

6. CONFERENCE CONCLUSIONS

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Introduction

First, I would like to thank and congratulate all the organisers for this very important initiative. A lot of collaborative work has gone into the conceptualisation and organisation of the conference. Good dialogue has been well served by good *preparatory* dialogue. I am sure I speak on behalf of everyone when I say that this conference really has lived up to its billing. We have had a very rich and detailed



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dialogue today among real makers and shakers in the world of freedom of expression: people from the frontlines of journalism, whistle-blowing, judicial decision-making, civil society and academia. It has been a real privilege to be here.

Before offering some conclusions and reflections on the present conference, it is important to recall a forerunner conference organised by Dirk Voorhoof, Mario Oetheimer and Constance Grewe at the European Court of Human Rights in October 2008. True to its title,

'Seminar on the European Protection of Freedom of Expression: Reflections on Some Recent Restrictive Trends',⁷⁹ that conference drew attention to, and explored, a number of emergent worrying trends. Several of those trends have persisted in the ever-evolving jurisprudence of the European Court of Human Rights (hereafter 'the ECtHR' or 'the Court'). The present conference⁸⁰ therefore picks up on relevant themes and trends and seeks to continue the discussion initiated in 2008. The continuation and re-focusing of that discussion is important for at least three reasons:

1. The European Convention on Human Rights (hereafter 'ECHR') is a living instrument and the Court's case-law shows clear evolutionary characteristics: it builds on, and often refines, earlier approaches as European societies and judicial insights develop over time. There is scope to consolidate strong freedom of expression principles and to correct or adjust weaker approaches taken in particular cases. Dialogue between the judiciary and other actors enhances this developmental process.

⁷⁹ See also the concept note of today's conference, with annex: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806fbf0f>

⁸⁰ See the conference website: <http://www.coe.int/en/web/freedom-expression/ecpmfcthr2017>

2. The Council of Europe has elaborated a dynamic system for the protection of freedom of expression. The system comprises principles and rights, as enshrined in treaty law and developed in case-law; political and policy-making standards, and State reporting/monitoring mechanisms. It is shaped by the interplay between norms, institutions and actors.⁸¹ Sustained dialogue and other forms of engagement with civil society actors are essential for the effective operation of the system.
3. We must always guard against complacency when it comes to the protection of human rights, including the right to freedom of expression. Threats from increasing populism, extremism and terrorism, as well as the repressive political responses they often elicit, call for us to be “eternally vigilant” regarding any attempts to impose checks on freedom of expression.⁸²

Specific pixels and broader patterns

The conference demonstrated complementarity between very specific focuses



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on individual experiences and single cases on the one hand, and comparative perspectives on the other hand. It is important to focus on the individuals, individual cases and individual judgments as they are the specific pixels which ultimately create the bigger pattern of principles. They determine the colours that we see in the jurisprudence and standard-setting.

In terms of the more individual focuses and particular judgments, Lawrence Early gave a very detailed exposition of *Magyar Helsinki Bizottság v. Hungary* (hereafter *MHB*),⁸³ a Grand Chamber

judgment with important ramifications for the right to freedom of information in general and the right of access to State-held information in particular. Judge Popović gave an in-depth analysis of the *Selmani and Others v. the former Yugoslav Republic of Macedonia* case,⁸⁴ which involved the forcible removal of accredited journalists

81 See further: Tarlach McGonagle, 'Freedom of expression: still a precondition for democracy?', *Conference report*, Strasbourg: Council of Europe, 2015, pp. 4-8.

82 Paraphrasal of Holmes, J., dissenting, in *Abrams v US*, 250 US 616 (1919), at p. 630, and referenced in the title of the edited volume: Lee C. Bollinger & Geoffrey R. Stone, Eds., *Eternally Vigilant: Free Speech in the Modern Era* (Chicago & London, University of Chicago Press, 2002). The parting message of Dunja Mijatović as OSCE Representative on Freedom of the Media was: "Never give in; never give up. Eternal vigilance is the price of a free press": OSCE RFOM, Regular Report to the [OSCE] Permanent Council for the period from 2 December 2016 through 9 March 2017, Doc. No. FOM. GAL/2/17/Rev.2, 9 March 2017, p. 4.

83 *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, 8 November 2016.

84 *Selmani and Others v. the former Yugoslav Republic of Macedonia*, no. 67259/14, 9 February 2017.

from the national Parliamentary gallery. In both cases, the ECtHR found violations of Article 10 ECHR. In reaching those findings, it attached great importance to public debate in democratic society – and the crucial public watchdog role carried out by journalists, the media, NGOs and, increasingly, other actors such as academics and bloggers.

There were also several testimonies from individuals at the frontline of freedom of expression, whether journalism or whistle-blowing. Drawing on first-hand experiences, Dutch journalist Sanne Terlingen spoke about the vulnerabilities of journalists in particular situations, for instance when facing financial constraints as they try to defend themselves against legal action, and also the intimidation of journalists as a result of their reporting.

Antoine Deltour, reflecting on his own experiences as a whistleblower in the so-called *LuxLeaks* case, pointed out that some ECtHR case-law and Council of Europe standard-setting texts had proved useful in his legal defence. There is an important lesson here: the Council of Europe's system for the protection of freedom of expression has provided a range of resources – some legal, others more political in character – which are important tools that we can use as advocates and proponents of freedom of expression.

A somewhat different message was delivered by Markus Pentikäinen, whose own case culminated in a finding by a majority of the Grand Chamber that his right to freedom of expression had not been violated as a result of his arrest, detention and criminal prosecution because he refused to obey a police order to leave the area while covering a public demonstration as a photo-journalist.⁸⁵ In line with the dissenting opinion in that judgment, and subsequent judgments by the Court, several commentators took the view that in the *Pentikäinen* judgment, the Grand Chamber gave the right to freedom of expression the short end of the stick.

While it is important to subject individual cases to critical scrutiny, it is equally important to position them in broader, comparative perspectives. There is, as Judge Sajó reminded the conference, an onus on the free speech community to "raise its eyes and critical voice from the [nitty-gritty] of specific cases". That wider jurisprudential context was explored by a number of speakers. Galina Arapova and Barbara Trionfi highlighted some of the Court's case-law on (criminal) defamation, for instance. Dirk Voorhoof surveyed developments and trends in the Court's case-law dealing with a number of inter-related themes: protection of investigative journalism/newsgathering; access to information/public documents; protection of journalists' sources, and protection of whistleblowers. Duygu Köksal prised open and compared some recent ECtHR case-law dealing with the right to protest and the role of the media. In a similar vein, Daniel Simons compared and contrasted approaches under Articles 10 and 11 ECHR – two articles which often dove-tail in practice.

⁸⁵ Pentikäinen v. Finland [GC], no. 11882/10, § 90, 20 October 2015.

This report will now set out some of the overarching and recurrent themes explored during the conference, as captured in and triggered by the keynote speeches by Judge András Sajó and Silvia Grundmann. Their keynotes focused on the challenges facing the ECtHR and the Council of Europe's standard-setting activities, respectively.

The report will then re-engage with the themes mentioned above in the context of each of the conference's panels:

1. Defamation, privacy and processing of personal data;
2. Investigative journalism, access to information, protection of sources and whistleblowers, and
3. The right to protest and the role of the media during protests.

The report will conclude with some personal reflections on the nature of the dialogue between the ECtHR and the media freedom community and on how to sustain and structure that dialogue in the future. A number of thematic priorities from the conference will be identified for that purpose.

