EUROPEAN COURT OF HUMAN RIGHTS
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# Annual ERA conference on European media law

## "Freedom of expression and media freedom in the light of the case law of the ECHR"

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I am very pleased to participate as keynote speaker in ERA's online Annual Conference on Media Law and in particular to be setting out for you, legal practitioners in this field, the human rights challenges in the media sector.

I have been asked to speak about freedom of expression and media freedom in the light of the case-law of the European Court of Human Rights ("ECHR").[1]

After outlining the main principles of freedom of expression under the European Convention on Human Rights, I would like to look at the importance of preserving freedom of expression during times of crisis, such as the present global pandemic, a topic touched upon in your first session yesterday, before concluding by looking at freedom of expression in the age of the internet.

But first a preliminary remark on the link between freedom of expression and democracy. Every year since 2002, Reporters Without Borders publishes its World Press Freedom Index. This annual index is a snapshot of the media freedom situation in the country based on an evaluation of pluralism, independence of the media, quality of legislative framework and safety of journalists. We measure media freedom, because freedom of expression, a broader concept, is indissociable from democracy, it is a measure of how far a country is deemed "free". It has been said that freedom of expression is the condition *sine qua non* for a genuine pluralist democracy. Freedom of expression is not only a safeguard against interferences by the State, it is also an objective fundamental principle for life within a democracy.

[1] I have based my intervention today on a video message I gave for the European Conference on Democracy and Human Rights at Kristiansand on 5 May 2021.

The top four countries ranked for press freedom in 2021 were Norway, Finland, Sweden and Denmark. Perhaps unsurprisingly, those same four countries appear in the top four of the World Justice Project's Rule of Law index for 2020[2] (albeit in a different order). As the Court has consistently held in its judgments there is a clear link between freedom of expression, democracy and the rule of law.

Despite the fact that the European Convention on Human Rights deals with many core rights such as the right to life and freedom from torture, Article 10 of the Convention, its free speech provision, is often regarded as one of the most central and fundamental provision of the Convention. One may ask: why is that?

Let us now turn to Article 10 of the Convention.

### *I. Article 10 of the European Convention on Human Rights ("the Convention")*

Article 10 of the Convention has its origins in Article 19 of the Universal Declaration of Human Rights (1948). Similar provisions can be found in Article 19 of the International Covenant on Civil and Political Rights (1966), Article 13 of the American Convention on Human Rights (1969), Article 9 of the African Charter on Human and Peoples' Rights (1981) and Article 11 of the Charter of Fundamental Rights of the European Union (2000). These examples demonstrate the universal importance of freedom of expression in human rights instruments.

Freedom of expression (as enshrined in Article 10 of the European Convention on Human Rights) is a multi-faceted right that unfolds into freedom to hold opinions, to receive and impart information and ideas, without interference by public authorities and regardless of frontiers. As an integral part, it embraces media freedom, including independence, pluralism and diversity of media, safety of journalists and other media actors. Online and offline, all these constituent elements of freedom of expression are equally protected by the Convention.

In its interpretation of Article 10 of the Convention, the European Court of Human Rights has held, in a now rather well-known phrase dating back to 1976 that "*freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man*"[3].

The Court in that case went on to say that "*Subject to [legitimate restrictions] it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".*

Why is freedom of expression so crucial for democracy?

[2] https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf
[3] Handyside v. the United Kingdom, § 49.

The exercise of this freedom has been, and remains, one of the essential factors allowing transition from authoritarian rule to democratic government. Conversely, when an authoritarian regime takes power, its first measures are usually to abolish freedom of expression and silence the press, or more recently the internet.

I would like to make two points here. Firstly, that freedom of expression permits proper scrutiny of government and therefore contributes in an important way to making government accountable. Secondly, creating a favourable environment for freedom of speech has the consequential effect of creating a favourable environment for minority groups within society, although as always this will not be achieved without maintaining a proper balance between the right itself and commensurate duties and obligations. Freedom of expression should not be a vehicle for the destruction of other human rights.

As the Court has repeatedly held freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.

The Court has emphasised on several occasions the importance of Article 10, which is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"[4].

Freedom of political debate, which is at the very core of the concept of a democratic society, also includes the free expression by prohibited organisations of their views, provided that these do not contain public incitement to commit terrorist offences, or condone the use of violence.[5]

In addition to those general considerations, the Court has explored in its case-law the States' positive obligations in protecting the exercise of this right. These positive obligations imply, among other things, that States are required to establish an effective mechanism for the protection of authors and journalists in order to create a favourable environment for participation in public debate. This enables them to express their opinions and ideas without fear or violence, even if they run counter to those defended by the official authorities or by a significant part of public opinion, or even if they are irritating or shocking to the latter.[6] In consequence, Article 10 of the Convention enjoys a very wide scope, whether with regard to the substance of the ideas and information expressed, or to the form in which they are conveyed. Indeed, there is little scope under Article 10 of the Convention for restrictions on political speech or on debate concerning questions of public interest.

