 July 2015
- President of Section from 1 August 2015 to 31 January 2017
- Vice-President of the Court from 1 November 2015 to 31 January 2017.



DANIEL SIMONS

OPEN SOCIETY FOUNDATIONS, LEGAL / OFFICER FOR FREEDOM OF ASSEMBLY / EXPRESSION AND INFORMATION

Daniel Simons is a Legal Officer for Freedom of Assembly, Expression and Information at the Open Society Justice Initiative in New York.

He has worked on legal issues affecting civil society and the media for the past 12 years, first at Article 19, the London-based NGO campaigning for freedom of expression and information, and subsequently as a legal counsel at Greenpeace International in Amsterdam from 2008-2016.

He obtained his law degree from the University of Amsterdam and his LL.M. from Columbia University. During his studies he interned at the International Criminal Tribunal for Rwanda and the International Tribunal for Law of the Sea.

Daniel is a member of the Bar of New York.



ROBERT SPANO

THE EUROPEAN COURT OF HUMAN RIGHTS, JUDGE

Robert Spano is a Judge of the European Court of Human rights elected with respect of Iceland. His term of office began on 1 November 2013. Before being elected, Judge Spano served provisionally as Parliamentary Ombudsman of Iceland and Professor and Dean of the Faculty of Law, University of Iceland. He was a member of the European Committee on Crime Problems and an Independent Expert to the Lanzarote Committee of the Council of Europe. He also served as Chairman of the Standing Committee of Experts on Criminal Law of the Icelandic Ministry of Justice. Judge Spano is a graduate of Oxford University.



SANNE TERLINGEN

ONeWORLD & ARGOS, JOURNALIST

Sanne Terlingen is a Dutch investigative journalist currently working for OneWorld (online and magazine) and Argos (Dutch national radio). She mostly writes about migration, people smuggling and human trafficking. Her story on a Dutch multimillionaire abusing minors in Ghana earned her 'De Loep 2012' for the best investigative journalism by a journalist under 30, and 'De Tegel' (the main journalism award in the Netherlands), but she was also confronted with threats and legal procedures started by the main figure in the story. More recently, she published about the Eritrean military regime and American contractors contributing to sex trafficking in Djibouti. Both stories led – again – to several legal threats.



DIRK VOORHOOF

EUROPEAN CENTRE FOR PRESS AND MEDIA FREEDOM & HUMAN RIGHTS CENTRE/GHENT UNIVERSITY


Dirk Voorhoof is prof. em. at Ghent University, Belgium. He is a member of the Executive Board of the European Centre for Press and Media Freedom (ECPMF) and of the Human Rights Centre at the Law Faculty of Ghent University. Since 2005 he is lecturing Media Law at the University of Copenhagen (UCPH) and from 1995 to 2005 he was a member of the Federal Commission for Access to Administrative Documents in Belgium. The last ten years he was also a member of the Flemish Media Regulator (VRM), and he is a member of Legal Human Academy, of the CMPF Scientific Committee, Robert Schuman Centre for Advanced Studies, European University Institute, Florence, of the Global FOE&I @Columbia experts network, Columbia University, New York, and of the Committee of Experts on Internet intermediaries (MSI-NET) of the Council of Europe. He reports on developments regarding freedom of expression, media and journalism, including in Iris, legal newsletter of the European Audiovisual Observatory, Auteurs & Media and Mediaforum. He regularly writes academic blogs on Strasbourg Observers and Inform's Blog.

10. CONFERENCE AGENDA

THE PALAIS DE L'EUROPE BUILDING – ROOM 1

09:30	Welcoming and opening of the conference Flutura Kusari
09:40	Keynote speech András Sajó
09:55	Keynote speech Silvia Grundmann
10:10	Defamation, privacy and processing of personal data Gill Phillips • Galina Arapova • Robert Spano • Sanne Terlingen
12:00	Lunch break
13:45	Investigative journalism, access to information, protection of sources and whistleblowers Lucy Freeman • Helen Darbishire • Antoine Deltour • Lawrence Early Dirk Voorhoof
15:00	Coffee Break
15:30	The right to protest and the role of the media during protests. Peter Noorlander • Duygu Köksal • Markus Pentikäinen • Dragoljub Popović • Daniel Simons
17:00	Concluding Remarks Tarlach McGonagle

11. SOCIAL MEDIA COVERAGE



**ECPMF ECtHR
 CONFERENCE 2017**
 24 March 2017 | Strasbourg | EUROPEAN CENTRE FOR
 PRESS & MEDIA FREEDOM


Curated by ECPMF

ECPMF ECtHR Conference 2017
 53 items
 Promoting dialogue between the European Court of Human Rights and the media freedom community
 0 views · 2 months ago

Enter the #DialogueECtHR!

