Bulletin No 1

Latest developments in the case-law of the European Court of Human Rights on freedom of expression

Freedom of expression and freedom of the media

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Introduction

The Bulletin is prepared within the framework of the joint initiative of the European Union and the Council of Europe "Horizontal Facility for the Western Balkans and Turkey 2019-2022" and its Action on "**Freedom of expression and freedom of the media in South-East Europe (JUFREX)**".

In order to continue cooperation with the legal professionals, JUFREX certified trainers and contribute to further improvement of knowledge in the field of freedom of expression and freedom of the media, we have prepared this Bulletin as an additional tool for sharing information on new trends and developments in the case-law of the European Court of Human Rights (ECtHR, Court).

The Bulletin in front of you is, in fact, just a new format of the continuation of the good practice we have jointly established in previous years. We had analysed and discussed some new standards and interesting cases during the JUFREX 1 closing conference, held in April 2019, in Sarajevo. With this Bulletin we would like to provide you with some information on recent ECtHR judgments and relating reasoning.

In the analysed period of time (April 2019-July 2020) the European Court of Human Rights delivered a number of judgments advancing freedom of expression standards. The Court delivered a number of judgments in different areas of art. 10 of the European Convention of Human Rights, which elaborate or clarify a number of already set standards in the field of access to information, access to public institutions, freedom of expression online, consumer boycott (symbolic speech) and electoral campaigning. The ECtHR also had the chance to widen the limits of protected speech, based on cases concerning erotic content or religious hate speech. In the first part of this Bulletin you will be provided with a short description of selected cases, in the second part, an in depth analysis of three crucial cases, would be provided.

Review of most important freedom of expression cases

Studio Monitori and Others v. Georgia, judgment of 30 January 2020, application no. 44920/09 and 8942/10

Facts of the case

There were three applicants in the case of Studio Monitori and others v. Georgia. The first applicant is an NGO established for conducting journalistic investigations into matters of public interest. The second applicant is a journalist and one of the NGO's founding members. In 2007 the second applicant, acting on behalf of the first applicant, asked the registry of the Khashuri District Court to give her access to a case file concerning an unrelated criminal case brought against a certain T.E, and in which he had been convicted. She did not give any reasons for her request and briefly indicated that she intended to photocopy and photograph the criminal case material stored in the archives of the court registry. The court registry declined the second applicant's request. The second applicant lodged a court action against the registry's decision, requesting its annulment. The Borjomi District Court dismissed the second applicant's action as ill-founded and confirmed that the court registry's disputed decision was based on a correct interpretation of the law. The second applicant appealed. At the hearing before the Tbilisi Court of Appeal dismissed the applicant's claim and upheld the lower court's judgment. Later, the Supreme Court of Georgia declared the applicant's claim inadmissible and terminated the proceedings.

The third applicant was a practicing lawyer in Georgia. He was convicted of fraud for stealing money entrusted to him by a client to secure bail in criminal proceedings. While still in prison, the applicant requested a copy of all the court orders concerning the imposition of pre-trial preventive measures in six distinct and unrelated criminal cases. He did not specify why he was interested in that particular information. The registry of the Tbilisi City Court sent the third applicant a copy of the operative parts of the relevant court orders, stating that, according to the criminal procedure code, only the operative parts of detention orders could be disclosed. The third applicant brought a court action against the registry of the Tbilisi City Court. The Tbilisi Court of Appeal dismissed the third applicant's action as ill-founded.

Subsequently, all three applicants applied to the ECtHR, alleging that their right to freedom of expression under Article 10 ECHR had been violated by the denial of access to the information sought.

Court's reasoning

The Court found no violation of freedom of expression when Georgian authorities refused to disclose criminal case files to an NGO and its journalist, as the latter did not specify the purpose of the information request. Moreover, the Court held that since a journalist could proceed and finalize an investigation, without the denied information, the information in question was not instrumental for the effective exercise of her freedom-of-expression rights. Concerning the second application, by a lawyer unconnected

to the first two applicants, the Strasbourg Court held that the applicant was neither journalist nor public watchdog and thus, while requesting state-held information, he could not enjoy protection under article 10 of the Convention.

The most important consequence of the judgment is that NGOs, journalists or other public watchdogs requesting access to public documents have to motivate and clarify that access to the documents they are applying for is instrumental for their journalistic reporting and that the requested documents contain information of public interest. If these conditions are not fulfilled, article 10 ECHR does not cover a right of access to information, which leaves the national authorities the discretionary power to determine at domestic level the scope and limits of the right of access to public documents, without scrutiny by the ECtHR.

The case of Studio Monitori and Others v. Georgia is one of the cases following the judgment of the Grand Chamber in Magyar Helsinki Bizottság v. Hungary (judgment of 8 November 2016, application no. 18030/11) to test the limits of the right of access to public documents and the applicability of article 10 ECHR (Bubon v. Russia, judgment of 7 February 2017, application no. 63898/09 and Gennadiy Vladimirovich Tokarev v. Ukraine, judgment of 21 January 2020, application no. 44252/13).

