REPORT ON SAFEGUARDS AND REMEDIES IN THE CONTEXT OF ONLINE PUBLICATION OF JUDICIAL DECISIONS

Fostering transparency of judicial decisions and enhancing the national implementation of the European Convention on Human Rights

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Fostering transparency of judicial decisions and enhancing the national implementation of the European Convention on Human Rights

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Introduction

This report considers the safeguards and remedies in the context of online publication of judicial decisions that the authorities are expected to establish. It also highlights the importance of the specific actions undertaken by the authorities in this area as such actions can determine whether the European Court of Human Rights (ECtHR, Court) would find a violation of the European Convention on Human Rights (ECHR, Convention). This report first considers what legal framework needs to be established by the state in order to protect rights enshrined in Article 8 of the Convention adequately. Moreover, it examines what individual circumstances should be taken into account by national courts in their consideration of the compliance of publishing national judicial decisions on the Internet with the standards established in the case law of the Court.

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The case law of the ECtHR in this context is rather sparse and therefore this report takes inspiration from cases which are not specifically on the point but can be used by analogy. The important factual differences are duly acknowledged and explained.

The key conclusions of the report are:

1. The Convention does not create a clear obligation prescribing the state authorities to upload national judicial decisions on the Internet but in some limited circumstances this obligation can be deduced from Article 6 of the ECHR. Soft law instruments emanating from the Council of Europe encourage states to provide easy access to key national judicial pronouncements.
2. The authorities should establish a proper regulatory framework in this context and the national courts dealing with these issues should engage in robust judicial reasoning. In such cases, the ECtHR will unlikely to replace the reasoning of the national authorities with their own.
3. The authorities need to establish regulatory framework that would specify which judicial decisions should be selected for publishing or decide that all of them should be published. This framework needs to clearly indicate for what aims and purposes and by whom the information provided can be used. Furthermore, relevant legislation should enshrine regulations on what information should be redacted, how long these judicial decisions should be available online, provide remedies to those whose rights are violated by such judicial decisions.
4. Together with the regulatory framework effective domestic remedies shall be established in order to allow to those who are affected by the online publication to have their rights protected. Such remedy shall be effective not only in theory but also in practice. This means

that the remedy shall at minimum be accessible and allow prompt examination of the merits of the complaint, with sufficient redress and adequate compensation.

5. Within the national regulatory framework, domestic courts should be able to consider individual cases and follow the tests developed by the ECtHR. These include considering, for example whether less intrusive for privacy measures are available or whether there are sufficient reasons to uphold the right to be forgotten.

This report contains four sections.

► **Section 1** will overview the role of procedural review in the ECtHR's case law and importance of giving reasons. More and more often the ECtHR engages in reviewing the decision-making process rather than the substance of the decisions made as a result of such process. The latter is done on very rare occasions, when the reasoning is manifestly inadequate.

► **Section 2** looks at the general considerations relevant to publishing of the national judicial decisions online. In this section, the report will look at the dilemma of ensuring access of public to judicial pronouncements vis-à-vis the need to safeguard the right to privacy and the right to be forgotten.

► **Section 3** considers what would constitute a proper regulatory framework from the point of view of the case law of ECtHR as a safeguard in the context of online publication of judicial decisions. This section will analyse in particular whether states should facilitate publishing judicial decisions online and if so under what conditions. The report will also consider how national legislation should accommodate the right to be forgotten and what sort of judicial or other remedies should be provided to be in line with the standards set in the jurisprudence of the Court.

► Finally, **section 4** will look at a proper assessment of the individual circumstances. In this section, the report will examine the specific elements that the ECtHR requires national courts to consider in deciding whether to publish a particular judicial decision online or authorise the removal of such decision from the databases.

Section **1**

Procedural Review and Importance of Giving Reasons

The ECtHR is an international human rights tribunal which is subsidiary to the national systems of human rights protection. Although the Court itself established that it is a subsidiary body, in 2018, Protocol 15 added references to subsidiarity and the margin of appreciation to the European Convention on Human Rights.[1]

Subsidiarity can be understood in two senses: technical and substantive. From the technical point of view, subsidiarity means that the ECtHR can only come into play after the Contracting Parties had a chance to remedy a human rights violation. This form of subsidiarity is covered by the admissibility requirements enshrined in Article 35 of the Convention, specifically by the requirement to exhaust domestic remedies before applying to the ECtHR.

The substantive understanding of subsidiarity means that the Court should not only follow the national system chronologically but also take into account the substance of the decisions taken at the national level. The Court does not necessarily substitute the decisions made by the domestic courts but rather ensures that they do not cross certain lines prohibited by the ECHR. This type of subsidiarity is much more complex. One of the forms in which the Court embraces this form of subsidiarity is through focusing on how the national courts reason rather then what the substance of the reasoning is.

Nowadays, the ECtHR increasingly uses procedural review which focuses on processes rather than on substance[2]. The ECtHR considers whether the national courts provided proper reasons

[1] The new reading of the relevant part of the preamble is: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'.

[2] See, for example, J. Gerards and E. Brems (eds) "Procedural Review in European Fundamental Rights Cases" (Cambridge University Press, 2017); P. Popelier, 'The Court as Regulatory Watchdog: The Procedural Approach in the Case Law of the European Court of Human Rights', in P. Popelier et. al. (eds.), O M Arnardóttir, '"The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15(1) International Journal of Constitutional Law 9. For a discussion beyond the ECtHR, see, for example,

for their decisions rather than the substance of the outcome of a case unless such outcome is manifestly in breach of the Convention.

> 94. Where the national authorities have weighed up the interests at stake in compliance with the criteria laid down in the Court's case-law, strong reasons are required if it is to substitute its view for that of the domestic courts. In other words, there will usually be a wide margin afforded by the Court if the State is required to strike a balance between competing private interests or competing Convention rights.[3]

Former President of the European Court of Human Rights Robert Spano argued that the Court is entering the stage of 'procedural embedding' of the Convention.[4] This approach extends in relation to various national decision-makers including courts.[5] To conclude, if the national courts reason their judgments properly, it is then more likely that the ECtHR will not find a violation in this case. This means that if national courts use the tests established by the Court to consider whether the judicial decision which online publication they are about to authorise interferes with privacy, it is likely that the Court will not find a violation. Moreover, if the stakeholders challenge publishing national judicial decisions, the national court shall follow the tests established by the ECtHR and in this case, the likelihood of finding a violation is limited.

It is crucial that national courts consider the Court's approach and case law when deciding cases related to publication of national judicial pronouncements. There can be various ways of how the publication is organised domestically and states have wide margin of appreciation in setting their system, but almost in all systems national courts have a role to play in checking the legality of publishing judicial pronouncements online. Even if the judicial decision in question is published by the executives or even private actors, the state would have a positive obligation to protect the right to privacy. In many cases, this positive obligation will be fulfilled by national courts and the appropriateness of such fulfilment will depend at least to some extent on the quality of reasoning.

Leonie M Huijbers, Process-based Fundamental Rights Review: Practice, Concept and Theory. Cambridge: Intersentia, 2019.

[3] M*.L. and W.W. v. Germany*, https://hudoc.echr.coe.int/?i=001-183947.

[4] Spano R, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 Human Rights Law Review 473.

[5] See, for example Saul M, 'Shaping Legislative Processes from Strasbourg' (2021) European Journal of International Law.

Section **2**

General Considerations Relevant to Publishing of National Judicial Decisions Online

Publication of court decisions is undoubtedly an important process that serves public good. It enhances the transparency of judiciary, contributes to the rule of law in a sense that it makes law clearer and more predictable; it can also act as a soft mechanism of accountability for judges. It is not difficult to identify various public interests in providing access to judicial decisions. It has been argued that the open data approach to access to public sector information can lead to the following positive outcomes:

> When informed, citizens can actively participate in public decisions, and monitoring the activity of public administrations or improving their decision-making process by informing citizens of public matters, so that their participation may be well-founded is considered a principle of good governance.[6]

However, at the outset it needs to be clarified that there is no specific obligation placed on states by the Convention to publish all judicial decisions online:[7] Article 6 §1 of the ECHR only obliges states to ensure that judgments are pronounced publicly which can be facilitated in various forms not necessarily through their online publication.[8] Moreover, in some cases the person who requests access to a decision can be legitimately asked to declare their specific interest in getting such access. Having said that, one can identify some legal instruments of the Council of Europe that require states to make at least some judicial decisions accessible to the public. Similar requirements stem from the interpretation of some other provisions of

[6] Agustí Cerrillo-i-Martínez, Fundamental interests and open data for re-use, *International Journal of Law and Information Technology*, Volume 20, Issue 3, 2012, 203, 207.

