**Protecting Freedom of Expression and of the Media in Serbia**

**PROFREX**

# GUIDE FOR LEGAL PROFESSIONALS ON FREEDOM OF EXPRESSION, SLAPPS AND RELATED ECHR STANDARDS

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## List of Abbreviations

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| CSO | Civil Society Organisation |
| CoE | Council of Europe |
| ECHR | Convention for the Protection of Human Rights and Fundamental Freedoms (usually referred to as European Convention on Human Rights) |
| ECtHR | European Court of Human Rights |
| EU | European Union |
| GC | Grand Chamber (of the European Court of Human Rights) |
| SLAPP | Strategic Lawsuit Against Public Participation |
| SLAPPs | Strategic Lawsuits Against Public Participation |

## Introduction

Freedom of expression is a foundational element of democratic society. It enables public debate, the scrutiny of those in power, and the dissemination of information necessary for informed civic participation. At the same time, the right to freedom of expression, protected under Article 10 of the European Convention on Human Rights (hereinafter referred to as the Convention), is not absolute. Legal systems must carefully balance this right against other legitimate interests, including the protection of reputation, privacy, and public order. Defence lawyers and judges have a central role in ensuring that this balance is maintained in accordance with established human rights principles.

In recent years, concern has grown regarding the use of legal actions to unduly burden or silence critical voices, particularly through Strategic Lawsuits Against Public Participation (SLAPPs). This has led to the emergence of standards at both the Council of Europe and European Union levels. The Council of Europe has underlined the dangers posed by SLAPPs to democratic participation, notably through Committee of Ministers Recommendation CM/Rec(2024)2 on countering the use of SLAPPs, while the European Union has advanced legislative measures through Directive (EU) 2024/1069 on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Anti-SLAPP Directive"). Taken together, these instruments highlight a growing European consensus on the need to shield public watchdogs and safeguard civic space. This Guide is intended to assist legal professionals in identifying and addressing such challenges while ensuring that genuine legal claims are adjudicated fairly and in line with human rights obligations.

This Guide is structured around key areas of law where the legitimate exercise of the right to freedom of expression is most often threatened. Chapter 1 begins by outlining the three-part test for limiting freedom of expression. This chapter explains that in order for a restriction to be legitimate under the requirements of the Convention, it must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society.

Chapter 2 of the Guide addresses the enhanced protection afforded to the media and civil society actors, when their publications contribute to debate on issues of public interest. It discusses why the role of these actors in democratic life warrants strong legal safeguards and highlights the legal risks they face. Chapter 3 continues this theme by focusing on the protection of good faith reporting and responsible journalism. Chapter 4 turns to the standards applicable to criticism of public figures. It explains the principle that politicians and similar public figures must tolerate a greater degree of criticism than private individuals, given the importance of open debate in a democratic society.

Chapter 5 examines the principle of proportionality in sanctions. It elaborates on the chilling effect that excessive sanctions – whether under civil, criminal, or administrative law – can have on the exercise of freedom of expression and explains that sanctions must be proportionate to the harm caused. Chapter 6 specifically analyses the use of criminal sanctions to restrict expression, discussing the limited circumstances under which criminal penalties are compatible with the Convention.

Turning to particular areas of substantive law, Chapters 7, 8, and 9 focus respectively on key principles regarding the balance between privacy and freedom of expression, defamation, and the relationship between data protection and freedom of expression. Finally, Chapter 10 addresses the liability of online platforms for user-generated content.

**How to Use This Guide**

This Guide seeks to provide a clear, impartial, and practical resource. Each chapter begins with an overview of the relevant legal standards developed under the European Convention on Human Rights, followed by an analysis of one or two judgments of the European Court of Human Rights (ECtHR) that illustrate how these standards are applied in practice. Through this approach, it aims to support lawyers and judges in protecting freedom of expression while upholding other rights and due process.

The Guide does not provide an exhaustive account of all relevant case law but focuses on key principles and illustrative judgments to support effective legal reasoning and decision-making. Readers are encouraged to consult the full text of judgments where necessary to understand the complete context and reasoning of the Court.

As the case law of the European Court of Human Rights continues to evolve, readers are encouraged to remain up to date with developments. Regular updates on the European Court of Human Rights' caselaw can be accessed through the Court's Knowledge Sharing platform, available at: https://ks.echr.coe.int/web/echr-ks/article-10. Subscribing to alerts or regularly checking the platform can assist legal professionals in maintaining familiarity with recent judgments and emerging standards relevant to the right to freedom of expression.

# 1. The Three-Part Test for Restricting Freedom of Expression

## 1.1. Main Legal Principles as Developed by the European Court of Human Rights

Under Article 10 of the European Convention on Human Rights, the right to freedom of expression may be subject to restrictions,[1] provided that these meet a strict three-part test developed through the case law of the European Court of Human Rights. The elements of the test are as follows:

1) the restriction must be prescribed by law;
2) the restriction must pursue one or more of the legitimate aims listed in Article 10(2); and
3) the restriction must be necessary in a democratic society.

This is a cumulative test: all three parts of the test must be met in order for a restriction to be legitimate. The burden to justify any restriction lies with public authorities, and the courts must exercise close scrutiny, especially in cases involving the media and matters of public concern.[2]

### 1.1.1. "Prescribed by law"

The requirement that a restriction is "prescribed by law" stems from the text of Article 10(2) of the Convention. The Court has interpreted this to mean that the legal basis for the interference must be accessible, foreseeable, and formulated with sufficient precision to enable individuals to regulate their conduct accordingly.[3] The degree of precision depends to a considerable extent on the content of the instrument at issue, the field it is designed to cover, and the number and status of those to whom it is addressed.[4] The Court has recognised that absolute certainty is unattainable, and that professionals, such as journalists, can be expected to seek legal advice as to the meaning of a given law in particular circumstances.[5] The notion of foreseeability applies not only to a course of conduct of which an applicant should be reasonably able to foresee the consequences, but also to any formalities, conditions, restrictions or penalties which may be attached to such conduct, if found to be in breach of the national laws.[6] Criminal-law provisions must clearly and precisely define the scope of relevant offences, in order to avoid unfettered discretion for law enforcement authorities and arbitrary prosecutions.[7] Furthermore, the Court has held that a law that authorises a restriction must contain effective safeguards to prevent its abuse or arbitrary use, including judicial oversight.[8]

### 1.1.2. "Legitimate aim"

The legitimate aims of interferences with the right to freedom of expression are limited to those that are set out in Article 10(2) of the Convention:

- the interests of national security, territorial integrity or public safety;

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[1] The text of Article 10 uses the terms "interference" as well as "formalities, conditions, restrictions or penalties".
[2] *Handyside v. the UK*, Application no. 5493/72, 7 December 1979; *Sunday Times v. the UK (No. 1)*, Application no. 6538/74, 26 April 1979.
[3] *Lindon, Otchakovsky-Laurens and July v. France [GC]*, Applications nos. 21279/02 and 36448/02, 22 October 2007, par. 41.
[4] *Groppera Radio AG and Others v. Switzerland*, Application no. 10890/84, 28 March 1990, par. 68.
[5] *Chauvy and Others v. France*, Application no. 64915/01, 29 June 2004, par. 45.
[6] *Kafkaris v. Cyprus [GC]*, Application no. 21906/04, 12 February 2008, par. 140.
[7] *Savva Terentyev v. Russia*, Application no. 10692/09, 28 August 2018, par. 85.
[8] *Association Ekin v. France*, Application no. 39288/98, 17 July 2001, par. 58; *Ahmet Yıldırım v. Turkey*, Application no. 3111/10, 18 December 2012, par. 64.

- the prevention of disorder or crime;
- the protection of health or morals;
- the protection of the reputation or rights of others;
- preventing the disclosure of information received in confidence; and
- maintaining the authority and impartiality of the judiciary.

This list is exhaustive; restrictions imposed for any other purpose are incompatible with the Convention.[9] Public authorities must be able to demonstrate that their objective in restricting expression falls clearly within one of these grounds.

#### 1.1.3. "Necessity"

The requirement that restrictions must be necessary in a democratic society is found in the text of Article 10(2) of the Convention. The Court has states this implies several elements:

1) the interference must be "necessary": this is a higher standard than the restriction merely being expressions as "reasonable", "desirable", "admissible", or "ordinary", although the requirement is not so high as to mean that the restriction must be "indispensable" or "absolutely necessary" or "strictly necessary";[10]
2) the interference must correspond to a "pressing social need", for which national authorities, including the courts, must provide "relevant and sufficient reasons".[11] The absence of relevant and sufficient reasons is not compensated by the light nature of any sanction imposed;[12]
3) the means used must be proportionate to the legitimate aim pursued. In deciding proportionality, the context of the expression – in particular, whether it contributes to public debate on matters of public interest – is important; a high level of protection is afforded to political speech, journalism, as well as to art when it constitutes social commentary;[13]
4) there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned.[14]

### 1.2. Illustrative cases

#### 1.2.1. Editorial Board of Pravoye Delo and Shtekel v. Ukraine: 'prescribed by law'

Application no. 33014/05, 5 May 2011

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[9] *OOO Memo v. Russia*, Application no. 2840/10, 15 March 2022, par. 37; *Bielau v. Austria*, Application no. 20007/22, 27 August 2024, par. 30

[10] *Handyside v. the UK*, Application no. 5493/72, 7 December 1979, par. 48; *Sunday Times v. the UK (No. 1)*, Application no. 6538/74, 26 April 1979, par. 59

[11] *Handyside v. the UK*, Application no. 5493/72, 7 December 1979, paras. 48, 50; *Sunday Times v. the UK (No. 1)*, Application no. 6538/74, 26 April 1979, par. 62; *Uj v. Hungary*, Application no. 23954/10, 19 July 2011, paras. 25-26; *Scharsach and News Verlagsgesellschaft v. Austria*, Application no. 39394/98, 13 November 2003, par. 46; *Mariya Alekhina and Others v. Russia*, Application no. 38004/12, 17 July 2018, par. 264

[12] *Tőkés v. Romania*, Application Nos. 15976/16, 50461/17, 27 April 2021, paras. 85, 98.

[13] *Morice v. France [GC]*, Application no. 29369/10, 23 April 2015, paras. 124-127; *Pentikäinen v. Finland [GC]*, Application no. 11882/10, 20 October 2015, paras. 87-91; *Vereinigung Bildender Künstler v. Austria*, Application no. 68354/01, 25 January 2007.

[14] *Mouvement raëlien suisse v. Switzerland [GC]*, Application no. 16354/06, 13 July 2012, par. 75; *Glor v. Switzerland*, Application no. 13444/04, 30 April 2009, par. 94; *Axel Springer SE and RTL Television GmbH v. Germany*, Application no. 51405/12, 21 September 2017, par. 56.

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| *Facts:* | The applicants, the editorial board and the editor-in-chief of a newspaper, published an anonymous letter allegedly written by an employee of the Security Service of Ukraine. It had been obtained from a news website. The letter alleged that senior security service officials had engaged in corrupt and criminal activities. The newspaper referred to the source of the information, indicated that the information might be false, and invited comments and other information.<br><br>The president of a boxing federation who was named in the letter as a member of a criminal group, sued the applicants for defamation. The Prymorskiy District Court of Odessa ordered the applicants to pay compensation and publish a retraction and an apology. An appeal was unsuccessful. |

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| *Judgment:* | The Court first recalled the applicable principles, citing the applicable ECtHR case law:<br><br>- a law providing for a restriction must be "formulated with sufficient precision to enable the citizen to regulate his conduct [and] foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail";<br>- "the degree of precision depends to a considerable extent on the content of the instrument at issue, the field it is designed to cover, and the number and status of those to whom it is addressed"; and<br>- "the notion of foreseeability applies not only to a course of conduct, of which an applicant should be reasonably able to foresee the consequences, but also to 'formalities, conditions, restrictions or penalties', which may be attached to such conduct, if found to be in breach of the national laws".<br><br>The Court then turned to the circumstances of the case. It observed that the issues were: (a) the question of clarity and foreseeability of the legislative provisions; and (b) the alleged absence of legal grounds for an obligation to apologise in cases of defamation.<br><br>As regards issue (a), the Court observed that the publication at issue was a reproduction of material downloaded from a publicly accessible internet newspaper. It contained a reference to the source of the material and comments by the editorial board, formally distancing themselves from the material. The Court observed furthermore that the Ukrainian Press Act exempts journalists from civil liability for verbatim reproduction of material published in registered media; but that this exemption does not apply to the reproduction of material from unregistered internet sources. The Court also noted that there existed no domestic regulations on State registration of internet media.<br><br>Considering the important role that the Internet plays in the context of professional media activities, the Court went on to hold that the absence of a sufficient domestic legal framework allowing journalists to use information obtained from the Internet without fear of incurring sanctions seriously hindered the exercise of their function as a 'public watchdog'. It stated: |

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| | > [T]he complete exclusion of such information from the field of application of the legislative guarantees of journalists' freedom may itself give rise to an unjustified interference with press freedom under Article 10 of the Convention (par. 64)<br><br>The Court concluded:<br><br>> [G]iven the lack of adequate safeguards in the domestic law for journalists using information obtained from the Internet, the applicants could not foresee to the appropriate degree the consequences which the impugned publication might entail.<br><br>As regards issue (b), the Court observed that Ukrainian law provided that in defamation cases defamation, injured parties are entitled to compensation and a retraction of defamatory statements; but it does not provide for the possibility of requiring an apology. There was no indication that Ukrainian courts had previously imposed such a requirement, and the domestic courts had given no explanation for why the requirement was imposed in this case. In these circumstances, the Court found that the national court's order to the second applicant to apologise was not "prescribed by law".<br><br>The Court held that it was not necessary to also deal with the question of whether the restriction had been necessary in a democratic society. It found a violation of the right to freedom of expression. |

### 1.2.2. OOO Memo v. Russia: 'legitimate aim'

Application no. 2840/10, 15 March 2022

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| *Facts:* | The applicant, OOO Memo, is the owner of the media outlet, *The Caucasian Knot*. It published a report on the suspension of a 5 million rouble subsidy from Volgograd Region to Volgograd City. The report alleged that the suspension was due partly to political reasons, and partly because the City had refused to award an order to a local bus manufacturer whose tender had been promoted by the Regional administration.<br><br>Volgograd Region commenced civil defamation proceedings. The Ostankinskiy District Court of Moscow held for the Region and ordered the Caucasian Knot to retract its report. The judgment was upheld on appeal. |

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| *Judgment:* | The Court began its analysis by observing that the claimant in the defamation proceedings was the executive authority of an entity of the Russian Federation. The issue at stake was whether such an entity has a "reputation", as meant by the permissible aim stated in Article 10(2) of protecting "the protection of the reputation or rights of others".<br><br>The Court reiterated that the list of legitimate aims provided in Article 10(2) is exhaustive. Referring to previous caselaw, it observed that while the ambit of the "protection of the reputation … of others" can apply to companies as well as to individuals, this is only because there exists a legitimate "interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good" (citing amongst others *Steel and Morris v. the UK*, no. 68416/01). |

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| | However, it held that these considerations are not applicable to an executive body of the state which does not engage in direct economic activities.<br><br>The Court then recalled previous caselaw in which it had held that an elected body could only in exceptional circumstances rely on the "protection of the rights or reputations of others" clause to take defamation proceedings; for example when in a small town local councillors were readily identifiable and their reputation would be affected by media reports (citing *Lombardo and Others v. Malta* (no. 7333/06)).<br><br>The Court then noted that there was a growing awareness of the risks that SLAPPs bring for democracy, as highlighted by the Council of Europe Commissioner for Human Rights. It considered that to prevent abuse of power and corruption of public office, executive state bodies must be open to public scrutiny. Protecting them from criticism under the pretext of protecting a 'business reputation' – which they actually do not have – limits media freedom. It followed that civil defamation proceedings brought by such entities may therefore not, as a general rule, be regarded as being in pursuance of the legitimate aim of "the protection of the reputation ... of others", under Article 10(2) of the Convention. It was not necessary to examine whether the restriction had been necessary in a democratic society. The Court found a violation of the right to freedom of expression. |