Mandli and others v. Hungary, judgment of 26 May 2020, application no. 63164/16

Facts of the case

In 2016, a number of Hungarian journalists received letters from the Hungarian Chief Press Officer of Parliament informing them that their accreditation as journalists had been suspended. These journalists were banned from Parliament for an indefinite period of time because they had previously refused to leave certain parts of the premises where they were not authorised to film. The journalists had accessed this part of the premises to ask MPs questions because they had been unable to approach MPs in the designated area.

Court's reasoning

The Court found in particular that the applicants, journalists working for various media outlets, had been reporting on a matter of public interest – alleged illicit payments linked to the National Bank. Their accreditation to work in parliament had been suspended after they had tried to interview deputies outside the designated areas for such work.

While acknowledging the right of parliaments to regulate conduct on their premises, the Court found that the applicants had had no mechanism to appeal against the suspension of their accreditation. The sanction against them had thus not been accompanied by sufficient safeguards, resulting in a breach of the Convention.

The judgment is a further development of the case Selmani & others v. the former Republic of Macedonia (judgment of 9 February 2017, application no. 25147/09) concerning the forcible removal of journalists from the parliament during protests.

Szurovecz v. Hungary, judgment of 8 October 2019, application no. 15428/16

Facts of the case

The applicant is a journalist at a Hungarian online news portal who wanted to cover the activities of a human rights NGO in a reception centre for asylum-seekers and refugees during the "the refugee crisis" in May 2015. The applicant requested permission from the Office of Immigration and Nationality (OIN) to enter different reception centers, but the requests were rejected based on the protection of the security and the right to privacy of asylum-seekers.

The journalist challenged the refusal in a judicial review procedure, but the Budapest administrative and labor court concluded that the OIN's decision was not an administrative act, therefore no judicial remedy was available in the case.

Court's reasoning

The ECtHR observed that the domestic authorities had not given sufficient consideration to whether the refusal of permission to access and conduct journalistic research inside the reception centre, for reasons concerning the private life and security of asylum-seekers, had been effectively necessary in practice. The ECtHR emphasized that newsgathering, including first-hand observation, is an essential part of press freedom. It found that the authorities had failed to properly consider the journalistic purpose and public interest in reporting on Government management of the refugee crisis. The Court concluded that the absence of any real balancing of the interests in the issue by the domestic authorities constituted an absolute refusal which failed to satisfy the requirements of proportionality under article 10 of the Convention. Consequently, the Court found a violation of the applicant's freedom of expression.

Baldassi and others v. France, judgment of 11 July 2020, application no. 15271/16

Facts of the case

The applicants are eleven members of the 'Palestine 68 Collective', a French organization supporting the Boycott, Divestment, Sanctions (BDS) movement. The movement was founded in 2005 as a response from Palestinian non-governmental organizations to the Advisory Opinion on the Legality of Israel's Construction of a Wall delivered by the International Court of Justice (ICJ) the year before. On September 2009 and May 2010, the applicants took part in an action inside a supermarket, where they placed products which they deemed to be of Israeli origin in trolleys and called for a boycott. Consequently they were summoned by the Colmar public prosecutor to appear before the Mulhouse Criminal Court for incitement to discrimination under section 24 (8) of the Law of 29 July 1881. While the first instance court acquitted the applicants on December 2011, the Colmar Court of Appeal convicted them on November 2013. The applicants appealed the decision before the Court of Cassation for violation of articles 7 and 10 of the ECHR, but the Court of Cassation confirmed the decision of the Appeal Court.

Court's reasoning

The ECtHR found that there had been a violation of activists' freedom of expression when national courts convicted them of incitement to economic discrimination for calling for a boycott of Israeli goods. The Court recognized that a boycott is a means of expressing protesting or political opinions on matters of public interest, combined with a call for differential treatment. While discrimination is a form of intolerance justifying a legitimate restriction of freedom of expression under article 10(2) of the European Convention, the Court clarified that inciting to treat differently is not the same as inciting to discriminate. Further, the applicants were not convicted of making racist or anti-Semitic statements or for having incited hatred or violence. The Court concluded that the French courts did not demonstrate that the conviction of the applicants was necessary in a democratic society to achieve the legitimate aim of protecting others, and therefore found a violation of article 10 of the European Convention on Human Rights.

The case is a further development of boycott and protests with the use of symbolic speech, from case Willem v. France, judgment of 16 July 2009, application no. 10883/05 and further Mătăsaru v. the Republic of Moldova, judgment of 15 January 2019, application no. 69714/16 and 71685/16.

Brzeziński v. Poland,
judgment of 25 July 2019, application no. 47542/07

Facts of the case

In October 2006, during a political campaign for election to municipal and district councils and regional assemblies, Zenon Brzezinski was standing for the post of municipal councillor. In a brochure in which the public was called to vote for the members of his electoral group, Brzezinski criticised the way in which the municipality was run. These criticisms mainly concerned the mayor and the members of the municipal council. Brzezinski implied that the members of the local council had concluded a form of agreement, with the sole aim of taking advantage of the posts that they held. The mayor and a local politician who were targeted in the brochure sued Brzezinski, applying for an injunction to prevent the dissemination of the brochure and obliging its author to rectify the incorrect information and offer a public apology. On the morning of 27 October 2006, the applicant was summoned by telephone to a hearing scheduled for 1.30 p.m. on the same date at the Częstochowa Regional Court. The applicant did not attend the hearing. By a decision of the same date, the court barred Brzezinski from continuing to distribute his brochure and ordered him to apologise and to correct the inexact information contained therein. It also ordered him to pay a sum to the charitable organisation and to the complainants for costs incurred. The court noted that the applicant had implied that fraud had been committed in the allocation of public grants, although, in the findings of the court, these facts had not been established. It found that the allegations in the brochure were 'untrue', 'malicious' and 'exceeded the permissible forms of electoral propaganda'. The regional court's judgment was later upheld by the court of appeal.