[7] See, van Opijnen, Marc and Peruginelli, Ginevra and Kefali, Eleni and Palmirani, Monica, On-Line Publication of Court Decisions in the EU: Report of the Policy Group of the Project 'Building on the European Case Law Identifier' (February 15, 2017). Available at SSRN: https://ssrn.com/abstract=3088495, p. 7.

[8] For instance, submission a judgment of the second instance court to the Court's registry and allowing access to it was sufficient to satisfy Article 6-1 (*Pretto and Others v. Italy*, para 27), or publication the judgment in an official newspaper *Ernst and Others v. Belgium*, 2003, §§ 69-70.

Articles 6 and 10 of the ECHR.[9] This report will first look at the Council of Europe instruments in more general terms and then consider the case law of the ECtHR in this context.

As early as in 1995, the Council of Europe Committee of Ministers Recommendation encouraged states to make the case law of the national courts available on the Internet:

> The jurisprudence concerning all fields of law and from all geographical areas should be disseminated by one or more automated systems. States should themselves set up or encourage the setting up of systems covering sectors not already covered.[10]

Somewhat more limited obligation can be found in Recommendation Rec(2003)14 of the Committee of Ministers to member states on the interoperability of information systems in the justice sector:

> 6.1. Member states should promote methods of electronic exchanges between public justice sector information systems and those of private justice sector organisations such as lawyers and other stakeholders. Such data exchanges may only be carried out in accordance with international and national law.
>
> 6.2. Member states should, at the same time, consider and implement appropriate precautions to ensure information security and personal data protection. Systems of accountability should be established in order to be able to control how information subject to special protection is handled.[11]

The Committee of Minister's Recommendations are not legally binding but creates a forceful incentive for the states to follow them. Article 10 of the ECHR encourages the member states to make some documents public when it is appropriate. This Article also covers judicial pronouncements:

> At its own initiative and where appropriate, a public authority shall take the necessary measures to make public official documents which it holds in the interest of promoting the transparency and efficiency of public administration and to encourage informed participation by the public in matters of general interest.

Some judgments of the ECtHR also point out that state authorities must provide some access to national judicial decisions. In *Faziyski v Bulgaria*, the Court stated:[12]

[9] Right to a fair trial (Article 6) and freedom of expression (Article 10).
[10] Recommendation no. R (95) 11 of the Committee of Ministers to Member States Concerning the Selection, Processing, Presentation and Archiving of Court Decisions in Legal Information Retrieval Systems.
[11] https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805df179
[12] *Faziyski v Bulgaria*, https://hudoc.echr.coe.int/?i=001-118573

> 64. The public character of proceedings before the judicial bodies referred to in Article 6 § 1 of the Convention protects litigants against the administration of justice in secret with no public scrutiny. It is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.
>
> 65. It should however be emphasised that, although linked to the overall requirement of fairness, the requirement of Article 6 § 1 that judgment be pronounced publicly is free-standing. Therefore, it cannot be regarded as decisive that the applicant was able to access the judgments in his case in the Supreme Administrative Court's registry and exercise his rights of appeal. What ultimately matters is whether those judgments were, in some form, made accessible to the public.

Another possibility is that the obligation to publish national judicial decisions online can also stem from the principle of equality of arms, meaning that both parties should have equal access to law which can be interpreted in judicial decisions. It is clear that the prosecution might have naturally better access to national judicial decisions if some of them are not published online and this might provide the prosecution with an unfair advantage. That said, this is rather extreme and very limited situation that might happen in case of specific regulations only accessible via the particular unpublished judicial act. Therefore, it is hard to infer the general obligation to provide access to judicial decisions from equality of arms.

The attempt to justify access to judicial pronouncements can also be made through Article 10 of the ECHR (freedom of expression). This right does not only provide the freedom of speech but also the right to access of information in certain cases. Article 10 does not establish an obligation to provide access to each and every national judicial decision. This right is quite limited and can be exercised under strict conditions. In *Magyar Helsinki Bizottság v. Hungary* the Court established the threshold criteria for the right of access to the state-held information:[13]

> (α) The purpose of the information request
> 158. First, it must be a prerequisite that the purpose of the person in requesting access to the information held by a public authority is to enable his or her exercise of the freedom to "receive and impart information and ideas" to others. Thus, the Court has placed emphasis on whether the gathering of the information was a relevant preparatory step in journalistic activities or in other activities creating a forum for, or constituting an essential element of, public debate.

[13] *Magyar Helsinki Bizottság v. Hungary*, https://hudoc.echr.coe.int/?i=001-167828.

…

(β) The nature of the information sought

161. … the Court considers that the information, data or documents to which access is sought must generally meet a public-interest test in order to prompt a need for disclosure under the Convention. Such a need may exist where, inter alia, disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance by the public at large.

162. The Court has emphasised that the definition of what might constitute a subject of public interest will depend on the circumstances of each case. 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, 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. In order to ascertain whether a publication relates to a subject of general importance, it is necessary to assess the publication as a whole, having regard to the context in which it appears.

…

(γ) The role of the applicant

164. A logical consequence of the two criteria set out above – one regarding the purpose of the information request and the other concerning the nature of the information requested – is that the particular role of the seeker of the information in "receiving and imparting" it to the public assumes special importance. Thus, in assessing whether the respondent State had interfered with the applicants' Article 10 rights by denying access to certain documents, the Court has previously attached particular weight to the applicant's role as a journalist or as a social watchdog or non-governmental organisation whose activities related to matters of public interest.

…

(δ) Ready and available information

170. … the Court is of the view that the fact that the information requested is ready and available ought to constitute an important criterion in the overall assessment of whether a refusal to provide the information can be regarded as an "interference" with the freedom to "receive and impart information" as protected by that provision.

In *Mitov and others v Bulgaria*, the ECtHR considered the complaint by a group of journalists arguing that the lack of access to anonymised parts of judgments uploaded to the Internet violates their Article 10 right to access to information. The Court disagreed with this, applied the criteria from Magyar Helsinki Bizottság and stated:

> 32. In the present case, however, there are no particular circumstances on the basis of which to apply the above-mentioned criteria and conclude that the information to which the applicants claim not to have access is instrumental for the exercise of their right to freedom of expression. The applicants' complaint does not concern a specific piece of information or even a defined category of information held by a public authority. They are aggrieved by the impossibility of accessing on the Internet all scanned case material available in the database of the Bulgarian Supreme Administrative Court and the anonymised parts of all of that court's judgments and decisions. They argued that all that information concerned matters of public interest, and that the impossibility of accessing it hindered them from reporting on such matters. But even though the applicants' role as "public watchdogs" is not in doubt, this remains an entirely abstract statement, whereas, as already noted by the Court, the definition of what might constitute a subject of public interest depends on the circumstances of each case. It must be the case that some of the documents and information in question touched upon matters of public interest and that some did not. It is impossible to assess this question … in the abstract; it cannot be said that all judicial review and other cases heard by the Bulgarian Supreme Administrative Court concern matters of public interest, as this notion is understood in the Court's case-law, and that all information relating to those cases relates, without distinction, to such matters. The Court has already had occasion to note that an applicant cannot complain of a restriction on access to information in the abstract. It has also held that general statements on why certain types of information held by the authorities ought to be made available are not sufficient to engage Article 10 of the Convention. It should also be noted in this connection that if the documents and information in question here were to be made freely available on the Internet, they would inevitably be available not only to the applicants but also to any member of the public.
>
> 33. The question whether Article 10 of the Convention requires a State authority to disclose information is different from that what form of publicity of judicial decisions would suffice to satisfy the requirements of the second sentence of Article 6 § 1 of the Convention.[14]

[14] *Mitov and others v Bulgaria*, https://hudoc.echr.coe.int/?i=001-223828.

In a number of other judgments,[15] the ECtHR emphasised that under Article 10, the request for access to information should be explained by the reasons of public interest and this distinguishes it from Article 6.