### 1.2.3. Bladet Tromsø and Stensaas v. Norway: 'necessity' (pressing social need and proportionality)

Application no. 21980/93, 20 May 1999

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| *Facts:* | The applicants, the publisher and editor of the newspaper Bladet Tromsø, published a report by an official seal hunting inspector which alleged violations of seal hunting regulations. The report allegations that members of the crew of a ship on which he had been appointed to serve had violated seal hunting regulations and that they had threatened the inspector. Bladet Tromsø published the report after the Ministry of Fisheries decided to delay publishing it. Bladet Tromsø published numerous other reports on the matter, several of which featured interviews with seal hunters who gave their responses to the issues raised.<br><br>The crew members sued for defamation. The Sarpsborg City Court held that several allegations, including that seals were skinned alive, were defamatory and awarded the crew members compensation and legal costs. A Supreme Court appeal was unsuccessful. |

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| *Judgment:* | Focusing on whether the defamation judgment had been "necessary in a democratic society", the Court began by recalling its general principles: that there must be a "pressing social need" for a restriction, that restrictions should be proportionate to the aim pursued, and that the reasons given for restrictions should be relevant and sufficient. The Court emphasised "the essential function the press fulfils in a democratic society" and its "duty ... to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest" (citing amongst others, *Jersild v. Denmark*, no. 15890/89, par. 31). The Court recalled further that "journalistic freedom ... covers possible |

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| | recourse to a degree of exaggeration, or even provocation", and that the media must be able "to exercise its vital role of 'public watchdog' in imparting information of serious public concern (citing inter alia *Prager and Oberschlick v. Austria*, no. 15974/90).<br><br>Applying these principles to the case, the Court considered that it was necessary to take account of the overall background against which the statements had been made. It observed that seal hunting was a matter of national and international controversy; and that freedom of expression included the freedom to impart information on issues of public interest that was shocking – and that the public had a right to receive such information. The issue of seal hunting had been reported on widely, including by other media and by NGOs such as Greenpeace; and the applicant had been careful also to publish the views of those involved in the hunt.<br><br>The Court considered that it should apply "the most careful scrutiny", because sanctions imposed on the media can discourage future reporting on issues of public interest. But, it also acknowledged that freedom of expression may be restricted; and that journalists reporting on issues of general interest must act in good faith to provide accurate and reliable information in accordance with the ethics of journalism (citing inter alia *Fressoz and Roire v. France*, no. 29183/95).<br><br>The Court observed that the applicants' reporting on seal hunting had presented both sides. While the impugned allegations were very serious, they were made in a report by an official inspector, and the applicants could legitimately "rely on the contents of official reports without having to undertake independent research. Otherwise, the vital "public-watchdog role of the press may be undermined" (citing *Goodwin v. the UK*, no. 17488/90). The Court also noted that Ministry of Fisheries had acknowledged that illegal hunting had possibly occurred.<br><br>The Court held that on balance, the crew members' interest in protecting their reputation did not outweigh the vital public interest in ensuring an informed public debate over a matter of national and international interest. The Court concluded:<br><br>> [T]he reasons relied on by the respondent State, although relevant, are not sufficient to show that the interference complained of was "necessary in a democratic society" … [T]here was no reasonable relationship of proportionality between the restrictions placed the applicants' right to freedom of expression and the legitimate aim pursued.<br><br>The Court found a violation of the right to freedom of expression. |

## 2. Protecting Public Interest Debate and the Role of the Media and Civil Society

### 2.1. Main Legal Principles as Developed by the European Court of Human Rights

The Court has consistently emphasised "the essential function the press fulfils in a democratic society" and its "duty ... to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest".[15] The media must be able "to exercise its vital role of 'public watchdog' in imparting information of serious public concern".[16] Moreover, not only does the media have the task of imparting such information; the public has a right to receive it.[17] An interference with the freedom of expression of the media thus affects not only the media outlet concerned, but the public at large who is deprived of the information. This applies to all forms of media: print, audiovisual, and internet, and to professional as well as to non-professional journalists, including bloggers and popular social media users.[18]

The Court has emphasised that "journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation"; and that freedom of expression applies to "'information' or 'ideas' that offend, shock or disturb the State or any section of the population".[19]

The Court has emphasised that "there is little scope ... for restrictions on political speech or on debate on matters of public interest".[20] The Court has emphasised that the question of whether debate on a particular issue is of "public interest" needs to be established in the light of the circumstances of each case. "Public interest" does not mean whatever the public is interested in, but denotes an issue that is of legitimate concern to society:

> Public interest ordinarily relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about.[21]

The protection of political speech means that restrictions placed on members of parliament and similar political figures, as well as speech in elected assemblies, are subjected to close scrutiny.[22] The watchdog function of the media, coupled with the right of the public to receive media output on issues of public interest, means that restrictions placed on the media are also examined with heightened scrutiny. This is especially so when restrictions imposed on the media can have a potential 'chilling effect' – meaning that they would discourage others from exercising their right to freedom

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[15] *Bladet Tromsø and Stensaas V. Norway*, Application no. 21980/93, 20 May 1999, par. 59.
[16] *Dalban v. Romania*, Application no. 28114/95, 28 September 1999, par. 49.
[17] *The Sunday Times v. the UK (No. 2)*, Application no. 13166/87, 26 November 1991, par. 50; *Pedersen and Baadsgaard v. Denmark [GC]*, Application no. 49017/99, 17 December 2004, par. 71.
[18] *Jersild v. Denmark*, Application no. 15890/89, 23 September 1994, par. 31; *Delfi v. Estonia*, Application no. 64569/09, 16 June 2015, par. 133; *Falzon v. Malta*, Application no. 45791/13, 20 March 2018, par. 57; *Magyar Helsinki Bizottság v. Hungary*, Application no. 18030/11, 8 November 2016, par. 168.
[19] *Prager and Oberschlick v. Austria*, Application no. 15974/90 , 26 April 1995, par. 38; *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, Application no. 15153/89, 19 December 1994, par. 36.
[20] *Ceylan v. Turkey*, Application. no. 23556/94, 8 July 1999.
[21] *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, Application no. 931/13, 27 June 2017, par. 171.
[22] *Karácsony and Others v. Hungary [GC]*, Applications nos. 42461/13 and 44357/13, 17 May 2016; *Castells v. Spain*, Application no. 11798/85, 23 April 1992, par. 46.

of expression.[23] The most careful scrutiny is called for when courts consider an application to prohibit the media from publishing a particular report or on a particular issue – even if only temporarily:

> [T]he dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, 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.[24]

As civil society organizations increasingly report on matters of public interest, the Court has accorded them a similar status, stating that they are "exercising a public watchdog role of similar importance to that of the press".[25] The Court has held that the principles that relate to the protection of journalists apply similarly to human rights defenders or activists.[26] The Court has highlighted that attempts to silence the leaders of CSOs can have a serious chilling effect on other activists, and applies heightened scrutiny in these cases also.[27] The Court has also accorded heightened protection to academic researchers, authors of literature on matters of public interest, and election observers.[28]

The importance of the media and the role of journalists in democratic society means that they enjoy certain privileges: the protection of confidential sources of information; heightened protections against searches of media premises; and heightened protections against seizure of journalistic materials. None of these protections are absolute; like the right to freedom of expression they may be restricted when prescribed by law, in a legal framework setting out appropriate safeguards, including authorization of the measure by a judge or independent authority; and when necessary in a democratic society for the protection of a legitimate aim (see the three-part test set out in the previous chapter).[29] The Court has urged that "limitations on the confidentiality of journalistic sources call for the most careful scrutiny."[30]

## 2.1. Illustrative cases

### 2.1.1. OOO Flavus and Others v. Russia

Application nos. 12468/15, 23489/15, and 19074/16, 23 June 2020

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| *Facts:* | The applicants own several media outlets. In March 2014, the Russian authorities blocked access to websites on request from the Prosecutor General, acting under Russia's Information Act, over content which allegedly promoted mass disorder and extremist speech. The applicants unsuccessfully applied for a judicial review, complaining about the |

[23] *Stoll v. Switzerland [GC]*, Application no. 69698/01, 10 December 2007, par. 106; *Bladet Tromsø and Stensaas V. Norway*, Application no. 21980/93, 20 May 1999, par. 64.
[24] *Observer and Guardian v. the UK*, Application no. 13585/88, 26 November 1991, par. 60.
[25] *Animal Defenders International v. the UK [GC]*, Application no. 48876/08, 22 April 2013, par. 103; *Vides Aizsardzības Klubs v. Latvia*, Application no. 57829/00, 27 May 2004, par. 42.
[26] *Steel and Morris v the UK*, Application no. 68416/01, 15 February 2005, par. 89; *Taner Kılıç v. Turkey (no. 2)*, Application no. 208/18, 31 May 2022, par. 147.
[27] *Reznik v. Russia*, Application no. 4977/05, 4 April 2013, par. 50.
[28] *Magyar Helsinki Bizottság v. Hungary*, Application no. 18030/11, 8 November 2016, par. 168; *Chauvy and Others v. France*, Application no. 64915/01, 29 June 2004, par. 68; *Timur Sharipov v. Russia*, Application no. 15758/13, 13 September 2022, paras. 26, 35.
[29] *Goodwin v. the UK*, Application no. 17488/90, 27 March 1996; *Roemen and Schmit v. Luxembourg*, Application no. 51772/99, 25 February 2003; *Sanoma v. Netherlands (GC)*, Application no. 38224/03, 14 September 2010; *Nagla v. Latvia*, Application no. 73469/10, 16 July 2013.
[30] *Nagla v. Latvia*, Application no. 73469/10, 16 July 2013, par. 95.

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| | wholesale blocking of access to their websites, and of a lack of notice of the specific offending material, which they could therefore not remove in order to restore access. |

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| *Judgment:* | The Court started by reiterating:<br><br>> [T]he Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information. The Internet provides essential tools for participation in activities and discussions concerning political issues and issues of general interest, it enhances the public's access to news and facilitates the dissemination of information in general.<br><br>The Court observed that the applicants are owners of online media outlets which had been blocked. This was an interference which needed to be prescribed by law and necessary in a democratic society in pursuit of a legitimate aim. The Court emphasised that a law that allows for a restriction must be adequately accessible and foreseeable; that it must afford protection against arbitrary interferences by public authorities; and that it must indicate the scope of any discretion conferred on the national authorities (citing, amongst others, *Hasan and Chaush v. Bulgaria [GC]*, no. 30985/96). The Court found that the national law in question conferred broad discretion on the authorities, and that the Prosecutor General's had not identified any specific articles that called for unauthorised public events. It had therefore been arbitrary and manifestly unreasonable.<br><br>The Court went on to consider whether blocking the applicants' entire websites had pursued a legitimate aim and could be considered 'necessary in a democratic society'. It reiterated that the blocking access to an entire website is an extreme measure, and that it blocks large amounts of content which has not been identified as illegal. The Government had not put forward any justification for the blocking order; the Court therefore found that this did not pursue any legitimate aim.<br><br>The Court then turned to the issue of safeguards which domestic law must provide to prevent excessive and arbitrary blocking measures. It reiterated that blocking measures are a prior restraint; and held (citing *Association Ekin v. France*, no. 39288/98):<br><br>> The dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court and are justified only in exceptional circumstances. This is especially so as far as the press is concerned, 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 ... In cases of prior restraints on the operation of media outlets such as the present one, a legal framework is required to ensure both tight control over the scope of bans and an effective Convention-compliant judicial review.<br><br>The Court found that the domestic law did not provide any procedural safeguards. The media websites were blocked without their owners being notified. There had been no impact assessment of the blocking measures, and the urgency of the immediate block had not been justified. The blocking measures had not been sanctioned by a court or other independent body. The Court noted furthermore that the domestic legislation did not require the authorities to justify the necessity and proportionality of the blocking; to ensure that only illegal content would be blocked; or whether the same result could be |

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| | achieved by less intrusive means. When the owners sought a judicial review, the domestic court did not weigh up their right to freedom of expression against the state's aims.<br><br>For all these reasons, the Court found that the blocking measure was excessive and arbitrary, and found a violation of the right to freedom of expression. |

### 2.1.2. Nagla v. Latvia

Application no. 73469/10, 16 July 2013

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| *Facts:* | The applicant, a journalist and host of the investigative news programme De Facto, was contacted by an anonymous source who exposed serious security flaws in the Latvian State Revenue Service's (VID) database. The breach allowed access to sensitive data, including the income, tax records, and personal details of public officials and private individuals. The applicant reported on the incident on De Facto. A week later, the source – using the pseudonym 'Neo' – began publishing salary information of state officials on Twitter. The VID initiated criminal proceedings; the applicant was interviewed as a witness but refused to reveal her source. Police searched the applicant's home and seized her laptop and external drives. The authorities invoked a special urgent procedure allowing for retroactive judicial approval. The applicant's legal challenge was dismissed. |

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| *Judgment:* | The Court emphasised that "a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources" (citing *Financial Times Ltd and Others v. the UK*, no. 821/03). The laptop and external drives could identify confidential sources.<br><br>The Court referred to previous caselaw that set out the applicable principles, in particular concerning the need for a strong legal framework that provides protection against abuse (citing *Sanoma v. Netherlands (GC)*, no. 38224/03). It noted that domestic law provided procedural safeguards by virtue of prior judicial scrutiny by an investigating judge. The search was therefore 'prescribed by law' as required under Article 10(2) of the Convention.<br><br>The Court then considered whether the search had been 'necessary in a democratic society'; in particular whether the reasons given for the search were 'relevant' and 'sufficient', and whether the interference was proportionate and corresponded to a 'pressing social need' (citing *Financial Times Ltd and Others v. the UK*, no. 821/03).<br><br>The Court reiterated that a search conducted with a view to identifying a journalist's source is a drastic measure, especially when the search warrant allows the seizure of "any information" pertaining to the crime. Investigators who raid a journalist's workplace or home have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist. The Court reiterated that "limitations on the confidentiality of journalistic sources call for the most careful scrutiny".<br><br>The Court observed that the subject matters of the leaks – public sector salaries paid at a time of economic crisis, and security flaws in the State Revenue Service – were issues of legitimate public debate. The Court considered that whether the source had acted lawfully was only "one factor to be taken into consideration in carrying out the balancing |

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| | exercise required under Article 10(2) of the Convention" (citing *Financial Times Ltd and Others v. the UK*, no. 821/03); and that "the right of journalists not to disclose their sources cannot be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources" (citing *Tillack v. Belgium*, no. 20477/05).<br><br>The Court further observed that there had been three months between the broadcast and the search of her home, when the applicant had already agreed to testify, and that the search had been conducted under an 'urgent' procedure. The investigating authorities had argued that this was to prevent the destruction or concealment of evidence, but did not substantiate that.<br><br>The Court found that the investigating judge had failed to establish that the interests of the investigation overrode the public interest in the protection of the journalist's sources. The Court therefore concluded that "relevant and sufficient" reasons for the interference were not given; leading to a violation of the right to freedom of expression. |

## 3. The Protection of Good Faith Reporting and Responsible Journalism

### 3.1. Main Legal Principles as Developed by the European Court of Human Rights

The right to freedom of expression "protects journalists' right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism".[31] This derives from the text of Article 10, which states that the right to freedom of expression "carries with it duties and responsibilities". The Court has emphasised that "[t]hese considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance."[32]

The Court has emphasised that "[i]n considering the 'duties and responsibilities' of a journalist, the potential impact of the medium concerned is an important factor",[33] highlighting that audiovisual media are more impactful than the print media. With regard to internet-based media, the Court has emphasised that each needs to be assessed with regard to its reach and the impact it might have:

> The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms is certainly higher than that posed by the press, as unlawful speech, including hate speech and calls to violence, can be disseminated as never before, worldwide, in a matter of seconds, and sometimes remain persistently available online. At the same time, it is clear that the reach and thus potential impact of a statement released online with a small readership is certainly not the same as that of a statement published on mainstream or highly visited web pages. It is therefore essential for the assessment of a potential influence of an online publication to determine the scope of its reach to the public.[34]

The Court has equally emphasised that "[w]here freedom of the 'press' is at stake, the authorities have only a limited margin of appreciation to decide whether a 'pressing social need' exists [to impose a restriction on freedom of expression] … there is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate of questions of public interest".[35] Furthermore, courts should not judge editorial decisions that are made in good faith:

> It is not for the Court, or for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists in any given case … the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question."[36]

The question of good faith is of importance when allegations are made that turn out to be wrong:

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[31] *Fressoz and Roire v. France*, Application no. 29183/95, 21 January 1999, par. 54;
[32] *Stoll v. Switzerland*, Application no. 69698/01, 10 December 2007, par. 104.
[33] *Jersild v. Denmark*, Application no. 15890/89, 23 September 1994, par. 31.
[34] *Savva Terentyev v. Russia*, Application no. 10692/09, 28 August 2018, par. 79.
[35] *Stoll v. Switzerland*, Application no. 69698/01, 10 December 2007, paras. 105, 106.
[36] *Jersild v. Denmark*, Application no. 15890/89, 23 September 1994, par. 31. *Stoll v. Switzerland*, Application no. 69698/01, 10 December 2007, par. 146.