The overarching issues

In the first keynote speech, Judge Sajó shared a very probing personal reflection on the paradigmatic changes that have come over the communications environment in recent years. Due to technological advances and how society has embraced those advances, it has become possible for a growing range of actors to participate effectively in public debate. In the past, such a privileged position was more or less limited to professional journalists and traditional media. A wider public space has now opened up, offering great potential for individual participation and inclusive deliberation. This development came with the prospect of a tightly controlled system for "the production and management of information" being "replaced with a decentralized system where individuals would become more active partners in generating information". The European Court of Human Rights has repeatedly underlined how important it is for a diversity of specific actors to be able to contribute meaningfully to public debate.

However, as Judge Sajó rued, "pain is the sister of progress" and the hope of democratic debate being enhanced has not been (fully) borne out in practice. Technological developments have also led to the possibility, and indeed tendency, for people to retreat into groups where there is a predominance or an exclusivity of like-minded opinions and they become trapped in so-called filter bubbles. All of this can result in citizens living in "self-imposed selective worlds of alternative truth, where their rational capacities are paralyzed by externally reinforced wishful thinking", he said.

Society's increasing reliance on the Internet and social media is clearly impacting on the already complex and ambiguous relationship between freedom of expression

and democracy. The fundamental question at the heart of Judge Sajó's keynote asks "how to justify speech in a communication sphere where communication and communicators apparently do not satisfy fundamental expectations of rational discourse"? What are appropriate responses to self-selecting groups and their self-serving alternative facts and the rise of identity politics? Should the State be required to set "the conditions of communication right by limiting potentially harmful expression"? Or would that be a first regressive step on the slippery slope towards State censorship? Who is to say that calls for "responsible speech are but another attempt to determine governmentally or politically what is right or wrong and to impose a new political correctness on dissent that is labelled fake"? If truth were to be afforded regulatory protection, who would determine what is true ... and how?

These thorny questions can best be answered by paying attention to matters of substance and matters of perception. Freedom of expression is, after all, increasingly being shaped by changing public and political attitudes to the content and scope of the right and to the nature of the supranational judicial protection it is afforded.

In terms of matters of perception, Judge Sajó suggested that much rides on how the Court is perceived and how it perceives itself. Is the Court buoyed by public political support and (inter)national commitment to its mandate and mission, or is it dragged down by the pressure of increasingly isolationist and sovereignty-driven governments? Does it see itself as deferring to national visions of democracy or does it aspire to higher values, even when they are out of favour in national visions of democracy?

Matters of substance and perception also come together when one considers the role of the ECtHR as it tries to steer its way through the changed communications environment and reflects on the kind of principles that should guide it. Judge Spano subsequently explained that it is the task of the Court to develop a framework of principles, which need to be applied sensitively to factual realities. In other words, the important statements of principle formulated by the Court still need to overcome the challenges of operationalisation. Due to its framework character, this framework of principles does not cover all eventualities specifically: there remain unanswered questions and missed opportunities, as the panel discussions revealed. Nevertheless, as Peter Noorlander pointed out, when - as now - "the media are under fire like never before", there is a particular onus on the Grand Chamber of the Court to clarify concepts and to provide journalists with the clear guidance that they need on the parameters for their important work. The Court will continue to develop and refine its principles in future case-law and other bodies of the Council of Europe will continue to operationalise the Court's principles in their political standard-setting activities.

Whereas the first keynote dwelt on the role of the Court, the second keynote, delivered by Silvia Grundmann, Head of the Council of Europe's Media and Internet Division, focused on another dimension of the Council of Europe's broader system for the protection of freedom of expression, i.e., political standard-setting activities

by the Committee of Ministers (hereafter, the CM).⁸⁶ The CM has the responsibility to develop and maintain a policy framework for the protection of freedom of expression and media freedom through the adoption of standard-setting texts, such as Declarations and Recommendations to Council of Europe Member States.

The interplay between the Court's case-law and the CM's standard-setting activities is becoming increasingly frequent and increasingly important.⁸⁷ Principles developed by the Court can provide a starting-point for political standard-setting, with the latter operationalising the former, for example, by applying them to a variety of scenarios. The Court may – and often does – resort to standard-setting texts for inspiration when its existing case-law does not (adequately) deal with particular issues or scenarios. For instance, as Grundmann mentioned, the Court has referred to Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media,⁸⁸ in its *Yildirim*⁸⁹ and *Delfi*⁹⁰ judgments.⁹¹ Shortly after the conference, on 13 April 2017, the Court referred for the first time in a judgment to Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and the safety of journalists and other media actors⁹² – a central focus of Grundmann's speech.⁹³

Recommendation CM/Rec(2016)4 calls on States to urgently raise their game when it comes to guaranteeing the protection of journalism and safety of journalists and other media actors. It urges States to regularly review relevant national laws – and their implementation – to ensure that they are in conformity with the legal obligations created by the Convention. It seeks to develop themes that have only received limited attention in relevant European and international standards. One such theme is the gender-specific dimension to violence, threats and abuse targeting female journalists and commentators, especially online. Another is the digital security of journalists, including confidentiality of communications and freedom from surveillance.

86 For an overview and analysis of the Council of Europe's system for the protection of freedom of expression, see: Tarlach McGonagle, Conference report, 'Freedom of expression: still a precondition for democracy?', Strasbourg: Council of Europe, 2015, pp. 4-8.

87 Declaration of the Committee of Ministers on measures to promote the respect of Article 10 of the European Convention on Human Rights, 13 January 2010.

88 Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media, 21 September 2011.

89 *Ahmet Yıldırım v. Turkey*, no. 3111/10, 18 December 2012.

90 *Delfi AS v. Estonia (GC)*, no. 64569/09, 16 June 2015.

91 For further discussion of the added value of standard-setting texts for the Court's decision-making, especially on Internet-related issues, see Judge Spano's presentation at Internet freedom: a constant factor of democratic security in Europe, Conference, Council of Europe, Strasbourg, 9 September 2016, via: <http://www.coe.int/en/web/freedom-expression/internetfreedom2016>

92 Recommendation CM/Rec(2016)4 of the Committee of Ministers [of the Council of Europe] to member States on the protection of journalism and safety of journalists and other media actors, 13 April 2016.

93 *Huseynova v. Azerbaijan*, no. 10653/10, 13 April 2017. See also the interesting partly dissenting opinion by Judges Nußberger and Vehabović, which points at the shortcomings in the Court's approach to the lack of an investigation into the killings of the journalist and the need to interpret procedural violations of Article 2 (right to life) in the light of Article 10 ECHR.

The Recommendation is firmly grounded in relevant principles developed by the ECtHR in its case-law. It sets out those principles explicitly and in detail. This makes the Recommendation's key political recommendations traceable to hard legal obligations and therefore difficult to contest. This also provides a solid basis for teasing out the practical implications of those State obligations. This is particularly true of relevant positive obligations of States which, as Judge Spano pointed out, have enormous potential for ensuring enhanced level of protection for freedom of expression and participation in public debate.⁹⁴

The Recommendation explores what States' obligations mean in practice in various specific situations, such as during election periods and at public demonstrations.



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In both contexts, members of the public have a clear interest – and a right – to be informed and it is paramount for journalists and others to be able to inform them. The *Pentikäinen* case illustrates very well the issues that can arise when journalists and photo-journalists endeavour to cover public demonstrations where there is an element of unrest or violence. The Recommendation encourages dialogue between State authorities and journalists' organisations when demonstrations are due to take place, in order to minimize friction and avoid clashes between the police, demonstrators and the

media.⁹⁵ In its *Frumkin* judgment, the Court held that State authorities have a duty to communicate with the organisers of an assembly, which is "an essential part of their positive obligation to ensure the peaceful conduct of the assembly, to prevent disorder and to secure the safety of all the citizens involved".⁹⁶ The Recommendation goes one step further. It seeks to use this general positive obligation as a logical basis for developing a more specific positive obligation for dialogue that would also include members of the media. As Daniel Simons elaborated, such dialogue could prioritise reaching agreement on a process for identification of journalists or other media actors covering an assembly and establishing secure observation zones, etc.