Court's reasoning

The Court noted that the contested statements had been made in the context of a debate on issues which were important for the local community. It held that the language used in the brochure had remained within the limits of admissible exaggeration or provocation, having regard to the ordinary tone and register of the political debate at local level.

Furthermore, in addition to the ban on continuing to publish the brochure, the applicant had been ordered to apologise and to rectify the comments that were held to be incorrect, by having a statement published on the front page of two local newspapers. He had also been ordered to pay a sum to a charitable organisation. In consequence, the Court considered that the applicant had been subjected to a penalty that could have an inhibiting effect, although he had been taking part in a political debate.

The judgment is a confirmation of the well-established case law concerning wider protection of political speech, resulting from judgments such as Kwiecień v. Poland, judgment of 9 January 2007, application no. 51744/99 and Kita v. Poland, judgment of 8 July 2008, application no. 57659/00.

Pryanishnikov v. Russia,
judgment of 10 September 2019, application no. 25047/05

Facts of the case

Sergey Viktorovich Pryanishnikov, a Russian national, challenged the refusal by domestic courts to grant him a film reproduction license because he was suspected of producing or distributing pornography. The applicant is the producer of erotic films and owns the copyright to over 1,500 such films. He applied to the Russian Ministry of Press, Broadcasting and Mass Media in 2003 for a film reproduction license and it was denied because the Ministry claimed that Pryan-

ishnikov was "involved in investigative measures concerning the illegal production, advertising and distribution of erotic and pornographic material and films," which is an offense under the Russian Criminal Code. The applicant challenged the decision in the Russian Commercial Court of Moscow, Appellate Court, and Court of Cassation, all of which upheld the Ministry's refusal to grant the license. The charges of producing/distributing pornography were dropped.

Court's reasoning

The ECtHR found that "the refusal to issue a film reproduction licence had amounted to an interference with the applicant's freedom of expression. The interference had been prescribed by law and had 'pursued legitimate aims' for the purposes of article 10 par. 2, protecting morals and the rights of others, in particular children. When determining whether the interference was also 'necessary in a democratic society,' the Court established that the domestic judgments – in so far as they relied on a suspicion regarding the applicant's involvement in producing and distributing pornography—had been based on assumptions rather than reasoned findings of fact. The ECtHR observed that the domestic courts had not weighed the impact which the refusal of a film reproduction licence would have on the applicant's ability to distribute all the films for which he had distribution certificates or on his freedom of expression in general. The national courts had therefore failed to recognise that the case involved a conflict between the right to freedom of expression and the need to protect public morals and the rights of others, and had failed to perform a balancing exercise. The Court considered that such a far-reaching restriction on his freedom of expression had not been justified. There had been therefore no reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Accordingly, there had been a violation of article 10 of the Convention.

Lilliendhal v. Iceland, decision on inadmissibility of 12 May 2020, application no. 29297/18

Facts of the case

In April 2015, the municipal council of the town of Hafnarfjörður, Iceland, approved a proposal to strengthen education and counselling in elementary and secondary schools on matters concerning LGBTI+ inclusion. The project was coordinated in assistance with the national queer association of Iceland, Samtökin '78. The decision produced substantial public discussion, being reported in the news and local media, such as the radio station Ú.S., where listeners could express their opinions while phoning and intervening in the show. One of the initiators of the proposal, Mr. Ó.S.Ó., wrote an online article blaming the show hosts for allowing people to voice their "clear prejudice and hate speech" without countercriticism. Lilliendahl, the applicant in this case, subsequently wrote these comments in response to the article: "[w]e listeners of [Ú.S.] have no interest in any [expletive] explanation of this kynvilla [derogatory word for homosexuality, literally 'sexual deviation'] from [Ó.S.Ó.]. This is disgusting. To indoctrinate children with how kynvillingar [literally 'sexual deviants'] eðla sig ['copulate', primarily used for animals] in bed. [Ó.S.Ó.] can therefore stay at home, rather than intrude upon [Ú.S.]. How disgusting". These comments were reported by Samtökin '78 to the police, claiming they violated article 233(a) of the General Penal Code, which penalizes publicly mocking, defaming, denigrating or threatening of a person or group of persons for certain characteristics, including their sexual orientation or gender identity, with fines or imprisonment for up to two years. The applicant was first acquitted by the District Court of Reykjavík, which considered that the comments did not reach the threshold required to fall within the scope of article 233(a). The judgement was subsequently overturned by the Supreme Court of Iceland. The Court conducted a thorough analysis of the circumstances of the case, balancing

the freedom of expression of the applicant with the right of sexual minorities to respect for their private life and to enjoy human rights equally to others. It found that the comments of the applicant were "serious, severely hurtful and prejudicial, none of which was necessary for him to express his opposition to such education", thus falling under the provision of article 233 (a). Consequently, it convicted the applicant and sentenced him to a fine of approximately 800 euros. The applicant lodged a complaint to the ECtHR claiming that his conviction amounted to a violation of art. 10 of the Convention.

