

2014-2

Media in the Courtroom

LEAD ARTICLE

Court Reporting by Audiovisual and Online Media in the Russian Federation

- Constitutional and statutory provisions
- Resolutions of the top courts
- Case law

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Media in the Courtroom

Foreword

*« C'est une expérience éternelle,
que tout homme qui a du pouvoir
est porté à en abuser ;
il va jusqu'à ce qu'il trouve des limites »*
Montesquieu, *De l'esprit des lois*, Buch XI, 1748.

The model of separation of powers (legislature, executive and judiciary) in its different declinations forms the basis for the political structure of most democratic states in the world. Not formally one of these powers, the press is nevertheless often called “the Fourth Estate” or “the fourth branch of government”, since it provides information to the people on matters of public concern and thereby acts as a guarantee that these state powers do not abuse their prerogatives.

In order for the press to carry out this “sacred duty”, it needs access to information on the doings (and “undoings”) of these three powers. In the case of the judiciary, this includes not only the ability of the press to report on decisions adopted by the courts but very importantly also to report on court proceedings. And for this to happen the press must inter alia be present in the courtroom.

Obviously, the press is also composed of humans, and these can abuse their own prerogatives, or cause unnecessary damage to individuals. Sometimes, transparency can go so far as to infringe upon freedoms and rights of others. That is why Article 10.2 ECHR expressly provides that the exercise of freedom of expression can be limited in order to protect inter alia the reputation or rights of others or to maintain the authority and impartiality of the judiciary.

This IRIS *plus* provides you with an overview of legal issues regarding court reporting by audiovisual and online media. The Lead Article reviews relevant legislation as well as recent case law in the Russian Federation. Thereby it addresses fundamental legal issues concerning the balance between access to information and the right to privacy, as well as possible limitations to freedom of information and media freedom, prejudgment by the media, etc. The Zoom brings a pan-European perspective to the issue at hand. It introduces the fundamental principles at stake enshrined in the ECHR and explores specific concerns linked to media reporting of criminal proceedings, which have proved to generate, in some prominent cases, a great deal of media interest. The Related Reporting section complements the Zoom with articles published in our newsletter IRIS and further explaining relevant legal instruments of the Council of Europe and related jurisprudence of the European Court of Human Rights.

Strasbourg, June 2014

Susanne Nikoltchev
Executive Director
European Audiovisual Observatory

TABLE OF CONTENTS

LEAD ARTICLE

Court Reporting by Audiovisual and Online Media in the Russian Federation 7

by Andrei Richter, Faculty of Journalism, Lomonosov Moscow State University

Introduction 7

I. Constitutional and statutory provisions. 8

II. Resolutions of the top courts 10

III. Case law 14

1. Access to the courtroom 15

2. Right to image 15

3. Presumption of innocence 16

4. Online archives 17

5. Protection of private data online 18

6. Defamation 19

7. Protection of witnesses. 20

IV. Conclusion 21

RELATED REPORTING

Pan-European Standards 23

*by Mireille van Eechoud (Institute for Information Law (IViR), University of Amsterdam),
Christophe Poirel (Council of Europe, Directorate of Human Rights),
Dirk Voorhoof (Ghent University (Belgium) & Copenhagen University (Denmark)
& Member of the Flemish Regulator for the Media), Charlotte Vier (Légipresse)*

Committee of Ministers 24

- European Convention on Access to Official Documents 24

- Adoption of Two Texts on Media and Criminal Proceedings 25

European Court of Human Rights. 26

- Youth Initiative for Human Rights v. Serbia 26

- Case of TASZ v. Hungary. 27

- Case of Tourancheau and July v. France (affaire Libération) 28

- Cases of B. and P. v. the United Kingdom 29

- Finding against France on Violation of Article 10 30

- Recent Judgments on the Freedom of Expression and Information and on the Right of a Fair Trial and Media Coverage of a Court Case. 31

ZOOM

Media Reporting on Court Proceedings and the pan-European Human Rights Framework. 33

by Amélie Lépinard, European Audiovisual Observatory

- **General principles 34**
- **The media's ability to report on criminal proceedings 37**
- **Conclusion 39**

Court Reporting by Audiovisual and Online Media in the Russian Federation

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Introduction

Openness, or *glasnost*, of the courts is not a new concept in Russia, as it existed both in law and, to a lesser degree, in practice during both the Imperial and Soviet eras. Many court cases, lawyers and judges have become a part of Russian national memory due to the press coverage and images of the participants. To give just a few examples known in Europe, let me mention the jury trial of Vera Zasulich (Véra Zassoulitch) in 1878, Stalin's "show trials" of the 1930s, and the Pussy Riot case in 2012.

For the majority of the Russian population the audiovisual media have become the principal means of information on the work of the courts. According to the results of public opinion polls, TV news and TV shows simulating court hearings with a pseudo-judge represent the two major sources of information on the court system and the activity of the courts, while movies and TV series occupy fourth place. In other words television creates the image of what is going on in the courtrooms more than any other media or personal experience.¹

In recent years the issue of the admissibility of modern technologies to record and transmit hearings from the courtrooms has become an important question for Russian law and jurisprudence. As the procedural codes struggle to keep up with the speed of technological progress, judges are often at a loss as to whether they can, may and should apply the old yardstick to non-traditional means of communications.

Thus the top Russian courts have recently adopted interpretive resolutions to guide the judges on the openness of the courts for the media. Somewhat earlier a federal statute was adopted to provide for accessibility of court information. This lead article will review the relevant legal instruments as well as recent case law to discuss modern doctrines and policy in Russia. Focusing on audiovisual and online media it will address issues of balance between access to information and the right to privacy, possible limitations to freedom of information and media freedom, prejudgment by the media, etc.

1) See Gudkov L., Dubin B., Zorkaya N., *Российская судебная система в мнениях общества*, / *Vestnik obshchestvennogo mneniya*, 2010, No. 4 (106), p. 7-43. As quoted in Pavlov I., *et.al. Интернет как средство укрепления общественного доверия к судам общей юрисдикции: пути и перспективы*, Saint-Petersburg, 2013

I. Constitutional and statutory provisions

On the openness of the courts, the 1993 Constitution of the Russian Federation in paragraph 1 of Article 123 that is part of Chapter 7 (“Judicial Power”) proclaims:

Examination of cases in all courts shall be open. Examinations in camera shall be allowed only in cases envisaged by the federal law.²

The 2001 Criminal Procedural Code of the Russian Federation in Article 241 (“Openness”) rules that:

1. The judicial proceedings on criminal cases in all the courts shall be open, with the exception of the cases pointed out in the present Article.
[...]
5. The persons, attending an open court session, shall have the right to carry out audio recording and to make records of it in writing. Taking photographs, video recording and/or cinema shooting shall be admissible only with the permission of the presiding justice of the court session.
7. A court sentence shall be pronounced in open session. In the event of trying a criminal case in camera or in the event of trying a criminal case on offences in the area of economic activities, solely the title and judicial disposition of the sentence may be pronounced on the basis of a court ruling or decision.³

The 2002 Civil Procedural Code of the Russian Federation in Article 10 (“Openness of Judicial Proceedings”) echoes:

1. The judicial proceedings in all courts shall be open. The judicial proceedings in closed court sessions shall be conducted on cases containing information which comprises a state secret, or the secret of the adoption of a child (for a son or daughter), and also on other cases, if this is stipulated in federal law.
[...]
7. The persons taking part in the case and the citizens present in an open court session shall have the right to fix the course of judicial proceedings in writing and with the assistance of the audio recording devices. Taking photographs, video recording and broadcasting of the court session on the radio and on television shall be admissible by permission of the court.
8. The court decisions shall be announced in public, with the exception of cases when such announcement of the decisions infringes the rights and the lawful interests of the underaged.⁴

In its turn the 2002 Arbitration Procedural Code of the Russian Federation in Article 11 (“Publicity of Court Proceedings”) stipulates that:

1. Cases shall be tried in arbitration courts in full session.
2. It shall be allowed to try a case in camera, when examination thereof in open court may lead to the divulgence of a state secret, and in other instances provided for by federal laws, as well as in the event of satisfying a petition of a person participating in the case who refers to the necessity of keeping commercial, official or other secrets protected by law.
[...]
7. Persons participating in full session shall enjoy the right to make notes in the course of the session and to record it with the help of sound recorders. Filming, photography and videotape

2) See official translations of the Constitution of the Russian Federation into foreign languages at: www.constitution.ru/index.htm

3) Criminal Procedural Code of the Russian Federation No. 174-FZ of 18 December 2001 (as amended), see the English translation at: <http://legislationline.org/documents/section/criminal-codes/country/7>

4) Civil Procedural Code of the Russian Federation No. 138-FZ of 14 November 2002 (as amended), see the English translation at: www.wipo.int/wipolex/en/text.jsp?file_id=277039

recording, as well as radio and television broadcasting of an arbitration court session shall be allowed by authority of the judge presiding over the court session.

8. Judicial acts shall be pronounced publicly by an arbitration court.⁵

Finally, the 2001 Code of Administrative Offences of the Russian Federation notes in Article 24.3 (“Public Hearing of Cases Concerning Administrative Offences”):

1. Cases concerning administrative offences shall be tried in public, except for cases provided for by Part 3 of Article 28.6 of this Code or cases where this may lead to divulgence of state, military, commercial or other secrets protected by law, as well as where it is necessary in the interests of ensuring the security of persons participating in proceedings in a case concerning an administrative offence, of their family members and relatives, as well as in the interests of protecting the honour and dignity of said persons.

[...]

2. The persons who participate in the proceedings in a case of an administrative offence and the persons attending the public examination of the case of the administrative offence shall have the right to fix the progress of the examination of the case of the administrative offence in written form, and also with the aid of audio recording means. Photography, video recording, transmission of the public examination of a case of the administrative offence over radio and television shall be allowed with the permit of the judge, the organ or the official who heard the case of the administrative offence.⁶

To sum up, the statutory procedural law provides that in the course of a court session anyone, including media professionals, has the right to independently:

- make hand or computer notes, short hand coding (stenograph) and make sketches,
- make sound recordings with the help of audio devices.

There is neither need to inform the court of an intention to use this right or of making such records, nor to solicit permission for this activity.

Permission of the court (or presiding judge) is necessary though for:

- photography, film or video recording,
- transmission of the proceedings over radio or television.

In August 2013 the Ministry of Justice of the Russian Federation submitted for public discussions a draft law that would introduce uniform rules for video recordings and online transmission of court hearings.⁷ This would be achieved through amendments to the procedural codes described above.