> [I]n situations where on the one hand a statement of fact is made and insufficient evidence is adduced to prove it, and on the other the journalist is discussing an issue of genuine public interest, verifying whether the journalist has acted professionally and in good faith becomes paramount.[37]

In deciding good faith and whether a journalist acted responsibly, a holistic view needs to be taken:

> The criterion of responsible journalism should recognise the fact that it is the article as a whole that the journalist presents to the public.[38]

The Court has called for national courts to be cautious in assessing these cases:

> If the national courts apply an overly rigorous approach to the assessment of journalists' professional conduct, the latter could be unduly deterred from discharging their function of keeping the public informed. The courts must therefore take into account the likely impact of their rulings not only on the individual cases before them but also on the media in general.[39]

The Court has held that these principles apply equally to a civil society organisation that assumes a public watchdog function.[40] It has cited with approval the Code of Ethics and Conduct for NGOs of the World Association of Non-Governmental Organisations (WANGO), highlighting that "an NGO should not violate any person's fundamental human rights", "should give out accurate information … regarding any individual" and "the information that [an NGO] chooses to disseminate to … policy makers … must be accurate and presented with proper context".[41]

## 3.2. Illustrative cases:

### 3.2.1. Bozhkov v. Bulgaria

Application no. 3316/04, 19 April 2011

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| *Facts:* | The applicant, a journalist, had learned that 14 parents of children who applied to specialised secondary schools had complained that a large number had been admitted to these schools on the basis of an alleged medical condition rather than through competitive examination, despite being in good health. The parents who complained claimed these children had paid bribes for their school places. The applicant reported on the issue, stating among other things that if the Minister for Education accepted the findings of an ongoing official inquiry, the experts would be dismissed.<br><br>The experts sued the applicant for defamation, and won damages in compensation for being falsely accused of an offence, and for damage to their reputation. |

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| *Judgment:* | The Court's judgment included a section assessing whether the applicant acted as a responsible journalist. This summary focuses on that section.<br><br>The Court first observed that freedom of expression carries with it 'duties and responsibilities', and that journalists must act in good faith in order to provide accurate |

[37] *Flux v. Moldova (no. 7)*, Application no. 25367/05, 24 November 2009, par. 41.
[38] *Bozhkov v. Bulgaria*, Application no. 3316/04, 19 April 2011, par. 50.
[39] *Bozhkov v. Bulgaria*, Application no. 3316/04, 19 April 2011, par. 50.
[40] *Magyar Helsinki Bizottság v. Hungary*, Application no. 18030/11, 8 November 2016, par. 159;
[41] *Medžlis Islamske Zajednice Brčko and Others v. Bosnia And Herzegovina*, Application no. 17224/11, 27 June 2017, par. 87.

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| | and reliable information in accordance with the ethics of journalism. It emphasised that in situations where a statement of fact is made on a matter of genuine public interest and there is insufficient evidence to prove it, verifying whether the journalist acted professionally and in good faith is paramount (citing *Flux v. Moldova (no. 7)*, no. 25367/05).<br><br>The Court noted that the nature of the allegation – that the experts would be dismissed for bribe-taking – made it very difficult for the applicant to provide direct corroboration. Because the potential dismissal was a hypothetical event that lay in the future, the applicant could not know for certain that this would happen. While the applicant could have delayed publishing, the Court recalled that "it is not for the Court to substitute its own views for those of the press as to the appropriate timing of publication of a news story. 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" (citing, amongst others, *Observer and Guardian v. the UK*, no. 13585/88). As the story related to the school admission process, it was not unreasonable to publish it before the beginning of the school year four days later. The Court also observed that the authorities had not yet released official information on the results of the formal inspection. The lack of this information, coupled with the irregularities in the admission of students, could reasonably have prompted the applicant to report on anything that was available, including uncorroborated information. The Court emphasised that "the situation must be examined as it presented itself to the journalist at the material time, rather than with the benefit of hindsight" (citing *Bladet Tromsø and Stensaas v. Norway*, no. 21980/93).<br><br>The Court furthermore observed that the national courts had not considered the overall thrust of the article, which included accurate allegations about breaches of the school admissions regulations. The Court emphasised that "the criterion of responsible journalism should recognise the fact that it is the article as a whole that the journalist presents to the public"; and that while the applicant could have chosen more careful words, he did point out that the experts' fate would be decided at a later point. The Court also noted that the article was a short news flash which called for concise wording.<br><br>There was no evidence that the applicant acted with reckless disregard for accuracy. The allegations made by the protesting parents, coupled with the high number of irregularities in the school admission procedure, made it plausible that the inspection relating to the experts' conduct might lead to disciplinary sanctions for corruption. The Court was therefore satisfied that the applicant acted responsibly and found that the defamation judgment against the applicants violated their right to freedom of expression. |

### 3.2.2. Flux v. Moldova (No. 7)

Application no. 25367/05, 24 November 2009

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| *Facts:* | The applicant newspaper published an article reporting that four apartments had been built with public money in a former Parliament warehouse. The article indicated that according to parliamentary sources, the future owners of these apartments included several politicians. The article stated added that the newspaper had not managed to get a response from the politicians concerned or other parliamentary sources and criticised |

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| | the Parliament for its lack of transparency. The article also described the unsuccessful efforts made by one member of parliament to obtain information on the expenditure. The newspaper was then sued by one of the politicians it had named. The Buiucani District Court held that the article was defamatory and awarded compensation; on appeal, the defamation finding was upheld although the amount of compensation was reduced. |

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| *Judgment:* | A significant part of the Court's judgment assessed whether the journalist reported responsibly and in good faith. This summary focuses on that analysis. The Court first reiterates that "as part of their role of 'public watchdog', the media's reporting on 'stories' or 'rumours' – emanating from persons other than the applicant – or 'public opinion' is to be protected where they are not completely without foundation" (citing *Thorgeir Thorgeirson v. Iceland*, no. 13778/88). It then emphasised that "in situations such as this, where on the one hand a statement of fact is made and insufficient evidence is adduced to prove it, and on the other the journalist is discussing an issue of genuine public interest, verifying whether the journalist acted professionally and in good faith becomes paramount" (citing *Flux v. Moldova (no. 6)*, no. 22824/04).<br><br>The Court observed that the article included a number of uncontested facts, including that financial information had been withheld by the Court of Accounts and the Parliament's leadership. These uncontested facts gave credibility to the parliamentary source who had contacted the journalist. The Court also observed that the newspaper did not just publish what the source had told it, but verified some of the information by actually visiting the apartments and establishing that they were being prepared for allocation. Furthermore, it contacted two of the four parliamentarians to whom the apartments had allegedly been allocated, as well as a several officials. The newspaper had acted professionally and in good faith to verify the facts as far as was reasonably possible.<br><br>The Court emphasised furthermore that "news is a perishable commodity" (citing *Observer and Guardian v. the UK*, no. 13585/88), and that lodging a formal access to information request would have taken too long to obtain an answer. Moreover, the Court took into account that such a request would most likely have been unsuccessful, given the unsuccessful attempts by members of parliament to obtain information. The Court held:<br><br>> The lack of any official information on the matter at issue, despite the applicant newspaper's attempts to obtain such details, plus the other uncontested facts raising legitimate doubts as to the legitimacy of the distribution of the apartments, could reasonably have prompted the journalist to report on anything that was available, including unconfirmed rumours (citing *Timpul Info-Magazin and Anghel v. Moldova*, no. 42864/05).<br><br>Finally, the Court took into account that the newspaper informed its readers that it had been unable to verify the information, and thus avoided presenting the rumours as fact.<br><br>The Court found that the defamation judgment against the applicants constituted a violation of their right to freedom of expression. |

### 3.2.3. Thomaidis v. Greece

Application no. 28345/16, 7 May 2024

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| *Facts:* | The applicant was host of a television program who had been sued by a football official after broadcasting a witness statement from a criminal investigation concerning alleged match fixing. He had allowed a guest on his show to read out unlawfully intercepted conversations and make offensive remarks about the official. The Piraeus Court of First Instance awarded the official €10,000 in compensation, finding that the broadcasts had damaged his reputation and were not justified by public interest. The Court of First Instance considered that the journalist had designed the broadcasts to insult the official; that the content served no informative purpose, as the allegations were already public knowledge; and that no substantive discussion followed their presentation. The Court of First Instance also pointed to the inflammatory nature of the statements, the personal conflict between the official and the guest, and the journalist's failure to moderate or prevent the defamatory content. Appeals were dismissed. |

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| *Judgment:* | The Court focused on whether the journalist had overstepped the boundaries of responsible journalism. The Court emphasised that responsible journalism entails both good faith and compliance with the law (citing Bédat v. Switzerland ([GC], no. 56925/08). The Court stated that, as a professional, the applicant had been aware of the illegality of the disclosures; and that there was a risk of undermining ongoing proceedings.<br><br>The Court agreed with the domestic courts' assessment that the broadcasts were intentionally defamatory and aimed to sensationalise (citing *Erla Hlynsdóttir v. Iceland (no. 2)*, no. 54125/10). The journalist had failed to contextualise the information within a broader, informative discussion. The broadcasts featured inflammatory remarks by a guest amid a known personal quarrel, suggesting a deliberate attempt to prejudice public opinion against the official rather than contributing to a debate of public interest. The Court found that the broadcasts encouraged viewers to assume the official's guilt. Thus, while the subject of match fixing was undeniably of public concern, the way in which the journalist structured and conducted the broadcast did not contribute meaningfully to a public understanding of the issue. The reporting had therefore not been in good faith and the journalist had overstepped the boundaries of responsible journalism. The Court found that the defamation judgment did not constitute a violation of the right to freedom of expression. |

## 4. The Need for Politicians and Public Figures to Tolerate Criticism

### 4.1. Main Legal Principles as Developed by the European Court of Human Rights

The Court has held that political debate requires that politicians must tolerate great criticism:

> The limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10(2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.[42]

This principle applies to politicians at all levels, from the president down to mayors and local politicians;[43] it implies that a law that provides increased protection for heads of State and Government is not in keeping with the spirit of the Convention.[44]

The Court has applied the same principle to public figures other than politicians, stating that "the limits of critical comment are wider if a public figure is involved, as he inevitably and knowingly exposes himself to public scrutiny and must therefore display a particularly high degree of tolerance."[45] This has been applied in cases involving journalists; a lecturer; the director of a mosque; and a businessman; all of whom had either sought publicity or could be criticised for the public nature of their work or public statements that they had made.[46] The principle applies equally to NGOs, and to individuals who enter into public debate: "private individuals or associations lay themselves open to scrutiny when they enter the arena of public debate."[47] The Court has also stated that "[i]t is true that large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies".[48]

The Court has emphasised that governments must tolerate even more criticism than politicians:

> The limits of permissible criticism are wider with regard to a government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion.[49]

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[42] *Lingens v. Austria*, Application no. 9815/82, 8 July 1986, par. 42.
[43] For example, *Tuşalp v. Turkey*, Application nos. 32131/08, 41617/08, 21 February 2012 (prime minister); *Brasilier v. France*, Application no. 71343/01, 11 April 2006 (mayor); *Oberschlick v. Austria (no. 2)*, Application no. 20834/92, 1 July 1997 (leader of a political party).
[44] *Otegi Mondragon v. Spain*, Application no. 2034/07, 15 March 2011; *Colombani and Others v. France*, Application no. 51279/99, 25 June 2002.
[45] *Kuliś v. Poland*, Application no. 15601/02, 18 March 2008, par. 47.
[46] *Gelevski v. North Macedonia*, Application no. 28032/12, 8 October 2020 (journalist); *Brunet-Lecomte and Lyon Mag' v. France*, Application no. 13327/04, 20 November 2008 (lecturer); *Chalabi v. France*, Application no. 35916/04, 18 September 2008 (director of a mosque); *Verlagsgruppe News GmbH v. Austria (no. 2)*, Application no. 10520/02, 14 December 2006 (businessman).
[47] *Jerusalem v. Austria*, Application no. 26958/95, 27 February 2001, par. 38.
[48] *Steel and Morris v. the UK*, Application no. 68416/01, 15 February 2005, par. 94.
[49] *Dyuldin and Kislov v. Russia*, Application no. 25968/02, 31 July 2007, par. 45.

