

The Media and the Legal Professions: Trust in the Judiciary Requires Trust in the Media
Enhancing Cooperation between Two Pillars of Democratic States

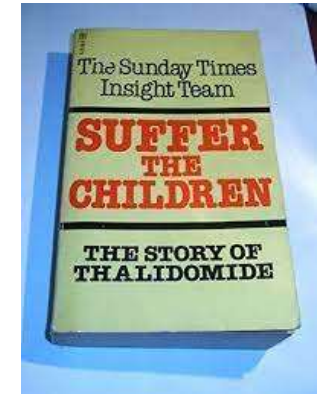
ERA - Brussels 1 December 2023
Annual Conference of the European Forum of the Legal Professions

**The influence of the media on certain court cases,
and the transparency of the judiciary
from the perspective of the Strasbourg case law**

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Courts cannot operate in a vacuum,
media have the right to report on matters before the courts
and the public has the right to be properly informed...



Sunday Times v. UK, 16 Apr 1979

Courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in **specialised journals, in the general press or amongst the public at large.**

It is incumbent on the **mass media to impart information and ideas** concerning matters that **come before the courts** just as in other areas of public interest. **Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them**

But: the mass media must **not overstep the bounds** imposed in **the interests of the proper administration of justice**

Injunction was violation Article 10 ECHR (11/9)

... and the authorities have the **right** to inform the public about criminal investigations



Allet de Ribemont v. France, 10 Feb 1995

38. Freedom of expression, guaranteed by Article 10 ECHR includes the freedom to receive and impart information. Article 6 para. 2 ECHR **cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but** it requires that they do so with all the **discretion and circumspection** necessary if the **presumption of innocence is to be respected.**

41. The Court notes that in the instant case some of the **highest-ranking officers** in the **French police** referred to Mr Allet de Ribemont, without any qualification or reservation, as one of the instigators of a murder and thus an accomplice in that murder. This was clearly a declaration of the applicant's guilt which, firstly, **encouraged the public** to believe him guilty and, secondly, **prejudged** the assessment of the facts by the competent judicial authority.

There has therefore been a breach of Article 6 para. 2 ECHR

See also **Pandy v. Belgium, 21 Sept 2006** (investigative judge)

From a **right to a duty** to inform the public when public persons are involved or serious misconduct

Bavčar v. Slovenia, 7 Sept 2023

The Court has considered that **in a democratic society it is inevitable** that information is imparted when a **serious charge of misconduct** in office is brought. It has acknowledged that in cases where an applicant was **an important political figure** at the time of the alleged offence the highest State officials, including the **Prosecutor General**, **were required to keep the public informed** of the alleged offence and the ensuing criminal proceedings, e.g. in their interviews with the press.

However, **this duty to inform the public** cannot justify all possible choices of words and has to be carried out with a view to **respecting the right of suspects to be presumed innocent**

RTBF 2 v. Belgium, 13 Dec 2022



A report on the RTBF about suspicious acts by a couple, involved in sexual exploitation of girls and young woman, was considered as breaching the right to respect for private life (Art. 8 ECHR) and the right to be presumed innocent (Art. 6 ECHR) of the couple.

ECtHR emphasized the importance of the issues raised in the report and **the lack of an official statement by the investigating authorities**, while **the public had an interest in being informed of the pending proceedings**, in order to be able to exercise its right of **scrutiny over the functioning of the criminal justice system** and, where necessary, to be **alerted to the potential danger** for girls who were likely to associate with Mr and Ms V.

Context of a television programme on a **subject of major public interest**, and viewers were reminded that the investigation was ongoing and that the couple were **presumed innocent**.

The reasons put forward by the domestic courts had not been sufficient to establish that the interference complained of by the RTBF had been necessary in a democratic society

Violation of Article 10 ECHR

ECtHR found violations of Article 6, para. 2 (POI) **only by authorities** : police, public prosecutor, investigative judge, interim court decision, minister of justice...