On 24 March 2017, the European Centre for Press and Media Freedom (ECPMF), supported by the Council of Europe and several partners, held the ECPMF ECtHR 2017 conference in Strasbourg. The aim was to provide room for a dialogue on freedom of expression between the European legal and the media sphere. It united judges and lawyers of the European Court of Human Rights (ECtHR) with media lawyers, journalists and other media workers, academics, policy makers and civil society representatives from all over Europe. Together, they discussed ECtHR case law concerning freedom of expression and media freedom.

In three panels, the speakers discussed "Defamation, privacy and the processing of personal data", "Investigative journalism, access to information, protection of sources and whistleblowers" and "The right to protest and the role of media during protests". Around 300 participants made this first ECPMF ECtHR conference a huge success!



**ECPMF ECtHR
 CONFERENCE 2017**
 24 March 2017 | Strasbourg | EUROPEAN CENTRE FOR
 PRESS & MEDIA FREEDOM

Full conference schedule of ECPMF ECtHR 2017
[Sched](#)
 Find here the full schedule and all speaker's bios.

Welcoming and opening of the conference

In her welcome note, main organiser Flutura Kusari, legal advisor of the ECPMF, gave an insight about the development of ECPMF ECtHR 2017, for which the initial idea was already discussed two years ago - however in a much smaller scale. Instead of 50 people, she and the organisation team - Prof. Dirk Voorhoof, Urska Umek and Peter Noorlander - managed to get the Council of Europe and many supporting organisations on board to then set up one of the biggest legal dialogue events Europe has seen in the last years.



ECPMF
 @ECPMF
 @fluturakusari "DialogueECtHR planned for 50 people initially - happy to see many more are interested in #mediafreedom & #ECtHR case law!"
 9:40 AM · 24 Mar 2017
 1 retweet 1 like 4 hearts

Keynote speech by ECtHR judge András Sajó


András Sajó, honourable judge and former Vice-President of the ECtHR, started the conference with his keynote speech. He served as judge from 2008 to 2017 and is known for his extraordinary commitment to freedom of expression.

In his opening speech, he especially stressed the new technical developments and their possibilities, but also their restrictions for and negative influence on freedom of expression. He mentioned the hopes put in new technologies as facilitator of new media, and social media which have the power to form more participative media structures and involve the public in better ways. But progress rarely comes without drawbacks: the production and quick dissemination of, for example, fake news is also a phenomenon supported by new technologies - something which is a legal act of free speech.


Future discussions thus might turn more around the question of what is true or not - and who is able and allowed to give an answer to this question. In this context and with regard to future decisions of the court, judge Sajó stressed the importance of the specific self-understanding of the ECtHR.




ECPMF
 @ECPMF
 Keynote by #ECtHR judge Sajó: Social media gave hope for new participative media structures. But pain's the sister of progress #DialogueECtHR
 9:48 AM · 24 Mar 2017
 3 retweets 1 like



A. Sajó stresses the importance of the self-understanding of #ECHR European Court of Human Rights for future court rulings
 #DialogueECHR
 9:56 AM - 24 Mar 2017




#DialogueECHR Judge Sajó raised the main question about #fakenews: "Who will determine what is true and how?"
 9:58 AM - 24 Mar 2017




#ECHR judge Sajó on #FoX and law: "Freedom of expression can also be the freedom to produce fake news"
 #DialogueECHR
 9:50 AM - 24 Mar 2017

Keynote by Silvia Grundmann


The second keynote speech was given by Silvia Grundmann who works for the Council of Europe as Head of the Media and Internet Division and was also a driving force behind the ECPMF/ECHR 2017 Conference. In her introductory speech, she was focussing on the interplay between the ECtHR and the CoE Committee of Ministers, which, with its standard setting mechanism, provides a policy framework for the protection of freedom of expression across Europe. This was described as important two-way process of interaction between the two institutions, where they can both test and elaborate on their standards and get important mutual feedback.