Here, the Court suggests that Article 10 does not guarantee an unrestricted right to access to judicial decisions online. So, although the Court has emphasised the importance of publication of decisions online, it never established the obligation that all decisions have to be published.

Although states are not obliged to publish all decisions online, they can do so. It seems that for the Court, uploading a decision on the Internet database would satisfy the requirements of public pronouncement pursuant to Article 6 of the ECHR. In the following case, the Court found a violation of Article 6 of the ECHR because none of the forms of pronouncement were used by the authorities – uploading the judgment to the Internet is among these forms:

> […] the judgments given were not delivered in public and were not available at the registry of the court or on its Internet site, nor could the first applicant herself obtain a copy. [16]

In these circumstances, however, the authorities are facing a dilemma: on the one hand, they are encouraged (although not strictu sensu obliged beyond the requirement to pronounce domestic decisions publicly under Article 6 §1 of the ECHR) to provide wide access to judicial decisions, on the other hand, by providing this access they should not violate privacy rights of those involved. The ECtHR had to deal with some of such cases in the past and they will be discussed in the subsequent sections of this report.

To briefly conclude, the Council of Europe instruments do not create a strict obligation to upload all national judicial decisions on the Internet for public access, but it creates an incentive to do so at least in some cases. Undoubtedly, the state authorities can go beyond what the Council of Europe requires in this area and offer access to some or even all judicial decisions of national courts. In doing so, they however, should not violate other relevant rights such as right to privacy under Article 8 of the ECHR.

Irrespectively of whether in the realm of Article 6 or 10 of the ECHR, the majority of Court's rulings in this area are related to the access to printed copies of decisions of the local courts rather than those available on the Internet.[17] The nature of the former is significantly different as their online counterparts which allow easier access to a major number of decisions to an unlimited number of users. The advantages are that the easy access enhances the public

[15] See, for example, *Sioutis v. Greece*, para 29, *Studio Monitori and Others v. Georgia*, para 42.
[16] See, for example, *Nikolova and Vandova v Bulgaria*, https://hudoc.echr.coe.int/?i=001-139773, para 84.
[17] See, for instance, *Pretto and Others v. Italy*, *Ernst and Others v. Belgium*, and many others. However, the privacy concerns were raised in relation to online publication of sensitive judgments see, for example, *G v Finland*, https://hudoc.echr.coe.int/?i=001-90939. The above mentioned *Mitov and others v Bulgaria* also concerns with access to judgments on the Internet.

scrutiny,[18] increases public awareness and improves legal research. However, this makes the privacy concerns related to availability of decisions online much more pertinent. In other words, everyone without any legitimate interest can access decisions that can be quite sensitive for the accused, victims, parties in civil cases and other people involved. In order to balance the interests of transparency and privacy properly the Contracting Parties are required to establish proper regulatory framework. This does not mean that the solutions to these dilemmas should be uniform in all 46 member states of the Council of Europe, but they should be clearly considered and the relevant regulation should be certain and its consequences should be foreseeable. The regulation needs to provide clear safeguards and remedies if the authorities opt to publish judicial decisions online. The following section will look at the issues that should be considered by the relevant regulations.

[18] van Opijnen, note 7 above, p 29.

Section **3**

Proper Regulatory Framework as a Safeguard in the Context of Online Publication of Judicial Decisions

It is important that online publication of judicial decisions is regulated by law or a publicly available policy document. If this issue is complained about, the availability of clear regulatory framework will make the state's position in the ECtHR stronger as for instance Article 8 requires that the interferences with this right should be prescribed by law[19] and such law must be of sufficient quality. The quality here means that the law is accessible, foreseeable and clear. This section specifies what criteria the national regulatory framework should comply with in order to be considered as appropriate by the Court.

The importance of the comprehensive regulatory framework was emphasised in somewhat different but relevant context in *Roman Zakharov v Russia*:

> 228. The Court notes from its well-established case-law that the wording "in accordance with the law" requires the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the Preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus meet quality requirements: it must be accessible to the person concerned and foreseeable as to its effects.[20]

In another case - concerning storing and publishing of personal data - the Court stated that the following considerations should be taken into account by the regulatory framework:

> 129. The Court notes at the outset that an important feature of the mandatory publication scheme was that the Hungarian Tax Authority had no discretion under domestic law to review the necessity of publishing taxpayers' personal data. Where a

[19] In *Vavřička and Others v. the Czech Republic* [GC], https://hudoc.echr.coe.int/eng?i=001-209039 the Court explained the meaning of 'law' for the purposes of the ECHR: 'the term "law" as it appears in the phrases "in accordance with the law" and "prescribed by law" in Articles 8 to 11 of the Convention, is to be understood in its "substantive" sense, not its "formal" one. It thus includes, inter alia, "written law", not limited to primary legislation but including also legal acts and instruments of lesser rank. In sum, the "law" is the provision in force as the competent courts have interpreted it'. Para 269.

[20] *Roman Zakharov v Russia*, https://hudoc.echr.coe.int/eng?i=001-159324.

> tax debt had been outstanding for 180 days continuously, the debtor's name and home address were subject to mandatory publication by the Tax Authority. As already stated above, regardless of the existence or not of any subjective fault or other individual circumstances, any tax debtors meeting the objective criteria in section 55(5) were systematically identified by their name as well as their home address on the list published by the Tax Authority on its website. The information was published as long as the debt had not been settled or until it was no longer enforceable. In other words, the publication policy as set out in the 2003 Tax Administration Act did not require a weighing-up of the competing individual and public interests or an individualised proportionality assessment by the Tax Authority.
>
> 30. While, as explained above, the choice of such a general scheme is not in itself problematic, nor is the publication of taxpayer data as such, the Court must assess the legislative choices which lay behind the impugned interference and whether the legislature weighed up the competing interests at stake, given the inclusion of personal data such as a home address.[21]

Within this framework, the considerations should be given to:

- public interest in dissemination of the information
- the nature of the disclosed information
- the aims of the disclosure
- the repercussions on and risk of harm to the enjoyment of private life of the persons concerned
- the potential reach of the medium used for the dissemination of the information, in particular, that of the Internet
- guarantees in domestic law - basic data protection principles including those on purpose limitation, storage limitation, data minimisation and data accuracy.

The regulatory framework needs to identify the aims for which the provided information can be re-used. The EU Directive 2003/98/EC defined re-use as follows:

> the use by persons or legal entities of documents held by public sector bodies, for commercial or non-commercial purposes other than the initial purpose within the public task for which the documents were produced.

Overall, re-use of judicial pronouncements seems to be seen as positive. For instance, in the EU Conclusions of the Council and the representatives of the Governments of the Member States meeting within the Council on Best Practices regarding the Online Publication of Court Decisions (2018/C 362/02) it was stated:

[21] *L.B. v Hungary*, https://hudoc.echr.coe.int/eng?i=001-223675.

12. It can be considered a good practice to make published court decisions, to the extent possible given technical or budgetary constraints and given the features of the drafting process, available for re-use in computer-readable formats.
13. It can be considered a good practice, to make at least formal metadata available for reuse as well, in a well-structured format.
14. To cater for the needs of reusers, adequate options for download might be considered.

It can be expected that judicial pronouncements available online can be re-used for various positive purposes including research and education:

> Open access policies aim in particular to provide researchers and the public at large with access to research data as early as possible in the dissemination process and to facilitate its use and re-use. Open access helps enhance quality, reduce the need for unnecessary duplication of research, speed up scientific progress, combat scientific fraud, and it can overall favour economic growth and innovation.[22]

It is however possible that the masses of judicial decisions are used for other questionable purposes such as to predict judgments or identify and use patterns in decision-making.[23] The ECtHR has already opined that use of data for improper purpose can justify interference with the freedom of expression.[24] It does not seem that there is consensus as to the regulation of the aims and purposes for which the openly accessible judicial pronouncements can be used but it seems that the requirement should be that the proper regulatory framework should clearly identify these aims and purposes and establish the consequences for failing to comply with them.

The following subsections will provide an overview of what else should be regulated by the legal framework established on the national level and in some cases – how it should be regulated.

1. What Should be Published?

States have broad margin of appreciation in deciding what judicial decisions can be published online. The ECtHR was not particularly prescriptive in this area; however, one can assume that the criteria for publishing should be transparent and prevent arbitrariness in selection.