Other elected bodies, such as local councils, fall in the same category; the Court has emphasised that "it is only in exceptional circumstances that a measure proscribing statements criticising the acts or omissions of an elected body such as a council can be justified with reference to 'the protection of the rights or reputations of others'".[50] State executive bodies are also subject to wider limits of criticism.[51] The Court has held that public bodies cannot justify defamation proceedings as being "in pursuance of the legitimate aim of 'the protection of the reputation ... of others'".[52] Similarly, public institutions and institutions that provide a public service and/or are publicly funded need to tolerate greater criticism of their functioning.[53] The same reasoning applies to state-owned companies, although the Court has accepted that they may have a commercial reputation to protect.[54]

Individual civil servants must also display a high degree of tolerance with regard to their official functioning, although not at the same level as politicians – and the Court has stated that it may be necessary to protect them from offensive and abusive verbal attacks whilst on duty:[55] "it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions."[56] The Court has held that the level of post that the civil servant holds is an important factor – the more important their job, the more criticism they must tolerate.[57]

Judges fall into a separate category. Under Article 10(2), restrictions may be imposed on freedom of expression when necessary in a democratic society for the purpose of "maintaining the authority and impartiality of the judiciary". The Court has held that this does not mean that they are beyond reproach: "bearing in mind that judges form part of a fundamental institution of the State, they may as such be subject to personal criticism within the permissible limits, and not only in a theoretical and general manner ... When acting in their official capacity they may thus be subject to wider limits of acceptable criticism than ordinary citizens."[58] The only exception is "in the case of gravely damaging attacks that are essentially unfounded".[59]

## 4.2. Illustrative cases

### 4.2.1. Lingens v. Austria

Application no. 9815/82, 8 July 1986

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| *Facts:* | Four days after the 1975 general elections, a television interview revealed that Friedrich Peter, leader of the Austrian Liberal Party, had served in the first SS infantry brigade |

[50] *Lombardo v. Malta*, Application no. 7333/06, 24 April 2007, par. 50.
[51] *Romanenko and Others v. Russia*, Application no. 11751/03, 17 November 2005.
[52] *OOO Memo v. Russia*, Application no. 2840/10, 15 March 2022; see also *Mária Somogyi v. Hungary*, Application no. 15076/17, 16 May 2024, paras. 30-44.
[53] *Kharlamov v. Russia*, Application no. 27447/07, 8 October 2015 (university); *Frisk and Jensen v. Denmark*, Application no. 19657/12, 5 December 2017 (public hospital).
[54] *Uj v. Hungary*, Application no. 23954/10, 19 July 2011
[55] *Lešník v. Slovakia*, Application no. 35640/97 , 11 March 2003.
[56] *Janowski v. Poland [GC]*, Application no. 25716/94, 21 January 1999, par. 33.
[57] *De Carolis and France Télévisions v. France*, Application no. 29313/10, 21 January 2016; *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, Application no. 17224/11, 27 June 2017, par. 98.
[58] *Morice v. France*, Application no. 29369/10, 23 April 2015, par. 131.
[59] *Morice v. France*, Application no. 29369/10, 23 April 2015, par. 131.

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| | during World War II, which had committed atrocities. The following day, retiring Chancellor Bruno Kreisky, head of the Austrian Socialist Party – which was considering a coalition with the Liberal Party – was asked about the allegations and strongly defended Peter. This prompted the applicant to publish two critical articles. In the first, he argued that former Nazis should not hold political power and criticised Kreisky's support of Peter. In the second, he labelled Kreisky's stance "immoral" and "undignified", accusing him of disregarding Nazi victims. The applicant suggested that Kreisky had wasted an opportunity to help Austria confront its Nazi past and build national self-confidence. In response, Kreisky sued for defamation. The Vienna Regional Court held for Kreisky, finding that terms such as "immoral" and "basest opportunism" were defamatory, and awarded compensation. Appeals were ultimately unsuccessful. |

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| *Judgment:* | The judgment of the European Court of Human Rights focused on Kreisky's status as a politician. This summary concerns the Court's analysis on that point.<br><br>The Court first reiterated, "[f]reedom of the press ... affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention" (par. 42). It then held:<br><br>> The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 (art. 10-2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues. (par. 42)<br><br>The Court noted that the applicant had been convicted because of the use of allegedly defamatory expressions with regard to Mr. Kreisky, who was Federal Chancellor. The Court emphasised that the expressions concerned Kreisky's role as a politician, and had come against the background of a post-election political controversy.<br><br>The Court emphasised further that the defamation conviction could have a chilling effect, not just on the applicant but also on other journalists: it "amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future" (par. 44). The Court stated:<br><br>> In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog. (par. 44)<br><br>The Court went on to note that the words that the domestic court had found to be defamatory were value judgments, the truth of which could not be established. The Court |

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| | concluded that the applicant's conviction for defamation had violated the right to freedom of expression. |

#### 4.2.2. Stancu and Others v. Romania

Application no. 22953/16, 18 October 2022

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| *Facts:* | The applicants were two journalists and the publisher of a legal news site. They had been convicted for defamation following a series of articles criticising a prosecutor, referred to only by the initials O.S.H., for her involvement in the prosecution of a man later acquitted after spending 13 months in detention. At the time O.S.H. was a prosecutor who was an elected member and vice-president of the High Council of the Judiciary (*Consiliul Superior al Magistraturii* – CSM), an independent body that seeks to safeguard the independence of the judiciary; the independence, impartiality and professional reputation of individual judges and prosecutors; and to contribute to the efficient organisation and functioning of courts and prosecutor's offices. The articles accused O.S.H. of professional misconduct and contributing to a miscarriage of justice. While the articles referenced public documents, the Bucharest County Court found that the language used – including claims that she had "destroyed" a life and had been responsible for "abuses" – exceeded acceptable limits of journalistic expression and misrepresented her legal role in the case. The applicants were ordered to pay O.S.H. damages; on appeal, the damage award was reduced. |

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| *Judgment:* | The judgment of the European Court of Human Rights contained a section focusing on O.S.H.'s status. This summary concerns the Court's analysis on that point.<br><br>The Court first noted that the applicants' reports had been published against the background of a larger public debate concerning the organisation and functioning of the CSM, fuelled by in-house conflicts within the organisation and the position of certain officers of the court. The Court also noted that O.S.H. was intending to run for the post of CSM president and that her intentions were publicly known at the time; and observed that the articles concerned O.S.H.'s professional activity and rise to a high-ranking position within the CSM and ultimately the justice system.<br><br>The Court observed furthermore that O.S.H. was a high-ranking publicly elected official who had received attention from the press even before the publication of the article in question in the present case. In such circumstances, the Court emphasised:<br><br>> Such a public servant must be considered to have inevitably and knowingly entered the public domain and laid himself or herself open to close scrutiny of his or her acts and that the limits of acceptable criticism must accordingly be wider than in the case of an ordinary professional. (par. 128)<br><br>The Court took into account the inherent duties and responsibilities with respect to the justice system entailed by O.S.H.'s status as prosecutor and CSM member, and stated that she could not be compared to an actual politician. However, even taking into account the special role of the judiciary in society and its special need for public confidence, the |

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| | Court emphasised that O.S.H. belonged to a group of persons who could not claim protection of her right to respect for her private life in the same way as an ordinary citizen, or even a professional for that matter, could. The Court concluded that she was therefore subject to wider limits of acceptable criticism than ordinary individuals and professionals.<br><br>Noting the content of the articles, the Court concluded that the defamation conviction violated the right to freedom of expression. |

## 5. The Proportionality of Civil Sanctions

### 5.1. Main Legal Principles as Developed by the European Court of Human Rights

Large sanctions awards can have a chilling effect not only on the person or entity on whom they are imposed, but also on others. The Court has therefore stated that "the most careful scrutiny … is called for when the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the media in debates over matters of legitimate public concern".[60] When imposing a sanction, national courts must "demonstrate convincingly the existence of a pressing social need" and "provide 'relevant and sufficient reasons' to justify the award".[61]

Proportionality is the paramount consideration:

> [A]n award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.[62]

States are left flexibility to determine what is proportionate in their national context, but the law must "offer adequate and effective safeguards against a disproportionately large award".[63]

The primary factors that need to be taken into account are the impact of the award on the applicant, in particular their financial situation and any chilling effect a sanction might have on their future exercise of freedom of expression; and the chilling effect that the sanction might have on others.[64] The assessment may also take into account the applicant's notoriety.[65] In assessing impact on the applicant, reference can be made to the applicant's income, as well as to the minimum or average salary in the country or in a particular professional field.[66]

The Court has also assessed proportionality by comparing defamation awards with awards made in other types of cases. For example, in *Narodni List d.d. v. Croatia*, it observed that a defamation award of approximately €6,870 amounted to two-thirds of an award for mental anguish caused by the wrongful death of a sibling; it went on to hold that it was "difficult to accept that the injury to … reputation … was of such a level of seriousness as to justify an award of that size."[67]

In some cases, the Court has found an award excessively high in absolute terms, or in comparison with other awards. In *Tolstoy Miloslavsky v. the UK*, the Court found that a £1.5m award was high in absolute terms and three times the highest awarded previously; in *Pakdemirli v. Turkey*, it noted that the award of €60,000 was the highest ever in the country.[68] In *Gouveia Gomes Fernandes and Freitas e Costa v. Portugal*, the Court considered an award of €25,000 "quite high and likely to deter [the applicants] from contributing to the public discussion of issues of concern to the life of the

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[60] *OOO Regnum v. Russia*, Application no. 22649/08, 8 September 2020, par. 77.
[61] *OOO Regnum v. Russia*, Application no. 22649/08, 8 September 2020, par. 79.
[62] *Tolstoy Miloslavsky v. the UK*, Application no. 18139/91, 13 July 1995, par. 49.
[63] *Tolstoy Miloslavsky v. the UK*, Application no. 18139/91, 13 July 1995, paras. 41, 50.
[64] As summed up in *Tolmachev v. Russia*, Application no. 42182/11, 2 June 2020, paras. 52-53.
[65] In *Mesić v. Croatia*, Application no. 19362/18, 5 May 2022, the Court found that a substantial was had been appropriate to neutralise the 'chilling' effect of the defamatory statements.
[66] As summed up in *Tolmachev v. Russia*, Application no. 42182/11, 2 June 2020, paras. 52-53. In *Kasabova v. Bulgaria*, Application no. 22385/03, 19 April 2011, the Court noted that the compensation awarded equalled 35 monthly salaries, and the applicant struggled for years to pay it off (par. 71).
[67] Application no. 2782/12, 8 November 2018, par. 71.
[68] Application no. 18139/91, 13 July 1995; Application no. 35839/97, 22 February 2005.

community."[69] In *Ghiulfer Predescu v. Romania*, the Court described an award of €13,500 as "extremely high [and] capable of having a 'chilling', dissuasive effect on the applicant's freedom of expression".[70] In *Público - Comunicação Social, S.A. and others v. Portugal*, the Court held that "the sum of EUR 75,000 to which all the applicants were ordered to pay – but which was ultimately paid in full by the first applicant – was undoubtedly an unusually high amount, especially in comparison with other defamation cases brought before the Portuguese courts and before the Court and taking into account the fact that the reputation of a legal entity and not an individual was at issue."[71] The Court went on to warn:

> Such a sanction inevitably risks deterring journalists from contributing to the public discussion of issues of interest to the life of the community. By the same token, it is likely to hinder the press in the performance of its task of information and control. (par. 55)

With regard to the media, the Court has sought to ensure that damages awards are not so high that they threaten its financial and economic foundations.[72]

In addition to the sanction award, the proportionality assessment needs to also take into account other costs that may be imposed, such as an award to pay the legal costs of the party suing for defamation, which may include a "success fee" and insurance premiums.[73]

Finally, the Court has held that even a very low award, of €1 in 'symbolic compensation', can still have a chilling effect on the right to freedom of expression: the very fact of a legal judgment for the exercise of freedom of expression has a significant impact, even without financial consequences.[74]

## 5.2. Illustrative cases

### 5.2.1. Tolstoy Miloslavsky v. the United Kingdom

Application no. 18139/91, 13 July 1995

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| *Facts:* | The applicant had accused Lord Aldington of orchestrating war crimes during the repatriation of Cossacks and Yugoslavs in 1945, leading to the deaths or brutal treatment of tens of thousands of people. He equated his conduct to that of Nazi war criminals. Lord Aldington initiated defamation proceedings against Tolstoy. In the High Court of Justice, the jury in the proceedings found that the allegations were defamatory and untrue, and awarded Lord Aldington £1.5 million in damages. This was the largest libel award in English legal history at the time, approximately three times the previous highest award. The High Court judge had provided extensive instructions to the jury on how to assess damages, emphasising that they should aim to compensate for damage to reputation, not punish; the importance of reputation and injury to feelings; and the need for |

[69] Application no. 1529/08, 29 March 2011, par. 54.
[70] Application no. 29751/09, 27 June 2017, par. 61.
[71] Application no. 39324/07, 7 December 2010, par. 55.
[72] *Timpul Info-Magazin and Anghel v. Moldova*, Application no. 42864/05, 27 November 2007 (the media outlet was forced to close as a result of the compensation it was ordered to pay. See also *Błaja News Sp. z o. o. v. Poland*, Application no. 59545/10, 26 November 2013,par. 71.
[73] *Associated Newspapers Limited v. the UK*, Application no. 37398/21, 12 November 2024; *MGN Limited v. the UK*, Application no. 72497/17, 20 September 2022 (dec.); *Ileana Constantinescu v. Romania*, Application no. 32563/04, 11 December 2012; *MGN Limited v. the UK*, Application no. 39401/04, 18 January 2011.
[74] *Brasilier v. France*, Application no. 71343/01, 11 April 2006.

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| | 'vindication' of the plaintiff's character. He cautioned against using other cases as benchmarks and encouraged grounding the award in real-world terms. The Court of Appeal upheld the High Court judgment and the jury award. |

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| *Judgment:* | The Court focused its judgment on the award, and not on the finding of defamation. It noted, first, that the statements that had been found to be untrue – accusations of war crimes – were very serious and extremely damaging to reputation, and merited a high award. However, this did not mean that the jury was free to make any award it saw fit; "under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered" (par. 49).<br><br>The Court observed that the jury had been directed not to punish the applicant but only to award an amount that would compensate the non-pecuniary damage to Lord Aldington. Yet, the jury awarded a sum three times the size of the highest defamation award previously made in England; and no comparable award had been made since. The Court held that "[a]n award of the present size must be particularly open to question where the substantive national law applicable at the time fails itself to provide a requirement of proportionality" (par. 49).<br><br>The Court went on to observe that the national law allowed a great discretion to the jury, and that the domestic Court of Appeal could not set aside an award simply on the grounds that it was excessive but only if the award was so unreasonable that it could not have been made by sensible people and must have been arrived at capriciously, unconscionably or irrationally. This in effect constituted an almost limitless discretion, which even the domestic Court of Appeals had in a later judgment considered was not 'necessary in a democratic society'. The European Court of Human Rights observed that the domestic Court of Appeal had, since this judgment, also given guidance to juries in future cases, urging it to ensure that any award they made was proportionate to the damage which the plaintiff had suffered and was a sum which it was necessary to award him to provide adequate compensation and to re-establish his reputation.<br><br>The European Court of Human Rights endorsed the domestic Court of Appeal's observations, holding that "the scope of judicial control, at the trial and on appeal, at the time of the applicant's case did not offer adequate and effective safeguards against a disproportionately large award." Accordingly, it found a violation of the right to freedom of expression. |

### 5.2.2. Tolmachev v. Russia

Application no. 42182/11, 2 June 2020

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| *Facts:* | The applicant faced two separate sets of defamation proceedings arising from critical newspaper articles he had authored about judges in his area. The first set of proceedings concerned an editorial which harshly criticised the President of the District Court, accusing her of unlawfully appropriating communal property in her apartment building and of discrediting the judiciary. The judge sued for defamation and was awarded |

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| | €24,360 in damages and legal costs by the Oktyabrskiy District Court of Rostov-on-Don. The award did not consider the applicant's financial situation but emphasised the seriousness of defaming a judge. On appeal this was reduced to €5,250, the Rostov Regional Court citing the need for proportionality and the importance of freedom of the press. The second set of proceedings concerned an article in which the applicant accused a former judge of taking bribes. In defamation proceedings brought by the former judge's son (the former judge had died), District Court of Rostov-on-Don awarded €25,000 in damages. An appeal was unsuccessful. |