The draft envisaged that courts would allow video recording and live transmissions of the proceedings by a special decision issued upon request by an interested party. A refusal to grant such permission would be possible only on the grounds of “objective reasons”. They would include the need to protect privacy, commercial and other lawful secrets, or when “such activity may lead to violation of fundamental human rights and liberties, as well as lawful interests”. The draft law would allow limiting recording and live transmission of some of the court procedures. It would make possible to restrict recording and live transmission of personal data of participants, such as their addresses or places of work. But any restriction would have to be justified by the party seeking

5) Arbitration Procedural Code of the Russian Federation No. 95-FZ of 24 July 2002 (as amended), see the English translation at: www.wipo.int/wipolex/en/text.jsp?file_id=276748

6) Code of Administrative Offences of the Russian Federation No. 195-FZ of 30 December 2001 (as amended), see the English translation at: www.wipo.int/wipolex/en/text.jsp?file_id=276912

7) *Проект федерального закона “О внесении изменений в некоторые законодательные акты Российской Федерации”* (Draft of the Federal Law “On amending certain legal acts of the Russian Federation”), see at: img.rg.ru/pril/article/76/57/64/proekt-internet.doc The draft was published on the website of the Ministry of Justice but later made unavailable.

to introduce it. The draft law provided that the person wishing to conduct video recording or live transmission should state in its petition to allow this activity, the title of the media outlet or of the Internet portal where they would be accessible. The court would then make the relevant online addresses public on its official website.⁸

At the time of writing this article the draft law has not been formally submitted to the State Duma (Lower House of the Federal Assembly of the Russian Federation).

The central role in regulating access to courtrooms and information held by the courts belongs to the Federal Statute "On the Provision of Access to Information on the Activity of Courts in the Russian Federation" (hereinafter "Federal Statute on access to court information"). While its drafting started in 2003, the bill was submitted to the State Duma by the Supreme Court of the Russian Federation (*Верховный суд Российской Федерации*) in 2006. The deputies drastically changed the text before adopting it in 2008, while its entry into force was further delayed till 1 July 2010.⁹

Among other things, the Federal Statute on access to court information stipulates that full texts of decisions and verdicts of all courts, as well as information on appeals and their results, shall be published on official Internet sites established by the courts in Russia. There are several important exceptions to this rule (Article 15). For example no publication on Internet is allowed for court rulings on state crimes or in family law cases (e.g. on divorce).

The texts of decisions by general jurisdiction courts (and only by this type of courts) will be edited to remove information pertaining to state secrets and other secrets protected by law. In addition, all names (except those of participating judges, prosecutors and barristers) shall be replaced with initials or pseudonyms to protect the individuals' privacy (part 3 of Article 15). According to later amendments to the Federal Statute on access to court information, the list of excepted persons was enlarged and now also includes the plaintiff, defendant, third parties, civil plaintiff, civil defendant, convicted person, acquitted person, the person on trial for an administrative offense, and the court clerk – their last names and initials for first and patronymic names are allowed to be published online. Again, arbitration and other courts shall still publish texts in full.

The Federal Statute on access to court information also allows for inquiries on a court's activity to be made via e-mail; replies then shall be provided within 30 days. Information is to be provided free of charge.

It should be noted that issues relating to audiovisual or online recording or transmission were not specifically dealt with by the Federal Statute on access to court information.

II. Resolutions of the top courts

Even before the Federal Statute on access to court information entered into force the Supreme Court of the Russian Federation made strong efforts to explain to judges its role and meaning. In doing so, it departed from its own tradition to first collect and evaluate the case law and then direct the judges based on the existing best practice, and decided to address the issue in advance.

8) Корня, Anastassia, *Суд выпустят в сеть*, *Vedomosti* daily, 6 August 2013.

See www.vedomosti.ru/politics/news/14932131/chto-zahotyat-to-pokazhut#ixzz2bb9b00Dj

9) The Federal Statute *Об обеспечении доступа к информации о деятельности судов в Российской Федерации* ("On the Provision of Access to Information on the Activity of Courts in the Russian Federation") (as amended) No. 3262-FZ of 22 December 2008. An English translation of the Federal Statute is available on the official webpage of the Supreme Court of the Russian Federation at: www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=6800. See also Richter A., "Transparency of Courts to be strengthened", IRIS 2009-3: Extra, European Audiovisual Observatory, 2009, available at: <http://merlin.obs.coe.int/iris/2009/3/article101.en.html>

The Resolution of the Plenum of the Supreme Court of the Russian Federation On the practice of application by the courts of the Statute of the Russian Federation On the mass media contained several provisions (points 16 and 17) that were somewhat artificially inserted in the text as they actually discussed norms that were not related to the Statute on the Mass Media, or at least not directly.¹⁰

The Resolution reminded the judges that the openness of the justice system presupposes the necessity of a broad informational coverage of the courts' activity. Therefore the courts should seek a wider use of the mass media for an objective, reliable and fast coverage of their activities.

In its Resolution, the Supreme Court recalls that judges have no right to deny journalists access to court proceedings or to stop them from covering a particular case unless such a possibility is directly foreseen by law. Such a possibility is provided for by the procedural law related to closed sessions or in a situation where a person may be expelled from the courtroom for violation of the order of the court proceeding. Journalists may not be denied access, for example, because of a shortage of seats in the courtroom. The Resolution explains that any "closed door session" of the court of law on grounds that are not directly stipulated by the federal statutes contradicts the constitutional provisions that examination of cases in all courts shall be open. It also represents "a possible violation" of the right to a fair and public hearing as stipulated by paragraph 1 of Article 6 of the European Convention on Human Rights and also paragraph 1 of Article 14 of the International Covenant on Civil and Political Rights.

In point 16 of the Resolution, the Supreme Court explains under what conditions a request for information on activities of the courts may be denied. Among the circumstances foreseen by the Federal Statute on access to court information features "obstruction to justice", which is described in the following way:

The information that may be refused according to paragraph 5 part 1 of Article 20 of the mentioned Federal Statute (the requested information presents an obstruction to justice) includes such information whose dissemination can create obstacles for execution of a fair trial guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (for example, it may jeopardise the equality of the parties, the adversarial nature of the proceedings, the presumption of innocence and reasonable terms for a case examination).

The Resolution further explains the procedures for the use of recording equipment in the courtroom. It recalls that according to the procedural law anyone (including journalists) when present at a court hearing may record the court proceedings in writing or by using audio recording equipment. The law does not oblige the person who makes the audio recording to notify the court of his doing so. At the same time, the recording of a hearing by film, photo or video, or via television or radio broadcasting is allowed only with the court's (judge's) permission and the reporter is obliged to make his intention known to the court (judge).

The Supreme Court provides an important reference point for judges when deciding whether to allow such audiovisual recording or broadcast: they shall balance the right of everyone to freedom of information, on the one hand, with the right of everyone to protect one's private life, personal and family secrets, honour and good name, secrecy of correspondence and other communications, and one's image, on the other hand. Thus for the first time ever the Russian courts are instructed to consider in such situations the necessity to observe the right to information in the following words:

When deciding whether to grant permission to make a film and/or photo recording, video recording, or radio broadcast of a court hearing, the court (judge) shall take into account the corresponding procedural norms (part 7 of Article 10 and part 5 of Article 158 of the Civil Procedural Code of the Russian Federation, part 3 of Article 24.3 of the Code on Administrative Infringements of the Russian Federation, part 5 of Article 241 of the Criminal Procedural Code of

10) Resolution of the Plenum of the Supreme Court of the Russian Federation on the Judicial Practice Related to the Statute on the Mass Media No. 16 of 15 June 2010. See full text in English, French or German in Nikoltchev S., (ed.), A Landmark for Mass Media in Russia, IRIS *plus* 2011-1, European Audiovisual Observatory, Strasbourg, 2011, see: www.obs.coe.int/shop/irisplus/-/asset_publisher/k6BP/content/iris-plus-2011-1

the Russian Federation) and shall seek to balance the right of everyone to freely seek, obtain, transfer, produce, and disseminate information by any legal means (part 4 of Article 29 of the Constitution of the Russian Federation, Article 1 of the Statute of the Russian Federation *On the mass media*) and the right of everyone to protect one's private life, personal and family secrets, to protect one's honour and good name, the secrecy of correspondence, telephone, mail, telegraph and other communications (Article 23 of the Constitution of the Russian Federation) and to protect one's image (Article 152.1 of the Civil Code of the Russian Federation).

On 8 October 2012 the Higher Arbitration Court of the Russian Federation¹¹ adopted at its plenary session the Resolution On Provisions of Openness in Arbitration Court Procedure.¹²

The Resolution instructs arbitration judges that text reporting from court sessions via social media and Internet with the use of personal technical means is allowed without any special permission or notification of the presiding judge or sides of the parties in the proceedings.

The Higher Arbitration Court establishes a presumption of the permissibility of photo, video or film recording of the open court proceedings, as well as their live transmission by means of radio, TV or Internet. A ban on such recordings is allowed only to protect fundamental human rights.

In case of recording and/or live TV and webcasting no permission of those present in the courtroom to use their images is necessary. Such recordings may be used as proof of possible procedural violations in the case.

Arbitration courts are instructed that online publication of court decisions that contain personal data of persons who participate in administrative cases¹³ may not *per se* be viewed as an action that affects the security of these persons, members of their families, relatives, or their honour and dignity. As explained by the Higher Arbitration Court, the Federal Statute "On Personal Data"¹⁴ and the Federal Statute on access to court information do not prevent arbitration courts from publishing court decisions online in full because of personal data therein.

Indeed since 28 June 2010 the Federal Statute "On Personal Data" (paragraph 5 of part 2 of Article 1) clearly stipulates that it shall not be applied to relations that emerge when providing information in accordance with the Federal Statute on access to court information.

The Resolution also instructs judges that they may not stop citizens from being present in the courtroom during open hearings if there are available seats. In cases when no courtroom can seat all those wishing to attend, a live broadcast of the session may be arranged (usually to a hall on the same premises).

On 13 December 2012 the Supreme Court of the Russian Federation followed the challenge of the Higher Arbitration Court and adopted at its Plenum a similar Resolution "On Openness and Transparency of the Judicial Process and on Access to Information on the Activity of the Courts".¹⁵

11) *Высший Арбитражный суд Российской Федерации* (the Higher Arbitration Court of the Russian Federation) was until recently a supreme judicial body at the top of the hierarchy of arbitration courts with their 4 000 arbitration judges, competent to settle economic disputes. It exercised judicial supervision over their activities in accordance with the Arbitration Procedural Code of the Russian Federation. It was abolished and *de facto* merged with the Supreme Court of the Russian Federation by amendments to the Constitution of the Russian Federation and several statutes that all went into force on 6 February 2014. One of the major reasons for the judicial reform was to create a uniform interpretation of the laws for the judges.

12) Resolution of the Plenum of the Higher Arbitration Court of the Russian Federation 8 October 2012 No. 61 *Об обеспечении гласности в арбитражном процессе* (On Provisions of Openness in Arbitration Court Procedure), see: <http://merlin.obs.coe.int/redirect.php?id=16184>

13) Some groups of administrative cases are adjudicated by the arbitration courts.

14) Federal Statute *О персональных данных* ("On Personal Data") of 27 July 2006, No. 152-ФЗ.

15) *Об открытости и гласности судопроизводства и о доступе к информации о деятельности судов* (Resolution of the Plenum of the Supreme Court of the Russian Federation on Openness and Transparency of the Judicial Process and on Access to Information on the Activity of the Courts), No. 35 of 13 December 2012. The author took part in drafting the text of the Resolution. See its text (in Russian) at: www.vsr.ru/Show_pdf.php?Id=8331

In particular, the Resolution of the Supreme Court noted that given that the presence of journalists in an open court in order to obtain information on a case is a legitimate method to access information, and that in the exercise of their professional activity journalists perform a public duty, it is not allowed to raise obstacles and refuse them access to the courtroom on the grounds of their professional affiliation, because of the lack of accreditation, and (or) on other grounds that are not provided for by statutory law (point 4).