In the Recommendation No R(95)11, the Committee of Ministers pointed out:

[22] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast) para 27.
[23] For helpful information on the state of research in the area see, Medvedeva, M., Wieling, M. & Vols, M. Rethinking the field of automatic prediction of court decisions. *Artif Intell Law* **31**, 195–212 (2023).
[24] See the discussion of the case *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* in Section 3.3 below.

2.1. In accordance with the rules of the legal system or the needs of automated systems, a selection of decisions can be made, if necessary.
2.2. In sectors where a selection is made, this must be objective, according to the criteria set forth in Appendix II, and the selected decisions must be generally representative of the jurisprudence in the sector in question.

In turn the Appendix II, has identified the following criteria:

Selection of court decisions can be carried out according to the following criteria:
- hierarchical selection: the choice of court decisions of one or several instances of courts according to their hierarchical status in the legal order of the country concerned;
- geographical selection: the choice of court decisions given by one or several courts selected according to their geographical location;
- selection by fields of law: the choice of court decisions in one or more fields of law, for example penal law, environmental law, procedural law, marriage law, fiscal law, etc;
- selection by substance: the choice of court decisions according to whether they are or are not considered of sufficient legal interest.

The selection can be positive or negative which has been defined as following:

Negative selection: all decisions are published, unless if the grounds on which they are based are stated according to a standard formula or formula clause, especially in case of rejections on procedural grounds, or if there are specific reasons not to publish a specific decision, e.g. for the protection of minors, state security or data protection.
Positive selection: decisions are not published unless they meet specific criteria, which are formulated beforehand. Such criteria can be objective or subjective, broad or narrow, concrete or vague, procedural or substantive.[25]

In the Recommendation No R(95)11, the Committee of Ministers stated that

Concerning negative selection criteria, decisions may be excluded:
a. if the grounds on which they are based are stated according to a standard formula or formula clause. This standard formulation can be recognised by modules, such as word processing modules;
b. if they concern questions of evidence which are in agreement with existing case-law. If a selection proves necessary in the case of the highest courts, it appears desirable that the negative selection method be used in all fields of law.
The following positive selection criteria might be used for choosing decisions:

[25] On-line Publication of Court Decisions in the EU Report of the Policy Group of the Project 'Building on the European Case Law Identifier' https://www.bo-ecli.eu/uploads/deliverables/Deliverable%20WS0-D1.pdf.

a. decisions in which the explanation of a concept or legal term is given, that is a rule of law is formulated or amended;
b. decisions in which the method of interpretation used results in an existing rule of law being applied to a body of facts in a way which departs from earlier applications;
c. decisions in which a method of argumentation is noted which departs from earlier applications;
d. decisions in which questions concerning the competence of the court are decided;
e. decisions involving a concurring or dissenting opinion;
f. decisions in which a rule of law and/or a body of facts is involved, which is of general interest.

The effective databases that serve public purpose should include useful search engine and avoid provide overwhelming information. In order to do that, the databases should include a search engine and be supplied with the metadata:

> Metadata are an important element with regard to accessibility: they are essential to specify a search request, filter the results or facilitate the understanding and contextualizing of a decision. Identifying metadata, like name of court, date of decision and case number are always present, as well as – in most cases – type of decision, field of law and chamber or division within the court. More descriptive metadata, like head notes, abstract or some other kind of description are less widely available, and in most cases only for the highest jurisdictions. One of the most important reasons is probably the fact that creating such metadata requires time and well-trained human resources, means usually only available for smaller collections.[26]

Effective regulation should include the criteria for selection of relevant information that should be published in publicly accessible databases, it should explain whether the national judicial decisions are published in full or in part, whether they are anonymised, which cases are to be excluded from the database and what safeguards and remedies are provided again excessive interference with the privacy rights of the stakeholders.

2. What Information Should Not Be Provided?

As it has already been identified, publication of judicial pronouncements can interfere with the right to privacy of the parties, victims, witnesses or other involved persons which is protected

26 https://deliverypdf.ssrn.com/delivery.php?ID=226125090117007071077123018124126065052057047032095057123114014088086087088102118027096101058032022062055109089095000002125114114054094081027099029098018110127092099050048056029086101071120093001017000017071126092096120112120003016115066080122000007071&EXT=pdf&INDEX=TRUE page 16

by Article 8 ECHR. The information concerned can be any information relating to an identified or identifiable individual.[27] This data can include:

- **Information regarding a plaintiff's mental state**

> 61. It is to be noted that the Court of Appeal, having reviewed the case, came to the conclusion that the first instance judge's treatment of the applicant's personal information had not complied with the special regime concerning collection, retention, use and dissemination afforded to psychiatric data by Article 32 of the Constitution and Articles 23 and 31 of the Data Act 1992, which finding was not contested by the Government. Moreover, the Court notes that the details in issue being incapable of affecting the outcome of the litigation, the Novozavodsky Court's request for information was redundant, as the information was not "important for an inquiry, pre-trial investigation or trial", and was thus unlawful for the purposes of Article 6 of the Psychiatric Medical Assistance Act 2000.[28]

- **Information regarding the HIV status**

> 95. In this connection, the Court will take into account that the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention (art. 8). Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general.
>
> The domestic law must therefore afford appropriate safeguards to prevent any such communication or disclosure of personal health data…
>
> 113. Finally, the Court must examine whether there were sufficient reasons to justify the disclosure of the applicant's identity and HIV infection in the text of the Court of Appeal's judgment made available to the press.
>
> Under the relevant Finnish law, the Court of Appeal had the discretion, firstly, to omit mentioning any names in the judgment permitting the identification of the applicant and, secondly, to keep the full reasoning confidential for a certain period and instead publish an abridged version of the reasoning, the operative part and an indication of

[27] See, the Council of Europe's Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, Article 2. See also, *Amann v Switzerland*, https://hudoc.echr.coe.int/eng?i=001-58497, para 65.
[28] *Panteleyenko v. Ukraine* https://hudoc.echr.coe.int/eng?i=001-76114 para 61.

the law which it had applied. In fact, it was along these lines that the City Court had published its judgment, without it giving rise to any adverse comment.

In these circumstances, and having regard to the considerations mentioned in paragraph 112 above, the Court does not find that the impugned publication was supported by any cogent reasons. Accordingly, the publication of the information concerned gave rise to a violation of the applicant's right to respect for her private and family life as guaranteed by Article 8 (art. 8).[29]

► **Identification of the third party in the case**

47. The Court accepts that the liability proceedings against the public administration had specific features that must be taken into account. Notwithstanding this, the Court notes that the High Court of Justice did not confine its reasoning to simply declaring the strict liability of the public administration or to concluding that the situation suffered by the applicant's colleague had amounted to workplace harassment and that the education authorities, despite being aware of the situation, had not taken effective measures to prevent it or bring it to an end. It went beyond this by stating that the applicant's conduct had amounted to repeated psychological harassment. The High Court of Justice drew its conclusion by conducting a thorough analysis of the facts and the evidence before it that identified the applicant by stating his full name and other relevant data.

…

49. The Court is therefore of the opinion that the disclosure of the applicant's full name in the High Court of Justice's judgment coupled with the statement of his acts as part of its own reasoning was not supported by any cogent reasons. As the Constitutional Court pointed out, Law 30/1992 made no mention of identifying the public official who had caused the damage, nor did it make the liability conditional upon establishing the public official's negligence, fault or intent. This was not even required, it having been sufficient to prove the damage and its link with the functioning of the public service. In this connection, the Court reiterates that the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life.[30]

These examples are far from being exhaustive, for example according to Article 6 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) (Convention 108) other types of such information can include: genetic data, personal data relating to offences, criminal proceedings and convictions, and related security

[29] *Z v Finland*, https://hudoc.echr.coe.int/eng?i=001-58033.
[30] *Vicent Del Campo v. Spain*, https://hudoc.echr.coe.int/?i=001-187509.

measures, biometric data uniquely identifying a person, as well as personal data for the information they reveal relating to racial or ethnic origin, political opinions, trade-union membership, religious or other beliefs, health or sexual life.[31] The national regulatory framework should ensure that the sensitive private information of identified or identifiable person is not reproduced in the publicly available judicial decisions without proper justification. Removal of this data might create a significant challenge as its automatic removal might prove to be insufficient, while manual removal might be overly costly and also insufficient in some cases. Even if the names and other immediate data is removed from the case, the person/s involved might still be reidentified. The law and policy makers need to consider the possibility of re-identification seriously. If the judicial decision is capable of revealing sensitive data, the authorities might be liable for the violation of Article 8 if reasonable measures were not taken to prevent re-identification.