Another relevant reason to focus on Recommendation CM/Rec(2016)4 is its scope. There was an ongoing discussion throughout the conference, triggered by Gill Phillips' early calls for clarification: who are we trying to protect and who deserves

⁹⁴ In this connection, he referred to: Tarlach McGonagle, 'Positive obligations concerning freedom of expression: mere potential or real power?', in Onur Andreotti, Ed., *Journalism at risk: Threats, challenges and perspectives* (Strasbourg, Council of Europe Publishing, 2015), pp. 9-35.

⁹⁵ Ibid., para. 14.

⁹⁶ *Frumkin v. Russia*, no. 74568/12, § 129, 5 January 2016 (extracts).

protection? How these questions are answered can have important, sometimes far-reaching, implications for the nature and scope of protection for freedom of expression. For instance, regulatory provisions for journalistic privileges or exceptions regarding data protection, access to information and particular forums, etc., can be drawn widely or narrowly – with positive or negative consequences for freedom of expression. Daniel Simons later re-engaged with these questions by advocating preferential or differential protection for journalists or others contributing to public debate, given the importance of their task for democratic society.

By referencing journalists and other media actors, the title of Recommendation CM/Rec(2016)4 reflects the growth that has taken place within public debate and acknowledges that nowadays a range of actors contribute to public debate. To protect journalism, it is therefore vital to guarantee the safety of all those actors who wish to participate in public debate and to ensure that they may express their ideas and share information without fear. This principle was laid down by the Court in its *Dink v. Turkey* judgment.⁹⁷ More specifically, the Court stated:

States are obliged to put in place an effective system of protection for authors and journalists as part of their broader obligation to create a favourable environment for participation in public debate by everyone and to enable the expression of opinions and ideas without fear, even when they are contrary to those held by the authorities or by a significant section of public opinion and even if they are annoying or shocking for the latter.⁹⁸

Recommendation CM/Rec (2016)4 takes a broad, forward-looking view of what journalism entails and underlines its importance in a democratic society. It acknowledges the valuable contributions that bloggers, whistle-blowers and a growing range of other actors can make to public debate and stresses the need to guarantee their safety and freedom of expression, as the ECtHR has repeatedly recognised. This is consistent with leading international standards, such as the United Nations Human Rights Committee's General Comment No. 34⁹⁹ and the approach taken by UNESCO. This is both a principled *and* a pragmatic approach. All rights guaranteed by the ECHR have to be practical and effective – not merely theoretical or illusory.¹⁰⁰ To determine whether the right to freedom of expression is effective for a journalist, a photo-journalist or a whistleblower, one has to look at the specific set of circumstances that obtain. Particular circumstances may require particular measures in order to protect those persons' efforts to contribute to public debate, and thereby ensure that their right to freedom of expression is effective in practice.

⁹⁷ *Dink v. Turkey*, nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, § 137, 14 September 2010.

⁹⁸ Author's translation of *ibid*.

⁹⁹ Human Rights Committee, General Comment 34: Article 19 (Freedoms of Opinion and Expression), UN Doc. CCPR/C/GC/34, 12 September 2011.

¹⁰⁰ *Airey v. Ireland*, no. 6289/73, § 24, 9 October 1979.

The operational autonomy that allows journalists to carry out their functions is, however, neither unlimited nor unconditional. In accordance with Article 10(2), the exercise of the right to freedom of expression "carries with it duties and responsibilities". This vague phrase has never been fully unpacked by the Court. Indeed, according to a clear strand in the conference discussions, it is maybe just as well that the phrase has never been fully unpacked – due to the chilling effect arising from the Court's increasingly heavy emphasis on "responsible journalism".¹⁰¹ As Judge Sajó underscored, it is very difficult to determine the appropriate levels of responsibility for a variety of actors. Moreover, while the exercise of the right to freedom of expression is governed by duties and responsibilities, those duties and responsibilities should not, of themselves, restrict the exercise of the right.

The Court has, however, clarified that the scope of those "duties and responsibilities" varies, depending on the "situation" of the person exercising the right to freedom of expression and on the "technical means" used.¹⁰² Different technical means may be appropriate in different circumstances. In this regard, Dirk Voorhoof warned against "turning Article 10 upside down" by stating that a particular technique is "not necessary" in circumstances of a particular case. This warning is consistent with an important principle established by the Court in its *Jersild v. Denmark* judgment.¹⁰³ In that *locus classicus* for journalistic and media freedom, the Court held that it is not the task of a judge in Strasbourg, a national judge – or even (I dare to venture), a "judge prophet" of the kind referred to by Judge Sajó – to determine for a journalist what the most appropriate technique is.¹⁰⁴ This is a judgment call that has to be made by the journalist him-/herself in accordance with the ethics of the profession.

The Court has explained that "the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism".¹⁰⁵ Or, as Carl Bernstein of Watergate fame has put it, journalism is all about a commitment to provide "the best obtainable version of the truth".¹⁰⁶ In relevant ECtHR case-law, i.e., "Bladet Tromsø and its progeny", newspapers did not "as a rule" have an "absolute duty to verify the truth of a critical factual statement", as Judge Sajó pointed out. However, if one were to "read the tea-leaves of the *Pentikäinen* judgment", such a duty "would be found acceptable or even necessary", he stated. In *Pentikäinen*, the familiar phrase, "the ethics of journalism", has been replaced by the phrase, "the tenets of responsible journalism".¹⁰⁷

¹⁰¹ *Pentikäinen v. Finland* [GC], op. cit., § 90.

¹⁰² *Fressoz and Roire v. France* [GC], no. 29183/95, § 52, 21 January 1999.

¹⁰³ *Jersild v. Denmark*, no. 15890/89, 23 September 1994.

¹⁰⁴ *Ibid.*, § 31.

¹⁰⁵ *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 65, 20 May 1999.

¹⁰⁶ Carl Bernstein, "The Idiot Culture: Reflections of post-Watergate journalism", *The New Republic*, 8 June 1992, pp. 22-28, at p. 24.

¹⁰⁷ *Pentikäinen v. Finland* [GC], op. cit., § 90.

One of the main criticisms of the Court's growing reliance on "responsible journalism" is that however well-intentioned it may be, such an approach has the practical effect of unduly limiting freedom of expression. The term is taken to cover "the contents of information which is collected and/or disseminated by journalistic means" and "*inter alia*, the lawfulness of the conduct of a journalist, including, [...] his or her public interaction with the authorities when exercising journalistic functions".¹⁰⁸ In *Pentikäinen*, the majority of the Court stated that the "fact that a journalist has breached the law in that connection is *a most relevant, albeit not decisive*, consideration when determining whether he or she has acted responsibly".¹⁰⁹ However, the majority did not build on this statement to set out a convincing case as to why the public interest in the reporting (which was acknowledged elsewhere in the judgment) did not prevail. The upshot of this - and of other cases in which "responsible journalism" has a central place¹¹⁰ - is that the room for journalists' ethical and professional autonomy is restricted by turning ethical considerations into legally-binding criteria, while downplaying the public's right to be informed about matters of importance to society.