Court's reasoning

Before considering the applicant's complaints, the Court considered whether it should dismiss the application on the grounds that it was incompatible with article 17 of the Convention. The question for the Court was whether the applicant's statements sought to stir up hatred or violence and whether, by making them, he attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it. To answer this question the Court relied upon its judgment in Perinçek v. Switzerland (judgment of 15 October 2005, application no. 27510/08) in which it held that article 17 is only applicable on an exceptional basis and in extreme cases and, in cases concerning article 10, it should only be resorted to if it is immediately clear that the impugned statements sought to deflect this article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention. The Court decided that the applicant's statement could not be said to reach the high threshold for applicability of article 17. The Court stated "[a]lthough the comments were highly prejudicial ... it is not immediately clear that they aimed at inciting violence and hatred or destroying the rights and freedoms protected by the Convention. The Court recognized that Mr Lilliendahl's conviction undoubtedly constituted an interference with his freedom of expression, that the restriction placed on him was prescribed by law, and pursued the legitimate aim of protecting the rights of others".

In considering whether the restriction was necessary in a democratic society, the Court examined the reasoning of the Supreme Court of Iceland that had convicted the applicant and concluded that it had taken into account the Court's relevant case-law and acted within its margin of appreciation. Furthermore, the Supreme Court's assessment of the nature and severity of the comments was not manifestly unreasonable and it had adequately balanced the applicant's personal interests against the more general public interest in the case encompassing the rights of gender and sexual minorities. Recalling the principle of subsidiarity – which means that it is not for the Court to substitute its own assessment of the merits for that of the Supreme Court – the Court could find no strong reasons to reach a different conclusion to the national authorities. The Court therefore decided that the complaint under article 10 was manifestly ill-founded and rejected it.

One of the oldest established principles of the Court is that freedom of expression constitutes one of the essential foundations of a democratic society and "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population" – these are the "demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'" (Handyside v. the United Kingdom, judgment of 7 December 1976, application no. 5493/72). However, the Court has also held that the "abuse of freedom of expression is incompatible with democracy and human rights and infringes the rights of others" (Witzsch v. Germany, decision of 13 December 2005, application no. 7485/03).

OOO Flavus and others v. Russia, judgment of 23 June 2020, application no. 12468/15

Facts of the case

The case concerns a series of blocking orders issued by the Prosecutor General, and enacted by Roskomnadzor (the Russian telecoms regulator), against three websites by virtue of the Information Act, which was amended in 2013 to grant the Prosecutor General the authority to block access to websites containing (1) calls for mass disorder, extremist activities, participation in unauthorised mass gatherings; (2) extremist materials, as well as (3) information on technologies that can be used to access blocked websites containing extremist material. The orders were made against three of the Russian major opposition websites, namely: Grani.ru, a news and opinion site registered as mass media, the owner of which is OOO Flavus, the applicant company; the online newspaper Eg.ru; and the website Kasparov.ru, owned by an opposition politician, who is also one of the applicants in the case. The websites contained publications in support of the people arrested during the mass disorders that took place in the Bolotnaya Square in Moscow on 6 May 2012.

Access to the applicants' websites had been blocked and they had been required by a notice to delete the allegedly offending information. The Kasparov.ru website submitted in its application to the ECtHR that notwithstanding the replacement of the accused material, it had received no response from the telecom regulator when it had repeatedly asked them to stop blocking access. The website blocking order had been issued by the Prosecutor General on the basis that the information on the applicants' websites "revealed a uniform thematic trend towards the coverage of public events of an unlawful nature in the Russian territory".

Court's reasoning

The ECtHR held that the orders to block the applicant's VKontakte account and to restrict access to three blog postings on the planned demonstration had amounted to a "prior restraint", as prosecutors had acted before any court decision on the content being illegal. Such prior restraints were only justified in exceptional circumstances and required a clear legal framework so that the courts could review them effectively.

The ECtHR found that Russian prosecutors had wide powers to block access to internet content related to taking part in unauthorised demonstrations. That wide discretion hampered the courts in providing an effective review of decisions and meant successful legal challenges were likely to be difficult. The one-month deadline for reviews meant they might not finish before the event itself, depriving the proceedings of their meaning. The blocking procedure therefore lacked the necessary guarantees against abuse, as required by the ECtHR's case law on prior restraint measures.

Further, the internet posts had concerned a picket on a matter of general public interest, only about 50 people had been expected to attend, and the applicant had not called for violence or disorder. His breach of procedure in relation to public events had therefore been of a purely formal nature and minor in nature.