In this context it is important to consider not only the availability of the decisions even if they are redacted but also whether the public has an easy access to the case file.

> 49. Agreeing with the Court of Appeal's approach, it also considered that the effects of disclosure of the disputed messages on the applicant's private life had been limited. The messages were disclosed only in the context of civil proceedings. Public access to the files of such proceedings is restricted.[32]

Lack of such access might increase the argument in favour of publication of the key judicial decisions online.

3. What Further Safeguards Should Be Envisaged?

While disclosing sensitive data is an interference with the right enshrined in Article 8 of the ECHR, it does not always mean that such interference will result in a violation. The regulatory framework should envisage the means that can minimise the discloser of the personal data and disclose it only when it is necessary in a democratic society. In *L.L. v France*:

> 45. The Court notes at the outset that the present case concerns civil proceedings in the area of divorce, which by definition are proceedings during which information on the intimacy of private and family life may be revealed and where it is in fact part of a court's duty to interfere in the couple's private sphere in order to weigh up the conflicting interests and settle the dispute before it. However, in the Court's view, any unavoidable interference in this connection should be limited as far as possible to that

[31] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), available at http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm

[32] *M.P. v Portugal*, https://hudoc.echr.coe.int/?i=001-211781. Non-official translation of the quoted paragraph. The official text in French reads as follows: 'Souscrivant à l'approche de la cour d'appel, elle estime de même que les effets de la divulgation des messages litigieux sur la vie privée de la requérante ont été limités. En effet, ces messages n'ont été divulgués que dans le cadre des procédures civiles. Or, l'accès du public aux dossiers de ce type de procédures est restraint'

> which is rendered strictly necessary by the specific features of the proceedings and by the facts of the case.[33]

Although the facts of this cases are not directly relevant to publication of judicial decisions, the principle would stand. The disclosure of personal data is possible but it has to be justified and the safeguards need to be provided. The Court was more specific as to the necessary safeguards in *M.M. v the United Kingdom*, in particular the Court stated:

> … the indiscriminate and open-ended collection of criminal record data is unlikely to comply with the requirements of Article 8 in the absence of clear and detailed statutory regulations clarifying the safeguards applicable and setting out the rules governing, inter alia, the circumstances in which data can be collected, the duration of their storage, the use to which they can be put and the circumstances in which they may be destroyed.[34]

One of the most important safeguards that should be considered by the national policy-makers in the context of publication of judicial decisions is anonymisation (pseudonymisation) of such judgments. The regulation should envisage how it could be done. There is a wide variety of possibilities to anonymise texts (pseudonymise), one of the criteria for using them is minimisation of the possibility for reidentification.

The safeguards should also include the regulation of how long the judicial decisions should be stored and whether they can be automatically deleted. The length of storage is an important safeguard against improper interference with the right to privacy.

Retention of judicial decisions for a long period might not be justified. Perhaps certain decisions of precedential value can be kept for a very long time, but this is rather exceptional; the majority of decisions should be automatically deleted from the database after some time. In somewhat different context, the Court considered retention of data in a closed database:

> the applicant's biometric data and photographs were retained without reference to the seriousness of his offence and without regard to any continuing need to retain that data indefinitely. Moreover, the police are vested with the power to delete biometric data and photographs only in exceptional circumstances. There is no provision allowing the applicant to apply to have the data concerning him deleted if conserving the data no longer appeared necessary in view of the nature of the offence, the age of the person concerned, the length of time that has elapsed and the person's current personality.[35]

[33] *L.L. v France*, https://hudoc.echr.coe.int/eng?i=001-77356
[34] *M.M. v the United Kingdom*, https://hudoc.echr.coe.int/eng?i=001-114517, para. 199 (emphasis added).
[35] *Gaughran v. the United Kingdom*, https://hudoc.echr.coe.int/fre?i=001-200817, para 94.

The regulatory framework should establish the duration of retention of judicial decisions in databases especially so in publicly available online ones. The Court considered the obligation of the data processor to reviewer whether the continued storage of the data is necessary:

> 46. In addition, while there are no statutorily prescribed maximum time-limits for the storage of DNA profiles, the Federal Criminal Office is, however, obliged to review at regular intervals whether the continued storage of the data is still necessary for the performance of its task or otherwise to be deleted. The time-limit fixed for this purpose shall not exceed ten years with respect to adults while taking into account in each case the purpose for which the data had been stored as well as the nature and gravity of the circumstances of the case. The Court finds that in view of the fact that DNA profiles may only be obtained from convicts who have committed offences reaching a certain level of gravity, the said time-limit is not unreasonable. It further notes in this connection that the applicants have not contended that they would not have an opportunity to apply for the deletion of data stored on the ground that the statutory requirements for its retention are not or no longer met. A decision by the Federal Criminal Office refusing such request could be made subject to judicial review by the administrative courts in accordance with the general provisions of administrative procedural law.[36]

In some cases, the specific period or at least a method of establishment of the period[37] for retention of data should be established in the regulation. Again, in the context of retention of DNA profiles the Court stated:

> 52. … that the applicable legislation at the time did not set a specific time-limit for the retention of DNA data of the applicants as convicted persons. Indeed, as stated by the Government, DNA profiles were to be recorded in the relevant registers and "retained for a certain [length of] time, but not indefinitely (засекогаш)". That such data "may be retained until it has fulfilled the purpose for which it has been taken" is open to various interpretations….
>
> 53. Furthermore, it has not been argued that the nature or gravity of the offence of which a person was convicted, or received a penalty for, or any other defined criteria, such as previous arrests, and any other special circumstances, have any bearing on the collection, storage and retention of DNA records. Moreover, whereas the police are vested with the power to delete personal data from the registers, the law is silent on the conditions under which it can be done and procedure to be followed. Whereas the

[36] *Peruzzo and Martens v. Germany*, https://hudoc.echr.coe.int/eng?i=001-121998.
[37] It means that the regulation should explain who and under what conditions set the period.

> law provides, in general terms, for the possibility of judicial review coupled with a prior administrative review, there is no provision allowing for a specific review of the necessity of data retention. Similarly, there is no provision under which a person concerned can apply to have the data concerning him or her deleted if conserving the data no longer appears necessary in view of the nature of the offence, the age of the person concerned, the length of time that has elapsed and the person's current personality.
>
> 54. In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the DNA profiles of the applicants, as persons convicted of an offence, coupled with the absence of sufficient safeguards available to the applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped the acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society.[38]

Although, of course, storage of the DNA or photographs in closed police databases is not the same as publishing court decisions online, some of the privacy concerns might be of similar nature in both cases. Here, the Court effectively requests the states to define the time limit for retention of personal data and to establish the process as to how this data can be removed if there are good reasons for this.

The issue of publication of judicial decisions can interfere with the right to be forgotten. In the recent case, the Grand Chamber of the Court considered if the online newspaper should be obliged to anonymise a historic court report. In this case, the ECtHR commented on the existence of the right to be forgotten within the Convention framework:

> 199. Thus, from the standpoint of the Convention, the "right to be forgotten online" has been linked to Article 8, and more specifically to the right to respect for one's reputation, irrespective of what measures are sought for that purpose (the removal or alteration of a newspaper article in the online archives or the limitation of access to the article through de-indexing by a news outlet). In the Court's view, a claim of entitlement to be forgotten does not amount to a self-standing right protected by the Convention and, to the extent that it is covered by Article 8, can concern only certain situations and items of information. In any event, the Court has not hitherto upheld any measure removing or altering information published lawfully for journalistic purposes and archived on the website of a news outlet.[39]

[38] *Trajkovski and Chipovski v. North Macedonia*, https://hudoc.echr.coe.int/?i=001-200816
[39] *Hurbain v Belgium*, https://hudoc.echr.coe.int/?i=001-225814

In this case, the Court established the following criteria in deciding whether the relevant court report should be anonymised:

- The nature of the archived information;
- The time elapsing since the events and since initial and online publication;
- Whether the person claiming entitlement to be forgotten is well known, and his or her conduct since the events;
- The negative repercussions of the continued availability of the information online;
- The degree of accessibility of the information in the digital archives;
- The impact of the measure on freedom of expression and more specifically on freedom of the press.[40]

Although these criteria are not directly applicable to the publication of judicial decisions, they offer a useful referencing framework in order to understand what level of protection of personal data is expected from the authorities. In the present case, the newspaper published a report that mentioned the full name and the circumstances of the traffic accident in which a particular person was involved in and subsequently found guilty of in criminal proceedings. If the judicial decisions are anonymised, the authorities would have a better justification for keeping them accessible for a long period time.