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| *Judgment:* | Part of the Court's judgment assesses the award; this summary is focused on that.<br><br>The Court observed that the District Court omitted any reference to the applicant's financial situation, emphasising instead that the claimant was a judge whose reputation was to be protected. Even though the Regional Court reduced the award on appeal, it did not properly assess whether the sum that it eventually awarded was proportionate, taking into account the applicant's financial situation. The Court then observed that in the second set of proceedings, the domestic courts had focused on the fact that the claimant must have profoundly suffered because of the attack on his deceased mother's reputation. While the District Court had noted in passing that it had taken into account of 'the financial situation of each defendant', it had failed to provide any details regarding that situation. The Regional Court had merely reiterated the lower court's reasoning. Accordingly, the Court considered that the national courts, in deciding on the compensation for non-pecuniary damage to be paid by the applicant in the two sets of defamation proceedings, had failed to ensure that there was a reasonable relationship of proportionality to the injury to reputation suffered by the claimants.<br><br>The Court considered that the reasons given by the domestic courts in justifying the two instances of interference with the applicant's right to freedom of expression, although relevant, could not be regarded as sufficient. The domestic courts had not given due consideration to the principles and criteria as laid down by the Court's case-law for balancing the right to respect for private life and the right to freedom of expression. They had thus exceeded the margin of appreciation afforded to them and failed to demonstrate that there was a reasonable relationship of proportionality between the two instances of interference in question and the legitimate aim pursued. The Court found a violation of the right to freedom of expression. |

## 6. Criminal Sanctions

### 6.1. Main Legal Principles as Developed by the European Court of Human Rights

The Court has emphasised that States must show restraint in using the criminal law to restrict the exercise of freedom of expression:

> [T]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.[75]

The Court has stated that one of the dangers of using criminal law against freedom of expression is that it has a strong chilling effect and may deter journalists as well as others from commenting on issues of genuine public interest. It has emphasised:

> [T]he Court must be satisfied that the penalty does not amount to a form of censorship intended to discourage the press from expressing criticism. In the context of a debate on a topic of public interest, such a sanction is likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, it is liable to hamper the press in performing its task as purveyor of information and public watchdog. In that connection, the fact of a person's conviction may in some cases be more important than the minor nature of the penalty imposed.[76]

The imposition of imprisonment – the ultimate sanction under criminal law – is compatible with the right to freedom of expression only in extremely rare cases:

> [T]he imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.[77]

Even a minor criminal sanction – a suspended sentence, a sentence that is later pardoned, or a symbolic fine – can have a chilling effect, as the mere existence of a criminal conviction is serious and can lead to significant consequences.[78] In considering the proportionality of an interference with freedom of expression – whether it is "necessary in a democratic society" - the fact that the criminal law has been used is a significant factor which outweighs the minor nature of any penalty imposed.[79]

While the Court has not ruled that criminal law defamation law is incompatible with the right to freedom of expression, it has recommended that States should use civil and other remedies whenever these are available. The Court has indicated that criminal defamation measures should be reserved for "certain grave cases – for instance in the case of speech inciting to violence".[80] In *Amorim Giestas and Jesus Costa Bordalo v. Portugal*, the Court found that a criminal defamation conviction

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[75] *Castells v. Spain*, Application no. 11798/85, 23 April 1992, par. 46.
[76] *Bédat v. Switzerland*, Application no. 56925/08, 29 March 2016, par. 79.
[77] *Cumpănă and Mazăre v. Romania*, Application no. 33348/96, 17 December 2004, par. 115.
[78] *Cumpănă and Mazăre v. Romania*, Application no. 33348/96, 17 December 2004, par. 11; *De Carolis and France Télévisions v. France*, Application no. 29313/10, 21 January 2016, par. 63.
[79] *Stoll v. Switzerland*, Application no. 69698/01, 10 December 2007, par. 154; *Haldimann and Others v. Switzerland*, Application no. 21830/09, 24 February 2015, par. 67.
[80] *Raichinov v. Bulgaria*, Application no. 47579/99, 20 April 2006, par. 50.

violated the right to freedom of expression "all the more so since [the Civil Code] provides for a specific remedy for the protection of honour and reputation."[81]

While many of the cases that the Court has decided have concerned journalists, these principles apply equally to others who comment on issues of general interest, including activists as well as members of the public.[82]

## 6.2. Illustrative cases

### 6.2.1. Castells v. Spain

Application no. 11798/85, 23 April 1992

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| *Facts:* | The applicant, a lawyer and senator from San Sebastián affiliated with a pro-Basque independence party, published an article criticising the Spanish government's handling of violence in the Basque Country. He implied that government officials were complicit in politically motivated killings of Basque dissidents. Shortly after, the public prosecutor charged him under a law criminalising serious insults or false accusations against the government. His parliamentary immunity was lifted and the Criminal Division of the Supreme Court convicted him, sentencing him to just over a year in prison, ruling that his article had exceeded acceptable political criticism. Appeals were unsuccessful. |

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| *Judgment:* | The Court first recalled that freedom of expression "constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress; and that it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'" (par. 42). This is especially so for an elected representative.<br><br>The Court observed that the applicant had been convicted for views that he had expressed in a media article, and that the media "affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders" (par. 42). He had been convicted because the domestic courts had considered that the article had crossed over the line between political criticism and insult, albeit only slightly.<br><br>The Court emphasised that while freedom of political debate is not absolute in nature, any restrictions on it must be carefully scrutinised. This is especially so when the criminal law is used:<br><br>> [T]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media. (par. 46) |

[81] *Amorim Giestas and Jesus Costa Bordalo v. Portugal*, Application no. 37840/10, 3 April 2014, par. 36.
[82] For example, *Toranzo Gomez v. Spain*, Application no. 26922/14, 20 November 2018 (activist); *Raichinov v. Bulgaria*, Application no. 47579/99, 20 April 2006 (civil servant); *Mătăsaru v. the Republic of Moldova*, Application nos. 69714/16 and 71685/16, 15 January 2019 (individual conducting a one-person protest).

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| | The Court went on to note that while a relatively lenient sanction had been imposed, this was irrelevant to its judgment. It held that the criminal conviction had violated the right to freedom of expression. |

### 6.2.2. Cumpănă and Mazăre v. Romania

Application no. 33348/96, 17 December 2004

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| *Facts:* | The applicants had published an article in a newspaper in which they questioned the legality of a contract that the city council had awarded to a company to tow away illegally parked vehicles. The article alleged the involvement of a lawyer employed by the city and a former deputy mayor, and was accompanied by a cartoon showing the lawyer on the former deputy mayor's arm, carrying a bag containing banknotes. The lawyer, who had since been appointed a judge, sued the applicants on the grounds that the cartoon had led readers to believe that she had had intimate relations with the former deputy mayor, despite the fact that they were both married. The Constanța Court of First Instance convicted the applicants of insult and defamation, and sentenced them to seven months' imprisonment. It also disqualified them from exercising certain civil rights, prohibited them from working as journalists for one year, and ordered them to pay damages. An appeal was dismissed, but the applicants were eventually granted a presidential pardon. |

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| *Judgment:* | Part of the Court's judgment dealt with the criminal nature of the proceedings against the applicant. This summary focuses on that part of the judgment.<br><br>The Court first emphasised that it "must … exercise the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern" (par. 111), and noted that the sanctions imposed on the applicants were "undoubtedly very severe" (par. 112). The Court reiterated the chilling effect of criminal sanctions:<br><br>> Investigative journalists are liable to be inhibited from reporting on matters of general public interest – such as suspected irregularities in the award of public contracts to commercial entities – if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment or to a prohibition on the exercise of their profession. (par. 113)<br><br>The Court held that "[t]he chilling effect that the fear of such sanctions has on the exercise of journalistic freedom of expression is evident" and "works to the detriment of society as a whole" (par. 114). This was an important factor in considering proportionality.<br><br>The Court restated that "the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence" (par. 115). It considered that the circumstances of this case, which it described as "a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest" presented "no justification whatsoever for the imposition of a |

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| | prison sentence" (par. 116). It emphasised that "[s]uch a sanction, by its very nature, will inevitably have a chilling effect" (par. 116). The fact that the applicants later received a pardon and did not serve their prison sentence did not alter the Court's conclusion, because a pardon is a discretionary power of the President and it does not expunge a conviction.<br><br>The Court noted furthermore that the prison sentence imposed on the applicants was accompanied by an order disqualifying them from exercising their civil rights. The Court held that "such a disqualification – which in Romanian law is automatically applicable to anyone serving a prison sentence, regardless of the offence for which it is imposed as the main penalty, and is not subject to review by the courts as to its necessity – was particularly inappropriate in the instant case and was not justified by the nature of the offences for which the applicants had been held criminally liable" (par. 117).<br><br>Finally, as regards the order prohibiting the applicants from working as journalists, the Court reiterated that "prior restraints on the activities of journalists call for the most careful scrutiny ... and are justified only in exceptional circumstances" (par. 118). This sanction, too, was "particularly severe and could not in any circumstances have been justified by the mere risk of the applicants' reoffending" (par. 118). The Court finally held that "by prohibiting the applicants from working as journalists as a preventive measure of general scope, albeit subject to a time-limit, the domestic courts contravened the principle that the press must be able to perform the role of a public watchdog in a democratic society". The Court concluded that the criminal sanctions imposed on the applicants, which included prison sentences, a one-year ban on working as journalists, disqualification from certain civil rights, and an order to pay damages, violated their right to freedom of expression under the Convention, whether these sanctions were considered individually or as a whole. |

## 7. Privacy and the Right to Freedom of Expression

### 7.1. Main Legal Principles as Developed by the European Court of Human Rights

The right to privacy is protected under Article 8 of the European Convention on Human Rights; the right to freedom of expression is protected under Article 10 of the Convention. "[A] as a matter of principle these rights deserve equal respect";[83] where they come into conflict – for example, when there is an allegation that a media outlet has intruded on someone's privacy, the Court engages in a balancing exercise. It uses the following criteria:

(a) contribution to a debate of public interest;
(b) the degree to which the person concerned is well known;
(c) the prior conduct of the person concerned;
(d) the method of obtaining the information and its veracity;
(e) the content, form and consequences of the publication

Depending on the case, other criteria may also be taken into account. For example, in a case in which a trial could be influenced, the Court added the criterion "influence on the criminal proceedings"; in a case concerning the publication of the photograph of someone who had in the past been convicted of neo-Nazi activities, the Court considered the time lapse between conviction and publication.[84]

As set out in chapter 2 of this Guide, the Court has emphasised that "public interest" is to be established in the light of the circumstances of each case. It does not equate to whatever the public is interested in, but denotes an issue that is of legitimate concern to society. The Court has emphasised that it does not approve of media reporting that is merely intrusive:

> The public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism.[85]

In the context of privacy, examples of public interest reporting include publishing on the medical condition of a candidate for the highest office of State,[86] sporting issues,[87] performing artists,[88] crimes or criminal proceedings in general,[89] and a sex scandal in a political party involving members of the Government.[90] Media articles that solely report on the private lives of well-known individuals are generally not regarded as being in the public interest.[91]

As regards the degree to which the person concerned is well known, the role or function of the person is important as well as their work or activities.[92] Anyone who, through their work or position, has

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[83] *Couderc and Hachette Filipacchi Associés v. France*, Application no. 40454/07, 10 November 2015, par. 91.
[84] *Axel Springer SE and RTL Television GmbH v. Germany*, Application no. 51405/12, 21 September 2017; *Mediengruppe Österreich GmbH v. Austria*, Application no. 37713/18, 26 April 2022.
[85] *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, Application no. 931/13, 27 June 2017, par. 171.
[86] *Éditions Plon v. France*, Application no. 58148/00, 18 May 2004.
[87] *Nikowitz and Verlagsgruppe News GmbH v. Austria*, Application no. 5266/03, 22 February 2007; *Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v. Portugal*, Application no. 29856/13, 27 July 2021.
[88] *Sapan v. Turkey*, Application no. 44102/04, 8 June 2010.
[89] *Dupuis and Others v. France*, Application no. 1914/02, 7 June 2007; *July and SARL Libération v. France*, Application no. 20893/03, 14 February 2008; *White v. Sweden*, Application no. 42435/02, 19 September 2006.
[90] *Kącki v. Poland*, Application no. 10947/11, 4 July 2017.
[91] *Von Hannover v. Germany*, Application no. 59320/00, 24 June 2004.
[92] *Verlagsgruppe News GmbH v. Austria (no. 2)*, Application no. 10520/02, 14 December 2006; *Axel Springer AG v. Germany*, Application no. 39954/08, 7 February 2012.

entered the public arena can be considered a public figure. For example, in *Drousiotis v. Cyprus* the Court held that a high-ranking lawyer who aspired to be Attorney General and frequently appeared in the media was a public figure.[93] But the Court has held that even public figures have some expectation of privacy: "even where a person is known to the general public, he or she may rely on a 'legitimate expectation' of protection of and respect for his or her private life ... the fact that an individual belongs to the category of public figures cannot in any way, even in the case of persons exercising official functions, authorise the media to violate the professional and ethical principles which must govern their actions, or legitimise intrusions into private life."[94] This is particularly so where photographs are concerned.[95]

As regards prior conduct, the extent to which the person bringing the privacy claim has in the past invited attention or made disclosures about their private life is a relevant consideration. For example, in *Hachette Filipacchi Associés (ICI PARIS) v. France*, the Court held that the fact that a well-known singer had himself made disclosures about the lavish way in which he managed and spent his money meant he could not rely on the protection of the right to privacy for this kind of information.[96]

As regards the method of obtaining the information and its veracity, the Court has highlighted the intrusion caused by a surreptitiously taken photographs and indicated its strong disapproval of sensationalist paparazzi photographers, continuing to this type of photography as "continual harassment" and even "persecution".[97] When hidden cameras are used, the Court has taken into account whether this was in public or in a private space.[98] Media cannot be penalised for publishing information 'leaked' material to them that was obtained illegally; and there is no requirement to notify a person prior to publication that information concerning their private life will be published.[99]

As regards the content, form and consequences of the publication, the Court has emphasised that "that the approach used to cover a subject is a matter of journalistic freedom ... it [is] for journalists to decide what details ought to be published to ensure an article's credibility."[100] At the same time, the media are required to take into account the impact of the information and pictures to be published prior to their dissemination.[101] For example, they can minimise intrusion into privacy by using pixelation and voice distortion.[102] The Court has strongly disapproved of the alteration or abusive use of a photo in respect of which a person had given authorisation for a specific purpose.[103] With regard to the impact and consequences of the publication, the Court has indicated that the

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[93] Application no. 42315/15, 5 July 2022.
[94] *Couderc and Hachette Filipacchi Associés v. France [GC]*, Application no. 40454/07, 10 November 2015, par. 122.
[95] *Von Hannover v. Germany (no. 2)*, Applications nos. 40660/08 and 60641/08, 7 February 2012, par. 96.
[96] Application no. 12268/03, 23 July 2009.
[97] *Von Hannover v. Germany*, Application no. 59320/00, 24 June 2004, par. 59.
[98] *Alpha Doryforiki Tileorasi Anonymi Etairia v. Greece*, Application no. 72562/10, 22 February 2018, paras. 64-65.
[99] *Radio Twist a.s. v. Slovakia*, Application no. 62202/00, 19 December 2006; *Mosley v. the UK*, Application no. 48009/08, 10 May 2011.
[100] *Couderc and Hachette Filipacchi Associés v. France [GC]*, Application no. 40454/07, 10 November 2015, par. 139.
[101] *Couderc and Hachette Filipacchi Associés v. France [GC]*, Application no. 40454/07, 10 November 2015, par. 140.
[102] *Haldimann and Others v. Switzerland*, Application no. 21830/09, 24 February 2015, par. 65.
[103] *Hachette Filipacchi Associés (ICI PARIS) v. France*, Application no. 12268/03, 23 July 2009, par. 48; *Reklos and Davourlis v. Greece*, Application no. 1234/05, 15 January 2009.