The ECtHR held that there had been no pressing social need for prior restraint measures and the courts had not given "relevant and sufficient reasons" for interfering with the applicant's rights. There had therefore been a violation of article 10.

The judgment is a continuation of the "Russian blocking cases" and should be read in line with the judgment in Kablis v. Russia, described below.

In-depth analysis of selected cases

Tagiyev and Huseynov v. Azerbaijan, judgment of 5 December 2019, application no. 13274/08

Facts of the case

The applicants were Mr Tagiyev and Mr Huseynov, journalists in Azerbaijan. Mr Tagivey is a well-known columnist who wrote an article entitled "Europe and us", which was published in Sanat Gazeti newspaper on the 1 of November 2006 as part of a series entitled "East-West studies." The second applicant, as a chief editor, approved this article for publication. A variety of religious figures and organizations in Azerbaijan and Iran severely criticised the article as it included a comparison between the Eastern and Western philosophical traditions and spoke of Islam in a pejorative manner.

On 11 November 2006, prosecutors initiated criminal proceedings and an investigation into the applicants based on article 283 of the Criminal Code, which covers incitement to religious hatred and hostility, committed publicly or by use of the mass media. As part of the investigation, "a forensic linguistic and Islamic assessment" was conducted which concluded that aspects of the article could incite religious hostility. The impugned aspects of the text included a comparison stating that Jesus Christ was preferable to the Prophet Muhammad, and another which "ridiculed" eastern philosophers by likening them to clowns prone to madness. It highlighted another sentence which the authors of the report believed inferred "that Muslims livening in the West are terrorists and Islam supports terrorism." The impugned sentence stated that "at best, Islam would advance in Europe with tiny demographic steps. And maybe there would be a country in which Islam would be represented by a few individuals or terrorists living incognito" (par. 11).

The applicants were detained pending trial. The Sabayil District Court on 4 May 2007 found the first applicant guilty of incitement to religious hatred and hostility (Art. 283.1 of the Criminal Code) and he was sentenced to three years' imprisonment. The second applicant, as a chief editor of Sanat Gazeti, was sentenced to four years' imprisonment under Art. 283.2.2 (inciting religious hatred and hostility perpetrated by a person using official position). These judgements were based solely on the forensic report.

Even though applicants applied for an appeal against these judgements on the ground of a violation of article 10 of the European Convention and citing related case law, the Court of Appeal upheld the convictions on the 6th of July 2007, without considering the possible breach of freedom of speech. The Supreme Court upheld this decision on the 22nd of January 2008 based on the linguistic assessment and witness testimony. Before this decision, both applicants were released from prison by presidential decree on the 28th of December 2007.

The applicants lodged complaints against the Republic of Azerbaijan with the Court on 7 March 2008 claiming a violation of their Art. 10 rights due to their criminal conviction for the publication of the impugned article.

In 2011, while this case was pending before the ECtHR, the first applicant was stabbed to death by an unknown assailant on his way home from work and he died in the hospital on 19 November 2011. His wife was subsequently accepted by the Court as an applicant to pursue the complaint in question.

Court's reasoning

The main issue before the Court was whether the criminal convictions for incitement to religious hatred and hostility based on the article "Europe and us" amounted to a violation of freedom of expression. The applicants argued that the article, which compared the values of Islam and Christianity, expressed an opinion and that their custodial sentences based on the findings of the forensic report was an unjustified and disproportionate interference with their freedom of expression. Moreover, they pointed out that the circulation of the newspaper was only around 800 copies, which has a small impact on society.

Even though the Government of Azerbaijan agreed with the applicants that the criminal conviction was an interference with their freedom of expression, it argued that this conviction was legitimate as the impugned article was an "abusive attack on religion," that "offended and insulted religious feelings" and instigated severe criticism from segments of society (par. 30-31). The Government submitted that states enjoy a wider margin of appreciation, especially when considering "public morals" as this concept has no uniform definition among the European societies. Thus, the domestic courts succeeded in striking a balance between freedom of religion and freedom expression.

The Court began by affirming that the criminal convictions constituted an interference with the right to freedom of expression under Art. 10 of the ECHR. Next, the Court looked at whether this interference was justified under Art. 10 par. 2 of ECHR. To be considered as a justified interference, the interference must be prescribed by law, the state must pursue a legitimate interest, and the interference must be necessary in a democratic society. In the instant case, the Court observed that the criminal convictions imposed under Art. 283 of the Criminal Code, were provided by law and pursued the legitimate aims of protecting the rights of others and preventing disorder (par. 32).

The Court then assessed whether the criminal conviction met a pressing social need and hence was necessary for a democratic society. The Court stated that freedom of expression plays an essential role in the democratic society; the scope of the right covers not only inoffensive expressions but also offending, shocking and disturbing ones. In the present case, the article 10 rights of the journalists must be balanced against the article 9 to right Freedom of thought, conscience and religion, which imposes "a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane (Giniewski v. France, judgment of 31 January 2006, application no. 64016/00). The Court clarified that "[w]here such expressions go beyond the limits of a critical denial of other people's religious beliefs and are likely to incite religious intolerance" (par. 37), governments may restrict the right to freedom of expression. Further, State authorities have the discretion to adopt rules, including criminal sanctions to prevent disorder in their society, if proven necessary. State authorities also have a broader discretion to adopt restrictive measures since there is an "absence of a uniform European conception of the requirements of the protection of the rights of others concerning attacks on their religious convictions" (par. 39).