Abdullah Bozkurt
 @abdbozkurt
 Silvia Grundmann, head of Media & Internet Division @coe says digital tech empowered journo to protect their sources #ECPMF #DialogueECHR
 10:17 AM - 24 Mar 2017



Grundmann: "Whistleblowing sometimes perceived as political action rather than act of sharing of info for benefit of society"
 #DialogueECHR
 10:13 AM - 24 Mar 2017




ECPMF
 @ECPMF
 @coe S. Grundmann: "The watchdog function of journalists and media outlets is today more important than ever"
 #DialogueECHR
 10:15 AM - 24 Mar 2017

Panel 1: Defamation, privacy and processing of personal data

Speakers: Gill Phillips, Yaman Akdeniz, Galina Arapova, Robert Spano, Sanne Terlingen, Barbara Trionfi

After the two keynote speakers touched upon a wide range of challenges that lay ahead of the Mediafreedom community and the ECHR the first panel of the day made the complexity of the topic clear. Sanne Terlingen, a dutch investigative journalist, talked about her experience with defamation lawsuits filed by the individuals she wrote about. On the other aisle might be the judge of the ECHR Robert Spano, giving the audience insight into the courts decision process and argumentation. Amongst other things was the distinction between freespreech and hatespeech very important to him. This in the context of how to deal with the rise of fake news/hatespeech/citizen journalism in the digital sphere was the guideline to him for further court decisions. Is it hatespeech it is prohibited by law across member states, is it not it falls under freespreech.



ECPMF
 @ECPMF
 Dutch investigative journo @SanneTerlingen speaking at #DialogueECHR on physical intimidation&legal threats she had to face doing her work.
 10:27 AM - 24 Mar 2017


Melody Patry
 @melodypatry

Testimony from @SanneTerlingen "Lawsuits and legal threats against me were used to inflict self-censorship and censorship" #DialogueECtHR

10:36 AM · 24 Mar 2017


CFOM
 @CFOMshff

Galina Arapova discusses chilling effect of defamation laws & misuse of power to stop #mediafreedom bit.ly/1KDVHR6 #DialogueECtHR

10:49 AM · 24 Mar 2017




ECPMF
 @ECPMF

@barbara_trionfi presents results of @globalfreemedia's comparative study on "Defamation & insult laws in the @OSCE region" #DialogueECtHR

11:00 AM · 24 Mar 2017


Melody Patry
 @melodypatry

Here's the link to the @globalfreemedia publication on criminal defamation in OSCE countries ipi.media/criminal-defam... #DialogueECtHR

11:04 AM · 24 Mar 2017


Defamation and Insult Laws in the OSCE Re...
 Read and Download This study examines the existence of criminal defamation and insult laws in the territory of the 57 participating States of the IPI media




Anna Mirtchyan
 @AnarMirtchyan

@barbara_trionfi: Penalties for criminal #defamation should not include imprisonment #DialogueECtHR

11:09 AM · 24 Mar 2017 · Strasbourg, France




Abdullah Bozkurt
 @abdbzkurt

Gillian Phillips, media lawyer, says #Turkey's top court blocks journos' cases from moving to #ECHR, #ECPMF #DialogueECtHR @ladywell23.

11:14 AM · 24 Mar 2017


Konstanze K.
 @kasonze

@ECPMF #DialogueECtHR Common standards for Media Freedom are overdue: human rights are universal: ban imprisonment for freedom of speech

11:17 AM · 24 Mar 2017





Panel 2: Investigative journalism, access to information, protection of sources and whistleblowers

Speaker: Lucy Freeman, Helen Darbishire, Antoine Deltour, Lawrence Early, Dirk Voorhoof

Beginning the second panel debate, it was established among participants that good and thorough investigative journalism relies on and is only possible with sources. Referring to the case of Antoine Deltour it was stated that this relationship is under pressure as long as the protection of sources/whistleblowers is not enforced EU-wide. Antoine Deltour raised the issue of the often narrowly and amongst member states differently defined term "public interest", making the protection of sources across borders extremely difficult.