It referred to an important procedural privilege of journalists as watchdogs for the public, by stating that before the announcement of the ruling of the court to conduct the proceedings in a closed session court bailiffs may not expel journalists from the courtroom and prevent them from making notes or audio recordings of the court proceedings. The Supreme Court went further by instructing judges that although after making such an announcement all persons present who are not party to the proceedings are to be expelled from the courtroom, journalists should be allowed to leave the courtroom last.

The Supreme Court also spoke for a restricted meaning of privacy rights in court hearings:

The presence in the case of information that relates to the private life of the individuals involved, is not an unconditional basis for the court's decision to hold proceedings in camera. Courts, in deciding whether or not to conduct proceedings in camera on the grounds of ensuring the right of individuals to privacy, should take into account the nature and content of the information about the private life of a person, as well as the possible consequences of the disclosure of such information.

The Resolution of the Supreme Court drew a presumption of the right of everyone present in an open court proceeding (including journalists) to record it in writing, by means of audio, photo, video, and film recording, as well as to transmit (broadcast) it live. It furthermore instructed the courts to provide equal conditions for everyone to use this right.

While the procedural codes (see above) stipulate that no permission of the judge is needed to conduct text recording (note-taking) of the court proceedings, the Supreme Court interpreted such recording in the context of the world of modern technologies to include online reporting or texting (e.g. with the use of Twitter, or online text reporting on a news website). In fact such online reporting of trials that present public interest has since become a new feature for online media in Russia that combine it with video and photo images. Most notably it is present on the website of RAPSI, or Russian Agency for Legal and Court Information,¹⁶ but also on the Lenta.ru news portal, and on Kommersant.ru, the website of a daily business newspaper.

The procedural codes stipulate that permission of the court is still necessary for photography, video recording, filming and broadcasting on radio and (or) television of the course of the trial. The Supreme Court noted in this regard that the same procedure is required to perform live video transmission of a trial on the Internet.

For the first time the Supreme Court made it clear that a request for such permission should be reflected in the official record of the court proceedings. Such request must be reviewed by the court with the participation of the sides, and the decision on the request must also be reflected in the record. A refusal to grant permission should be detailed to include the reasons that guided the court in its decision.

The Resolution instructs judges that when deciding on the admissibility of photography, video, film recording, or live transmissions of open court proceedings they should start from the assumption that such activity is possible in every case. There are exceptions to this rule, which include a possible breach of the rights and legitimate interests of the participants in the court proceedings, including the right to privacy, protection of reputation, secrecy of correspondence, telephone conversations,

16) RAPSI belongs to the RIA Novosti news service which is now being liquidated by decree of the President of the Russian Federation. Its fate was unknown at the time of writing.

and other communications containing private information. On the other hand, the Supreme Court stated that if the court of law comes to the conclusion that such actions will not result in a violation of the rights and legitimate interests of the participants in the proceedings, it has no right to ban them just because of the subjective and unmotivated objections of the participants in the proceedings.

The video and audio recordings produced as a result of such activity, the Supreme Court stated, may not be claimed by the court from the participants and members of the public. In the manner prescribed by the procedural legislation of the Russian Federation, the participants in the proceedings may file a petition for the admission to the case of materials obtained as a result of such recording. This may happen only with the consent of the persons who were making the recordings to provide these materials.

An important provision of the Resolution for the audiovisual media relates to the admissibility of bringing recording and transmission equipment into the courthouse *before* obtaining a permission to use it in the courtroom. Past practices showed that having obtained the permission to record or transmit the proceedings, journalists had no time to bring in the necessary equipment before the start of court deliberations on the case. The reason was that the bailiffs guarding the courthouse would not allow journalists to carry the equipment inside without a clear instruction of the presiding judge. From now on, according to the Resolution (point 19), "visitors and representatives of editorial staff of the media (journalists) with audio, photography, film and video equipment must be granted unhindered entrance to the courthouse."

Widening the meaning of its earlier Resolution "On the practice of application by the courts of the Statute of the Russian Federation On the mass media", the Supreme Court in the Resolution (point 34) made it clear that failure to comply with the requirements of the openness of court proceedings constitutes a violation of due judicial process and serves as a basis for cancellation of court judgments, "if such violation has respectively resulted in or could lead to the adoption of an illegal and (or) unjustified decision, did not allow a comprehensive, full and objective examination of the case..." In this context the Supreme Court pointed out that "intentional creation by a judge of conditions that limit or exclude from being present in the courtroom persons who are not participants in the open proceedings, including representatives of editorial staff of the media (journalists), or of conditions that prevent its recording, indicates a violation of professional ethics."

The Resolution also instructs court officials that interact with the media and other interested parties, such as chief justices and press secretaries, to assist journalists in their service to the public interest. In particular, the officials are expected by the Supreme Court to inform the media about upcoming court hearings on matters of public interest and also to assist them by organising online video broadcasts of the open proceedings on cases that raise public interest and by publicising such webcasts to the media.

III. Case law

Studying or following court precedents, which is a practice of continental law, is a concept somewhat alien to the judicial system in Russia. Judges are expected to be guided by the statutory law alone. Even the instructions of the resolutions of the top courts, like the ones described above, are sometimes viewed as recommendations that can be ignored. Therefore any study of the trends and tendencies in the case law has pure academic value as the judges pay little if any attention to the judgments rendered by their peers. In the following part of the article we focus on the cases that represent in our view the best judicial practice that enables both freedom of the media and fair justice. The case law is structured by issues.

For this part we have searched and studied the court cases made available mostly through the RosPravosudie database.¹⁷ RosPravosudie (or, if translated into English, RusJustice) is a non-

17) <https://rospravosudie.com/society/about>. The author would like to thank Darya Novatorova of Lomonosov Moscow State University for doing the initial search and classifying the collected data on case law.

commercial online project that provides access to some 38 million documents, mostly texts of court decisions made publicly available due to the enforcement of the Federal Statute on access to court information. Those court decisions are all properly documented and taken from the official websites of the Russian courts.

1. Access to the courtroom

The focus of the resolutions of the top courts on the need to allow for openness of the court proceedings was interpreted by most of the courts as the need to provide for video transmission from the courtroom to an adjacent hall in the same building and install a TV set there. The courts refuse to believe that the right of everyone to be present in an open court hearing stated in the procedural codes translates into an obligation of the courts to let everyone in or to hold sessions in larger courtrooms.

Bolotnaya case (2013-2014)

In the ongoing criminal trial of protesters that clashed with the police in Moscow on 6 May 2012, the hearings were at some point moved from a large hall of the Moscow City Court to a courtroom of the Zamoskvoretsky District Court with just 12 seats for the public. There was a consumer TV screen installed on the ground floor to allow the others to watch the court sessions. Unfortunately the TV set did not have sound amplifiers, nor was the ground floor room with its 40 seats large enough to accommodate the relatives, the press, and the public. In a reply to complaints that such an arrangement violated the transparency of the proceedings, the acting deputy chair of the district court stated:

...the principle of openness stipulated by Article 241 of the Criminal Procedural Code of the Russian Federation under which the judicial proceedings on criminal cases in all the courts shall be held openly was wrongly interpreted by you as a requirement of the court to provide for the personal presence of everyone in the courtroom.¹⁸

2. Right to image

This right is relatively new under Russian law, having been introduced in the Civil Code in December 2006. The courts tend to rule that the public interest outweighs the right to image when images are taken in the courtrooms. As a result, lawsuits to protect this right from audiovisual or photo court reporting are typically dismissed.

*Case of Yermolenko (2011)*¹⁹

Mr Yermolenko filed a complaint against the ruling of the court of first instance, which dismissed his objection to being filmed in the courtroom by a local TV company. Before the start of the criminal proceedings where Yermolenko was the accused party, a cameraman "in a deceitful manner" filmed him and his close relatives for three minutes. The prosecution did not take steps to stop the "illegal recording" and the judge in the case dismissed his complaints. The recording was later shown on TV in the context of the criminal case under court review. It was available on the website of the TV company and the images were reprinted in the local press. In his complaint Yermolenko claimed that as a result of disseminating the video the right to his image had been violated, as much as his presumption of innocence. His demands to the editor of the TV company, the TV company itself, the prosecutor and the judge from the initial hearing were: the removal of the video from the website, public apologies, and compensation for moral damages.

18) Letter dated 15 January 2014, reprinted in the article *Замоскворецкий суд. Час пик* by Yulia Polunina, *Novaya gazeta*, 3 February 2014, No. 11, p. 12-13, available at: www.novayagazeta.ru/inquests/62069.htm

19) The appeals decision by the Chamber on Civil Cases of the Astrakhan Regional Court on case No. 33 - 2108/2011. 20 July 2011. See: <http://rospravosudie.com/court-astraxanskij-oblastnoj-sud-astraxanskaya-oblast-s/act-103755423/>

This case was finally adjudicated on appeal in the Astrakhan Regional Court on 20 July 2011. The court noted that Yermolenko's objection to the recording of his image was not based on the law. The Criminal Procedural Code of the Russian Federation in Article 241 stipulates that in open hearings it is up to the presiding judge to permit video recording. The judge did allow it and he was not bound by law to take into account the position of the participants in the trial.

Indeed Article 152.1 of the Civil Code of the Russian Federation specifies that the divulging and further use of the image of a citizen is allowed only with the consent of the citizen. One of the exceptions to the rule is when the image is taken in a public place and the person portrayed is not the main object of the use. The Astrakhan Regional Court referred to the Joint Resolution of the plenary meetings of the Supreme Court and High Arbitration Court of the Russian Federation of 26 March 2009,²⁰ which points out that film, photo, and video recording in public places should be understood to also include recording in open court proceedings. Nevertheless the Astrakhan Regional Court avoided the issue whether the image was the main object of the use (which judging by the context was the case).

It should also be noted that the ruling was made in the absence of Yermolenko in court as he was serving his term at the time of the hearing.

3. Presumption of innocence

In the Yermolenko case above the Astrakhan Regional Court ignored in its arguments the issue of the possible violation by the TV journalists of Yermolenko's presumption of innocence. Article 49 of the Constitution of the Russian Federation stipulates that "Everyone accused of committing a crime shall be considered innocent until his guilt is proved according to the rules fixed by the federal law and confirmed by the sentence of a court which has come into legal force." Russian courts tend to believe that this presumption is to be observed by certain categories of court officials but not by the media.

Recommendation of the Judicial Chamber on Informational Disputes (1997)

If the Astrakhan Regional Court had not overlooked the issue, it could have referred to the Recommendation "On the application of the principle of 'presumption of innocence' for the activity of journalists" adopted by the Judicial Chamber on Informational Disputes under the President of the Russian Federation on 24 December 1997.²¹ The Recommendation, in itself a reply to the inquiry of the Moscow Media Law and Policy Center, was triggered by the draft law "On Television and Radio Broadcasting" that passed its first reading in 1997 (but eventually was never adopted). One of its provisions prohibited broadcasters from disseminating information that violated the "presumption of innocence". The Judicial Chamber concluded that the principle of presumption of innocence as laid down in the Constitution of the Russian Federation could be applied only to the governmental bodies that have power to restrict a person's rights and freedoms, as well as their staff. Journalists are not among them. Only courts can decide that someone is guilty of a crime with all the legal repercussions and weight.