However, the scope of the margin of appreciation by governments narrows when the expression involves freedom of the press and the topic contributes to discussions related to the public interest, such as in the present case. Although the article made derogatory remarks about Islam, the main issue in the article was the comparison of Eastern and Western values. Thus, the article must be analysed in the context of the role of religion in society, which is related to the public interest.

When considering the proportionality of the restriction, the Court referred to its own case law to determine that the content, context and intent of the speaker must be taken into consideration. Although some remarks about the Prophet Muhammad and Islam in the article might be seen as "capable of causing religious hatred" (par. 46), the Court stressed that national authorities must "carry out a comprehensive assessment of the impugned remarks, putting forward relevant and sufficient reasons for justifying the interference" (par. 46). As the domestic court simply reiterated what the forensic report stated and accepted the report's "legal characterization of the impugned remarks", the Court held that the domestic court failed to make its own legal assessment, which was not acceptable. Additionally, it noted that the domestic court did not examine the article in the context of general discussion on the religion and there was nothing in the article that undermined core values or rights of the convention. Taken in the appropriate context and considering the intent of the author, the article aimed to discuss the "role of a religion in society and its role in the development of society" which is in the public interest (par. 45). The Court held that "the domestic courts in their decisions did not even try to balance the applicants' right to freedom of expression with the protection of the right of religious people not to be insulted on the grounds of their beliefs" (par. 48).

The Court considered the nature and severity of the interference, sentencing three and four years' imprisonment to the applicants, respectively. Although the applicants were ultimately released, they spent more than thirteen months in detention. The Court observed that imposing criminal sanctions on expressing an opinion on the role of religion in society would have a chilling effect on the press, which plays a vital role in democratic society.

Having considered all factors, The Court held that the applicants' criminal conviction was disproportionate and not necessary in a democratic society and found a violation of freedom of expression guaranteed under Art. 10 of the ECHR.

Regarding pecuniary damages, the Court decided that as no documents substantiated the loss of earnings, compensation could not be granted to the applicants. Moreover, regarding non-pecuniary losses, the Court granted 12.000 euros for each applicant as a mere finding of violation was insufficient for the damages incurred.

General comment

The decision upholds important principles established in Paraskevopoulos v. Greece (judgment of 28 June 2018, application no. 64184/11), in which the Court states, "that when considering incitement to hatred, national courts are required to assess (a) the context, (b) the author's intention, and (c) the public interest of the matter discussed, in combination with other relevant elements". The ruling further reinforces precedent that potential incitement may only be restricted "under the strict conditions of 'relevant and sufficient reasons' justifying a proportionate interference". The judgment also clarifies the position adopted in the case E.S. v. Austria (judgment of 25 October 2018, application no. 38450/12), where the court held that even in a lively discussion it was not compatible with article 10 of the Convention to pack incriminating statements into the wrapping of an otherwise acceptable expression of opinion and claim that this rendered passable those statements exceeding the permissible limits of freedom of expression.

Kablis v. Russia, judgment of 30 April 2019, application no. 48310/16 and 59663/17

Facts of the case

In 2015, the Governor of the Komi Republic and several high-ranking officials were arrested and criminal proceedings were opened on suspicion of their membership of a criminal gang and fraud. The applicant notified the city authorities of Syktyvkar of his intention to organise a 'picket' a few days later at the crossroads behind

the Lenin monument at Stefanovskaya Square. The aim of the event was to discuss the arrest of the Komi Republic government; approximately 50 people were expected to take part in this peaceful public event. Kablis also published comments on his Internet blog about the events and his plan to organise a 'picket'. After the refusal by the Syktyvkar Town Administration to approve the venue chosen at Stefanovskaya Square, Kablis posted a message on his blog and he also published a post on VKontakte, the most popular online social networking service in Russia, calling for participation in the public discussion behind the Lenin monument in Syktyvkar two days later.

The next day Kablis' VKontakte account was blocked following an order by the Federal Service for Supervision of Communications, Information Technology and Mass Media and a deputy Prosecutor General of the Russian Federation. The deputy Prosecutor General found that the VKontakte post contained information about an unauthorised 'picket' to be held, and therefore amounted to campaigning for participation in an unlawful public event in breach of the Public Events Act, justifying the blocking of the account pursuant to section 15.3(1) of the Information Act. Kablis was also informed by the administrator of the Internet site that hosted his blog, that access to the three blog entries campaigning for the announced 'picket' had been restricted on the order of the Prosecutor General's office, because the posts contained calls to participate in public events held in breach of the established procedure. Kablis challenged the decisions of the Prosecutor General's office, but his complaint was dismissed at all relevant domestic levels.

Mr Kablis complained about the restrictions on the location of his picket under article 10 (freedom of expression) and article 11 (freedom of assembly and association), and alleged under article 13 (right to an effective remedy) that he had had no effective protection of his article 11 rights. He also relied on article 10 to complain about the restrictions on his VKontakte account and the blog entries.