Despite its importance, or perhaps because of it, Article 10 is not an absolute right. It operates on two levels: it first of all lays down a principle (the freedom guaranteed), then provides for exceptions (the limitations permitted).

[4] Handyside v. the United Kingdom, § 49; Observer and Guardian v. the United Kingdom, § 59.
[5] See for example *Gözel and Özer v. Turkey,* nos. 43453/04 and 31098/05, § 56, 6 July 2010
[6] *Dink v. Turkey*, § 137; *Khadija Ismayilova v. Azerbaijan*, § 158.

It may happen that the exercise of the right to freedom of expression interferes with other rights safeguarded by the Convention and its Protocols. In such cases, the Court examines whether the national authorities have struck a proper balance between protection of the right to freedom of expression and other rights or values guaranteed by the Convention[7]. The search for a fair balance may entail a weighing up of two rights of equal status. These cases typically involve the rights protected by Article 6 § 2 (presumption of innocence)[8] and by Article 8 of the Convention (private life including the right to protection of one's reputation)[9].

***II. Freedom of expression in times of crisis***

Freedom of expression and information and freedom of the media continue to play an important role in our societies in times of crisis, such as wars, terrorist attacks and also natural disasters such as global pandemics. This role is also coupled with increased responsibility, in providing accurate, reliable information to the public (countering misinformation and so-called fake news) but also in preventing panic and fostering people's understanding for and cooperation with necessary restrictions. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. As reaffirmed in the Council of Europe Guidelines on protecting freedom of expression and information in times of crisis, Article 10 of the European Convention on Human Rights and the relevant case law of the European Court of Human Rights remain the fundamental standards to be applied in the exercise of those rights.

As I have had the opportunity of saying previously, the pandemic is not only a crisis in the sanitary sense. It is a crisis for the further development of European democracy, the rule of law and for the protection of human rights. Crisis situations, such as the current pandemic, should not be used as a pretext for restricting the public's access to information or clamping down on certain journalists whose views are critical of the governing powers. On the contrary, in times of crisis we need more access to reliable information.

However, media organisations and journalists must adhere to the highest professional and ethical standards - what we call responsible journalism.

I would like to share with you four principles which I have drawn together and which I consider essential in preserving human rights, including freedom of expression, in the current pandemic.

Firstly - The public interest, whilst undoubtedly important, cannot be an absolute trump card for national authorities in the fight against the pandemic. The Convention requires proportionality, a balance to be struck between the public interest and the autonomy of the person. The responsibility for striking that balance is at the outset for the national authorities, but is subject to European supervision by the Court within the Council of Europe. In short, the Convention requires all national authorities, the legislative, executive and judicial branches, to engage with the principle of proportionality in good faith.

[7] *Perinçek v. Switzerland* [GC], § 274.
[8] *Bladet Tromsø and Stensaas v. Norway* [GC], § 65; *Axel Springer SE and RTL Television GmbH v. Germany*, §§ 40-42; *Eerikäinen and Others v. Finland*, § 60
[9] *Axel Springer AG v. Germany* [GC], §§ 83-84; *Von Hannover v. Germany (no. 2)* [GC], §§ 104-107.

Next - The principle of legality, based on the primordial principle of the rule of law that permeates the Convention as its lodestar[10] will become ever more salient when lockdowns, restrictions on freedom of movement and other such measures are imposed. The principle of legality requires that measures taken at national level are accessible and foreseeable. This precludes vague and overbroad rules that run the risk of unpredictability and arbitrariness in their enforcement.

Thirdly - Rules adopted at national level as a basis for pandemic-related measures restricting individual rights must not afford excessive discretion to the executive. In a true democracy, the executive must not be the sole arbiter of what rules are applicable. The democratically-elected legislator must be reactive and up to the task of engaging with the difficult balancing of interests required in this field.

Lastly - The adoption of emergency laws or declarations deviating in general from Convention guarantees must be strictly tailored to meet the exigencies of the situation. Emergency laws should not become the new normal. The pandemic may well alter our way of life, but the Council of Europe should be at the forefront in making clear that it must not eradicate the system of fundamental values which forms the cornerstone of the Council of Europe and the European Convention on Human Rights.

***III. Freedom of the expression in the age of the Internet***

The Court interprets the European Convention on Human Rights in a dynamic way as a living instrument. It takes into account all technological developments. In the current, increasingly digital, age the vast majority of communications take digital form.