Defamation, privacy and processing of personal data

Moderator Gill Phillips (Director of Editorial Legal Services, Guardian News & Media) opened this panel session with a reminder of the numerous sources of limitations on freedom of expression and the chilling effect they can have: anti-terrorism, national security and hate speech laws, especially when definitions of key terms are not tightly drawn, and uncertainty about levels of liability for online content, especially when it is posted by third parties on the websites of Internet intermediaries. The three grounds for limitations on freedom of expression mentioned specifically in the title of the panel session are a mix of old and new challenges for public debate. Defamation laws, designed to protect individuals' reputations, can have a restrictive effect on freedom of expression when they are inappropriately calibrated. The severe chilling effect of *criminal* defamation laws on freedom of expression is well-documented and it featured centrally in the panel discussions. The protection of privacy - as guaranteed by Article 8 ECHR - is increasingly being used to limit freedom of expression. This trend has been facilitated by the ECtHR's willingness to consider reputational rights under Article 8 instead of under the limitations envisaged under Article 10(2). Whereas privacy is increasingly invoked as potentially limiting freedom of expression, it appears that the protection of personal data is really "the new black". Data protection laws - at the European and national levels - offer individuals, especially public figures, new possibilities to try to restrict reporting and commentary on their (public) activities.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid. (emphasis added).

¹¹⁰ E.g. *Stoll v. Switzerland* [GC], no. 69698/01, 10 December 2007.

During the session, Barbara Trionfi, Executive Director of the International Press Institute (IPI), presented her organisation's recent study on defamation and insult laws throughout the OSCE.¹¹¹ A key general finding of the study is that criminal defamation and insult laws exist in 42 of the 57 OSCE Participating States and these laws are applied regularly. These laws "commonly" do not require the defamatory content to be false and there is provision for a sanction of imprisonment in "the vast majority of cases". A particularly controversial feature of criminal defamation laws is the focus that they often contain on insulting public figures and/or (domestic and/or foreign) heads of state. According to the study, 15 OSCE States provide for criminal liability for insulting public officials and nine OSCE States punish defamation "more harshly" if the victim is a public official. Nearly half of OSCE States offer special protection for the reputation and honour of the head of state and 18 OSCE States have special laws protecting foreign heads of state.

These findings are very worrying from a freedom of expression perspective (even allowing for the fact that the OSCE region is wider than the Council of Europe region) as they go very much against the grain of relevant principles that have been developed by the ECtHR. The IPI study neatly summarises the ECtHR's main principles on criminal defamation as follows:¹¹²

- Penalties for criminal defamation should not include imprisonment
- Convictions for defamation should only be secured when the allegedly defamatory statements are false, or made with reckless disregard as to whether they were true or false
- Public officials must be more, not less, tolerant of criticism and scrutiny
- Elected and non-elected heads of states (including foreign ones) should tolerate greater scrutiny and criticism
- Government bodies, state institutions, state symbols such as flags and anthems, should never be protected by defamation laws

These principles should be read in the context of the Court's overall approach to defamation.¹¹³ Although the Court has not unequivocally called for the decriminalisation of defamation, it has repeatedly "further observe[d] that the Parliamentary Assembly of the Council of Europe in its Resolution 1577 (2007) urged those member States which still provide for prison sentences for defamation, even if

111 Scott Griffen/International Press Institute, *Defamation and Insult Laws in the OSCE Region: A Comparative Study* (Commissioned by the OSCE Representative on Freedom of the Media), March 2017, available at: <http://www.osce.org/fom/303181>

112 Source: Barbara Trionfi, Powerpoint presentation of *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, 24 March 2017.

113 Tarlach McGonagle, *Freedom of expression and defamation: A study of the case law of the European Court of Human Rights*, Strasbourg, Council of Europe Publishing, 2016.

they are not actually imposed, to abolish them without delay".¹¹⁴ Having said that, the Court has consistently held that prior restraint and criminal sanctions clearly have a chilling effect on freedom of expression and public debate, and should be used with great restraint, if at all. In *Cumpănă and Mazăre v. Romania*, the Court held that "the circumstances of the instant case – a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest – present no justification whatsoever for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect ...".¹¹⁵ At the end of the day, the Court looks at the severity of the consequences of an interference for the individual in question, Judge Spano explained. Thus, for instance, a public prosecution for criminal defamation would be considered a more serious interference than a private one.

Notwithstanding these strong words about the chilling effect of criminal defamation and prison sentences, the Court does not always find criminal sanctions to be disproportionate interferences with the right to freedom of expression.¹¹⁶ Galina Arapova therefore called on the Court to be more consistent and more direct in its criticism of the use of criminal defamation to restrict freedom of expression.

Panelists and participants identified attempts by public figures to restrict reporting about them and their activities as a worrying trend. Starting with its *Lingens* judgment in 1986, the Court has developed robust standards for reporting on public figures.¹¹⁷ The so-called *Lingens*-line of case-law may be summarised as follows. Politicians (including (foreign) heads of state and government and members of government), public officials or public figures (including business people and even celebrities) must tolerate higher levels of criticism than other individuals. By deciding to enter public life, they knowingly lay themselves open to close scrutiny of their words and actions. While they are entitled to protection of their reputation, even when they are not acting in a private capacity, the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.

Relevant principles also apply *mutatis mutandis* to business persons: there is a public interest in knowing how business is conducted and because they consciously enter into commercial activities, business persons must expect that their actions and words will be subjected to public scrutiny. This does not mean that they relinquish their right to privacy or data protection (just like other public figures). However, it does clarify the legal parameters within which any alleged violation of their right to privacy or data protection will have to be judged. In the following panel, Helen Darbishire observed a tendency on the part of authorities to invoke the sensitivity of

¹¹⁴ See, for example, *Mariapori v. Finland*, no. 37751/07, § 69, 6 July 2010; *Niskasaari and Others v. Finland*, no. 37520/07, § 77, 6 July 2010; *Saaristo and Others v. Finland*, no. 184/06, § 69, 12 October 2010 and *Ruokanen and Others v. Finland*, no. 45130/06, § 50, 6 April 2010. See, for details of relevant case-law, Tarlach McGonagle, *Freedom of expression and defamation*, op. cit., p. 18.

¹¹⁵ *Cumpn and Mazre v. Romania* [GC], no. 33348/96, § 116, 17 December 2004. See also *Mariapori v. Finland*, op. cit., § 68.

¹¹⁶ *Mihaiu v. Romania*, no. 42512/02, 4 November 2008.

¹¹⁷ *Lingens v. Austria*, no. 9815/82, 8 July 1986.



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the private data of owners of companies as a reason not to disclose data. However, the Court's relevant jurisprudence, as just described, seems to challenge the underlying premise of such a tendency.

In a rapidly developing communications environment, the potential for reputational harm that can be caused to individuals is unprecedented in human history, Judge Spano explained. This is the context in which the Court has to operate. Various speakers and participants expressed concern at how the Court has dealt with reputational rights and interests in a number of cases. Article 10(2) ECHR includes "the protection of the reputation or rights of others" as one of the grounds on which it may be permissible to restrict the right to freedom of expression. To approach reputation from this angle – as the Court traditionally did – requires a standard proportionality analysis of a restriction on a right. However, in a series of cases, a shift in the Court's approach – described as a "re-reading of Article 10"¹¹⁸ and as a "re-drawing" of the relationship between freedom of expression and privacy¹¹⁹ – has been observed. In those cases, including *Chauvy*,¹²⁰ *Pfeifer*,¹²¹ *Petrina*,¹²² *Lindon*,¹²³ and *MGN*,¹²⁴ the Court established that "the scope of private life in Article 8 encompasses or extends to reputation".¹²⁵ This shift had far-reaching implications as it required that two Convention rights of equal value be balanced instead of performing a standard proportionality analysis. Judge Sajó described this as "contrary to the text of the Convention" and a reflection of "a new hierarchy of values compared to earlier years, perhaps more in tune with narcissistic times". In more recent case-law, the Court

¹¹⁸ Judge Sajó's keynote at this conference.

¹¹⁹ Marie McGonagle, 'Privacy – Confusing Fundamental Values and Social Traditions' [2010] 1 Irish Human Rights Law Review, 143-175, at 168.