Another important issue is whether there are safeguards in the legal system against improper use of the legally provided data. This issue was considered by the Court in *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*

> 189. Whilst the taxation data in question were publicly accessible in Finland, they could only be consulted at the local tax offices and consultation was subject to clear conditions. The copying of that information on memory sticks was prohibited. Journalists could receive taxation data in digital format, but retrieval conditions also existed and only a certain amount of data could be retrieved. Journalists had to specify that the information was requested for journalistic purposes and that it would not be published in the form of a list. Therefore, while the information relating to individuals was publicly accessible, specific rules and safeguards governed its accessibility.
>
> 190. The fact that the data in question were accessible to the public under the domestic law did not necessarily mean that they could be published to an unlimited extent. Publishing the data in a newspaper, and further disseminating that data via an SMS service, rendered it accessible in a manner and to an extent not intended by the legislator.[41]

[40] Ibid, paras 214-254.
[41] *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, https://hudoc.echr.coe.int/eng?i=001-175121.

This means that the policy-makers should consider specifying how the published judicial pronouncements are to be used and reproduced. The relevant law or policy document might specify that the judicial decisions should be used for information, education and research but not for any other improper purposes. Republication of judgments might be allowed but again within the constraints of the regulatory framework.

4. What Remedies Should be Established?

The authorities should allow the stakeholders to request the removal of relevant judicial decisions from the databases or claim damages whenever justified. The following section will examine what qualities such a remedy should possess in order to be deemed effective by the ECtHR. It will then focus on the practice of the Court directly linked to the subject of violation of right to privacy in conjunction with the right to an effective remedy.

A remedy established by the national law should be effective in rectifying a violation of the Convention rights. To emphasise at the outset, the term 'effective' means that the remedy must be sufficient and accessible, fulfilling the obligation of promptness.[42]

▸ ***The remedy must examine the merits of the Convention complaint.***

The Grand Chamber case of *Nada v Switzerland* is an important precedent here. In this case the applicant argued that he was not provided with an effective remedy to seek the deletion of the applicant's name from a list annexed to the Swiss 'Taliban' ordinance:

> 210. The Court observes that the applicant was able to apply to the national authorities to have his name deleted from the list annexed to the Taliban Ordinance and that this could have provided redress for his complaints under the Convention. However, those authorities did not examine on the merits his complaints concerning the alleged violations of the Convention. In particular, the Federal Court took the view that whilst it could verify whether Switzerland was bound by the Security Council resolutions, it could not lift the sanctions imposed on the applicant on the ground that they did not respect human rights.[43]

So, in principle there was a remedy, but it could not effectively consider the very essence of the complaint, namely removing the applicant from the 'Taliban' ordinance as this list was set up by the United Nations. The Court found a violation of the Convention in this case.

▸ ***Minimum guarantees of promptness***

Promptness can be of crucial importance in some case where privacy is interfered with by the publication of judicial decisions online. In different context, the ECtHR ruled that the delay should not render the proceedings meaningless.

[42] See, *Paulino Tomás v. Portugal* (dec.), https://hudoc.echr.coe.int/eng?i=001-23610.
[43] *Nada v Switzerland,* https://hudoc.echr.coe.int/eng?i=001-113118.

> In the case of *Kadiķis v. Latvia* (no. 2), 2006 (§§ 62-63), the Court found a violation of Article 13 of the Convention in the light of Article 3 given that, in particular, the applicant had been imprisoned for fifteen days and the competent authority by law had a period of fifteen or thirty days to respond to an application or complaint, with the possibility for those time-limits to be extended in certain cases.[44]

This mean that the delay in proceedings should not undermine the effects of the remedy.

▸ ***Remedies should be accessible***

The applicant should be able to access the remedy. For example, some cases of publication of judicial decision online might involve minors. The ECtHR ruled that legal representative of minors should be capable of bringing proceedings on their behalf.[45]

▸ ***Adequate compensation***

The availability of judicial remedy is not just the means in itself, it needs to provide adequate compensation and recovering of damages. In *Biriuk v Lithuania*, the Court stated

> 46. The Court recognises that the imposition of heavy sanctions on press transgressions could have a chilling effect on the exercise of the essential guarantees of journalistic freedom of expression under Article 10 of the Convention. However, in a case of an outrageous abuse of press freedom, as in the present application, the Court finds that the severe legislative limitations on judicial discretion in redressing the damage suffered by the victim and sufficiently deterring the recurrence of such abuses, failed to provide the applicant with the protection she could have legitimately expected under Article 8 of the Convention.[46]

▸ ***But not only compensation***

In *Petkov and others v Bulgaria*, the applicants were registered as candidates in the parliamentary elections. Shortly prior to the election, new legislation came into force which contained a provision allowing parties or coalitions to withdraw nominations of individuals who had allegedly collaborated with the former state security agencies. The applicants were struck off the lists of candidates on account of such allegations just 10 days before the elections took place. The decisions to strike them off the lists were subsequently declared null and void by the Supreme Administrative Court. However, the electoral authorities did not restore their names to the lists and as a result they could not run for Parliament.

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[44] Guide on Article 13 of the European Convention on Human Rights, https://www.echr.coe.int/documents/d/echr/guide_art_13_eng#:~:text=Article%2013%20secures%20the%20granting,shall%20have%20an%20effective%20remedy%E2%80%9D.

[45] See, *Margareta and Roger Andersson v. Sweden*, https://hudoc.echr.coe.int/eng?i=001-57748, para 101.

[46] *Biriuk v. Lithuania*, https://hudoc.echr.coe.int/?i=001-89827.

> 79. […] such an action, even if ultimately successful, cannot in the circumstances be considered as providing sufficient redress in itself, because it can result solely in an award of compensation. In cases where – as here – the authorities, through deliberate actions and omissions, prevent a parliamentary candidate from running, the breach of Article 3 of Protocol No. 1 cannot be remedied exclusively through such an award. If States were able to confine their response to such incidents to the mere payment of compensation, without putting in place effective procedures ensuring the proper unfolding of the democratic process, it would be possible in some cases for the authorities to arbitrarily deprive candidates of their electoral rights and even to rig elections. Were that to be the case, the right to stand for Parliament, which along with the other rights guaranteed by Article 3 of Protocol No. 1 is crucial to establishing and preserving the foundations of a meaningful democracy, would be ineffective in practice.[47]

The remedy should be capable of fixing the problem complained of. They need to be effective not only in theory but also in practice.

Thus, when considering regulatory framework, the decision-makers should ensure that the provided national remedies are capable of considering the merits of the complaint promptly. This remedy should be accessible and sufficient to provide necessary redress to the victim of an alleged violation.

Not less importantly, the ECtHR has already pronounced on topics of data privacy through the lens of effective remedies. In *B.B. v France*, the case concerned retention of data in the database, it was stated:

> 68. The Court considers that this judicial procedure for the deletion of data provides for an independent review of the justification for the retention of information on the basis of precise criteria and offers sufficient and adequate guarantees of respect for private life in the light of the seriousness of the offences justifying inclusion in the file. Admittedly, the storage of data for such a long period could pose a problem from the point of view of Article 8 of the Convention, but the Court notes that the applicant has, in any event, the concrete possibility of submitting an application for the deletion of the stored data even though the decision which led to his inclusion has ceased to have full effect. In those circumstances, the Court is of the opinion that the period for which the data were stored was not disproportionate to the purpose for which the information was stored.[48]

[47] *Petkov and others v Bulgaria*, https://hudoc.echr.coe.int/eng?i=001-93027.