El Kaada v. Germany, 12 Nov 2015

The principle of presumption of innocence will be violated if **a judicial decision** or a **statement by a public official** concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official **regards the accused as guilty.**



RTBF v. Belgium (nr. 2), 13 Dec 2022

Art. 6, para. 2 (POI) protects only against interference by state authorities

La Cour rappelle que l'article 6 § 2 de la Convention protège les individus **contre toute ingérence des autorités de l'État** et que la responsabilité de l'État sur le terrain de cette disposition **ne peut être engagée pour des propos tenus par des personnes privées.**

Toutefois, rien n'empêche les États de prévoir dans le droit interne des dispositions qui offrent **un niveau de protection** supplémentaire en répandant la portée d'un droit protégé par la Convention aux relations entre personnes privées.

Art. 6, para. 2 ECHR guaranteeing the presumption of innocence is not directly applicable to media and journalists

Relevant case law since 2012 based on

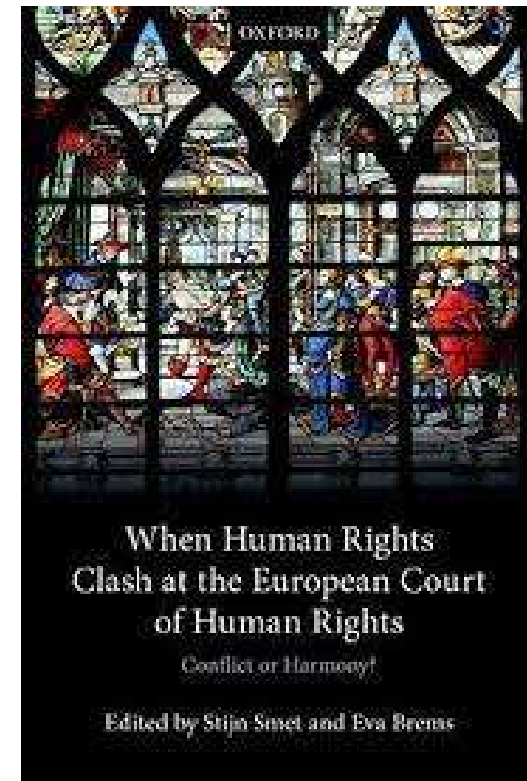
GC in Axel Springer v. Germany

Crime and court reporting that can affect the privacy or reputation of persons leads **to balancing the rights** under Art. 8 ECHR and Art. 10 ECHR

Six criteria:

1. The contribution to a debate of public interest
2. how well known the person concerned is and what the subject of the report is;
3. the conduct of the person concerned prior to the publication of the article;
4. the method of obtaining the information and its veracity;
5. the content, form and consequences of the information;
6. the severity of the sanction imposed.

+ journalists/media must act in accordance with journalistic ethics / responsible journalism



RBC B92 v Serbia, 5 Sept 2023



The Serbian courts found that the **allegations of corruption** against the assistant minister of health Z.P. were not sufficiently substantiated. In essence the domestic courts found that before publishing the information in question B92 had had a duty to verify the origin, accuracy and completeness of such serious allegations, which it had failed to do, relying only on an **official note of the Ministry** of the Interior, which was not considered a document of a relevant State body. **Furthermore Z.P. was not convicted, nor prosecuted for the alleged corruption.**

The Court must apply the **most careful scrutiny** when, as here, the sanctions imposed by a national authority are **capable of discouraging the participation of the press** in debates over matters of **legitimate public concern.**

The Court would also emphasise that if the national courts apply an overly rigorous approach to the assessment of journalists' professional conduct, journalists could be unduly deterred from discharging their **function of keeping the public informed.**

The courts must therefore take into account the likely **impact** of their rulings not only on the individual cases before them but also **on the media in general.** **Their margin of appreciation is thus circumscribed by the interest of a democratic society in enabling the press to play its vital role in imparting information of serious public concern.**

**Applying the six criteria in balancing test 8/10:
sanction of B92 was violation Art. 10 ECHR**

Even a virulent press campaign does not as such breach the right to a fair trial

Čivinskaitė v. Lithuania, 15 Sept 2020

A fair hearing can still be held after intensive adverse publicity. In a democracy, high-profile cases will **inevitably attract comment by the media**; however, that cannot mean that any media comment whatsoever will inevitably prejudice a defendant's right to a fair hearing.