¹²⁰ *Chauvy and Others v. France*, no. 64915/01, 29 June 2004.

¹²¹ *Pfeifer v. Austria*, no. 12556/03, 15 November 2007.

¹²² *Petrina v. Romania*, no. 78060/01, 14 October 2008.

¹²³ *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, 22 October 2007.

¹²⁴ *MGN Limited v. the United Kingdom*, no. 39401/04, 18 January 2011.

¹²⁵ Marie McGonagle, 'Privacy – Confusing Fundamental Values and Social Traditions', op. cit., at 168.

has pointed out that "In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life".¹²⁶ The Court has set out criteria to guide the balancing exercise: (i) contribution to a debate of general interest; (ii) how well known is the person concerned and what is the subject of the report?; (iii) prior conduct of the person concerned; (iv) method of obtaining the information and its veracity; (v) content, form and consequences of the publication, and (vi) severity of the sanction imposed.¹²⁷ The challenge for the Court is now to ensure consistency when applying these criteria.

A further worrying trend, described above as "the new black", is the increasing use of data protection laws to silence journalists and prevent them from writing about particular individuals, especially public figures. The already frictional relationship between the right to privacy and the right to freedom of expression is coming under increased strain in new communications environment. Friction between the two rights is at the core of the *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* case on data journalism, in which a much-anticipated Grand Chamber judgment is pending.¹²⁸ More specifically, the case concerns whether the publication by the media of bulk taxation information about individuals constitutes a journalistic activity - a status that would exempt it from data protection rules. The taxation information in question was accurate and publicly available, so there was no suggestion that the information had been obtained by underhand or illegal methods. Notwithstanding the public interest in the published data, the Court accepted the argument of the national authorities that the extent of the data (concerning 1.2 million individuals) involved meant that the publication should be classed as processing of personal data rather than journalistic activities. There is a wider relationship to be explored here, bringing together the publication, analysis and contextualisation of data and statistics as a contribution to public debate. It is to be hoped that the pending Grand Chamber judgment will clarify some of the legal complexities involved.

During the panel session, attention was also drawn to the alarming situation for freedom of expression in Turkey, in particular the extent of arrests of journalists and others and of the wide-ranging measures clamping down on the media, academia and civil society. It was mentioned that applications are being lodged with the ECtHR in which Article 18 ECHR is being invoked in conjunction with other rights guaranteed by the Convention. Article 18 ('Limitation on use of restrictions on rights') reads: "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed". Article 18 tends to be invoked infrequently and the Court

¹²⁶ *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012.

¹²⁷ *Ibid.* See also *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, 7 February 2012.

¹²⁸ *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, no. 931/13, 21 July 2015. The case was referred to the Grand Chamber on 14 December 2015. For a critical comment, see Dirk Voorhoof, "ECtHR accepts strict application of data protection law and narrow interpretation of journalistic activity in Finland", *Strasbourg Observers Blog*, 12 August 2015.

has found a violation of the Article in very few cases.¹²⁹ According to the Court, this is because when an allegation is made under Article 18, it applies "a very exacting standard of proof".¹³⁰ This means that an applicant alleging that his or her rights and freedoms were "limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed or which could be reasonably inferred from the context".¹³¹ A mere suspicion of improper motives is not sufficient¹³² and when assessing whether improper motives existed, the Court must "base its scrutiny only on the concrete facts of the case".¹³³ Thus, it "cannot accept as evidence the opinions and resolutions of political institutions or non-governmental organisations, or statements by other public figures".¹³⁴

A typical situation in which Article 18 could be invoked is when there is an allegation of the *mala fide* implementation of legislation, e.g. criminal defamation laws, to muzzle dissent or criticism and thereby unduly restrict freedom of expression. In this connection, Recommendation CM/Rec(2016)4 tries to go the extra mile by insisting that "Member States must exercise vigilance to ensure that legislation and sanctions are not applied in a discriminatory or arbitrary fashion against journalists and other media actors. They should also take the necessary legislative and/or other measures to prevent the frivolous, vexatious or malicious use of the law and legal process to intimidate and silence journalists and other media actors".¹³⁵

*Investigative journalism, access to information,
protection of sources and whistleblowers*

This panel, moderated by Lucy Freeman (Chief Executive Officer, Media Legal Defence Initiative (MLDI)), continued many of the discussions that had been begun earlier in the conference. The legal protection of the range of actors who engage in public debate again proved a central topic of discussion. In its recent *MHB* judgment, the Grand Chamber of the Court recognised very candidly that a growing range of actors nowadays play the role of public watchdog and that they depend on access to information in order to be able to do so. A central question in the case was whether a general right of access to State-held information exists under Article 10 ECHR, notwithstanding the absence of a textual provision for such a right. The Court sought to determine the scope of such a right by distilling four 'threshold criteria' from its existing case-law: the purpose of the information request; the nature of the information sought; the role of the applicant, and the ready and available character

¹²⁹ *Merabishvili v. Georgia*, no. 72508/13, § 101, 14 June 2016. The case was referred to the Grand Chamber of the Court on 17 October 2016. See also *Navalnyy v. Russia*, no. 29580/12, 2 February 2017, which was referred to the Grand Chamber of the Court on 29 May 2017.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, para. 100.

¹³² *Ibid.*

¹³³ *Ibid.*, para. 103.

¹³⁴ *Ibid.*

¹³⁵ Recommendation CM/Rec(2016)4, *op. cit.*, para. 13.

of the information.¹³⁶ In his meticulous examination of the judgment, Lawrence Early shed light on how the Court developed these criteria, drawing on underlying democratic values. The information-gathering exercise should thus constitute an “essential element” of public debate and there should be a public interest in the information sought. In the Court’s own words:

Given that accurate information is a tool of their trade, it will often be necessary for persons and organisations exercising watchdog functions to gain access to information in order to perform their role of reporting on matters of public interest. Obstacles created in order to hinder access to information may result in those working in the media or related fields no longer being able to assume their “watchdog” role effectively, and their ability to provide accurate and reliable information may be adversely affected.¹³⁷

It can be seen from the above emphases that the Court recognised not a general, unconditional individual right of access to State-held information, but a more specific, qualified individual right of access to State-held information in order to assist the public in forming an opinion on matters of general interest. In reaching its ultimate position, the Court reflected long and hard about the original intent of the drafters of the ECHR, the living instrument doctrine and comparative and international law.

The evolution of the Court’s case-law on access to (State-held) information has been slow and cautious and it is parsed in detail in the *MHB* judgment.¹³⁸ The slow up-take of the Council of Europe’s first-of-a-kind treaty on Access to Official Documents¹³⁹ was also adverted to. It was opened for signature and ratification in 2009, but it still has to gain the requisite ten ratifications that it needs to enter into force. With this background in mind, Helen Darbishire noted that the shortcomings of existing freedom of information regimes are pointed up by a contemporary culture of (high-profile) leaks. If we live in a culture that is defined by leaks, she asked somewhat rhetorically, what does that say about the quality of the freedom of information regimes that are in place at the national level?¹⁴⁰

136 *MHB v. Hungary*, op. cit., §§ 157-170.

137 *Ibid.*, § 167.

138 For academic chronicles and commentary, see: Wouter Hins & Dirk Voorhoof, ‘Access to State-Held Information as a Fundamental Right under the European Convention of Human Rights’, *EuConst* 3 (2007), p. 114-126; Dirk Voorhoof, ‘Freedom of Journalistic News-Gathering, Access to Information and Protection of Whistle-blowers under Article 10 ECHR and the Standards of the Council of Europe’, in Onur Andreotti, Ed., *Journalism at risk: Threats, challenges and perspectives* (Council of Europe Publishing, 2015), p. 105-143; P. Tiilikka, ‘Access to Information as a Human Right in the Case Law of the European Court of Human Rights’ (2013) 5 (1) *Journal of Media Law* 79-103.