extent to which privacy-infringing materials have been disseminated is an important factor. If they were published in the print media, considerations such as whether the newspaper is national or local and its circulation numbers are relevant; with regard to online media, the Court has indicated that the accessibility and the number of views (in other words, circulation) needs to be taken into account and has highlighted the role of search engines, through which privacy-infringing material online can be very easy to find.[104] The Court has also reiterated that audiovisual media have a far more immediate and powerful effect than print media, or even online media.[105]

## 7.2. Illustrative cases

### 7.2.1. Couderc and Hachette Filipacchi Associés v. France [GC]

Application no. 40454/07, 10 November 2015

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| *Facts:* | The applicants, the publications director and publisher of a weekly magazine, were sued by Prince Albert of Monaco after they published an interview with Nicole Coste who claimed he was the father of her child. The article included photos of Prince Albert with the child. Prince Albert sued for violation of his privacy and image rights and obtained a judgment ordering the publisher to pay €50,000 in damages and print the judgment on the front cover of the magazine. The Nanterre *tribunal de grande instance* (the first instance court) found the article invaded Prince Albert's private and family life and was not of public interest. Appeals were unsuccessful, although Prince Albert did admit – following the publication – that he was indeed the father of the child. |

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| *Judgment:* | The Court first recalled the general principles applicable in cases concerning the right to freedom of expression and privacy, and then went on to consider how these principles applied in the present context.<br><br>Considering the contribution to a debate of public interest, the Court began by reaffirming that there is limited scope for restrictions on freedom of expression where matters of public interest are concerned. It explained that the concept of 'public interest' is context-dependent, and while certain private matters may be shielded from media scrutiny, others may legitimately be subject to public discussion depending on their societal relevance. Private life information of public figures may contribute to a legitimate public debate, especially when it provides insight into personality traits or conduct that bear upon their public role – for example where it "raised the question of whether [the public figure] had been dishonest and lacked judgment" (par. 99, citing *Ruusunen v. Finland*, no. 73579/10). However, it emphasised that the right to report on such matters does not extend to "articles aimed solely at satisfying the curiosity of a particular readership regarding the details of a person's private life, however well known that person |

[104] *Karhuvaara and Iltalehti v. Finland*, Application no. 53678/00, 16 November 2004, par. 47; *Hurbain v. Belgium [GC]*, Application no. 57292/16, 4 July 2023, paras. 236-239.
[105] *Jersild v. Denmark*, Application no. 15890/89, 23 September 1994, par. 31; *Animal Defenders International v. the UK [GC]*, Application no. 48876/08, 22 April 2013, par. 119.

might be" (par. 100, citing *MGN Limited v. the UK*, no. 39401/04). The Court then emphasised that context is important:

> In order to ascertain whether a publication concerning an individual's private life is not intended purely to satisfy the curiosity of a certain readership, but also relates to a subject of general importance, it is necessary to assess the publication as a whole and to examine whether, having regard to the context in which it appears. (par. 102)

The public interest "relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree … This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about" (citing, amongst others, *The Sunday Times v. the UK*, no. 6538/74; *Barthold v. Germany*, no. 8734/79; *Tønsbergs Blad A.S. and Haukom v. Norway*, no. 510/04).

Applying these principles, the Court held that although the article contained personal and intimate details about the relationship and the child, "the publication, taken as a whole and in context … also concerned a matter of public interest" (par. 106). It stated that a birth is not merely a private matter "but also falls within the public sphere, since it is in principle accompanied by a public statement (the civil-status document) and the establishment of a legal parent-child relationship" (par. 107). This was particularly so given Monaco's political structure; the fact that Prince Albert was childless at the time meant that the birth had dynastic and financial implications. The article addressed issues such as succession, legal recognition, and the psychological welfare of the child, all of which the Court found elevated the story to a matter of public concern.

The Court rejected the domestic courts' assessment that the article lacked newsworthiness. It held that "the press's contribution to a debate of public interest cannot be limited merely to current events or pre-existing debates" and reiterated that "the press is a vector for disseminating debates on matters of public interest, but it also has the role of revealing and bringing to the public's attention information capable of eliciting such interest and of giving rise to such a debate within society". (par. 114).

With regard to Prince Albert's public figure status, the Court emphasised that while public figures remain entitled to a degree of privacy, this must be balanced with the public's legitimate interest in being informed about their conduct. The Court considered that Prince Albert, as the reigning monarch of Monaco, was "undeniably a prominent public figure" (par. 124) and held that the domestic courts had failed to take into account how this prominence affected the level of protection his private life should receive.

Considering the subject of the publication, the Court held that although the article addressed Prince Albert's love life and relationship with his child, the "essential element of the information contained in the article – the child's existence – went beyond the private sphere" (par. 126). The Court emphasised that the article was not solely about Prince Albert: it also included personal information voluntarily shared by Ms Coste, who had sole parental responsibility for the child. The Court recognised her right to speak publicly about her experience. The Court also found that Ms Coste's motivations were relevant. Her stated intention was to obtain recognition for her son, not to provoke

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| | scandal. The article thus reflected a combination of overlapping private and public interests, including those of the mother, child, and Prince.<br><br>As regards the prior conduct of the person concerned, the Court noted that no meaningful evidence on this had been presented; but did recall that prior cooperation with the media does not amount to consent for future reporting: "[a]n individual's alleged or real previous tolerance or accommodation with regard to publications touching on his or her private life does not necessarily deprive the person concerned of the right to privacy" (citing *Egeland and Hanseid v. Norway*, no. 34438/04).<br><br>The Court held that the manner in which the information was obtained and presented was crucial. It noted that the article stemmed from a voluntary, pre-arranged interview with Ms Coste and included no elements of deception or intrusion. The veracity of her statements had not been challenged by Prince Albert, who subsequently confirmed the facts publicly. The accompanying photographs were voluntarily submitted and did not portray Prince Albert in a negative or misleading way; they were not taken covertly or without the subject's awareness; and they supported the article: "above all they lent support to the content of the interview, illustrating the veracity of the information contained in it." (par. 135).<br><br>Considering the content, form and consequences of the article, the Court noted that the interview was presented in a balanced, non-sensational tone and allowed readers to distinguish clearly between factual content and personal opinion. It emphasised that the article must be evaluated as a whole and that the national courts failed to do so by, in particular by ignoring the public interest value of the article. The Court emphasised again that the accompanying photographs, although of a private nature, served a legitimate journalistic function in substantiating the story; they were "not defamatory, pejorative or derogatory" for the prince's image (par. 149). With regard to consequences, the Court observed that the prince publicly acknowledged his child shortly after the article was published.<br><br>Finally, the Court emphasised that the finding of a violation of privacy was in itself of serious consequence that could have a chilling effect on future reporting: "what matters is the very fact of judgment being given against the person concerned, including where such a ruling is solely civil in nature ... Any undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing future media coverage of similar questions" (par. 151).<br><br>For all these reasons, the Court found a violation of the right to freedom of expression. |

### 7.2.2. Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC]

Application no. 931/13, 27 June 2017

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| *Facts:* | The applicants are two Finnish media companies, Satakunnan Markkinapörssi Oy and Satamedia Oy. Since 1994, Satakunnan Markkinapörssi collected data from local tax offices on individuals' income and assets – data that was publicly accessible under Finnish law – and published it in catalogue format in the newspaper, Veropörssi. In 2002, the |

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| | paper published tax details of about 1.2 million individuals. In 2003, Satamedia Oy, which has the same owners as the first applicant, partnered with a telephone company and launched an SMS service through which users could obtain tax data on individuals by sending their names via text message. The data used for the SMS service came directly from Veropörssi's content.<br><br>In 2003, the Data Protection Ombudsman requested that the companies stop processing and publishing tax data in this format, arguing that it violated Finnish data protection laws and was not covered by the journalistic exemption in the Personal Data Act. The Data Protection Board initially rejected this request, and the Helsinki Administrative Court upheld that decision, finding that the publication served a journalistic purpose and was protected by the freedom of expression. However, on appeal, the Supreme Administrative Court referred the matter to the Court of Justice of the European Union (CJEU), which held that while journalistic activities must be interpreted broadly, data protection rights could only be limited where strictly necessary. In 2009, applying the CJEU's ruling, the Supreme Administrative Court quashed the earlier decisions and found that the companies' mass publication and use of the data, especially in the SMS service, did not fall within the journalistic exemption.<br><br>Following this decision, the Data Protection Board issued a new order in late 2009 prohibiting the companies from processing tax data in the same way as before and from transferring it to the SMS service. The companies appealed, arguing that the decision constituted unlawful prior restraint and violated their right to freedom of expression. Their appeal was rejected first by the Turku Administrative Court in 2010 and then by the Supreme Administrative Court in 2012, which reiterated that the case did not concern censorship or the general right to publish taxation data, but rather the manner and extent of data processing, which breached data protection rules. |

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| *Judgment:* | The Court began by outlining the fundamental principles for balancing the right to freedom of expression under Article 10 with the right to respect for private life under Article 8 of the Convention: "contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication, and, where it arises, the circumstances in which photographs were taken" (citing, amongst others, Axel Springer AG v. Germany [GC], no. 39954/08). The Court noted that, depending on context, some of these criteria carry more weight than others. In this case, the focus was on the public interest criterion; subject of the publication; and the content, form and consequences of the publication.<br><br>As regards the public interest criterion, the Court underscored that there is little room for restrictions on speech relating to political matters or issues of public interest. However, while tax transparency is undeniably important in a democratic society, the Court was not persuaded that the specific publication at issue contributed meaningfully to public debate. The Court emphasised: |

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| | > Public interest ordinarily relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about. The public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism. (para. 171)<br><br>While the Court acknowledged the importance of public access to official documents, including taxation data, it was "not persuaded" that the wholesale publication of tax data as done by the applicants contributed to a debate on an issue of public interest. Rather, the Court emphasized that public access to tax data was a prerequisite for journalistic analysis which could lead to subsequent publications, and generate or contribute to a debate on specific concerns revealed in the data. The Court endorsed the finding by the Finnish courts which had stated that publication of an entire tax data file covering 1.2 million people, without any analysis, did not serve a journalistic purpose and therefore did not contribute to a debate on an issue of public interest.<br><br>As regards the subject of the publication and how well-known the persons concerned were, the Court reiterated that the database comprised the surnames and names of 1.2 million people. Only very few of these were individuals with a high net income, public figures, or well-known personalities within the meaning of the Court's case-law; the majority belonged to low-income groups.<br><br>As regards the manner of obtaining the information and its veracity, the Court noted with disapproval that instead of using regulated channels available to journalists, the applicants had hired individuals to manually collect the data from local tax offices. This was not technically illegal, but it did bypass safeguards in place under domestic law to ensure data would be used for genuine journalistic purposes.<br><br>As regards the content, form and consequences of the publication, the Court acknowledged the importance of editorial freedom and affirmed that journalists must be free to decide what details to publish and how to present them. However, such freedom is not without limits. The Court emphasised that in this case, the publication consisted of unaltered tax records presented as catalogues, organised by income and municipality, and further disseminated via SMS. This "rendered it accessible in a manner and to an extent not intended by the legislator" (par. 190). Noting that it is unusual for states to make taxation information public in the way the Finnish authorities had done, the Court emphasised "that the safeguards in national law were built in precisely because of the public accessibility of personal taxation data, the nature and purpose of data protection legislation and the accompanying journalistic derogation". Reviewing the domestic proceedings courts, the European Court observed that the domestic courts had sought to strike a balance between freedom of expression and the right to privacy embodied in data protection legislation; and that they had analysed the relevant Convention and EU case-law and carefully applied the case-law of the Court to the facts of the instant case. |

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| | Finally, the Court observed that the applicant companies were not banned from publishing tax data outright: they remained free to do so, provided they complied with relevant laws. Although the limits placed on the format and volume of publication may have made their existing business model less viable, this did not amount to a 'sanction' under the Court's jurisprudence.<br><br>The European Court concluded that the Finnish courts had properly applied the ECHR principles concerning the balance between the rights to privacy and freedom of expression. The domestic authorities had given due weight to the nature and format of the publication, the scope of the data disclosed, and the lack of analytical or journalistic content. They correctly found that the publication did not serve a journalistic purpose within the meaning of domestic or EU law and did not contribute to a debate of public interest. Therefore, the Court held that there had been no violation of Article 10 of the Convention. |

# 8. Defamation and the Right to Freedom of Expression

## 8.1. Main Legal Principles as Developed by the European Court of Human Rights

Defamation cases fall into two categories. The Court has found that serious cases of defamation constitute an intrusion on the right to respect for private life. Individuals who believe that their rights were violated because domestic courts ruled against them in a defamation case that reached this level of seriousness may apply to the European Court of Human Rights, claiming a violation of Article 8. In these cases, Article 8 of the Convention needs to be balanced against Article 10. The second category concerns less egregious cases and is considered only under Article 10, where the test is whether the finding of defamation was a "necessary" interference with the right to freedom of expression.

### 8.1.1. Assessing whether Article 8 is engaged

The Court has held that protection of reputation may come within the scope of Article 8 of the Convention if an attack on a person's reputation attains a certain level of seriousness and causes prejudice to personal enjoyment of the right to respect for private life.[106] Examples of cases where the Court has deemed the attack on reputation to be so serious as to engage Article 8 have included accusation of involvement in a Nazi political party; 'jokes' and allegations regarding gender and sexual orientation; allegations of ethnic and religious prejudice; attacks on professional competence and reputation; allegations of crime; and allegations that the police had engaged in torture.[107]

In several cases, mostly concerning political analysis and commentary, the Court has stated that Article 8 does not apply.[108] In Karako v. Hungary, the Court explained:

> Personal integrity rights falling within the ambit of Article 8 are unrelated to the external evaluation of the individual, whereas in matters of reputation, that evaluation is decisive: one may lose the esteem of society – perhaps rightly so – but not one's integrity, which remains inalienable. In the Court's case-law, reputation has only been deemed to be an independent right sporadically … and mostly when the factual allegations were of such a seriously offensive nature that their publication had an inevitable direct effect on the applicant's private life.[109]

The Court has also emphasised that "Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence".[110]

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[106] *Axel Springer AG v. Germany*, Application no. 39954/08, 7 February 2012, par. 83.
[107] *Pihl v. Sweden (dec.)*, Application no. 74742/14, 7 February 2017; *Sousa Goucha v. Portugal*, Application no. 70434/12, 22 March 2016; *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina [GC]*, application no. 17224/11, 27 June 2017; *Vicent Del Campo v. Spain*, Application no. 25527/13, 6 November 2018; *A. v. Norway*, Application no. 28070/06, 9 April 2009; *Toranzo Gomez v. Spain*, Application no. 26922/14, 20 November 2018.
[108] See, for example, *Falzon v. Malta*, Application no. 45791/13, 20 March 2018; *Fedchenko v. Russia (no. 3)*, application no. 7972/09, 2 October 2018.
[109] Application no. 39311/05, 28 April 2009.
[110] *Axel Springer AG v. Germany*, Application no. 39954/08, 7 February 2012, par. 83; *Sidabras and Džiautas v. Lithuania*, Application nos. 55480/00 and 59330/00, 27 July 2004, par. 49.

### 8.1.2. Assessing defamation

In assessing defamation cases, whether or not Article 8 is engaged, the Court first analyses whether the report, article, or statement in question concerned a debate of public interest. As indicated in Chapter 2, 'public interest' needs to be assessed on a case-by-case basis and denotes issues that are of legitimate concern to society, "especially in that they affect the well-being of citizens or the life of the community."[111] Where debate of public interest is concerned, the Court has consistently held that there is little scope for restrictions.[112]

In assessing defamation cases, both the content of what was published and the context within which it was published are important. The primary content-related considerations are (i) the form and means of expression; (ii) whether the expression was a value judgment or a statement of fact; (iii) with regard to statements of fact, to what degree it can be proven to be truthful.