As to journalists, they do investigative reporting or cover criminal proceedings as part of their constitutional right to freedom of information; on the other hand, they fulfil their professional

20) Joint Resolution of the Plenary Meeting of the Supreme Court of the Russian Federation and Plenary Meeting of the High Arbitration Court of the Russian Federation of 26 March 2009 *О некоторых вопросах, возникших в связи с введением в действие части четвертой Гражданского кодекса Российской Федерации* ("On certain issues that arise due to entry into force of Part Four of the Civil Code of the Russian Federation"), No. 5/29, available at: www.rg.ru/2009/04/22/gk-sud-dok.html

21) See Richter A., "Judicial Chamber rules on Presumption of Innocence", IRIS 1998-1/13, European Audiovisual Observatory, 1998, available at: <http://merlin.obs.coe.int/iris/1998/1/article13.en.html>. The Judicial Chamber on Informational Disputes was created by the Decree of the President of the Russian Federation of 31 December 1993 and disbanded in June 2000. It was a state body entrusted with assisting the President in the realisation of his constitutional powers to guarantee the rights, freedoms and lawful interests in the sphere of mass information.

duty by informing the public about circumstances of public interest. Therefore, the opinion of a journalist that was expressed in the mass media shall not influence the right of a person to be considered innocent in the legal sense.

4. Online archives

The Resolution of the Plenary of the Supreme Court of the Russian Federation “On Judicial Practice Related to Disputes on the Protection of Honour and Dignity of Citizens, as well as of the Business Reputation of Citizens and Legal Entities” adopted in 2005²² made a significant impact on lawsuits relating to court reports that were correct at the time of publication but that due to decisions on appeal ceased to be accurate. While before plaintiffs were successful in their claims to receive compensation for moral damages and to have refutations of the outdated court information published online and in the printed press, this is now no longer the case.

Dzikanyuk v. Centre of Business Information (2012)

In this case the plaintiff filed a lawsuit against the media company *Центр деловой информации* (Centre of Business Information) for compensation for moral damages. Earlier Mr Dzikanyuk was convicted for fraud, but later he was acquitted on the grounds that his actions did not amount to a crime. The Centre of Business Information, the defendant, published in its newspaper *Business-Class*, as well as in its online version,²³ a court report that reflected the original conviction. It was not later corrected to take into account the acquittal of the plaintiff. As a result, for about 2.5 years he was defamed through untruthful information on committing a crime and his privacy was violated, which caused him to endure moral suffering.

The defendant explained to the court that at the time of publication the report corresponded to reality and thus was truthful.

The Leninsky District Court of the City of Perm discussed the case by going into the nature of the constitutional right to privacy. In particular it referred to the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom* adjudicated by the European Court of Human Rights on 28 May 1985. It quoted the opinion of the Strasbourg Court that the essential object of the right to privacy “is to protect the individual against arbitrary interference by the public authorities”.²⁴ Thus by defining in Article 241 of the Code of Criminal Procedure the principle of openness of criminal trials, the state in no way intrudes into the private life of citizens: it only fulfils its function as the protector of public interests. Considering the foregoing, the district court concluded that the information about the fact of a verdict that entered into force cannot be assimilated to private secrets. This conclusion, said the court, was confirmed by the position of the law-maker, who established in the Federal Statute on access to court information a mandatory posting on the Internet of the texts of judicial decisions.

Then the district court referred to the Resolution “On Judicial Practice Related to Disputes on the Protection of Honour and Dignity of Citizens, as well as of the Business Reputation of Citizens and Legal Entities” adopted on 24 February 2005 by the Supreme Court of the Russian Federation. The Resolution prescribed that:

The courts may not consider lawsuits brought under Article 152 of the Civil Code of the Russian Federation,²⁵ if they demand to refute information contained in the judgments and verdicts, rulings of the preliminary investigation bodies, and other official documents, which are to be appealed by another procedure established by law.

22) See Richter A., “Supreme Courts on Defamation”, IRIS 2005-4/32, European Audiovisual Observatory, 2005, available at: <http://merlin.obs.coe.int/iris/2005/4/article32.en.html>

23) www.business-class.su/

24) See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57416>

25) Article 152 is entitled “Protection of Honour, Dignity and Business Reputation”.

As to the absence of information on the acquittal of the plaintiff in the court report, the district court came to the conclusion that the mass media had no legal obligation to publish a report on the acquittal of Mr Dzikanyuk. This conclusion was based, noted the court, on the essence of both Article 29 of the Constitution of the Russian Federation and Article 10 of the European Convention on Human Rights.

At the same time the district court took into account the explanations provided in the Resolution of the Plenum of the Supreme Court of the Russian Federation On the practice of application by the courts of the Statute of the Russian Federation On the mass media. In particular it quoted point 24 of the Resolution that states:

If the mass media provided partial or one-sided information that leads to a distorted perception of the event that took place, or a fact, or a sequence of events and such publication infringes upon the rights, freedoms or protected by the statute interests of a citizen or organization then the indicated persons have the right to publish their reply in the same mass media in the order foreseen by Article 46 of the Statute of the Russian Federation *On the mass media*.

As the plaintiff did not seek to enforce his right to reply, the district court ruled to dismiss the lawsuit in its entirety.²⁶

5. Protection of private data online

With regard to protection of personal data in court decisions published online, the case law has gone in different directions. After the adoption of the the top court resolutions on the open-ness of hearings and trials the arbitration courts followed the policy of publishing court decisions online in full, while general jurisdiction courts adopted the strategy to first erase substantial case information on the basis of the need to protect privacy and private data.²⁷

PIK-Press case (2012)

This case started when Roskomnadzor, the governmental watchdog in the mass media sphere²⁸ (see IRIS 2012-8:1/36), issued an injunction against the stock company PIK-Press. The company runs a number of information websites. It is also the founder of the news agency *Судебные Решения РФ* (Court Decisions RF), a registered mass media outlet. Those websites, some of them being mirror sites, republish decisions of Russian courts, provide search engines and supply judicial news. The company's director-general is a Saint Petersburg journalist and a long-term activist for freedom of judicial information Pavel Netupskiy. He is also editor-in-chief of the above-mentioned online news agency.²⁹

Roskomnadzor, or Federal Service for Supervision in the Sphere of Telecommunications, Information Technologies and Mass Communications, is an agency under the jurisdiction of the Ministry of Communications and Mass Communications of the Russian Federation. By the Federal Statute "On Personal Data" it is empowered to ensure the protection of personal data owners' rights as well as the protection of citizens' rights to privacy, personal and family secrets.³⁰

26) Decision of the Leninsky District Court of the City of Perm on case No. 33-5429, 1 February 2012. See the text at: <https://rospravosudie.com/court-leninskij-rajonnyj-sud-g-permi-permskij-kraj-s/act-102493134/>. The case was reviewed on appeal by the Perm Territorial Court on 4 July 2012 which upheld the district court decision, see the text at: <https://rospravosudie.com/court-permskij-kraevoj-sud-permskij-kraj-s/act-424003290/>

27) Pozdnyakov, Mikhail, *Практическая реализация принципа открытости правосудия в Российской Федерации* (Practical Realization of the principle of openness of justice in the Russian Federation),. European University: Saint-Petersburg, 2013, p. 24.

28) See Richter A., "New Rules For Internet", IRIS 2012-8/36, European Audiovisual Observatory, 2012, available at: <http://merlin.obs.coe.int/iris/2012/8/article36.en.html>

29) For more on Mr. Netupskiy and his activity to disclose court information, see Richter, Andrei, *Post-soviet perspective on censorship and freedom of the media*. A UNESCO publication, IKAR Publishers, Moscow, 2007, p. 67, available at: <http://unesdoc.unesco.org/images/0015/001537/153744e.pdf>

30) See <http://rkn.gov.ru/eng/>

The injunction by Roskomnadzor was a result of its inspection of PIK-Press, which found that it had published a court decision on a civil case with a reference to a Mr Samashka E.R. without his permission. Roskomnadzor ordered PIK-Press to eliminate this violation of the law. The company appealed the injunction in the Arbitration Court of the City of Saint Petersburg and Leningrad Region. The court came to the conclusion that indeed by publishing the decision PIK-Press violated the rights of the “subject of personal information”, i.e. Mr Samashka. At the same time it found that the form of the injunction was not correct as it did not describe the essence of the violation and the means to eliminate the violation of the law. Thus it upheld the complaint and found the injunction null and void.

Roskomnadzor and PIK-Press both appealed the decision in the court of second instance – the 13th Federal Arbitration Appeals Court in Saint Petersburg. The agency stated that the court of first instance wrongly disregarded that the injunction had attachments: the inspection report and other materials that explained the nature of the offence and its remedies.

The Appeals Court agreed with the legality of the form of injunction but this time found no violation of the law in the actions of PIK-Press. The argument of Roskomnadzor that there is only one person living in Saint Petersburg and in the Leningrad Region with such name and initials (fact proven by the migration services) was dismissed as “having no judicial value for this case as the exceptionality of combination of last name, first name and patronymic does not automatically refer them to personal data that may not be published as part of a court decision”.

It also agreed with the argument of PIK-Press that the action challenged by Roskomnadzor is exempted from liability. In accordance with Article 57 (“Absolution from Responsibility”) of the Statute “On the Mass Media” it falls under the category of materials contained in materials of press services of state bodies.³¹

Thus the Appeals Court upheld the decision of the court of first instance to annul the injunction but amended its argumentation as it found no violation of the law in the actions of PIK-Press.³²

6. Defamation

Some plaintiffs believe that the very fact of being in the courtroom’s dock puts them in a negative light. Defamation lawsuits come when journalists use language that presupposes that the accused have already been convicted and defendants have lost their case. In such cases the courts tend to refer to the right of reply as a fair remedy.

Tatmedia case (2012)

This case concerns the issue of defamation related to audiovisual coverage of court proceedings on TV and online.

At the first session of criminal court proceedings in a case relating to organised crime charges in the town of Nizhnekamsk, Tatarstan, the presiding judge allowed journalists of the local TV company NTR to take brief video recordings of the participants in the trial. At the same time he warned them that the faces of the accused should not be shown. On the same day in the evening news of the NTR TV channel recognisable close-ups of the accused were shown and they were described as having been “convicted”, “an organised grouping”, and a “band”. The TV report was also published on NTR’s website.

31) On the issue of exemption from liability under Russian media law, see Nikoltchev S. (ed.), *op.cit.*, p. 15-17.

32) Resolution of the 13th Federal Arbitration Appeals Court on case No. A56-34496/2012, 5 December 2012. See the text at: http://ras.arbitr.ru/PdfDocument/7af62e0d-5697-45d3-987e-78b1fc86c23f/A56-34496-2012__20121205.pdf

Relatives of the accused filed a lawsuit for defamation, demanding compensation for moral damages. The lawsuit was addressed to Tatmedia, the major media company in Tatarstan that owns NTR. It was adjudicated by the Nizhnekamsk Town Court.³³

In court the lawyers for Tatmedia argued that the images of the accused were indeed blurred, while they were described as having been “convicted” mistakenly due to the “terminological incompetence” of journalists. The plaintiffs did not claim their right to refute the mistake, which is stipulated in the Statute “On the mass media”.

The court viewed the NTR video as it was shown on TV and came to the conclusion that the order of the judge not to show the faces of the accused had not been respected. This brought moral harm to the plaintiffs as the TV report caused “substantial public response and the plaintiffs were faced with narrow-minded curiosity of both strangers and acquaintances, including their colleagues”. This in itself disclosed details of the private life of the plaintiffs, concluded the court.