139 Council of Europe Convention on Access to Official Documents, CETS No. 205, 18 June 2009. At the time of the conference, it had nine ratifications.

140 For extensive analysis, see: Helen Darbishire, ‘Ten challenges to Right to Information in age of Mega-Leaks’, in Tarlach McGonagle & Yvonne Donders, Eds., *The United Nations and Freedom of Expression and Information: Critical Perspectives* (Cambridge University Press, 2015), pp. 271-303.

Dirk Voorhoof's presentation spanned the full breadth of the panel's focuses.¹⁴¹ He presented samplers of the Court's approach to each of the four topics,¹⁴² before identifying and criticising selected developments in the Court's recent case-law that give rise to concerns for freedom of expression. One swallow does not, of course, make a summer, but the more numerous the examples of worrying practice, the more problematic the overall pattern becomes. Moreover, Voorhoof's analysis¹⁴³ reveals that some of the restrictive trends in the ECtHR's case-law that were identified in 2008 are still evident in 2017. Here is a summary of the topics and the threats/challenges they are facing:

| Topics | Threats/Challenges |
|--|--|
| Protection of investigative journalism/newsgathering | Margin of appreciation is too broad Level of "responsible journalism" is too high in legal terms, in relation to confidential information, the presumption of innocence and journalistic techniques |
| Access to information/public documents | Emphasis on official documents having to be ready and available |
| Protection of journalists' sources | Uncertainty whether "illegal" leaks are still protected as journalistic sources |
| Protection of whistleblowers | Lack of enforcement/implementation at the national level Level of good faith required Requirement to exhaust internal channels of disclosure |

In respect of investigative journalism/newsgathering, when the public watchdog is also a bloodhound, the Court has consistently held that journalists should ordinarily respect the criminal law,¹⁴⁴ but there have been occasions on which it has condoned the use of illegal techniques, e.g., recording with a hidden camera, when there is an overriding public interest in the topic and the journalists put various checks and balances in place in their reporting.¹⁴⁵ In other cases, however, the Court has taken a dim view of perceived ethical shortcomings in journalists' activities, e.g., use of sensationalist style or breaching the law in the course of 'check-it-out journalism' by illegally purchasing a fire-arm to demonstrate how easy it was to do so¹⁴⁶ and by illegally bringing a weapon into a plane to expose airport security flaws.¹⁴⁷ Such findings go against the key finding in *Jersild*

141 For extensive analysis, see: Dirk Voorhoof, 'Freedom of Journalistic News-Gathering, Access to Information and Protection of Whistle-blowers under Article 10 ECHR and the Standards of the Council of Europe', in Onur Andreotti, Ed., *Journalism at risk: Threats, challenges and perspectives* (Council of Europe Publishing, 2015), pp. 105-143.

142 Most of the cases discussed are summarised in: Tarlach McGonagle (ed.), Dirk Voorhoof et al., *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights*, IRIS Themes, Vol. III, new, updated edition, Strasbourg: European Audiovisual Observatory, 2016.

143 For more detail and depth, see Dirk Voorhoof's conference presentation.

144 *Fressoz and Roire v. France*, op. cit.

145 *Haldimann and Others v. Switzerland*, no. 21830/09, 24 February 2015.

146 *Diamant Salihu and others v. Sweden* (dec.), no. 33628/15, 10 May 2016.

147 *Boris Erdtmann v. Germany* (dec.), no. 56328/10, 5 January 2016.

that journalists themselves should in principle have the freedom to choose the most appropriate reporting technique to tell their story.

As already mentioned, the Court has had a long, winding journey towards its Grand Chamber judgment in *MHB*. The right recognised in that case is not an autonomous right of access to State-held information as such, but a right that is contingent on being instrumental for freedom of expression, that meets a public-interest test, involves public watchdogs and documents that are ready and available. While an important milestone, *MHB* and other case-law emphasising that States are not under a positive obligation to collect and compile information that is not ready and available,¹⁴⁸ indicate that there is still some distance to travel before the Court's winding journey leads to a full-fledged right of access to information.

The Court has over the years developed a body of case-law giving strong protection to the confidentiality of journalistic sources as an essential component of press freedom. Voorhoof drew attention to some recent case-law continuing this trend. In *Görmüş and Others v. Turkey*, the Court found that searches in a newsroom as part of a criminal investigation into the leaking of a classified military document constituted a violation of Article 10 due to the serious chilling effect such measures could have on journalists or whistleblowers disclosing misconduct or controversial acts by public authorities.¹⁴⁹ The judgment did, however, imply that journalists should only publish leaked documents if whistleblowers procuring those documents have first exhausted all internal procedures to report the wrongdoing.¹⁵⁰ This begs the question of whether "illegal" leaks can be regarded as journalistic sources, Voorhoof said.

In a leading case on whistleblower protection, *Guja v. Moldova*, the Court formulated six guiding criteria, which can be summarised as follows: 1) no alternative channels for disclosure with effective protection for the whistleblower; 2) public interest in the disclosed information; 3) authenticity of the disclosed information; 4) justifiable damage; 5) expectation to act in good faith, and 6) severity of the sanction (including its consequences).¹⁵¹ Voorhoof cautioned that strict reliance on the exhaustion of internal procedures and channels and the good faith requirements could serve to weaken the protection of whistleblowers in certain cases.

Whether the Court will manage to overcome these threats and challenges in the future remains to be seen. The task will, in any event, require more than just engaging with the scope and substance of Article 10 ECHR. The

¹⁴⁸ E.g., *Weber v. Germany* (dec.), no. 70287/11, 6 January 2015; *Bubon v. Russia*, no. 63898/09, 7 February 2017.

¹⁴⁹ *Görmüş and Others v. Turkey*, no. 49085/07, 19 January 2016.

¹⁵⁰ *Ibid.*, § 61.

¹⁵¹ *Guja v. Moldova* [GC], no. 14277/04, 12 February 2008.

logic of the Convention, Judge Spano recalled, and indeed its ambition, is to contribute to ensuring that there is effective protection of human rights at the national level. This demands effective supervision by the Council of Europe's Committee of Ministers of the execution of the Court's judgments by ECHR Contracting Parties.

Voorhoof also made the point that the Court itself should endeavour to take proper account of the real-life contexts surrounding the cases that it adjudicates on. By way of illustration, he referred to a recent case against the Netherlands in which the applicants – a newspaper and a journalist – complained about the search of the journalist's house, the seizure of various documents and items, and the 'chilling effect' on potential sources. The case was struck off the list, following a unilateral declaration by the Government that the requirements of Article 10 ECHR had indeed been violated.¹⁵² When determining costs and expenses, the Court found that the applicants' lawyers' hourly fee of EUR 375 "goes well beyond what the Court is prepared to consider reasonable as quantum in the case".¹⁵³ Yet, it would appear that the going commercial rate for law firms in large European cities, especially for cases involving complicated legal issues – such as national security/counter-terrorism issues, as in the present case – would indeed be in this kind of financial bracket. The bigger point here is that a victory of principle for a victim of a human rights violation should lead to adequate compensation, otherwise the victory will feel like a very hollow one.

One message that seemed to emerge from this panel discussion was that the *Jersild* judgment remains a high-water mark for media and journalistic freedoms. We should not lose sight of that and we should reflect on how the *Jersild* principles could be rolled out and applied *mutatis mutandis* to other actors contributing to public debate. It is important for the Court to continue to embrace an expansive, evolutive concept of public watchdog. As Helen Darbishire noted, this, in turn, prompts the strategic question: how do we as a community work to advance these standards?