Court's reasoning

The orders to block Mr Kablis's VKontakte account and to restrict access to three Internet entries on the planned demonstration had amounted to a "prior restraint" as prosecutors had acted before any court decision on the content being illegal. Such prior restraints were only justified in exceptional circumstances and required a clear legal framework so the courts could review them effectively (par. 91). Prosecutors had wide powers to block access to Internet content on taking part in unauthorised demonstrations. That wide discretion also hampered the courts in providing an effective review of such decisions and meant successful legal challenges were likely to be difficult. The one-month deadline for such reviews meant they might not finish before the event itself, depriving the proceedings of their meaning. The blocking procedure thus lacked the necessary guarantees against abuse which were required in the Court's case-law on prior restraint measures (par. 97).

Section 15.3 of the Information Act does not require the Prosecutor General's office to examine whether the wholesale blocking of the entire website or webpage, rather than of a specific information item published on it, is necessary, having regard to the criteria established and applied by the Court under article 10 ECHR. The Court emphasises that "such an obligation, however, flows directly from the Convention and from the case-law of the Convention institutions. In particular, article 10 requires the authorities to take into consideration, among other aspects, the fact that such a measure, by rendering large quantities of information inaccessible, is bound to substantially restrict the rights of Internet users and to have a significant collateral effect on the material that has not been found to be illegal (par. 94).

The Internet posts themselves had concerned a picket on matters of general public interest, only about 50 people had been expected to attend, and the applicant had not called for violence or disorder. The breach of the procedure for the conduct of public events had therefore been of a purely formal nature and minor in nature (par. 99).

There had been no pressing social need for prior restraint measures and the courts had not given "relevant and sufficient reasons" for interfering with the applicant's rights. There had therefore been a violation of article 10. The Court held that Russia was to pay Kablis 12,500 euros in respect of non-pecuniary damage and 2,500 euros in respect of costs and expenses.

General comments

The judgment especially contains a clear message against 'too broad and vague' provisions in law organising forms or procedures of prior restraint. It also clarifies that as a minimum guarantee such legislation must guarantee the possibility to obtain a judicial review of a blocking measure of posts or accounts calling for participation to peaceful demonstrations before the date of the public event in question. It is obvious that there can be also other circumstances where a prompt judicial review must effectively be guaranteed 'for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest' (par. 91). The judgment develops previous case law concerning the blocking of internet, particularly the case of Ahmet Yıldırım v. Turkey (judgment of 18 December 2012, application no. 3111/10) and Cengiz and Others v. Turkey (judgment of 1 December 2015, application no. 48226/10 and 14027/11).

Magyar Kétfarkú Kutya Párt v. Hungary, judgment of 20 January 2020, application no. 201/17

Facts of the case

The applicant before the European Court of Human Rights was a Hungarian political party. On 2 October 2016, a referendum related to the European Union's migration relocation plan was held in Hungary. During the referendum campaign, several opposition parties had called on citizens to vote in a way to invalidate their ballots in protest against the holding of the referendum. The applicant had made available a mobile telephone application to voters called "the cast-an-invalid-vote app" where they could upload and share with the public photographs taken of their ballots, and also add comments on the reasons for how they cast their ballot. One of the main features of the application was that users could post and share photographs anonymously.

On 29 September 2016, a private individual lodged a complaint with the National Election Commission of Hungary (Commission) about the application. It held that the application had infringed the principles of fairness of elections, voting secrecy and the proper exercise of rights. The Commission concluded that the application was capable of discrediting the work of electoral bodies and tallying systems in the eyes of the public. The Commission ordered the applicant political party to refrain from further violations. It held, among other things, that taking photographs of the ballot papers could have led to electoral fraud.

The applicant then sought judicial review of the decision before the Supreme Court of Hungary (Kúria). On 10 October 2016, the Kúria upheld the decision of the Commission with regard to the infringement of the principle of the proper exercise of rights. It found that a ban on photographs and on publication had not infringed voters' freedom of expression, since they had been free to express their opinions by casting their ballots and to share with others how they had voted. The Kúria overturned the remainder of the Commission's decision on the infringement of the secrecy of elections and discrediting the work of electoral bodies.

On 3 October 2016, the same private individual lodged a new complaint with the Commission since the political party had activated the application during the day of the referendum. On 7 October 2016, the Commission reiterated its previous findings. It also added that as the ap-

plication called on voters to cast an invalid ballot this could have influenced voters and, therefore, constituted unlawful campaigning. It fined the political party approximately 27,000 euros.

On 18 October 2016, the Kúria upheld the Commission's decision in part. It upheld the finding that the taking of photographs of ballots amounted to an infringement of the principle of the proper exercise of rights. It reduced the fine against the political party to 330 euros.

The applicant political party then lodged constitutional complaints against the Kúria's decisions, arguing that they had violated the right to freedom of expression. The Constitutional Court declared the complaints inadmissible on 24 October 2016, arguing that the cases did not concern the political party's right to freedom of expression. It held that the political party had just provided a forum for voters to share photographs of their ballots, and had not itself expressed an opinion. Therefore, it had not been "personally concerned" by the decision of the Kúria.