Secret surveillance regimes have developed in ways unimaginable since even a decade ago. In an important Grand Chamber judgment, published in May this year, *Big Brother Watch and Others v. the United Kingdom*, the Court had the opportunity to look at three different surveillance regimes operating in the United Kingdom. The case was brought by journalists and human-rights organisations.

Under the bulk interception regime, confidential journalist material could have been accessed by the intelligence services intentionally, through the deliberate use of selectors or search terms connected to a journalist or news organisation. As that situation would very likely result in the acquisition of significant amounts of confidential journalistic material, it could undermine the protection of sources to an even greater extent than an order to disclose a source; the interference would be commensurate with that occasioned by the search of a journalist's home or workplace.

Therefore, before the intelligence services used selectors or search terms known to be connected to a journalist, they had to be authorised by a judge or other independent and impartial decision-making body vested with the power to determine whether they had been "justified by an overriding requirement in the public interest" and, in particular, whether a less intrusive measure might have sufficed to serve the overriding public interest.

[10] R. Spano, The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary, Eur Law J. 2021;1–17.

Confidential journalist material could also be accessed unintentionally, as a “bycatch” of the bulk interception operation; in such case, the degree of interference with journalistic communications and/or sources could not be predicted at the outset. Accordingly, it was imperative that domestic law contained robust safeguards regarding the storage, examination, use, onward transmission and destruction of such confidential material. Moreover, if and when it became apparent that the communication or related communications data contained confidential journalistic material, their continued storage and examination by an analyst had to only be possible if authorised by a judge or other independent and impartial decision-making body vested with the power to determine whether continued storage and examination was “justified by an overriding requirement in the public interest”. The Court found a violation of Article 10 in this case.

More generally, the Court has observed that the internet has become "*one of the principal means by which individuals exercise their right to freedom of expression and information*". This new form of communication therefore benefits, in the same way as the more traditional forms, from the protection guaranteed by the Convention.

In this respect, it is crucial to emphasise that the internet is a transformative paradigm in human-to-human relations. Its primordiality is manifest in at least the following dimensions:

It is primordial for opinion, thought and, indeed, personality formation, what can be termed the Human Dimension.

It is primordial for the development of those constructs and understandings that effect the trajectory of our societies politically, economically and culturally, this I call the Political and Economic Dimension.

The Internet is crucial for information dissemination and obtention, the Knowledge Dimension.

Finally, the Internet is primordial for the evolution of fundamental rights and freedoms, the Rights Dimension.

When dealing with cases related to freedom of expression in the age of the Internet, the European Convention on Human Rights requires a holistic evaluation of all of these various dimensions when the Court is called upon to articulate the nature and scope of Convention protections.

The questions submitted to the Court in this area are already numerous and varied: blocking of websites; access by prisoners to these new forms of communication; responsibility of news portals for content online. In each case, the Court has endeavoured to provide appropriate responses albeit realising that the jurisprudence in this area is in its infancy and needs to be carefully developed taking account of diverging and often clashing interests.

We all have come to realise that the internet provides greater public access to information and ideas. This accessibility can have undeniable advantages for democracy. However, we have also come to realise that the internet presents risks.

The Court is aware that content online may affect the exercise and enjoyment of fundamental rights and freedoms. Perhaps even more so than more traditional platforms of expression.

As we see every day, clearly unlawful speech can be disseminated like never before around the world, in a matter of seconds, and remain online for a very long time. These circumstances surrounding the use of the Internet have lead the Court to seek a balance between freedom of expression and other rights, as is required under the Convention.

It goes without saying that the digital sphere must in principle be regulated, although not exclusively, by democratically promulgated norms that safeguard fundamental rights. This is now often called the rise of *digital constitutionalism*. It is therefore imperative that all stakeholders actively engage in an open and enlightened conversation on the development of such rights, in particular freedom of expression in the age of the internet.

The courts, including the European Court of Human Rights, have their assigned roles in this process, to interpret and apply fundamental rights guarantees in a manner that retains their effectiveness in a novel area of human reality.

***IV. Concluding remarks***

Freedom of expression and freedom of the press are primordial for the establishment of a democratic society. This is why they must be protected at all costs, by sustaining a favourable environment for debate and a free exchange of ideas. This is even more important in times of crisis, such as the present global health crisis.

While the European Convention system and the European Court of Human Rights may not be on the frontline in the sanitary sense, we are certainly on the frontline in safeguarding and promoting the rights and values embedded within the Council of Europe structure and the European Convention on Human Rights and Article 10 in particular.

Thank you.