The right to protest and the role of the media during protests

This panel, moderated by Peter Noorlander (Director, Bertha Justice Initiative), examined a number of very pressing and topical challenges facing journalists, the media and other contributors to public debate; challenges that are evident in contemporary politics across Europe and that remain unresolved in the case-law of the ECtHR. The overarching challenge is to ensure effective access for journalists, the media and other public commentators to democratic institutions, forums and public events. It is well-established in the case-law of the Court that the public has

¹⁵² *Telegraaf Meda Nederland Landelijke Media B.V. & Van der Graaf v. the Netherlands*, no. 33847 (struck off the list), 22 September 2016.

¹⁵³ *Ibid.*, § 57.

the right to receive information and ideas concerning matters of public interest and that the media have the task of imparting such information and ideas.¹⁵⁴ It is therefore very understandable that journalists, the media and other contributors to public debate need to be as close as possible to the action in order to be able to give first-hand accounts of what is taking place or discussed. The public's right to know can clearly be contingent on effective access rights for public watchdogs.

Journalists and the media are often referred to as public watchdogs or the Fourth Estate. Both terms underscore the role of journalists and the media in keeping checks and balances on State authorities. The latter term – a would-be fourth pillar in Montesquieu's tripartite division of State powers – is believed to have been coined by Edmund Burke in 1787 when members of the press were first admitted into the British House of Commons in order to facilitate their reporting on parliamentary debates.

Given the origin of the term, the Fourth Estate, it is ironic that denial of access to parliament for journalists and the media has recently become a problematic issue in a number of European countries. In Poland, on 17 December 2016, the Speaker of the *Sejm* (Lower Chamber of the Polish Parliament) issued an order banning all journalists from entering the parliamentary estate. The order was issued, as stated in the alert registered on the Platform to promote the protection of journalism and the safety of journalists,¹⁵⁵ "following large demonstrations in Warsaw and other cities in Poland, in protest at proposed changes to rules governing journalists' access to the Polish parliament".¹⁵⁶ The order was withdrawn on 9 January 2017; prior rules of access were reverted to, and the partner organisations of the Platform subsequently declared the case to have been resolved as it no longer posed a threat to media freedom. In the former Yugoslav Republic of Macedonia, when the Parliament building was stormed by demonstrators on 27 April 2017, 21 journalists were threatened or barred from reporting from the scene, according to the Association of Journalists of Macedonia (AJM-ZNM).¹⁵⁷

Journalists' access to parliament has also featured in recent case-law of the ECtHR. The *Selmani and others* case concerned the forcible removal of accredited journalists from the press gallery of the Macedonian Parliament by security guards after unrest broke out among MPs during a parliamentary debate.¹⁵⁸ The ECtHR

154 *The Sunday Times v. the United Kingdom*, (no. 1), no. 6538/74, § 65, 26 April 1979.

155 The Platform, which was launched on 2 April 2015, is a public space to facilitate the compilation, processing and dissemination of information on serious concerns about media freedom and safety of journalists in Council of Europe member States. It was developed and is run by the Council of Europe in cooperation with a number of civil society partners: Reporters Without Borders, the International Federation of Journalists, the European Federation of Journalists, the Association of European Journalists, ARTICLE 19, the Committee to Protect Journalists, Index on Censorship, International Press Institute, International News Safety Institute and the Rory Peck Trust.

156 'Poland – Journalists' access to Parliament restricted', 20 December 2016, available via: <http://www.coe.int/en/web/media-freedom>.

157 "'The former Yugoslav Republic of Macedonia' – Two Reporters Injured During Storming of Parliament', 5 May 2017, available via: <http://www.coe.int/en/web/media-freedom>.

158 *Selmani and Others v. the former Yugoslav Republic of Macedonia*, op. cit.

found that the right to freedom of expression of the applicants had been violated, reasoning:

the applicants' removal entailed immediate adverse effects that instantaneously prevented them from obtaining first-hand and direct knowledge based on their personal experience of the events unfolding in the chamber, and thus the unlimited context in which the authorities were handling them [...]. Those were important elements in the exercise of the applicants' journalistic functions, which the public should not have been deprived of in the circumstances of the present case.¹⁵⁹

The Court drew a parallel with the importance of the watchdog role played by the media at public demonstrations where law enforcement authorities attempt to contain disorder. It specifically referenced the *Pentikäinen* judgment, in which the public interest in such information was acknowledged, but did not hold sway over Pentikäinen's refusal to comply with the police order to move away from the scene of the demonstration.

Another difference between the Court's approaches in the *Selmani* and *Pentikäinen* cases concerns the importance attached to the status of the applicant, either as a participant in a demonstration or a mere observer of a demonstration. In both cases, the applicants were observing the events with a view to documenting and reporting on the escalating unrest. In its *Selmani* judgment, the Court described the applicants as "passive bystanders who were simply doing their work and observing the events".¹⁶⁰ As such, they did not pose any threat to public safety or public order. The same could have been said about Pentikäinen, but the Court chose instead to emphasise that "the concept of responsible journalism requires that whenever a journalist – as well as his or her employer – has to make a choice between the two duties and if he or she makes this choice to the detriment of the duty to abide by ordinary criminal law, such journalist has to be aware that he or she assumes the risk of being subject to legal sanctions, including those of a criminal character, by not obeying the lawful orders of, *inter alia*, the police".¹⁶¹ In an earlier judgment, *Gsell v. Switzerland*, the Court had found that the state authorities had failed to distinguish between potentially violent individuals and peaceful demonstrators.¹⁶² In that case, the Court found a violation of the applicant journalist's right to freedom of expression when the application of a general police order prevented him from gaining access to Davos, where the annual World Economic Forum was to take place.

A further point of tension in the case-law surveyed by the panelists involves the question pondered by both Duygu Köksal and Daniel Simons: should journalists and the media enjoy a degree of preferential or different treatment compared to participants in a demonstration? And if so, how broadly should journalists and the

¹⁵⁹ Ibid., § 84.

¹⁶⁰ Ibid., § 80.

¹⁶¹ *Pentikäinen v. Finland* [GC], op. cit., § 110.

¹⁶² *Gsell v. Switzerland*, no. 12675/05, § 60, 8 October 2009.

media be understood? Should citizen journalists be included, following *Cengiz & others*,¹⁶³ or the range of actors envisaged in *MHB*: academic researchers, "authors of literature on matters of public concern", bloggers and "popular users of the social media"¹⁶⁴? Recommendation CM/Rec(2016)4 calls on law enforcement authorities to respect the role of journalists *and other media actors* covering demonstrations and other events. But how should such actors be identified for the purpose of guaranteeing them specific access rights?

In *Najafli v. Azerbaijan*, the applicant journalist "was subjected to the unnecessary and excessive use of force, amounting to ill-treatment under Article 3 of the Convention, despite having made clear efforts to identify himself as a journalist who was simply doing his work and observing the event".¹⁶⁵ This led the Court to find a violation of the applicant's right to freedom of expression. Both Duygu Köksal and Daniel Simons dwelt on the question of whether ID-cards, distinctive clothing, insignia or even oral explanations should suffice for the purpose of establishing someone's status as a journalist. Simons cautioned against an unnuanced approach, particularly in respect of distinctive clothing, which can in some situations draw unwanted attention to journalists and lead to them being targeted by intimidation, threats and violence.¹⁶⁶

Recommendation CM/Rec(2016)4 tries to spell out the obligations of states when it comes to identifying journalists and – significantly – other media actors covering public demonstrations. It states: "Press or union cards, relevant accreditation and journalistic insignia should be accepted by State authorities as journalistic credentials, and where it is not possible for journalists or other media actors to produce professional documentation, every possible effort should be made by State authorities to ascertain their status".¹⁶⁷ Thus viewed, State authorities (in particular, law enforcement authorities) should of their own accord seek to determine whether those present at public demonstrations are journalists or other media actors. This is another example of cross-fertilisation between the Court's case-law and the CM's standard-setting.