News Media Europe
 @newmediaEU
 .@helen_access balancing #privacy w/ the right to #access to information is a big challenge for the #mediafreedom community
 #DialogueECtHR
 2:15 PM - 24 Mar 2017



ECPMF
 @ECPMF
 .@helen_access appeals to #mediafreedom community @ #DialogueECtHR to advocate & push for ratification of #CoI: Access to Information treaty
 2:25 PM - 24 Mar 2017

Quentin Van Enis
 @e_watchdog
 #DialogueECtHR #access to information : Prof. Dirk Voorhoof underlines that "those who have the information also have a censorial power"
 2:23 PM - 24 Mar 2017

Loopholes in Article 10 ECHR protection

1. Investigative journalism under threat: too broad MoA, too high level of "responsible journalism" in legal terms, in relation to confidential information, presumption of innocence and journalistic techniques.
2. Access to official documents only when ready and available
3. 'Illegal' leaks no longer protected as journalistic sources?
4. No sufficient protection for whistleblowers

Lack of enforcement/implementation at national level

Abdullah Bozkurt
 @abdbozkurt
 Great presentation by Dirk Voorhoof on loopholes of Article 10 in #ECHR case law for investigative journalism. #ECPMF
 #DialogueECtHR
 2:33 PM - 24 Mar 2017

Melody Patry
 @melodypatry
 Dirk Voorhoof concludes his presentation quoting "The media are not meant to be peaceful puppies" #DialogueECtHR
 2:34 PM - 24 Mar 2017



ECPMF
 @ECPMF
 #DialogueECtHR D. Voorhoof raising the question: "Can journalists only work with legal sources and leaks?"
 #Whistleblower #accessinfo
 2:41 PM - 24 Mar 2017



ECPMF
 @ECPMF
 #LuxLeaks #whistleblower A. Deltour explains appealing is tough decision as "both financial & human costs are extremely high" #DialogueECtHR
 2:56 PM - 24 Mar 2017



ECPMF
 @ECPMF
 Audience questions in #DialogueECtHR panel 2 drawing attention to #EU-wide #whistleblower protection. Sign petition: bit.ly/2fcD5h4
 2:51 PM - 24 Mar 2017



Abdullah Bozkurt
 @abdbozkurt
 Helen Darbishire says complementary mechanisms other than #ECHR needed for better access to official documents
 #DialogueECtHR @helen_access
 2:57 PM - 24 Mar 2017

Camille Petit
 @CamillePetit1
 A Deltour en faveur du critère de "bonne foi" ms contre la rémunération des lanceurs d'alerte #whistleEU
 @support_antoine #DialogueECtHR
 3:03 PM - 24 Mar 2017



ECPMF
 @ECPMF
 Final words in Panel 2 #DialogueECtHR: #ECtHR's L. Early stressing importance of Amicus curiae delivered by #mediafreedom community & NGOs
 3:03 PM - 24 Mar 2017

Panel 3: The right to protest and the role of the media during protests

Speaker: Peter Noorlander, Duygu Köksal, David Mead, Markus Pentikäinen, Dragoljub Popović, Daniel Simons

The third and final panel of the conference #DialogueECtHR was opened by Peter Noorlander welcoming "a judge, a journalist and a criminal" amongst the panelists - leaving it open to the audience to decide who is who. The discussion greatly benefitted from the visually supported presentation of Markus Pentikäinen who talked about the details of his case. Going onwards from there the role of the media during demonstrations gained a real life example and helped to focus the following legal discussion.



ECPMF
 @ECPMF
 @PeterNoorlander setting scene for #DialogueECtHR Panel 2: "On this panel we have a criminal, a judge & some lawyers" Seems promising!
 3:46 PM - 24 Mar 2017



Melody Patry
 @melodypatry
 When photojournalists are targeted for doing their job... @mrksphoto recalls his 2006 experience "Get the photographer!" #DialogueECtHR
 3:58 PM - 24 Mar 2017



ECPMF
 @ECPMF
 #Turkey lawyer @duygukoksal "Press is the key element for public accountability in democracies, especially during protests" #DialogueECtHR
 4:06 PM - 24 Mar 2017