At the same time, the Nizhnekamsk Town Court underlined the right to freedom of expression and freedom of the media as guaranteed by Article 10 of the European Convention on Human Rights³⁴ and Article 29 of the Constitution of the Russian Federation. It referred to the resolutions of the Supreme Court of the Russian Federation, in particular the Resolution “On the practice of application by the courts of the Statute of the Russian Federation On the mass media”, when speaking about the need to balance rights to honour and dignity with the freedoms guaranteed by Article 29 of the Constitution.

The town court concluded that:

The use of the right to compensation for moral harm for extrinsic purposes, in particular, to create a situation under which the right of everyone to freedom of expression, including freedom to hold opinions and to receive and impart information and ideas without interference by public authorities, is de facto restricted, shall not be permitted.

The court believed therefore that the moral sufferings of the plaintiffs were rather caused by the criminal investigation itself than by the TV coverage, and therefore could be justly compensated with RUB 2 000 (about EUR 50) each, which the court ordered to be paid.

As to the references to the accused as having been convicted, the court noted that inaccuracies could be remedied by using the right of reply. The court ordered that the Tatmedia company through NTR publish a refutation that the word “convicted” should be understood as “accused”.

7. Protection of witnesses

Online video and text reporting challenges the rule that witnesses should not be aware of court deliberations before they testify in court. Some courts believe that attempting to adapt the rule to the new telecommunications reality would not lead to violations of the principle of openness of court proceedings.

Pussy Riot case (2012)

In this famous case three artists from the punk-rock group Pussy Riot were accused of hooliganism. There was a documented attempt to ban reporting of the testimonies of the witnesses at one point of this open trial. On 30 July 2012, the third day of hearings in the Khamovniki District Court of Moscow (court of first instance), the court’s press secretary announced to the journalists that

33) Decision of the Nizhnekamsk Town Court on case No. 2- 1808 /2012, 31 May 2012. See the text at: <https://rospravosudie.com/court-nizhnekamskij-gorodskoj-sud-respublika-tatarstan-s/act-105898662/>

34) Article 10 ECHR was referred to three times in the 8-page text of the decision.

they were prohibited from quoting the testimonies of the witnesses of the prosecution.³⁵ The press secretary explained that the gag order was based on Article 264 (“Removal of Witnesses from the Courtroom”) of the Criminal Procedural Code which empowers bailiffs to take measures to prevent the witnesses who have not yet been interrogated by the court from communicating with the witnesses who have already been interrogated, as well as with other persons present in the courtroom. Violation of the order would result in banning access for the abusers to the next court sessions. As the reporters rebelled to the announcement and demanded that the restriction be formally announced by the judge and recorded in the minutes of the trial, the press secretary backed off and said it was rather a request.

Apparently on the same day in another prominent criminal case – in the Zamoskvoretsky District Court of Moscow – the same order was announced by the court’s press secretary. Reports say that the order was confirmed by the presiding judge who banned live broadcasts of the interrogation of witnesses.³⁶ The order apparently affected the online transmission of the text of the hearings by RAPSI.³⁷

The incidents were disavowed by the press service of the Moscow City Court (the court of second instance for the district courts) on 1 August 2012. The statement said that witness testimonies are not secret and reporting on them may not be restricted. It quoted Article 278 (“Interrogation of Witnesses”) of the Criminal Procedural Code which does not stipulate such restrictions as those mentioned above.³⁸

At the same time, there have been cases that have shown the concern of judges that online reporting or video transmission of court proceedings may prevent a fair trial. For example, an order to prevent online reporting of the interrogation of witnesses was effectively enforced in the Kuibyshevsky District Court of the city of Saint Petersburg in February 2011.³⁹ The criminal case concerned charges against a police officer for abuse of power in relation to protesters at a rally and the ban was called for by the defence.

In the famous trial of Mikhail Khodorkovsky in the same Khamovniki District Court of Moscow in May 2009, the prosecutor demanded a ban on video transmission from the courtroom. He said:

The bailiff escorts witnesses from the courtroom, this procedure enables objective evidence in court. Witnesses should not communicate with each other and with other persons. At the same time in the case of a video transmission from the courtroom there is no such barrier created for this group of persons [witnesses]. As a result, there are no guarantees for the proper order [of the trial].

The defence attorneys objected by saying that one law (on interrogation of witnesses) may not be observed by breaching another law (on openness of the trial). The judge in this case agreed with the prosecution and satisfied its demand.⁴⁰

IV. Conclusion

Currently the concept of openness of the courts is under challenge due to technological innovations in the reporting of proceedings. They make images from the courtroom immediately available to the general public, but may also compromise a fair trial.

35) See report of the Lenta.Ru online news agency at: <http://lenta.ru/articles/2012/08/01/witness/>

36) See: <http://jaguarcatcat.livejournal.com/1976610.html>

37) See reports in <http://lenta.ru/news/2012/08/01/mirzaev/> and <http://diary-news.com/intresting/65149-sud-ogranichil-osveschenie-protsessy-nad-pussy-riot.html>

38) See report of the Regnum online news agency at: www.regnum.ru/news/1557325.html

39) See report by RAPSI at: http://rapsinews.ru/judicial_news/20110215/251850467.html

40) As reported by the press centre of Mikhail Khodorkovsky and Platon Lebedev.

See: <http://khodorkovsky-lj.livejournal.com/2377.html>

At the same time the Russian law-makers and top courts underline in their acts the need to open the judicial system to the citizens inasmuch as possible in order to gain public trust.

The Russian judges are attentive to the need to provide both openness and a fair trial; in this context they feel free to refer to the constitutional guarantees of freedom of information as well as to the freedom of expression provisions of the European Convention on Human Rights and the case law of the European Court of Human Rights.

Pan-European Standards

The Council of Europe plays an important role in developing European standards concerning the freedom of expression and information. Examples of this are the European Convention on Access to Official Documents as well as the Declaration and Recommendation of the Committee of Ministers on the provision of information through the media in relation to criminal proceedings. The jurisprudence of the European Court of Human Rights is also fundamental in this regard. This section summarises some of the most important decisions of the Strasbourg-based Court concerning access by the media to court proceedings. For a more comprehensive introduction to the European Court of Human Rights' case law on freedom of expression and media and journalistic freedoms we invite you to download our free e-book called "IRIS Themes - Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights". This publication is available at: <http://www.obs.coe.int/documents/205595/2667238/IRIS+Themes+III+%28final+9+December+2013%29.pdf>

Committee of Ministers

European Convention on Access to Official Documents

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At the 1024bis Meeting of 27 November 2008, the Committee of Ministers adopted the Council of Europe Convention on Access to Official Documents. Existing instruments are Council Recommendation (2002) 2 on access to official documents and Recommendation No. R (81) 19 on access to information held by public authorities. The idea behind these instruments is that public access to government information is essential for the exercise of fundamental rights, that it enhances the transparency and accountability of the public sector and the informed participation by citizens in the democratic process.

The Parliamentary Assembly has voiced a number of substantial criticisms of the Draft convention, inter alia, that it provided for too many exceptions, applied to too few public bodies and did not establish a robust enough procedure. It advised that the draft be sent back to the Steering Committee for Human Rights (CDDH) for further consideration (Opinion No. 270 (2008)). The Council however pushed forward. The Convention will take effect three months after ten states have consented to be bound by it.

The Convention starts from the premise that all official documents are in principle public and should only be withheld in order to protect other rights and legitimate interests. The right of access pertains primarily to documents of public authorities with administrative functions: these include local, regional and national administration, but also the legislature, judicature and legal persons, at least as far as their administrative tasks are concerned. Contracting states are free to regard documents relating to all public activities of legislative bodies and judicial authorities as subject to the right of access and also to include natural or legal persons, insofar as they have public functions or are funded with public money.

Public bodies should make official documents available at their own initiative, as long at least as this is in the interests of transparency and the stimulation of efficiency in the public sector, or to encourage citizens' participation (Art. 10). Many national Freedom of Information Acts also require public bodies to be pro-active. Access on request is regulated in more detail (Arts 4-8). The request procedure has the following characteristics: anybody can make a request, and the applicant shall not be obliged to give reasons for the request. The public authority should make reasonable effort to help the applicant identify which document(s) to which he or she seeks access. If necessary, the applicant is to be referred to the public authority which holds the official document. Requests must be dealt with "promptly", but the Convention does not prescribe a time limit. A refusal must be reasoned. If the rights and interests that justify refusal apply, but are relevant to part of the document only, then the remainder must be released. If access is granted, the applicant is in principle entitled to decide the form of access (inspection, receiving a copy in a certain format, etc.). Any charges for copies may not exceed the costs of reproduction and delivery.

The Convention recognizes four types of refusals. First, access may be refused because the request remains too vague to determine to which document it relates (Art. 5(5)i). Second, a request may be refused because it is manifestly unreasonable (i.e., huge or repetitive bulk requests; Art. 5(5)ii). Third, partial access to a document may be refused, if it requires an unreasonable effort to produce a "clean" document or if the document becomes misleading or meaningless due to the omissions. Fourth and final, a request may be refused because one or more of the countervailing rights and interests of Art. 3(3) is at stake.

The Convention lists twelve broad classes of such rights and interests, ranging from national security to privacy, from commercial or other economic interests (whether public or private) to public safety. These categories are not the same as those found in, for example, Art. 10 ECHR,

and some are optional. But the types of limitation to access must meet similar criteria as the infringement of fundamental rights under the ECHR: they must be set down precisely in law, be necessary in a democratic society and be proportionate to the aim pursued. The test for disclosure is a two-pronged one (Art. 3(3)): if a listed right or interest is at stake, access may be refused if 1) the making public of the information would harm or is likely to harm said interest, and 2) there is no overriding public interest in disclosure.

Citizens must always be able to appeal (implicit) decisions on requests before a court or other independent and impartial body established by law. A fast and inexpensive review procedure must also be available, although it need not necessarily be before an independent or impartial body: reconsideration by the refusing public authority suffices.

- Council of Europe Convention on Access to Official Documents (Adopted by the Committee of Ministers on 27 November 2008 at the 1042bis meeting of the Ministers' Deputies)
<http://merlin.obs.coe.int/redirect.php?id=11573>

IRIS 2009-2/2

Adoption of Two Texts on Media and Criminal Proceedings

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In Europe, as in other continents, the question of media coverage of criminal proceedings is a constant subject of debate between those who advocate maximum freedom of information on such proceedings and those who, in contrast, believe that this freedom should be restricted on account of the right to be presumed innocent, the right to a fair trial and the right to privacy. Numerous examples of abuses of various kinds reported in recent years in different European countries, some of which have had dramatic consequences for the parties to such proceedings or their families, prove that this is a highly topical and complex subject that is universally relevant.

It was with these questions and concerns in mind that, on 10 July, the Committee of Ministers of the Council of Europe adopted a Recommendation to the governments of its member states on the provision of information through the media in relation to criminal proceedings. This text, the result of more than two years' work by the Steering Committee on the Mass Media (CDMM), lists a number of principles which public authorities (police services and judicial authorities) involved in criminal proceedings should implement, concerning, for example, access to courtrooms and judgments, in order that the media may report such proceedings to the public while respecting the rights of the parties involved.