A final point of tension in this body of case-law concerns the extent to which journalists and other media actors covering public demonstrations should be subject to general criminal law. In *Pentikäinen*, the Court took the view that the applicant's conviction "amounted only to a formal finding of the offence committed by him and, as such, could hardly, if at all, have any "chilling effect" on persons taking part in protest actions".¹⁶⁸ This view seems out of synch with the Court's approach in other important judgments such as *Jersild* and *Olafsson*. In the former, the Court

163 *Cengiz and Others v. Turkey*, nos. 48226/10 and 14027/11, 1 December 2015.

164 *MHB v. Hungary*, op. cit., § 168.

165 *Najafli v. Azerbaijan*, no. 2594/07, § 68, 2 October 2012.

166 For an extensive discussion of this and related issues, see the OSCE Office for Democratic Institutions and Human Rights (ODIHR), *Handbook on Monitoring Freedom of Peaceful Assembly*, Warsaw, 2011, available at: <http://www.osce.org/odihr/82979?download=true>.

167 Recommendation CM/Rec(2016)4, op. cit., para. 14.

168 *Pentikäinen v. Finland* [GC], op. cit., §113.



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refused to accept the Danish Government's argument that the limited nature of the fine was relevant, holding that "what matters is that the journalist was convicted".¹⁶⁹ In the latter, it found that "in the context of assessing proportionality, irrespective of whether or not the sanction imposed was a minor one, what matters is the very fact of judgment being made against the person concerned, even where such a ruling is solely civil in nature".¹⁷⁰ Both findings show the Court's concern about the chilling effect of sanctions. As it stated in *Olafsson*: "Any undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing future media coverage of similar questions".¹⁷¹ By way of analogy with Article 11, in *Kudrevičius and Others v. Lithuania*, the Court held that "the freedom to take part in a peaceful assembly is of such importance that a person cannot be subject to a sanction – even one at the lower end of the scale of disciplinary penalties – for participation in a demonstration which has not been prohibited, so long as that person does not himself commit any reprehensible act on such an occasion".¹⁷²

In sum, the main axes of discussion in this panel were the status, rights, duties and responsibilities of journalists and other media actors when they perform a public watchdog role or otherwise contribute to public debate. The traditional jurisprudence of the Court on these issues is currently being stretched in apparently divergent directions. On the one hand, there is a growing emphasis on the "tenets of responsible journalism" and how journalists conduct their activities. On the other hand, the *Jersild* principles still stand tall and the Article 11 case-law discussed during the session seems to underscore the importance of free assembly and free expression for democracy.

¹⁶⁹ *Jersild v. Denmark*, op. cit., § 35.

¹⁷⁰ *Olafsson v. Iceland*, no. 58493/13, § 61, 16 March 2017.

¹⁷¹ *Ibid.*

¹⁷² *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 149, 15 October 2015.

Dialogue

I would like to conclude with a few reflections on the nature of the dialogue during the conference and how we could build on this. To be meaningful, a dialogue should have several characteristics or qualities. It should not be limited to once-off interaction. It should be an ongoing process that begins with two (or more) parties' shared intention to reach out to, and connect with, each other. It should be a communicative activity, involving speaking, listening, hearing and understanding each other. It should be about dialogical engagement across time and space. The previous conference seems like a long time ago – nine years, actually. One could quip that family conversations are often characterized by long pauses, but a more

serious observation is that dynamic subjects – like freedom of expression and media freedom – require dynamic scrutiny. Lengthy lapses rarely do dialogue much good.

To maintain momentum in the present dialogue, it is essential that we reflect on how to move forward with purpose. A great precedent has been set here today. The presence of several judges of the European Court of Human Rights, as well as all the speakers and participants who went to so much effort to attend is very heartening. This demonstrates clear communicative intent and a willingness



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to engage with each other, both of which are crucial vectors for taking the dialogue forward. It will be important not only to sustain this dialogue, but also to ensure that it is *informed* dialogue. A range of resources, which are already well-established, such as specialised (academic) blogs on the ECHR, freedom of expression and media freedom,¹⁷³ as well as information resources,¹⁷⁴ should continue to be used and further developed for this purpose.

It is also very heartening to hear Lawrence Early, Head of Jurisconsult at the Court,¹⁷⁵ stating explicitly how much benefit the Court derives from third-party interventions in which so many of the conference participants are regularly involved. That benefit derives from the comparative perspectives, national media law perspectives,

¹⁷³ For example: [Strasbourg Observers](#), [the International Forum for Responsible Media \(Inform\) Blog](#), [ECHR Blog](#), [LSE Media Policy Project Blog](#) and news and analysis by organisations such as [ARTICLE 19](#), [Index on Censorship](#) and [Media Legal Defence Initiative](#).

¹⁷⁴ See, for example, the Fact sheets and Case-law research reports provided by the [European Court of Human Rights](#) and the resources provided by the [Media and Internet Division of the Council of Europe](#) and the [European Centre for Press and Media Freedom](#).

¹⁷⁵ "The Jurisconsult is responsible for ensuring the consistency of case-law and supplying opinions and information, in particular to the trial benches and the members of the Court (Rule 18)." – source: www.echr.coe.int

technological perspectives and other perspectives provided by *amicus curiae* briefs. Such perspectives can supplement and enrich the Court's own judicial perspectives.

Third-party interventions are one – perhaps rather formal – form of dialogue. There are, of course, others. This conference, for instance, is a less formal and more fluid (or free-flowing, to use a familiar freedom-of-information metaphor) form. Conferences like this generate a networking dynamic that can carry dialogue towards action. They facilitate communication and engagement between members of different communities who are pursuing similar goals. This leads to contacts and cooperation way beyond the conference's conclusions.

During his presentation, Dirk Voorhoof usefully recalled the words of the former President of Court, Judge Wildhaber: "Institutions (...) will perish, if those who love them do not criticize them, and if those who criticize them do not love them".¹⁷⁶ This is the kind of tough love you also get and expect in families. There is a message here for the ECtHR and the media freedom community: be lovingly critical of one another; be constructively critical of one another. This begins with critical reflection by members of each community about how they should fulfil their respective roles and about the substantive focuses that they should prioritize.

A number of priorities may be distilled from the conference:

- Role of the Court and of the Grand Chamber of the Court in particular
- Operationalisation of the Court's principles and execution of its judgments
- Interplay and synergies between the Court and other organs of the Council of Europe's system for the protection of freedom of expression
- The Court and the media freedom community
- ECHR as a living instrument guaranteeing rights that are practical and effective
- Margin of appreciation
- Opportunities and threats in the evolving multi-media ecosystem
- Positive obligations of States to guarantee freedom of expression
- A favourable environment for freedom of expression and participation in public debate for everyone
- Rights, duties and responsibilities of the different actors who contribute to public debate: journalists, the media, NGOs, academics, citizen journalists, whistleblowers, bloggers, users of social media, etc.
- Intermediary and gate-keeping functions online and liability for third-party content

¹⁷⁶ Luzius Wildhaber, The Hague Conference 2012, cited by Dirk Voorhoof in his presentation.

- The "best obtainable version of the truth" versus "fake news"
- "Responsible journalism"
- Pluralistic public debate and tendencies towards self-selection of information and self-seclusion in filter bubbles and convenient or alternative "truths"
- (Criminal) defamation and reputation
- Privacy and data protection
- Access to information and leaks in the public interest
- Freedom of expression and freedom of assembly

There is certainly plenty to talk about!