Press coverage of current events is an exercise of freedom of expression, guaranteed by Article 10 of the Convention. If there **is a virulent press campaign surrounding the proceedings, what is decisive is not the subjective apprehensions** of the affected individual concerning the absence of prejudice required of the courts, however understandable, **but whether, in the particular circumstances of the case, his or her fears can be held to be objectively justified.**

Allow criticism of the judiciary

Anatoliy Yeremenko v. Ukraine, 15 Sept 2022 (journalist liable for defamation of judges)

Questions concerning the functioning of the judiciary fall within the public interest, so a **high level of protection of freedom of expression**, with the authorities thus having a **particularly narrow margin of appreciation**, will normally be accorded; on the other hand, judges must be protected from destructive attacks and the authority of the judiciary should be maintained.

“The Court notes that in the present case the domestic courts did not examine at all whether the publication concerned an issue of public interest, **concentrating solely** on the veracity of the impugned statements and **the harm to the judges’ reputation**”
Violation of Art. 10 ECHR

Morice v. France, 23 Apr 2015 (GC) Lawyer interview in

Le Monde

The key question in the statements concerned **the functioning of a judicial investigation**, which was a **matter of public interest**, thus **leaving little room for restrictions on freedom of expression**. In addition, a lawyer should be able to draw the public’s attention to potential shortcomings in the justice system; **the judiciary may benefit from constructive criticism**”

In stead of secrecy, more transparency

Open justice principle implemented by media coverage

Active policy by PP: regular press briefings, documents available, active policy of communication about cases of “public interest”

Court proceedings: judgments immediately available (+ online + summaries), facilities for the media/journalists, spokesperson

Need of better understanding of each others' functioning and importance in a democracy under the rule of law

More awareness and application by media and journalists of codes of journalistic ethics and role of self-regulatory Press Councils

Stop SLAPPs!

Strategic lawsuits against public participation

Actual debate this week: end of EU-trilogue anti-SLAPP directive and Recommendation COE CoM on its way



SLAPPs are abuse of the judiciary and try to silence or intimidate participation in public debate by media, journalists, NGOs, academics

SLAPPs bring a risk for democracy



THIRD SECTION

CASE OF *OOO MEMO v. RUSSIA*

(Application no. [2840/10](#))

JUDGMENT

In a judgment of 2022 in the case of *OOO Memo v. Russia* the ECtHR referred to the call by the COE Human Rights Commissioner to take urgent and robust action against SLAPPs.

The ECtHR raised awareness about “**the risks that court proceedings instituted with a view of limiting public participation bring for democracy**”.

Role for judges and courts to dismiss such cases in early stage or in accelerated procedure and sanction those who are initiating abusive or vexatious litigation against journalists/media reporting on issues of public interest.

Role of lawyers to refuse to initiate SLAPPs

Take aways

1. Media reporting about criminal investigations and court proceedings is **robustly protected under Article 10 ECHR** and does not as such violate the right to a fair trial as protected under Article 6 ECHR.
2. **The POI imposed on the authorities on the basis of art. 6 § 2 ECHR** must be guaranteed very strictly, but **does not prevent communications by the authorities** about criminal investigations in accordance with the POI. The ECtHR even considers such **communications a duty** for the authorities.
3. The domestic courts in **balancing Article 8 and 10 ECHR need to apply the six criteria developed** in the case law of the ECtHR. Interferences with journalistic reporting that do not pertinently apply these criteria are *as such* violating Article 10 ECHR.

Coda

Media and judiciary “frenemies” / “frères ennemis” ?

**Neither friends (brothers/sisters),
nor enemies.**

They are allies!

Both pillars in a democracy
under the rule of law