[48] *B.B. v. France*, https://hudoc.echr.coe.int/?i=001-96361. Non-official translation of the quoted paragraph. The official text in French reads as follows: 'La Cour considère que cette procédure judiciaire d'effacement des données assure un contrôle indépendant de la justification de la conservation des informations sur la base de critères précis et présente des garanties suffisantes et adéquates du respect de la vie privée au regard de la gravité des infractions

In that case, the availability of remedy played a role in considering the whole regulatory framework. Although there is no specific procedural obligation under Article 8, the availability of remedies can play an important role first, in identifying the appropriateness of the regulatory framework and second in considering the proportionality of interference. In *Roman Zakharov v Russia* for instance the Court confirmed the obligation of the Contracting Parties to establish judicial oversight over covert surveillance. The ECtHR has also requested that remedy is available in cases in which employee's communications have been monitored.[49]

Availability of effective remedies is not only a consideration relevant for Article 8 of the ECHR, but lack thereof can lead to finding a separate violation of Article 13 of the ECHR. The Court found violations of Article 13 in cases where there was no remedy at all. For instance, in *Rotaru v Romania* the ECtHR considered whether the lack of domestic remedies that could rule on the victim's application for destruction of the file containing information about him leads to a violation of Article 13 ECHR:

> 67. The Court reiterates that it has consistently interpreted Article 13 as requiring a remedy in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention. Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. This Article therefore requires the provision of a domestic remedy allowing the "competent national authority" both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligation under this provision. The remedy must be "effective" in practice as well as in law.
>
> 68. The Court observes that the applicant's complaint that the RIS [Romanian Intelligence Service] held information about his private life for archiving and for use, contrary to Article 8 of the Convention, was indisputably an "arguable" one. He was therefore entitled to an effective domestic remedy within the meaning of Article 13 of the Convention.
>
> 69. The "authority" referred to in Article 13 may not necessarily in all instances be a judicial authority in the strict sense. Nevertheless, the powers and procedural

justifiant l'inscription sur le fichier. Certes, la mémorisation des données pour une période aussi longue pourrait poser un problème sous l'angle de l'article 8 de la Convention, mais la Cour constate que le requérant a, en tout état de cause, la possibilité concrète de présenter une requête en effacement des données mémorisées alors que la décision ayant entraîné son inscription a cessé de produire tous ses effets. Dans ces conditions, la Cour est d'avis que la durée de conservation des données n'est pas disproportionnée au regard du but poursuivi par la mémorisation des informations'.

[49] *Bărbulescu v. Romania*, https://hudoc.echr.coe.int/eng?i=001-177082 para 121-122.

guarantees an authority possesses are relevant in determining whether the remedy before it is effective...

70. In the instant case the Government maintained that the applicant could have brought an action on the basis of Article 54 of Decree no. 31/1954. In the Court's view, that submission cannot be accepted.

Firstly, it notes that Article 54 of the decree provides for a general action in the courts, designed to protect non-pecuniary rights that have been unlawfully infringed. The Bucharest Court of Appeal, however, indicated in its judgment of 25 November 1997 that the RIS was empowered by domestic law to hold information on the applicant that came from the files of the former intelligence services.

Secondly, the Government did not establish the existence of any domestic decision that had set a precedent in the matter. It has therefore not been shown that such a remedy would have been effective. That being so, this preliminary objection by the Government must be dismissed.[50]

Subsequently, the ECtHR found a violation of Article 13 in this case. Another directly relevant case here is *X v Russia* where the applicant complained that the relevant judicial decision was published online and disclosed information regarding adoption of the applicant's children. The Court found a violation of Article 13 in conjunction with Article 8 because there was no remedy that could provide compensation for the non-pecuniary damage. The Court stated:

73. The Court notes in the instant case that the above-mentioned applicants' complaints under Article 13 of the Convention related to the absence of a judicial remedy capable of providing compensation for non-pecuniary damage caused by the malfunctioning of the judicial service. The persons concerned were not therefore seeking to establish the disciplinary or criminal liability of the judges or court officers who had committed the impugned act. In raising an objection to the complaint based on Article 8, the Government, for their part, appeared to be criticising the applicants for failing to avail themselves of the remedies available to them to establish such liability.

74. The Court observes that, in any event, the applicants X and Y tried unsuccessfully to refer their case to the Conseil supérieur de la magistrature (High Council for the Judiciary), which declared itself incompetent to supervise judicial proceedings and the

[50] *Rotaru v. Romania* [GC], https://hudoc.echr.coe.int/eng?i=001-58586. See also, *Segerstedt-Wiberg and Others v. Sweden*, https://hudoc.echr.coe.int/eng?i=001-70493.

operation of the registries. Moreover, the Government had not shown that this body was competent to provide the remedy sought by the applicants.

75. As to the Government's proposal to bring criminal proceedings against the judge in order to be able, under Article 1070 of the Civil Code, to institute civil proceedings to obtain compensation, where appropriate, the Court observed that, according to the Government, the act complained of had been committed not by a judge but by a member of the registry. However, the aforementioned provision made the State's liability conditional on fault on the part of the judge, who had been convicted of a criminal offence, and not on fault on the part of a member of the registry. Moreover, to make the State's liability for a judicial malfunction that infringes fundamental rights dependent on the fault of a judge convicted of a criminal offence is tantamount to making that right dependent on a factor that is beyond the power of the victim of such a malfunction. The latter may be the result of an unintentional act, which is not punishable by criminal law, or of an act or inaction not attributable to a particular judge, etc. The Court refers in this respect to the reasoning developed by the Russian Constitutional Court in its above-mentioned judgment of 2001. That Court concluded that the constitutional right to be compensated by the State for damage caused by judicial acts or by the inaction of a judge should not be made conditional on a finding of personal fault on the part of the judge.

76. That remedy therefore lacked the effectiveness required by Article 13 of the Convention.[51]

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[51] *X and others v Russia*, https://hudoc.echr.coe.int/eng?i=001-200350. Non-official translation of the quoted paragraph. The official text in French reads as follows: '73. La Cour note en l'espèce que les doléances des requérants susmentionnés sur le terrain de l'article 13 de la Convention portent sur l'absence d'une voie de recours judiciaire propre à offrir un dédommagement pour un préjudice moral causé par le dysfonctionnement du service de la justice. Les intéressés ne cherchaient donc pas à mettre en jeu la responsabilité disciplinaire ou pénale des juges ou des auxiliaires de justice ayant commis l'acte contesté. En soulevant une exception à l'encontre du grief fondé sur l'article 8, le Gouvernement, quant à lui, semble précisément reprocher auxdits requérants de ne pas avoir fait usage des voies de recours permettant d'engager une telle responsabilité.

74. La Cour relève que, de toute manière, les requérants X et Y ont tenté, en vain, de saisir le Conseil supérieur de la magistrature, ce dernier s'est déclaré incompétent pour contrôler la procédure judiciaire et le fonctionnement des greffes. Au demeurant, le Gouvernement n'a pas démontré que cette instance était compétente pour offrir le redressement souhaité par les intéressés.

75. Quant à la proposition du Gouvernement de poursuivre le juge au pénal afin de pouvoir engager, en vertu de l'article 1070 du code civil, une procédure civile pour obtenir, le cas échéant, un dédommagement, la Cour relève que, selon le Gouvernement, l'acte dénoncé avait été commis non par un juge mais par un membre du greffe. Or la disposition susmentionnée conditionne la mise en jeu de la responsabilité de l'État à une faute du juge, condamné au pénal, et non à celle d'un membre du greffe. En outre, faire dépendre la mise en jeu de la responsabilité de l'État pour un dysfonctionnement de la justice, portant atteinte aux droits fondamentaux, d'une faute du juge condamné au pénal revient à faire dépendre ce droit d'un élément qui échappe au pouvoir de la victime d'un tel dysfonctionnement. En effet, ce dernier peut résulter d'un acte non intentionnel, qui n'est pas passible d'une peine pénale, ou d'un acte ou une inaction non imputable à un juge en particulier, etc. La Cour renvoie à cet égard au raisonnement développé par la Cour constitutionnelle russe dans son arrêt précité de 2001. Cette juridiction a

Overall, a proper regulatory framework would include some form of judicial overview over publication of national judicial decisions. These decisions might include private data in relation to identified or identifiable individuals and therefore it is important to allow the concerned parties to request removal and claim damages. This section concludes that the remedy should be established and lack thereof can impact the Court's reasoning under Article 8 or/and it can also mean an outright violation of Article 13.

conclu en effet que le droit constitutionnel à être indemnisé par l'État pour les dommages occasionnés par des actes judiciaires ou de l'inaction d'un juge ne devait pas être subordonné à l'établissement d'une faute personnelle du juge.