The Recommendation was drafted in the light of the case-law of the European Court of Human Rights concerning Articles 6 (right to a fair trial), 8 (right to respect for private and family life) and 10 (freedom of expression and information) of the European Convention on Human Rights. It is complemented by a Declaration designed to remind the media and their professional organisations about certain principles that should govern their investigations and reporting of criminal proceedings. These principles concern, for example, respect for the dignity and security and the right to privacy of victims, suspects, accused persons and their families.

- Declaration on the provision of information through the media in relation to criminal proceedings (adopted by the Committee of Ministers on 10 July 2003 at the 848th meeting of the Ministers' Deputies)
<http://merlin.obs.coe.int/redirect.php?id=15870>

- Recommendation Rec(2003)13 of the Committee of Ministers to the member states on the provision of information through the media in relation to criminal proceedings (adopted by the Committee of Ministers on 10 July 2003 at the 848th meeting of the Ministers' Deputies)
<http://merlin.obs.coe.int/redirect.php?id=15872>

IRIS 2003-8/4

European Court of Human Rights

Youth Initiative for Human Rights v. Serbia

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In its judgment of 25 June 2013, the European Court of Human Rights has recognised more explicitly than ever before the right of access to documents held by public authorities, based on Article 10 of the Convention (right to freedom of expression and information). The judgment also emphasised the importance of NGOs acting in the public interest.

The case concerns an NGO, known as Youth Initiative for Human Rights, that is monitoring the implementation of transitional laws in Serbia with a view to ensuring respect for human rights, democracy and the rule of law. The applicant NGO requested the intelligence agency of Serbia to provide it with some factual information concerning the use of electronic surveillance measures used by that agency in 2005. The agency at first refused the request, relying on the statutory provision applicable to secret information. After an order by the Information Commissioner that the information at issue should be disclosed under the Serbian Freedom of Information Act 2004, the intelligence agency notified the applicant NGO that it did not hold the requested information. Youth Initiative for Human Rights complained in Strasbourg about the refusal to have access to the requested information held by the intelligence agency, notwithstanding a final and binding decision of the Information Commissioner in its favour.

The European Court is of the opinion that as Youth Initiative for Human Rights was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate, there has been an interference with its right to freedom of expression as guaranteed by Article 10 of the Convention. The Court recalls that the notion of "freedom to receive information" embraces a right of access to information. Although this freedom may be subject to restrictions that can justify certain interferences, the Court emphasises that such restrictions ought to be in accordance with domestic law. The Court is of the opinion that the refusal to provide access to public documents did not meet the criterion as being prescribed by law. It refers to the fact that the intelligence agency indeed informed the applicant NGO that it did not hold the information requested, but for the Court it is obvious that this "response is unpersuasive in view of the nature of that information (the number of people subjected to electronic surveillance by that agency in 2005) and the agency's initial response". The Court comes to the conclusion that the "obstinate reluctance of the intelligence agency of Serbia to comply with the order of the Information Commissioner" was in defiance of domestic law and tantamount to arbitrariness, and that accordingly there has been a violation of Article 10 of the Convention. It is interesting to note that the Court reiterates in robust terms that an NGO can play a role as important as that of the press in a democratic society: "when a non-governmental organisation is involved in matters of public interest, such as the present applicant, it is exercising a role as a public watchdog of similar importance to that of the press". Finally, as a measure under Article 46 of the Convention, the Court ordered the Serbian State to ensure, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of

the Convention, the intelligence agency of Serbia to provide the applicant NGO with the information requested.

- Judgment by the European Court of Human Rights (Second section), case of Youth Initiative for Human Rights v. Serbia, Appl. nr. 48135/06 of 25 June 2013
<http://merlin.obs.coe.int/redirect.php?id=16645>

IRIS 2013-8/1

Case of TASZ v. Hungary

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In April 2009, the European Court of Human Rights delivered an important judgment in which it recognised the right of access to official documents. The Court made it clear that, when public bodies hold information that is needed for public debate, the refusal to provide documents in this matter to those who are requesting access, is a violation of the right to freedom of expression and information guaranteed under Article 10 of the Convention. The case concerns a request by the *Társaság a Szabadságjogokért* (Hungarian Civil Liberties Union - TASZ) to Hungary's Constitutional Court to disclose a parliamentarian's complaint questioning the legality of new criminal legislation concerning drug-related offences. The Constitutional Court refused to release the information. As the Court found that the applicant was involved in the legitimate gathering of information on a matter of public importance and that the Constitutional Court's monopoly of information amounted to a form of censorship, it concluded that the interference with the applicant's rights was a violation of Article 10 of the Convention.

The European Court's judgment refers to 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. The Court refers to its consistent case law, in which it has recognised that the public has a right to receive information of general interest and that the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's "watchdogs", in the public debate on matters of legitimate public concern, including measures which merely make access to information more cumbersome. It is also underlined that the law cannot allow arbitrary restrictions, which may become a form of indirect censorship should the authorities create obstacles to the gathering of information, this by itself being an essential preparatory step in journalism and inherently a protected part of press freedom. The Court emphasised once more that the function of the press, including the creation of forums of public debate, is not limited to the media or professional journalists. Indeed, in the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The Court recognises the important contribution of civil society to the discussion of public affairs and categorised the applicant association, which is involved in human rights litigation, as a social "watchdog". The Court is of the opinion that, in these circumstances, the applicant's activities warrant similar Convention protection to that afforded to the press. Furthermore, given that the applicant's intention was to impart to the public the information gathered from the constitutional complaint in question, and thereby to contribute to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired.

It should be emphasised that the European Court's judgment is obviously a further step in the direction of the recognition by the Court of a right of access to public documents under Article 10 of the Convention, although the Court is still reluctant to affirm this explicitly. The Court recalls

that “Article 10 does not (...) confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual” and that “it is difficult to derive from the Convention a general right of access to administrative data and documents”. But the judgment also states that “the Court has recently advanced towards a broader interpretation of the notion of “freedom to receive information” (...) and thereby towards the recognition of a right of access to information”, referring to its decision in the case of *Sdruženi Jihočeské Matky v. Czech Republic* (ECHR 10 July 2006, Appl. No. 19101/03). The Court notes that “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”. In this case, the information sought by the applicant was ready and available and did not require the collection of any data by the government. Therefore, the Court considers that the state had an obligation not to impede the flow of information sought by the applicant.

- Judgment by the European Court of Human Rights (Second Section), case of *Társaság a Szabadságjogokért v. Hungary*, Application no. 37374/05 of 14 April 2009
<http://merlin.obs.coe.int/redirect.php?id=15402>

IRIS 2009-7/1

Case of *Tourancheau and July v. France* (affaire *Libération*)

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In 1996, the French newspaper *Libération* published an article focusing on a murder case in which adolescents were involved. The criminal investigation was still pending when the article was published and two suspects, a young man, B. and his girlfriend, A., had been under investigation. The article in *Libération*, written by Patricia Tourancheau, reproduced extracts from statements made by A. to the police and the investigating judge, and comments from B. contained in the case file. On the basis of section 38 of the Freedom of Press Act of 29 July 1881, criminal proceedings were brought against Tourancheau and against the editor of *Libération*, Serge July. Section 38 of the 1881 Press Act prohibits the publication of any document of the criminal proceedings until the day of the court hearing. Both the journalist and the editor were found guilty and were each ordered to pay a fine of FRF 10,000 (approximately EUR 1,525). Their conviction was upheld on appeal and by the French Supreme Court, although payment of the fine was suspended. In the meantime, A. had been sentenced to eight years' imprisonment for murder and B. had received a five-year prison sentence for failure to assist a person in danger.

In its judgment of 24 November 2005, the Strasbourg Court has come to the conclusion that the conviction of Tourancheau and July was not to be considered as a violation of Art. 10 of the Convention. The Court noted that section 38 of the 1881 Press Act defined the scope of the legal prohibition clearly and precisely, in terms of both content and duration, as it was designed to prohibit publication of any document relating to proceedings concerning serious crimes or other major offences until the day of the hearing. The fact that proceedings were not brought systematically on the basis of section 38 of the 1881 Act, the matter being left to the discretion of the public prosecutor's office, did not entitle the applicants to assume that they were in no danger of being prosecuted, since being professional journalists they were familiar with the law. They had therefore been in a reasonable position to foresee that the publication of extracts from the case file in the article might subject them to prosecution. In the Court's view, the reasons given by the French courts to justify the interference with the applicants'

right to freedom of expression had been “relevant and sufficient” for the purposes of Article 10 para. 2 of the Convention. The courts had stressed the damaging consequences of publication of the article for the protection of the reputation and rights of A. and B., for their right to be presumed innocent and for the authority and impartiality of the judiciary, referring to the possible impact of the article on the members of the jury. The Court took the view that the applicants’ interest in imparting information concerning the progress of criminal proceedings and the interest of the public in receiving such information, were not sufficient to prevail over the considerations referred to by the French courts. The European Court further considered that the penalties imposed on the applicants were not disproportionate to the legitimate aims pursued by the authorities. In those circumstances, the Court held that the applicants’ conviction had amounted to an interference with their right to freedom of expression which had been “necessary in a democratic society” in order to protect the reputation and rights of others and to maintain the authority and impartiality of the judiciary. It therefore held that there had been no violation of Article 10. The Cypriot, Bulgarian, Croatian and Greek judge formed the smallest possible majority (4/3 decision).

The judges Costa, Tulkens and Lorenzen (France, Belgium and Denmark) expressed a joint dissenting opinion, in which they argued why the conviction of the applicants is to be considered a clear violation of the freedom of expression. Neither the breach of the presumption of innocence, nor the possible impact on the members of the jury are considered pertinent arguments in this case in order to legitimise the interference in the applicants’ freedom of expression. According to the joint dissenting opinion, journalists must be able to freely report and comment on the functioning of the criminal justice system, as a basic principle enshrined in the Recommendation of the Committee of Ministers 2003 (13) on the provision of information through the media in relation to criminal proceedings. Referring to the concrete elements reported in the newspaper’s article and its context, the dissenting judges conclude that there is no reasonable and proportional relation between the imposed restrictions and the legitimate aim pursued. According to the dissenting judges Article 10 of the Convention has been violated.

- *Arrêt de la Cour européenne des Droits de l’Homme (première section), affaire Tourancheau et July c. France, requête n° 53886/00 du 24 novembre 2005* (Judgment by the European Court of Human Rights (First Section), case of Tourancheau and July v. France, Application no. 53886/00 of 24 November 2005)

<http://merlin.obs.coe.int/redirect.php?id=9237>

IRIS 2006-2/2

Cases of B. and P. v. the United Kingdom

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In the cases of B. and P. v. the United Kingdom, the applicants complained that they had been barred from divulging information about the proceedings on custody rights over their children. The judge dealing with the case had ordered that no documents used in the proceedings should be disclosed outside the court. B. had also been warned by the judge that any publication of information obtained in the context of the proceedings would amount to contempt of court. As the case was not heard in public and the judgments were not publicly pronounced, B. and P. complained in Strasbourg that these restricting measures on the publicity of their court case ought to have been considered to be in breach of Article 6 § 1 (right to a fair hearing) and Article 10 (freedom of expression) of the European Convention on Human Rights.