As regards the forms and means of expression, the Court has stated that forms such as art and satire need to be examined with their specific attributes in mind. Art and satire can be confrontational but must be protected:

> Satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care.[113]

In assessing whether a statement is defamatory or not, the question of whether it is a statement of fact or a value judgment is a crucial and frequently recurring issue. It is crucial because, as the Court has repeatedly highlighted, while "[t]he existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof".[114] It means that, crucially , if a statement is classified as a value judgment, a defendant cannot be required to prove its truth. In order to distinguish between a statement of fact and a value judgment a holistic view needs to be taken. The Court has often held that assertions about matters of public interest and in politics constitute value judgments rather than statements of fact.[115] For example, in *Scharsach and News Verlagsgesellschaft v. Austria*, the term "closet Nazi" to describe a politician was a value judgment, not an allegation that the politician belonged to a Nazi party.[116] The Court has held that while a value judgment does require some supporting facts,[117] these need not be included in the article concerned. For example, in *Feldek v. Slovakia*, the Court held that alluding to a politician's "fascist past" was a value judgment supported by facts because the individual concerned and his political views were well-known in society.[118] The Court has noted that satire frequently involves value judgments.[119]

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[111] *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, Application no. 931/13, 27 June 2017, par. 171.
[112] *Stoll v. Switzerland [GC]*, Application no. 69698/01, 10 December 2007, par. 106; *Castells v. Spain*, Application no. 11798/85, 23 April 1992, par. 43.
[113] *Vereinigung Bildender Künstler v. Austria*, Application no. 68354/01, 25 January 2007, par. 33.
[114] See for example, *Cumpănă and Mazăre v. Romania*, Application no. 33348/96, 17 December 2004; *Pedersen and Baadsgaard v. Denmark [GC]*, Application no. 49017/99, 17 December 2004. This phrase, or a version of it, appears in more than 150 of the Court's judgments, indicating the recurrence of the issue.
[115] For example, *Paturel v. France*, Application no. 54968/00, 22 December 2005; *Lopes Gomes da Silva v. Portugal*, Application no. 37698/97, 28 September 2000.
[116] Application no. 39394/98, 13 November 2003.
[117] *Jerusalem v. Austria*, Application no. 26958/95, 27 February 2001.
[118] Application no. 29032/95, 12 July 2001.
[119] For example, *Nikowitz and Verlagsgruppe News GmbH v. Austria*, Application no. 5266/03, 22 February 2007.

In defamation cases, a defence of 'truth' should always be available.[120] When a journalist or media outlet pleads a defence of 'truth', the Court has emphasised that journalistic allegations cannot be held to a standard of proof required in criminal proceedings: "to circumscribe in such a way the manner of proving allegations of criminal conduct in the context of a libel case is plainly unreasonable ... Allegations in the press cannot be put on an equal footing with those made in criminal proceedings."[121] Similarly, the Court has held that requiring individuals who criticised police action to abide by the legal definition of "torture", as opposed to its colloquial meaning, was disproportionately restrictive.[122] However, the Court has also held that the more serious the allegation, the more solid the supporting facts for that allegation need to be.[123] When a journalist cannot prove the truth of an factual allegation, a defence of "good faith" should still be available, as set out in Chapter 3 of this guide.

In assessing defamation cases, context is nearly as important as content. For example, when allegedly defamatory statements are made during a lively political debate, allegations require less basis in fact than if they were to be made as part of a well-researched piece of investigative journalism.[124] As emphasised in Chapter 2 of this Guide, the Court has often emphasised that, "there is little scope ... for restrictions on political speech or on debate on matters of public interest."[125] In the context of defamation cases, that means that the Court applies close scrutiny of restrictions imposed on freedom of expression.

As outlined in Chapters 2 and 4 of this Guide, the role and status of both the individual making the allegedly defamatory statement and the person or entity targeted by the statement are significant considerations. The role of the media and civil society organisations as "public watchdogs" is important; and the need for politicians, public figures, large companies, and others who insert themselves into public debate to tolerate greater criticism than 'ordinary' individuals is well-established. Specifically with regard to companies, the Court has held that whilst they may sue in defamation to protect a commercial reputation, this does not enjoy the same level of protection as individual reputation:

> [T]here is a difference between the commercial reputational interests of a company and the reputation of an individual concerning his or her social status. Whereas the latter might have repercussions on one's dignity, for the Court interests of commercial reputation are devoid of that moral dimension. [126]

As set out in Chapters 5 and 6 of this Guide, the level and nature of sanctions and compensation is a strong consideration, in which proportionality is the guiding light. A reply or retraction, as often ordered in defamation cases, is an interference with editorial freedom and as such needs to be 'necessary in a democratic society', including proportionate. The Court has indicated that a higher level of justification is required for an order to publish a reply or apology than for a rectification:

> [T]he legal obligation to publish a rectification may be considered a normal element of the legal framework governing the exercised of the freedom of expression by the media ... At the same time, ...

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[120] *Colombani and Others v. France*, Application no. 51279/99, 25 June 2002, par. 66.
[121] *Kasabova v. Bulgaria*, Application no. 22385/03, 19 April 2011, par. 62.
[122] *Toranzo Gomez v. Spain*, Application no. 26922/14, 20 November 2018, par. 65.
[123] *Pedersen and Baadsgaard v. Denmark [GC]*, Application no. 49017/99, 17 December 2004, par. 78.
[124] *Lombardo and Others v. Malta*, Application no. 7333/06, 24 April 2007, par. 60.
[125] *Ceylan v. Turkey*, Application. no. 23556/94, 8 July 1999, par. 34.
[126] *Uj v. Hungary*, Application no. 23954/10, 19 July 2011, par. 22.

> there need to be exceptional circumstances in which a newspaper may legitimately be required to publish, for example, a retraction, an apology or a judgment in a defamation case ... [T]he potential chilling effect of the penalties imposed on the press in the performance of its task as a purveyor of information and public watchdog in the future must also be taken into consideration.[127]

The Court has made clear that journalists and media outlets are under no legal obligation to contact the person, company, or organisation they are reporting on before publication to seek a response or comment.[128]

### 8.2. Illustrative case: Mesić v. Croatia (no. 2)

Application no. 45066/17, 30 May 2023

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| *Facts:* | The applicant was the President of Croatia from 2000-10. In 2013, in Finland, three former employees of a Finnish company Patria were charged with bribery in relation to a procurement process for armoured vehicles for the Croatian army. The indictment suggested that Mr Mesić was one of those who had been offered or given a bribe. Two of the former employees were found guilty. The day following the guilty verdict (which was later overturned, on appeal) the Croatian news portal Dnevno.hr published an article about the case suggesting that the Croatian authorities should investigate Mr Mesić's role. Mr Mesić requested that the news portal publish a correction of three statements that alleged bribe-taking which he considered to be false and defamatory. The news portal refused to publish a correction, upon which Mr Mesić sued for defamation. The Zagreb Municipal Civil Court dismissed his claim; further appeals were unsuccessful. |

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| *Judgment:* | The case was brought under Article 8; the applicant claimed that by dismissing his defamation case, the domestic courts had violated his right to a reputation as protected as part of his right to respect for private life. The Court began by restating its general principles in cases concerning defamation. It recalled that Article 8 protects the right to reputation when an allegation attains a certain level of seriousness and is made in a manner causing prejudice to personal enjoyment of the right to respect for private life. It reiterated the fundamental role that the press plays in democratic society, and that while it must "not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest" (par. 63, citing, amongst others, *Kaboğlu and Oran v. Turkey*, no. 1759/08).<br><br>The Court recalled that "where judicial cases or criminal investigations are concerned, it is inconceivable that there should be no prior or contemporaneous discussion of the subject matter of trials, be it in specialised journals, in the general press or among the public at large. Not only do the media have the task of imparting such information and ideas; the public also has a right to receive them" (par. 64, citing *SIC - Sociedade* |

[127] *Axel Springer SE v. Germany*, Application no. 8964/18, 17 January 2023, paras. 33-34.
[128] *Eigirdas and VJ "Demokratijos plėtros fondas" v. Lithuania*, Applications nos. 84048/17 and 84051/17, 12 September 2023.

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| | *Independente de Comunicação v. Portugal*, no. 29856/13). The Court recalled equally that the media must "act in good faith and on an accurate factual basis and provide 'reliable and accurate' information in accordance with the ethics of journalism" (par. 65) and the duties and responsibilities that are incumbent on it. When it comes to allegations of potential criminal activity, the Court emphasised that "special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegation. Also, of relevance for the balancing of competing interests which the Court must carry out is the fact that ... individuals have a right to be presumed innocent of any criminal offence until proved guilty" (par. 65, citing *Pedersen and Baadsgaard v. Denmark [GC]*, no. 49017/99). At the same time, "reporters and other members of the media must be free to report on events based on information gathered from official sources without having to verify them" (par. 66, citing *Selistö v. Finland*, no. 56767/00).<br><br>The Court emphasised that the media must strive for accuracy, especially when accusing an individual of a potential crime:<br><br>> [D]istorting the truth, in bad faith, can sometimes overstep the boundaries of acceptable criticism: a correct statement can be qualified by additional remarks, by value judgments, by suppositions or even insinuations, which are liable to create a false image in the public mind. Thus, the task of imparting information necessarily includes duties and responsibilities, as well as limits which the press must impose on itself spontaneously. That is especially so where a media report attributes very serious actions to named persons, as such "allegations" comprise the risk of exposing the latter to public contempt (par. 67, citing *Kaboğlu and Oran v. Turkey*, no. 1759/08).<br><br>Finally, the Court recalled its various criteria for balancing the right to respect for privacy, which protects against serious defamatory allegations, and freedom of expression. In this case, it indicated that it should consider, in particular, the contribution to a debate of general interest, how well known the applicant was, and the method of obtaining the information and its veracity.<br><br>Applying these general principles to the case, the Court noted that the article suggested that the investigation had established that Mr Mesić had received a bribe, which was a crime. This was a serious allegation, made to a wide audience, which meant that the case came within the ambit of Article 8. The article suggested that the findings of the Finnish prosecuting and judicial authorities called for further investigation in Croatia into the possible corruption of the former President of Croatia.<br><br>Referring to Mr Mesić as "a public figure par excellence", the Court emphasised that the article undoubtedly concerned a matter of public interest, and reiterated that there is little scope under the Convention for restrictions on debate on such matters: "The 'watchdog' role of the media assumes particular importance in such a context, where investigative journalism is a guarantee that the authorities can be held to account for their conduct" (par. 74). The Court also reiterated that the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual, and noted that |

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| | "[t]hese considerations apply even more so to the present case as the applicant was not an ordinary politician but a head of State [and the] article did not target the applicant's private life but referred to his conduct in the exercise of his official duties." (par. 75)<br><br>The Court took into account that a quote in the article which stated that Mr Mesić had "received a bribe of 630,000 euros from people who have just been convicted of giving bribes" was taken from documents that the journalists had received from the Finnish Prosecutor General. The Court noted furthermore that a Press Release from the Finnish Prosecutor-General, quoted in the article, had stated that two managers "were directly charged in the indictment with giving bribes to Stjepan Mesić [and] were sentenced to [terms of imprisonment of] one year and eight months for giving bribes for the sale of armoured vehicles to Croatia".<br><br>The Court emphasised that the article needed to be assessed as a whole, and noted that the last two paragraphs of the article had mentioned that there had been a lack of evidence with regard to Mr Mesić's alleged bribe-taking: there had been a string of intermediaries and the money could not be followed to the final recipient. The Court emphasised the importance of the final paragraph which began with, "The Finnish court obviously did not prove that [Mr Mesić was the final recipient], nor did it try to prove it at all, because it does not concern them ... But it means that the Croatian judiciary is obliged to try to prove that part of the indictment!". The Court considered that while the author of the article should have chosen his words more carefully, it could not be said that, having regard to the final paragraphs, there had been an unambiguous allegation of bribe-taking by Mr Mesić.<br><br>The Court emphasised:<br><br>> [I]n the cases such as the present one, the right of the media to inform the public and the public's right to receive information come up against the equally important right of the applicant to the presumption of innocence and protection of his private life. However, in that regard it is important to emphasise that under the Court's case-law the degree of precision for establishing the well-foundedness of a criminal charge by a competent court can hardly be compared to that which ought to be observed by journalists when expressing opinions on matters of public concern. (par. 80, citing amongst others *Brosa v. Germany*, no. 5709/09)<br><br>It concluded that there had not been a violation of the applicant's right to a reputation as protected under Article 8 of the Convention. |

# 9. The 'Right to be Forgotten'

## 9.1. Main Legal Principles as Developed by the European Court of Human Rights

The Court has emphasised both the importance of the Internet as an information and communication tool, and the high risk of harm posed by content and communications on the Internet, in particular to the right to respect for private life.[129] Search engines, which are the means through which many people find information online, play an important role in this regard. In response to concerns about potential violations of privacy through the wide availability and ease of access of private information online, the Court has developed jurisprudence around the so-called 'right to be forgotten' (so-named because initial cases concerned the online availability of private information that was years-old and concerned events that were no longer relevant). The Court's case law has built on, and in line with, jurisprudence of the Court of Justice of the European Union, and involves requests to remove, alter, anonymise, or limit access to archived content, either by news publishers or search engine operators.

In the case of *Hurbain v. Belgium [GC]*, the Court set out seven general principles concerning the 'right to be forgotten':

(i) the nature of the archived information;
(ii) the time that had elapsed since the events and since the initial and online publication;
(iii) the contemporary interest of the information;
(iv) whether the person claiming entitlement to be forgotten was well known and his or her conduct since the events;
(v) the negative repercussions of the continued availability of the information online;
(vi) the degree of accessibility of the information in the digital archives; and
(vii) the impact of the measure on freedom of expression and more specifically on freedom of the press. [130]

The Court has emphasised that in most cases, these criteria need to be assessed holistically rather than in isolation. The overall assessment must take into account both the importance of the right to be forgotten for the individual and the impact of any restrictions on freedom of the press and the integrity of public archives. Furthermore, not all criteria carry the same weight in every case. Particular attention needs to be paid to the interests of the individuals requesting removal or anonymisation of content and to the potential effects of such requests on news publishers:

> The principle of preservation of the integrity of press archives must be upheld, which implies ensuring that the alteration and, a fortiori, the removal of archived content is limited to what is strictly necessary, so as to prevent any chilling effect such measures may have on the performance by the press of its task of imparting information and maintaining archives. (par. 211)

The central task is to assess whether the means used to protect privacy are reasonable in light of the circumstances, and whether the balance struck between the rights involved is proportionate and justified and does not "impose an excessive and impracticable burden" (par. 255).

[129] *Hurbain v. Belgium [GC]*, Application no. 57292/16, 4 July 2023, par. 236.
[130] Application no. 57292/16, 4 July 2023, par. 205.