ECPMF
 @ECPMF
 Former #ECtHR judge Dragoljub Popovic speaking at #DialogueECtHR on case Selmani v FYROM. Read about the case: bit.ly/2pZaNs
 4:11 PM - 24 Mar 2017



ECPMF
 @ECPMF
 Should journo stay away from events? #ECtHR's Popovic "Presence is essential - everything else would be 2nd hand journalism" #DialogueECtHR
 4:51 PM - 24 Mar 2017



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 @ECPMF
 @dsimons1979 "Growing trend: citizen journo + non-journalistic observers covering demonstrations, too – how to treat them?" #DialogueECtHR
 4:28 PM - 24 Mar 2017

Concluding remarks by Tarlach McGonagle

Tarlach McGonagle from the Institute for Information Law (IViR) served as rapporteur at the #DialogueECtHR conference. Tackling the daring task of summing this long and comprehensive day up into a few final words head on he concluded the conference on a optimistic note.



ECPMF
 @ECPMF
 @tarlachmc "Right to freedom of expression is governed by duties & responsibilities - but should not be restricted by those!" #DialogueECtHR
 5:16 PM - 24 Mar 2017



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 Final words for #DialogueECtHR "Meaningful dialogue means ongoing dialogue" - let's continue! Thank you for the great discussions!
 5:27 PM - 24 Mar 2017

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A big Thank You to all our partners and supporters

The ECPMF thanks all partner organisations, who supported ECPMF/ECtHR 2017 and made this event possible. Special thanks go to the Council of Europe which supported the organisation of the entire event throughout the last months
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12. ABOUT ECPMF

Moving forward to amplify a strong voice for media freedom in Europe

The European Centre for Press&Media Freedom (ECPMF) exists to bring together initiatives that call for media freedom in Europe, and to make their appeals heard. The ECPMF promotes the implementation of the European Charter on Freedom of the Press in all European countries. It defends media freedom and pluralism. It aims to put in place concrete solutions to monitor and address media freedom violations as well as to support journalists under threat. It increases knowledge and awareness of the importance of media freedom in the European public sphere.

Under the lead of the ECPMF in Leipzig, Germany, all actions are undertaken in a group of six partner organisations: besides the ECPMF they are the Italian think tank Osservatorio Balcani e Caucaso Transeurope (OBCT), the Austrian grassroots monitoring centre South East Europe Media Organisation (SEEMO), the Italian independent monitoring centre Ossigeno per l'informazione (Ossigeno), the International Press Institute (IPI) in Austria, and Index on Censorship, a British NGO that campaigns for freedom of expression worldwide. The partners rely on a strong network of journalists' associations, academics and activists across Europe. Amongst others, they are working with the European Federation of Journalists (EFJ), Article19 and the Media Legal Defence Initiative (MLDI).

With the support of its partners, the ECPMF operates as an Alarm Centre, helping European media workers under threat, raising awareness about violations of media freedom and pluralism. The Centre publicises the results of its monitoring activities.

A rapid response to serious threats is offered by establishing fact-finding-missions: e.g. 2017 on-the-ground research in Macedonia and in 2016, the ECPMF report on Germany, "The concept of the enemy ii".

The ECPMF offers legal support to journalists who are suffering persecution because of their work. It also provides a temporary safe haven with its Journalists-in-Residence programme.

The Centre initiates training courses, workshops and international conferences to foster exchange and knowledge. Several conferences provide space for interaction with EU policy-makers and promote dialogue on EU media policy. With advocacy and lobbying work, solidarity actions, a fortnightly newsletter, social media as well as a news website, the ECPMF continues its mission of promoting press and media freedom across the continent.



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European Centre for Press and Media Freedom (ECPMF)

Managing Director: Lutz Kinkel

Phone: +49 341 200 403 13

Fax: +49 341 562 96 63

Email: info@ecpmf.eu

Internet: www.ecpmf.eu

Menckestraße 27

D-04155 Leipzig

Head of ECPMF

Henrik Kaufholz | Chair of the ECPMF

Hans-Ullrich Jörges | Vice Chair of the ECPMF

Organising committee

Dirk Voorhoof, Peter Noorlander, Urska Umek, Flutura Kusari

For more information, contact kusari@ecpmf.eu

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