In a judgment of 24 April 2001, the European Court of Human Rights (Third Section) noted that the proceedings in question concerned the residence of each man's son following the parents' divorce or separation, which were prime examples of cases where the exclusion of the press and public might be justified to protect the privacy of the child and parties and to avoid prejudicing the interests of justice. Concerning the publication of the judgments in question, the Court observed that anyone who could establish an interest was able to consult and obtain a copy of the full text of the judgments in child residence cases, while some of these judgments were routinely published, thus enabling the public to study the manner in which the courts generally approach such cases and the principles applied in deciding them. Under these circumstances, the Court reached the conclusion that there had been no violation of Article 6 § 1, either regarding the applicants' complaints about the public hearing or the public pronouncement of the judgments. Finally, the Court held that it was not necessary to examine separately the applicants' complaint under Article 10 of the Convention, thereby implying that the Court did not find a violation of Article 10 of the Convention either.

- Judgment by the European Court of Human Rights (Third Section), Cases of B. and P. v. the United Kingdom, Application nos. 36337/97 and 35974/97 of 24 April 2001
<http://merlin.obs.coe.int/redirect.php?id=32>

IRIS 2001-6/1

Finding against France on Violation of Article 10

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Almost two years after the *Canard Enchaîné* case, the European Court of Human Rights has again found that France has violated the principles contained in Article 10 of the Human Rights Convention.

The case concerned the finding against the director of a newspaper and a journalist who had reported on the proceedings brought by a company that managed hostels for immigrant workers against one of its former directors. It was taken on the basis of Article 2 of the Act of 2 July 1931, which prohibits the publication before the Courts reach a verdict, of any information concerning proceedings instigated by an individual. The Court of Appeal in Paris, to which the case had been referred, had considered that the ban contained in the 1931 act was compatible with Article 10 of the Convention inasmuch as it was aimed at guaranteeing the presumption of innocence and therefore fell within the scope of the restrictions on freedom of expression authorised by the Act.

As the Court of Cassation had rejected the appeal lodged against this decision, the plaintiffs took the case to the European Court of Human Rights ("Court"). In its decision of 3 October 2000, the Court recalled firstly that journalists writing articles on current criminal proceedings must respect the rights of the parties involved. In considering whether interference with the course of justice was involved, the Court noted that the disputed ban - which was absolute and general, covering any type of information - only concerned proceedings instigated by an individual and not those instigated by the Public Prosecutor or on the basis of an ordinary complaint. The judges expressed surprise at this difference of treatment, which did not appear to be based on any objective reason, since the ban prevents the press informing the public of facts which may be of public interest (here, the case brought against political figures and their allegedly fraudulent acts in managing a public-sector company).

The Court held that there were other mechanisms for protecting secrecy during investigation and enquiry procedures, such as Articles 11 and 91 of the Code of Criminal Procedure and in

particular Article 9-1 of the Civil Code, which provides that everyone is entitled to the benefit of the presumption of innocence. In addition, the latter provision states that in the event of a person against whom a charge has been brought and proceedings instigated by an individual being presented publicly, before any verdict is passed, as being guilty of the facts being investigated or enquired into by the courts, the judge may, even in urgent matters, order the insertion in the publication concerned of an announcement putting a stop to the infringement of the presumption of innocence.

This range of provisions, which the Court found sufficient, made the total ban contained in the Act of 2 July 1931 unnecessary; France had therefore been found in violation of Article 10 since the ban was not proportionate to the pursuit of the legitimate aims intended.

- *Arrêt de la Cour européenne des Droits de l'Homme, affaire Du Roy et Malaurie c. France, n° 34000/96, du 3 octobre 2000* (Decision no.34000/96 of 3 October 2000 of the European Court of Human Rights in the case of Du Roy and Malaurie v. France)
<http://merlin.obs.coe.int/redirect.php?id=9237>

IRIS 2000-9/2

Recent Judgments on the Freedom of Expression and Information and on the Right of a Fair Trial and Media Coverage of a Court Case

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[...]

It is interesting to note that the media coverage of, and the extremely high levels of press and public interest in, a court case can be regarded as relevant elements in evaluating whether someone is denied a fair hearing in breach of Article 6 § 1 of the Convention. In two judgments of 16 December 1999 in the cases *T. v United Kingdom* and *V. v United Kingdom* the Court came to the conclusion that the two applicants - who were both convicted for the abduction and murder of a two-year-old boy (James Bulger) - were not guaranteed sufficiently the right of a fair trial, taking into account that both were only eleven years old at the time of the trial before the Crown Court. According to the European Court, in respect of a young child charged with a grave offence attracting high levels of media and public interest, it is necessary to conduct the hearing in such a way as to reduce as far as possible the defendant's feelings of intimidation and inhibition. The Court *inter alia* took into consideration that the trial generated extremely high levels of press and public interest, to the extent that the judge in his summing-up referred to the problems caused to witnesses by the blaze of publicity and asked the jury to take this into account when assessing the evidence. In such circumstances the applicants were unable to participate effectively in the criminal proceedings against them. This led the European Court to the conclusion that in *casu* the applicants were denied a fair hearing in breach of Article 6 § 1 of the Convention.

- *T. v. United Kingdom and V. v. United Kingdom.*

IRIS 2000-1/2

Media Reporting on Court Proceedings and the pan-European Human Rights Framework

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The concept of “openness in court proceedings” and the right to receive information on matters of public concern, including the course of justice, deserve to be examined with particular reference to the relevant articles of the European Convention on Human Rights (“ECHR”), the case law of the European Court of Human Rights (“the Court”) and the most pertinent legal instruments developed by the Council of Europe for its member states, in particular the principles set out in the appendix of the Committee of Ministers’ Recommendation (2003)13 on the provision of information through the media in relation to criminal proceedings (“Recommendation (2003)13”).¹

Indeed, these pan-European principles underpin the media’s ability to fully inform the public on court proceedings, including practical issues such as access to court rooms, access to information, publicity of court decisions, right to report on court proceedings, etc. Notably, the Court has, in its consistent case law, recognised a concept of “public scrutiny” of trials stating that “the public character of proceedings before the judicial bodies referred to in Article 6 (1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 (1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention”.²

1) Recommendation Rec (2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings. The text of the Recommendation and its appendix are available at: <https://wcd.coe.int/ViewDoc.jsp?id=51365>. The Recommendation is an instrument of political commitment and not a legally enforceable instrument.

2) *Sutter v. Switzerland*, no. 8209/78, 22 February 1984, § 26. See also, for example, *Pretto and others v. Italy*, no. 7984/77, 8 December 1983, § 21; see *Diennet v. France*, no18160/9, 26 September 1995, §33; see also *Martinie v. France*, no. 58675/00, 12 April 2006, §39.

This article attempts to bring together and examine the general European standards cited above that underpin the regulatory framework enabling media to report fully on court proceedings. To organise this topic, the report will first briefly introduce the fundamental principles at stake in accordance with the rights guaranteed under the ECHR. The second part of the report will further explore specific concerns arising out of the reporting by the media of criminal proceedings, which proceedings have proved to generate, in some prominent and famous cases, a great deal of media interest. The case law cited and references to legal provisions are selective.

1. General principles

Informing the public on court proceedings is a journalistic activity that is governed by fundamental rights, namely the right to freedom of expression including the right to receive and impart information and ideas enshrined in Article 10 ECHR, the positive obligations of the state parties under Article 6 ECHR to ensure the fair administration of justice and the need to protect the privacy of the parties in court proceedings in accordance with Article 8 ECHR. With an eye to the European Court of Human Rights case law and other relevant Council of Europe instruments, this section distils some key principles that emerge and examines their scope.

1.1. The requirement of publicity

Under Article 6.1 of the European Convention on Human Rights, the state parties must guarantee that “everyone is entitled to a fair and public hearing” and that “the judgment is pronounced publicly”. Accordingly, the Convention establishes two key concepts which aim at contributing to fair trials through public scrutiny, i.e. hearings in public and the public pronouncement of judgments.

1.1.1. A public hearing before the national courts

The Court has considered, in relation to the failure to hold public hearings in the disciplinary proceedings before the Medical Association’s National Council, in the case *Diennet v. France* that the “holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6”.³ This principle implies the holding of public hearings before a relevant court.

However, the Convention does not make this principle an absolute one. Firstly, the Court acknowledged that this requirement shall be interpreted in view of the “special features of the proceedings viewed as a whole”⁴ and also of the circumstances of the case.

For example, in the *Martinie v. France* case, where the applicant had been unable to request a public hearing before the French Court of Audit because “the law did not provide the parties with an opportunity to submit such a request, either at first instance before the regional audit office or on appeal before the Court of Audit”, the Court recalled that “holding proceedings, whether wholly or partly, in camera must be strictly required by the circumstances of the case”. In this case, the Court found a violation of Article 6, but reiterated that “exceptional circumstances relating to the nature of the issues to be decided by the court in the proceedings concerned may justify dispensing with a public hearing.”⁵

More importantly, the public nature of hearings is subject to exceptions expressly provided in Article 6.1 of the Convention. The article states that “the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require,

3) *Diennet v. France* (Violation of Art. 6.1 (publicly)), 26 September 1995, §33.

4) *Axen v. Germany*, no. 8273/78, 8 December 1983, §28.

5) *Martinie v. France*, §41 and 44.

or to the extent strictly necessary in the opinion of the European Court in special circumstances where publicity would prejudice the interests of justice”.

In several cases, the Court had to assess whether a situation fell within the scope of the restrictions provided for in the Convention.

For example, in the case *P and B v. United Kingdom*, the Court accepted the absence of public hearings in child custody proceedings. The Court considered that “such proceedings are prime examples of cases where the exclusion of the press and public may be justified in order to protect the privacy of the child and parties and to avoid prejudicing the interests of justice”.⁶

Also, in the same case, the Court recalled that, even in a criminal-law context, “it can be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice”.⁷

1.1.2. *Public pronouncement of judgments and availability of court decisions for the public at large*

The wording of Article 6.1 of the Convention suggests that the judgment must be read out in open court. However, the Court observed that in order to determine which forms of publicity are compatible with this requirement, it shall be interpreted in view of the circumstances of the case and with reference to the purpose of Article 6, i.e. to ensure a fair trial.⁸

Even though Article 6.1 does not mention any exceptions to this requirement, it appears from the case *B and P v. United Kingdom* cited above that the Court is likely to adopt exceptions to the public delivery of judgments which fall within the scope of the restrictions applied to public hearings provided for in the Convention, e.g. the interest of juveniles.⁹

Further, the principle of publicity of judgments entails a practical issue that is the availability of court decisions to the public at large. In that respect, it does not seem to result from the text of the Convention that judgments shall be published in an official bulletin. However, the Court in *Sutter*¹⁰ recognised the importance of publication in official collections as it opened jurisprudence to public scrutiny to a certain extent. In *B and P v. United Kingdom*, the Court outlined further the importance of publication of court decisions “enabling the public to study the manner in which the courts generally approach such cases and the principles applied in deciding them”.¹¹

It is worth noting that, in case of criminal proceedings, principle 15 of Recommendation (2003)13 states that “[j]ournalists should be allowed, on a non-discriminatory basis, to make or receive copies of publicly pronounced judgments. They should have the possibility to disseminate or communicate these judgments to the public”.