76. Dès lors, ce recours est dépourvu du caractère effectif voulu par l'article 13 de la Convention.'

Section 4
Proper Assessment of Individual Circumstances

This section briefly outlines the specific factors that national courts should consider when implementing such regulatory framework. In Subsection 3.4, the obligation to establish effective remedy able to consider revealing of private information in national judicial decisions was established. This section will make specific suggestions as to what national courts should take into account when deciding such cases. Of course, this overview is not exhaustive, but it will provide some key indicators of how the proportionality of interference can be examined by the national courts.

National courts should consider whether the disclosure is necessary in democratic society, in other words, the courts will have to determine if less intrusive means measures are possible in the case at hand.

> 244. In order to determine, in any given case, whether there are sufficient grounds for disclosing, in the body of a judicial decision, the identity of an individual and other personal data on the latter, one important question is whether other less intrusive measures would have been possible under domestic law and practice. This includes of the possibility of a court omitting mentioning any names in the judgment permitting the identification of the data subject (Z v. Finland, 1997, § 113; Vicent Del Campo v. Spain, 2018, § 50), keeping the full reasoning confidential for a certain period and instead publishing an abridged version of the reasoning, the operative part and an indication of the law which it had applied (Z v. Finland, 1997, § 113), or restricting access to the text of a judgment or to certain matters therein (Vicent Del Campo v. Spain, 2018, § 50). The Court considers that such measures are generally deemed capable of reducing the impact of a judgment on the data subject's right to protection of his private life.[52]

National courts should consider if the specific circumstances of the case require the disclosure of personal data. Moreover, the national courts need to ensure that such disclosure is relevant to the aim pursued by such disclosure. The ECtHR normally considered these issues in relation

[52] Guide to the Case-Law of the of the European Court of Human Rights. https://www.echr.coe.int/documents/d/echr/Guide_Data_protection_ENG

to disclosure of this information in the court hearings, but this issue becomes even more pertinent if such information is available in court's decisions available online as the can be accessed by a much broader audience. In *J.L. v Italy*, the Court stated.

> 119. Moreover, the Court has already held that the rights of victims of offences who are parties to criminal proceedings generally fall within the ambit of Article 8 of the Convention. In this regard, the Court recalls that, while the purpose of Article 8 is essentially to protect the individual against arbitrary interference by the public authorities, it does not merely require the State to refrain from such interference: in addition to this negative undertaking, positive obligations inherent in effective respect for private or family life may be imposed. Such obligations may involve the adoption of measures aimed at ensuring respect for private life even in the relations between individuals (X and Y v. the Netherlands, 26 March 1985, § 23, Series A no. 91). It follows that the Contracting States must organise their criminal proceedings in such a way as not to endanger unduly the life, liberty or security of witnesses, and in particular that of the victims called to give evidence. The interests of the defence must therefore be weighed against those of the witnesses or victims called to give evidence (Doorson v. the Netherlands, 26 March 1996, § 70, Reports of Judgments and Decisions 1996-II). Moreover, criminal proceedings relating to sexual offences are often experienced as an ordeal by the victim, particularly when he or she is confronted with the defendant against his or her will and in a case involving a minor (S.N. v. Sweden, no. 34209/96, § 47, ECHR 2002-V, and Aigner v. Austria, no. 28328/03, § 35, 10 May 2012). Consequently, in the context of such criminal proceedings, special protective measures may be taken to protect victims (see Y. v. Slovenia, cited above, §§ 103-104). The provisions at issue imply adequate care for the victim during the criminal proceedings, with the aim of protecting him or her from secondary victimisation.[53]

[53] *J.L. v Italy*, https://hudoc.echr.coe.int/?i=001-210299. Non-official translation of the quoted paragraph. The official text in French reads as follows: 'Par ailleurs, la Cour a déjà affirmé que les droits des victimes d'infractions parties à une procédure pénale tombent d'une manière générale sous l'empire de l'article 8 de la Convention. À cet égard, la Cour rappelle que si l'article 8 a essentiellement pour objet de prémunir l'individu contre des ingérences arbitraires des pouvoirs publics, il ne se contente pas de commander à l'État de s'abstenir de pareilles ingérences : à cet engagement négatif peuvent s'ajouter des obligations positives inhérentes à un respect effectif de la vie privée ou familiale. Ces obligations peuvent impliquer l'adoption de mesures visant au respect de la vie privée jusque dans les relations des individus entre eux (X et Y c. Pays-Bas, 26 mars 1985, § 23, série A no 91). Il s'ensuit que les États contractants doivent organiser leur procédure pénale de manière à ne pas mettre indûment en péril la vie, la liberté ou la sécurité des témoins, et en particulier celles des victimes appelées à déposer. Les intérêts de la défense doivent donc être mis en balance avec ceux des témoins ou des victimes appelés à déposer (Doorson c. Pays-Bas, 26 mars 1996, § 70, Recueil des arrêts et décisions 1996-II). De plus, les procédures pénales relatives à des infractions à caractère sexuel sont souvent vécues comme une épreuve par la victime, en particulier lorsque celle-ci est confrontée contre son gré au prévenu et dans une affaire impliquant un mineur (S.N. c. Suède, no 34209/96, § 47, CEDH 2002-V, et Aigner c. Autriche, no 28328/03, § 35, 10 mai 2012). Par conséquent, dans le cadre de pareilles procédures pénales, des mesures de protection particulières peuvent être prises pour protéger les victimes (Y. c. Slovénie, précité, §§ 103-104). Les dispositions en jeu impliquent une prise en charge adéquate de la victime durant la procédure pénale, ceci dans le but de la protéger d'une victimisation secondaire.'

This effectively means that the national courts should aim at minimisation of data provided in the publicly available judicial decisions and include only very relevant information in relation to identified or identifiable persons.

It has already been noted that the right to be forgotten should be protected by the national legislation. However, national courts should take specific circumstances of the case to consider whether the passage of time justifies removal of a particular decision from the database. In this context the courts need to consider various relevant factors:

- **Value for public debate: this value diminishes with the passage of time;**

> 66. In this connection, the applicable domestic law, read in the light of the international legal supports the idea that the relevance of the applicant's right to disseminate information decreased over the passage of time, compared to V.X.'s right to respect for his reputation (in this connection, compare and contrast Éditions Plon v. France, no. 58148/00, §§ 53-57, ECHR 2004-IV, where as time elapsed, the public interest in discussing the history of President Mitterrand's time in office increasingly prevailed over any rights with regard to medical confidentiality; in that case, the Court considered in particular that, in any event, the duty of medical confidentiality had already been breached).[54]

- **Possibility of rehabilitation and reintegration into society;**

> 100. The Court observes that, after a certain period of time has elapsed and, in particular, as their release from prison approaches, persons who have been convicted have an interest in no longer being confronted with their acts, with a view to their reintegration in society. This may be especially true once a convicted person has been finally released. Likewise, the public's interest as regards criminal proceedings will vary in degree, as it may evolve during the course of the proceedings according to a number of factors such as the circumstances of the case.
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> 101. Turning back to the present case the Court observes that the Federal Court of Justice, while acknowledging that the applicants had a very significant interest in no longer being confronted with their conviction, stressed that the public had an interest not only in being informed about a topical event, but also in being able to conduct research into past events. The Federal Court of Justice also pointed out that the media's task was to contribute to shaping democratic opinion by making old news items that were stored in their archives available to the public.
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> 102. The Court fully agrees with this conclusion. It has consistently stressed the essential role played by the press in a democratic society, including through its websites and the establishment of digital archives, which contribute significantly to

[54] *Biancardi v. Italy*, https://hudoc.echr.coe.int/?i=001-213827.

> enhancing the public's access to information and its dissemination. Moreover, according to the Court's case-law, the legitimate interest of the public in access to the public Internet archives of the press is protected under Article 10 of the Convention, and particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive.[55]

National courts need to balance the right to be forgotten with other relevant considerations such as access to information, for example. In order to decide whether the judicial decision can be published the national courts need to consider the nature of the data. Although, some examples of sensitive data have been provided in the previous section (medical information etc.) it is important to highlight here that national courts need to provide a higher level of protection to sensitive personal information that can be released as a result of publication of judicial decisions in relation to identified or identifiable persons.

[55] *M.L. and W.W. v. Germany*, https://hudoc.echr.coe.int/?i=001-183947.