The applicant political party subsequently brought its case to the ECtHR, complaining that the imposition of a fine for operating a mobile telephone application allowing voters to publish photographs of their ballot papers had violated its right to freedom of expression as enshrined in article 10 of ECHR. It argued, in particular, that providing a forum for voters to express their opinions fell under the scope of the right to freedom of expression. The Government argued that there had been no interference with the applicant's right to freedom of expression since it had not expressed itself in speech. It also argued that the fine was aimed at ensuring the orderly conduct of the voting procedure and the proper use of ballot papers.

Court's reasoning

The ECtHR began by noting that article 10 of the Convention guaranteed the right to impart information and the right of the public to receive it. It noted that the freedom included the publication of photographs. It also reiterated that "article 10 applies not only to the content of the information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information" (par. 36).

In the case at hand, the Court ruled that the mobile telephone application was designed to enable users to share their comments and photographs through information technology. The Court went on to state that "the mobile phone application in the present case possesses a communicative value and thus, for the Court, constitutes expression on a matter of public interest, as protected by article 10 of the Convention. Moreover, in the present case, the Court is satisfied that what the applicant political party was reproached for was precisely the provision of the means of transmission for others to impart and receive information within the meaning of article 10 of the Convention" (par. 37).

The Court had then to examine whether the interference was justified under article 10 of the Convention, namely if it was "prescribed by law," pursued a "legitimate aim," and was necessary in a democratic society. The Court decided that it was unnecessary to consider whether the fine was "prescribed by law" since it did not pursue a "legitimate aim." With regard to whether the fine pursued a "legitimate aim," the Court first considered the Government's argument that the fine was aimed at ensuring the orderly conduct of the voting procedure and to secure the proper use of ballot papers. The Court recounted, and endorsed, the finding of the Kúria that the political party's conduct was not conducive to any prejudice in respect of the secrecy or the fairness of the referendum.

The Court also found that the Government failed to point to any other actual rights of "others" that would or could have been adversely affected by the anonymous publication of imagery of marked or spoiled ballots. Furthermore, they did

not show any resulting deficiency in the voting procedure requiring a restriction on the use of the application.

Finally, the Court noted that under domestic law it was illegal to use a ballot for any other purpose other than to vote. However, it held that the Government failed to convincingly establish any link between this domestic law and a "legitimate aim". Therefore, the Court found that the measure had not pursued a "legitimate aim". The Court concluded that, in the light of the aforementioned reasons, the sanction imposed on the political party for operating the mobile telephone application in question did not meet the requirements enshrined under the Convention. Therefore, there had been a violation of the right to freedom of expression under article 10 of the Convention.

As for damages, the Court awarded 330 euros to the applicant political party in respect of pecuniary damages.

General comments

The judgment sets a precedent, as the ECtHR ruled for the first time on the use of mobile applications. The decision expands freedom of expression since the Court recognized that sanctions placed on web application operators for providing the means for others to communicate will still interfere with the right to freedom of expression. The decision is also a rare occasion in which the ECtHR analysed at depth into whether a measure actually pursued a "legitimate aim" under article 10 par. 2 of the Convention. On this occasion, the Court ensure that the "legitimate aims" under article 10 par. 2 of the Convention were interpreted restrictively. The judgment should be read in line with the Council of Europe, Rec. CM/Rec(2016)5 of the Committee of Ministers to member States on Internet freedom (13 April 2016) and the Council of Europe, CM/Rec(2007)16 of the Committee of Ministers to member States on measures to promote the public service value of the Internet (7 November 2007).

Freedom of Expression and Freedom of the Media in South-East Europe (JUFREX)

The action is embedded in the "Horizontal Facility for the Western Balkans and Turkey 2019–2022" and it builds upon the results achieved during a previous regional European Union and Council of Europe Joint programme "Reinforcing Judicial Expertise on Freedom of Expression and the Media in South-East Europe (JUFREX)". The regional action is strongly interconnected with the six Beneficiary-specific JUFREX actions in: Albania, Bosnia and Herzegovina, Kosovo*, Montenegro, North Macedonia and Serbia.

JUFREX activities are implemented with the aim to:

- promote freedom of expression and freedom of the media in line with European standards;
- improve the application of those standards by engaging a range of actors responsible to apply such standards in their daily work, namely: judges, prosecutors, lawyers, police officers, representatives of media regulatory authorities, media actors and students;
- consolidate a platform for regional cooperation, discussion and exchange of good practices.

Where an enabling environment for freedom of expression and freedom of the media exists and the right to seek, impart and receive information is well protected, citizens can genuinely participate in the democratic processes. National training institutions for legal professionals (Judicial Academies and Bar Associations) play a vital role to make this become a reality.

All JUFREX activities are based on innovative and modern learning tools on freedom of expression and freedom of the media and adopt a dynamic methodology for adult learning and a peer-to-peer model.

The "Horizontal Facility for the Western Balkans and Turkey 2019-2022" is a joint initiative of the European Union and the Council of Europe that enables the Beneficiaries to meet their reform agendas in the fields of human rights, rule of law and democracy and to comply with the European standards, including where relevant within the framework of the EU enlargement process.

* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

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