1.2. Access to information

Further to the question of the publication and availability of court decisions discussed briefly above, it is worth turning one’s attention to the broader issue of access by the public and the media to information held by public bodies, which would in principle include information held by judicial authorities.

6) *P and B v. United Kingdom*, Application nos. 36337/97 and 35974/97, 24 April 2001, §38. For more details, see Voorhoof D., “Cases of B. and P. v. the United Kingdom”, IRIS 2001-6/1, European Audiovisual Observatory, 2001, available at: <http://merlin.obs.coe.int/iris/2001/6/article1.en.html>

7) *P and B v. United Kingdom*, §37; see also *Osinger v. Austria*, §45.

8) *Pretto and others v. Italy*, §26, see also *B and P v. UK* §45.

9) *P and B v. United Kingdom*, §46.

10) *Sutter v. Switzerland*, §34.

11) *P and B v. United Kingdom*, §47.

In its recent case law, the Court has adopted a broader definition of the notion of “freedom to receive information” (Article 10.1 ECHR) and accordingly, moved towards the recognition of a right of access to information on matter of public interest including records held by a public body.

In *Társaság a Szabadságjogokért v. Hungary* the applicant, a human rights non-governmental organisation, alleged that the decisions of the Hungarian courts denying access to the details of a parliamentarian’s complaint pending before the Constitutional Court had amounted to a breach of its right to have access to information of public interest. The European Court found that the authorities’ creation of an administrative obstacle to the legitimate gathering of information on a matter of public importance by the NGO amounted to a violation of Article 10 of the Convention. To be specific, “the Constitutional Court’s monopoly of information amounted to a form of censorship. Furthermore, given that the applicant’s intention was to impart to the public the information gathered from the constitutional complaint in question... its right to impart information was clearly impaired.”¹² Further to this, in 2013, in *Youth initiative for Human Rights v. Serbia*,¹³ where a non-governmental organisation complained about the refusal of the Intelligence agency of Serbia to provide factual information concerning the use of electronic surveillance measures, the Court held that there had been an interference with the NGO’s right to freedom of expression. Interestingly, the Court observed “that the notion of ‘freedom to receive information’ embraces a right of access to information.”

Further, the adoption of the European Convention on access to official documents (ETS 205)¹⁴ introduces positive obligations for the state parties to provide relevant information to the public including the media. Adopted in June 2009, this Convention establishes a right to access official documents and a right to request such access without having to prove a legitimate interest (Article 4). However, it acknowledges possible limitations for “privacy and other private legitimate interests” and also the “equality of parties in court proceedings and the effective administration of justice”. Lastly, the Convention does not make any distinction between the media and other individuals when it comes to exercising this right to access.¹⁵

In addition to this, the appendix to Recommendation (2003)¹³ establishes that “[w]hen journalists have lawfully obtained information in the context of on-going criminal proceedings from judicial authorities or police services, those authorities and services should make available such information, without discrimination, to all journalists who make or have made the same request.” (Principle 4)

1.3. Restrictions to the exercise of freedom of expression in relation to court proceedings

Article 10.2 ECHR expressly provides that the exercise of freedom of expression can be limited in order to protect the reputation or rights of others or to maintain the authority and impartiality of the judiciary.

12) *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14 April 2009, §28. For more details, see Voorhoof D., “Case of TASZ v. Hungary”, IRIS 2009-7/1, European Audiovisual Observatory, 2009, available at: <http://merlin.obs.coe.int/iris/2009/7/article1.en.html>

13) *Youth initiative for Human Rights v. Serbia*, no. 48135/06, 25 June 2013. For more details, see Voorhoof D., “Youth Initiative for Human Rights v. Serbia” IRIS 2013-8/1 European Audiovisual Observatory, 2013, available at: <http://merlin.obs.coe.int/iris/2013/8/article1>

14) Council of Europe Convention on Access to Official Documents adopted on 18 June 2009, not yet in force at the date of publication of this report, available at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/205.htm>

15) Explanatory report of the Council of Europe Convention on Access to Official Documents, Section 2, Paragraph 1, available at: <http://conventions.coe.int/Treaty/EN/Reports/Html/205.htm>

In this context, the Court usually conducts a proportionality test (“necessity in a democratic society”) to determine whether the “interference” complained of corresponded to a “pressing social need”, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient.¹⁶

For example, the Court observed, in *Worm v. Austria*, that “[r]estrictions on freedom of expression permitted by the second paragraph of Article 10 ‘for maintaining the authority and impartiality of the judiciary’ do not entitle States to restrict all forms of public discussion on matters pending before the courts. There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst the courts are the forum for the determination of a person’s guilt or innocence on a criminal charge, this does not mean that there can be no prior or contemporaneous discussion of the subject matter of criminal trials elsewhere, be it in specialised journals, in the general press or amongst the public at large”.¹⁷

2. The media’s ability to report on criminal proceedings

Some prominent criminal cases dealt with by national courts can generate a great deal of media interest. In the light of the fundamental principles set out in the first part of this report, a number of legal issues have to be taken into account, for example the protection of secrecy of investigations, the protection of the presumption of innocence, the recordings of trials, prejudices to the interests of justice, the protection of witnesses and sources, the accuracy of information collected and disseminated, the position of the victim etc. With an eye to the European Court of Human Rights case law and to Recommendation (2003)13, this section looks at some aspects of media’s ability to report on criminal proceedings, where the right to freedom of these expression must be balanced with other rights.

2.1. Information about the hearing and access of the press to courtrooms

Under the ECHR, the Court considered in the *Riepan v. Austria* case that “a trial complies with the requirement of publicity only if the public is able to obtain information about its date and place and if this place is easily accessible to the public.” In this case, where the applicant did not have a public hearing, as the trial was held in a prison, the Court observed that “the holding of a trial outside a regular courtroom, in particular in a place like a prison, to which the general public in principle has no access, presents a serious obstacle to its public character. In such a case, the State is under an obligation to take compensatory measures in order to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access.”¹⁸

Further, in Principle 15 of Recommendation (2003)13, the Committee of Ministers recommends that announcements of scheduled hearings, indictments or charges “should be made available to journalists upon simple request by the competent authorities in due time, unless impracticable.”

As for the important issue of admission of journalists and their access to the courtrooms, Recommendation (2003)13 (Principle 12 and 13) prescribes that “[j]ournalists should be admitted to public court hearings and public pronouncements of judgements without discrimination and without prior accreditation requirements. They should not be excluded from court hearings, unless and as far as the public is excluded in accordance with Article 6 of the Convention”. The Recommendation further adds that “the competent authorities should, unless it is clearly impracticable, provide in courtrooms a number of seats for journalists which is sufficient in accordance with the demand, without excluding the presence of the public as such.”

16) *Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, §62.

17) *Worm v. Austria*, 29 August 1997, Reports of Judgments and Decisions 1997-V, §50.

18) *Riepan v. Austria*, no. 35115/97, 14 February 2001, §29.

2.2. Live reporting or recordings by the media

As provided for in Recommendation (2003)¹³, live reporting or recordings by the media in courtrooms during criminal proceedings should not be authorised. However, the Recommendation provides for some exceptions to this general rule, i.e. “where expressly permitted by law or the competent judicial authorities” and “where it does not bear a serious risk of undue influence on victims, witnesses, parties to criminal proceedings, juries or judges.” (Principle 14)

In an inadmissibility decision¹⁹ concerning a complaint under Article 10 ECHR about restrictions on media coverage of a major criminal trial in Norway, the Court stated that “depending on the circumstances, live broadcasting of sound and pictures from a court hearing room may alter its characteristics, generate additional pressure on those involved in the trial and, even, unduly influence the manner in which they behave and hence prejudice the fair administration of justice.” In this case, the applicant had been prohibited from broadcasting via radio the lawyer’s opening statements and the court verdict. The Court held that “the national authorities, in particular the courts ... are better placed than the European Court in assessing whether live broadcasting in a given case may be prejudicial to the fair administration of justice.”

2.3. Right to presumption of innocence

Under the ECHR, presumption of innocence is a fundamental component of the right to a fair trial.²⁰ Accordingly, reporting on ongoing criminal proceedings should not prejudice this fundamental right of the suspect or accused. Principle 2 of the Recommendation also includes such a requirement.²¹

For example, in *Du Roy and Malaurie v. France*,²² the Court recalled that “journalists reporting on criminal proceedings currently taking place must, admittedly, ensure that they do not overstep the bounds imposed in the interests of the proper administration of justice and that they respect the accused’s right to be presumed innocent.”

Furthermore, in *Tourancheau and July v. France*,²³ the applicants (journalists) had been condemned by the national courts for having published an article that reproduced extracts from statements made in the context of a criminal investigation before the holding of the court hearing. The national courts had stressed in particular the damaging consequences of publication of the article for the protection of the reputation and rights of the two young suspects and for their right to be presumed innocent. The Court therefore held that there had been no violation of Article 10.2.

2.4. Protection of privacy

In *Egeland and Hanseid v. Norway*,²⁴ the Court assessed restrictions on the publication by the press of photographs taken of one of the accused in a famous criminal case in Norway²⁵ without her consent outside the court house while leaving, shortly after having attended the district court’s

19) *P4 Radio Hele Norge ASA v. Norway*, no. 76682/01, 6 May 2003 (Inadmissibility decision)

20) Article 6.2 ECHR states that “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”.

21) “Respect for the principle of the presumption of innocence is an integral part of the right to a fair trial. Accordingly, opinions and information relating to on-going criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused.”

22) *Du Roy and Malaurie v. France*, no. 34000/96, 3 January 2001.

23) *Tourancheau and July v. France*, no. 53886/00, 24 November 2005. For more details, see Voorhoof D., “Case of *Tourancheau and July v. France* (affaire Libération)”, IRIS 2006-2/2, European Audiovisual Observatory, 2006, available at: <http://merlin.obs.coe.int/iris/2006/2/article2.en.html>

24) *Egeland and Hanseid v. Norway*, no. 34438/04, 16 July 2009.

25) See also *op cit.* *P4 Radio Hele Norge ASA v. Norway*.

delivery of the judgment. The Court found that under the ECHR “by prohibiting the taking and publication of the photographs of B on the way from the court building to an awaiting police car, the respondent State acted within its margin of appreciation in assessing the need to protect her privacy and those of fair administration of justice. [The Court] is satisfied that the restrictions on the applicant editors’ right to freedom of expression resulting from the Supreme Court’s judgment of 23 March 2003 was supported by reasons that were relevant and sufficient, and was proportionate to the legitimate aims pursued.”²⁶

Protection of privacy in the context of ongoing criminal proceedings is also one important aspect covered by the Recommendation, which states that “the provision of information about suspects, accused or convicted persons or other parties to criminal proceedings should respect their right to protection of privacy in accordance with Article 8 of the Convention.” Special emphasis is given to the need for protection of parties who are minors or vulnerable persons, as well as to victims and their families (Principle 8).

Conclusion

The above leads us to acknowledge that while it is the responsibility of the national courts and state authorities to ensure the fair administration of justice, the media can contribute to this aim by informing the public in an accurate manner on the course of justice. However, this aspect of journalistic activity has to be exercised taking into account the scope and boundaries of the rights of others. The European Court plays an important role in balancing the interests and rights at stake, always in view of the circumstances of the case and the nature of the proceedings.

26) *Egeland and Hanseid v. Norway*, §65.



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