### 9.2. Illustrative case: Hurbain v. Belgium (GC)

Application no. 57292/16, 4 July 2023:

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| *Facts:* | The applicant, publisher of the daily newspaper Le Soir, had been ordered to anonymise, on grounds of the 'right to be forgotten', an article in the digital archives mentioning the full name of the driver responsible for a fatal road-traffic accident in 1994. The 1994 edition had reported on a car accident that had caused the death of two people and injured three others. The article mentioned the full name of the driver, who was convicted in 2000. He served his sentence and was rehabilitated in 2006. In 2008, Le Soir included on its website its archives dating back to 1989, available free of charge. In 2010, the driver requested that the article be removed from the archives, or that it at least be anonymised, explaining that the article appeared among the results when his name was entered in search engines. The newspaper's legal department refused to remove the article from the archives, but requested that Google Belgium delist the article so it would no longer be accessible through search results. No response was received to that request. In 2012, the driver brought court proceedings seeking anonymisation of the article. The Neufchâteau Court of First Instance granted his request in 2013; the newspaper's appeals were dismissed. |

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| *Judgment:* | The Court began by restating its general principles on the right to freedom of expression and the protection of privacy, emphasizing that the media not only plays a vital role reporting the news, in its 'public watchdog' function, but that it also "has a secondary but nonetheless valuable role in maintaining archives containing news which has previously been reported and making them available to the public" (par. 180). The Court recalled that "Internet archives make a substantial contribution to preserving and making available news and information. Digital archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free" (par. 180). The Court emphasised that even in the context of a defamatory publication, "it is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which have in the past been found, by final judicial decisions, to amount to unjustified attacks on individual reputations" (par. 182, citing *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07). The Court stated that since the role of archives is to ensure the continued availability of information, they must, as a general rule, remain authentic, reliable and complete. Therefore:<br><br>> [T]he integrity of digital press archives should be the guiding principle underlying the examination of any request for the removal or alteration of all or part of an archived article which contributes to the preservation of memory, especially if, as in the present case, the lawfulness of the article has never been called into question. (par. 185)<br><br>Whilst respecting the right to respect for privacy, the Court therefore emphasised that "national authorities must nevertheless be particularly vigilant in examining requests, grounded on respect for private life, for removal or alteration of the electronic version of |

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| | an archived article whose lawfulness was not called into question at the time of its initial publication. Such requests call for thorough examination" (par. 186).<br><br>The Court then reviewed its own emerging caselaw on the 'right to be forgotten', noting that parallel developments took place in the Court of Justice of the European Union and in national courts, drawing on data protection law. The Court concluded that while the 'right to be forgotten online' has been linked to Article 8, and more specifically to the right to respect for one's reputation, it "does not amount to a self-standing right protected by the Convention and ... can concern only certain situations and items of information." The Court emphasised that it had not hitherto upheld any measure removing or altering information published lawfully and archived on a news website.<br><br>Noting that both Article 8 as well as Article 10 are engaged, which are of equal value, the Court held that "the balancing of these various rights of equal value to be carried out in the context of a request to alter journalistic content that is archived online should take into account the following criteria: (i) the nature of the archived information; (ii) the time that has elapsed since the events and since the initial and online publication; (iii) the contemporary interest of the information; (iv) whether the person claiming entitlement to be forgotten is well known and his or her conduct since the events; (v) the negative repercussions of the continued availability of the information online; (vi) the degree of accessibility of the information in the digital archives; and (vii) the impact of the measure on freedom of expression and more specifically on freedom of the press." (par. 205)<br><br>Emphasising the need for a holistic approach, and noting that "the chilling effect on freedom of the press stemming from the obligation for a publisher to anonymise an article that was initially published in a lawful manner cannot be ignored", the Court applied the criteria as follows.<br><br>*i) The nature of the archived information*<br><br>The Court noted that the reporting on the traffic accident was found to be accurate, concise, and neutral. Furthermore, the Court noted that the events described did not fall into the category of offences whose gravity maintains enduring public interest, nor had they received significant media attention, at the time of the accident or subsequently.<br><br>*(ii) The time elapsed since the events and original publication*<br><br>The Court stated that a long passage of time can weigh in favour of recognising a 'right to be forgotten'. In this case, given that 16 years had passed since the article's publication and the applicant had served his sentence and been rehabilitated, the Court held that he had a legitimate interest in reintegrating into society without persistent reminders of his past.<br><br>*(iii) Ongoing public or historical interest in the article*<br><br>The key question here was whether the article continued to serve a role in public discourse or offered any historical, academic, or statistical value. The Court noted that a current public interest would significantly reduce the margin for asserting a right to be forgotten, and that even in the absence of current relevance, an article might retain value for archival or scholarly purposes. In this case, however, the Court held that the article's contribution |

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| | to public debate on road safety was merely statistical; that the identity of the driver was not crucial to its message, as he was not a public figure; and (c) the incident itself was routine and of no enduring historical interest.<br><br>*(iv) Public status of the person seeking anonymisation*<br><br>The individual involved was not a public figure at the time of the accident or at the time of requesting anonymisation. Moreover, the case had not received sustained or widespread publicity.<br><br>*(v) Harm caused by continued online availability*<br><br>The Court recalled that reputational harm must reach a certain threshold to interfere with private life rights. It considered that unlike delisting requests directed at search engines, anonymisation of archived articles is a greater intrusion into media freedom and thus requires proof of significant harm. The applicant's rehabilitation alone did not justify removal of his name; but the Court held that the article's online presence, freely accessible to anyone, including patients, colleagues, and others, posed a serious risk of stigmatisation, harmed the applicant's professional standing, and obstructed his societal reintegration.<br><br>*(vi) Accessibility of the archived content*<br><br>The Court observed that archived online material generally does not draw the attention of casual browsers unless they are actively searching for the individual in question. Nevertheless, it considered that the degree of openness of the archive was key: whether it was publicly available or restricted. In this case, the digital archive was fully accessible to the public and required no payment or registration.<br><br>*(vii) Effects of anonymisation on freedom of expression and the press*<br><br>The Court reviewed various methods developed across jurisdictions to support the right to be forgotten, ranging from how search results are presented to removing or anonymising content. It noted that measures aimed at publishers, such as removing an article, de-indexing, or altering content , is more intrusive on media freedom. The Court therefore introduced a proportionality test for assessing such restrictions: national courts must select the response that most effectively protects the applicant's legitimate interests, while being the least restrictive to journalistic freedom.<br><br>The Court concluded that the national courts had properly assessed the nature and seriousness of the events reported, the absence of ongoing public interest, and the anonymity of the individual involved. They had given due weight to the significant harm caused by the unrestricted online availability of the article, which risked creating a "virtual criminal record" long after the events occurred. The courts had also evaluated potential measures to protect privacy and found that anonymisation was both proportionate and effective, imposing no undue burden on the publisher. Given the careful balancing of competing rights, the Court held that there had been no violation of the right to freedom of expression. |

## 10. Liability of Platforms and Other Intermediaries

### 10.1. Main Legal Principles as Developed by the European Court of Human Rights

Online platforms and other intermediaries play a critical role in facilitating the exercise of the right to freedom of expression in the digital environment. While their technical function is essential to enabling access to and dissemination of content, it also raises complex legal questions regarding the scope of their liability for third-party content they host or enable access to. The European Court of Human Rights has addressed these issues in a series of judgments concerning, inter alia, the responsibility of news websites for user-generated comments, liability for hyperlinks to defamatory content, and the accountability of social media users for third-party remarks. In doing so, the Court has developed and refined a framework of principles to guide the assessment of intermediary liability in such contexts.

In assessing whether an Internet portal operator is required to remove comments posted by a third party, the Court has identified four criteria with a view to striking a fair balance between the right to freedom of expression and the right to reputation of the person or entity referred to in the comments:[131]

(i) the context and contents of the comments;
(ii) the liability of the authors of the comments;
(iii) the measures taken by the applicants and the conduct of the aggrieved party;
(iv) the consequences for the aggrieved party and for the applicants.

On the basis of these criteria, the Court held in *Delfi v. Estonia* that an Internet news portal could be required to pay damages for insulting anonymous comments posted on its site, in view of the extreme nature of the comments, which amounted to hate speech or incitements to violence;[132] whereas in *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, liability for third-party comments violated the right to freedom of expression because the comments in question did not constitute hate speech and the site's swift notice-and-take-down-system had provided an appropriate tool for protecting the commercial reputation of the real-estate management websites involved in this case. The Court has held that the nature of the website and its capacity to respond to take-down requests must be taken into account: in *Pihl v. Sweden*, it emphasised that the website concerned was "a small blog run by a non-profit association", and that the offending comment was taken down within a day.[133]

In cases where a news website is held liable for the content of other sites that it has repeated and links to, the Court has provided similar criteria, requiring domestic courts to take into account:[134]

(i) whether the impugned content was endorsed;
(ii) whether the impugned content was repeated, without endorsing it);
(iii) whether the website had merely linked to the content, without endorsing or repeating it);

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[131] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, Application no. 22947/13, 2 February 2016, par. 60; *Delfi AS v. Estonia [GC]*, Application no. 64569/09, 16 June 2015, par. 142.
[132] Application no. 64569/09, 16 June 2015.
[133] Application no. 74742/14, 7 February 2017 (dec.).
[134] *Magyar Jeti Zrt v. Hungary*, Application no. 11257/16, 4 December 2018.

(iv) whether the website knew or could it reasonably have known that the impugned content was defamatory or otherwise unlawful;
(v) whether the website had acted in good faith and in line with the ethics of journalism; and
(vi) whether the website had performed the due diligence expected in responsible journalism.

The Court has also elaborated on the responsibility of those who maintain social media pages. In *Sanchez v. France*, it held that the applicant's Facebook page was not comparable to a 'large professionally managed Internet news portal run on a commercial basis', and instead approached the case in the light of the 'duties and responsibilities' of politicians who have a social media page for political purposes that includes a discussion forum.[135] The Court applied the criteria set out in *Delfi v. Estonia*, set out above, and found that the politician could be held liable for comments left by third parties.

### 10.2. Illustrative case: Sanchez v. France (GC)

Application no. 45581/15, 15 May 2023

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| *Facts:* | The applicant was the mayor of the town of Beaucaire, and regional and chair of a right-wing political group. He was standing for election to Parliament for the Front National party. One of his opponents was F.P., a member of the European Parliament and first deputy to the mayor of Nîmes. On 24 October 2011 Mr Sanchez posted on his publicly accessible Facebook page, which he ran personally, deriding F.P. for having zero views on his website. The post attracted several comments. F.P.'s partner became aware of the comments and felt directly and personally insulted by some of the comments, which she viewed as racist. She approached one of those who had left comments to remove it, which he did, and then lodge a criminal complaint against the applicant and two of those who had left comments. The applicant subsequently posted a message inviting users to "be careful with the content of [their] comments", but did not intervene in relation to the comments already posted.<br><br>The applicant and the two commenters were charged with incitement to hatred or violence on grounds of ethnicity, race, or religion, and found guilty. The Nîmes Criminal Court concluded that, having set up a social media page for the purpose of exchanging opinions, and having left the offending comments visible for more than a month, the applicant had failed to act promptly to stop their dissemination. Appeals were dismissed. |

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| *Judgment:* | The majority of the Court's reasoning analysed on whether the conviction was "necessary in a democratic society"; this summary focuses on that part of the judgment.<br><br>The Court first restated its general principles in freedom of expression cases, recalling in particular the importance of protecting political debate and the right to freedom of expression of "an elected representative of the people, political parties and their active members" (par. 147). The Court also recalled that freedom of expression is not absolute, |

[135] Application no. 45581/15, 15 May 2023.

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| | and that "it may be considered necessary in certain democratic societies to penalise or even prevent all forms of expression that propagate, encourage, promote or justify hatred based on intolerance (including religious intolerance)" (par. 149). Moreover, the Court emphasised:<br><br>> [P]olitical figures also have duties and responsibilities. [I]t is crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance and that they should also be particularly careful to defend democracy and its principles, their ultimate aim being to govern. (par. 150)<br><br>The Court then emphasised that calls to foster the exclusion of foreigners constitute a fundamental attack on individual rights, and everyone – politicians included – should exercise particular caution in discussing such matters: "remarks capable of arousing a feeling of rejection and hostility towards a community fall outside the protection guaranteed by Article 10" (par. 150, citing Le Pen v. France (dec.), no. 45416/16). The Court noted that during an election campaign, "a certain vivacity of comment may be tolerated more than in other circumstances" (citing Desjardin v. France, no. 22567/03); but equally emphasised that politicians should not contribute to stirring up hatred and intolerance (par. 153). The Court reviewed its case law on hate speech, emphasising that "[h]ate speech is not always openly presented as such. It may take various forms, not only through patently aggressive and insulting remarks that wilfully undermine the values of tolerance, social peace and non-discrimination, but also implicit statements which, even if expressed guardedly or in a hypothetical form prove equally as hateful (par. 157, references omitted).<br><br>Reviewing its caselaw on freedom of expression online, the Court recalled the principles stated in the *Delfi v. Estonia* judgment: the context of the comments; second, the measures applied by the applicant company in order to prevent or remove defamatory comments; third, the liability of the actual authors of the comments as an alternative to the applicant company's liability; and fourth, the consequences of the domestic proceedings for the applicant company. The Court proceeded with its analysis on the basis of these principles.<br><br>*(i) Context of the comments at issue*<br><br>The Court found that the remarks were overtly derogatory toward Muslims, associating them with criminality, drug trafficking, and social decay. These comments, though framed within political discourse and electoral tensions, were marked by virulence, vulgarity, and a tone that transcended legitimate political expression, especially given their timing during an election campaign. The Court stressed that the comments were not isolated statements but formed an escalating and coordinated dialogue in response to the applicant's initial post. Despite the applicant's argument that the comments aligned with his party's political platform, the Court reaffirmed that political expression cannot justify speech that incites racial hatred or discrimination, especially in a volatile electoral setting.<br><br>The Court found that while the applicant's Facebook page could not be compared with a professionally managed news sites, he nevertheless had a duty, as a politician, to monitor user interactions on his page. The Court acknowledged practical limitations in |

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| | moderating online content but maintained that a model of shared liability, holding commenters liable as well as those of 'run' pages, was reasonable. The Court endorsed the domestic court's finding that the comments at issue clearly incited hatred and violence on religious grounds.<br><br>*(ii) Steps taken by the applicant*<br><br>The Court emphasised that while there was no legal requirement for automatic filtering or prior moderation of Facebook comments, a basic level of oversight was needed to ensure the prompt removal of clearly unlawful content. Account holders, particularly public figures, bear certain responsibilities in managing online discussions, especially when they opt to make their profiles publicly accessible. In the applicant's case, although he had posted a general warning to his followers about the tone of their comments, he failed to check or remove clearly problematic remarks even after being alerted to their potential harm. The Court agreed with the domestic courts that by choosing to make his Facebook page publicly accessible during an election campaign, the applicant, as a politically experienced communicator, should have anticipated the risks of inflammatory remarks. This context gave rise to a heightened duty of vigilance. The applicant's liability stemmed not from any one comment, but from his failure to take timely action in response to a series of unlawful comments that formed a coherent, escalating dialogue on his post. The applicant was a daily social media user and should have been aware of the comments; there were only fifteen in total which was within his capacity to monitor.<br><br>*(iii) The possibility of holding the authors liable instead of the applicant*<br><br>The Court emphasised that that the applicant's liability was based on his role as a 'producer' under French law, which carries specific obligations. It held that the domestic courts' interpretation and application of that provision were neither arbitrary nor unreasonable. It also emphasised that the applicant was not held liable instead of the authors of the unlawful comments, who were themselves prosecuted and convicted. As such, issues concerning anonymity or the identification of online commenters were not relevant to this case.<br><br>*(iv) Consequences of the domestic proceedings for the applicant*<br><br>The Court acknowledged that the attribution of liability for third-party comments may have a chilling effect on freedom of expression on the Internet, particularly when criminal liability is imposed. However, it emphasised that the comments amounted to hate speech, and held that the fine imposed was well below the maximum, fell short of imprisonment, and was therefore proportionate. The Court noted that the applicant's conviction had not prevented him from being elected mayor or from continuing to exercise responsibilities for his political party.<br><br>The conviction did not, therefore, constitute a violation of the right to freedom of expression. |

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