

FREEDOM OF EXPRESSION IN 2015 AND THE EUROPEAN COURT OF HUMAN RIGHTS

The Right to Freedom of Expression and Information Article 10 ECHR case law

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IMPACT ARTICLE 10 ECHR

Since 1979 hundreds of **violations** of Article 10 found by ECtHR **(619)**

2014: 46 violations

2015: **28 violations**



ARTICLE 10 ECHR IN 2015: STATISTICS

28 Violations of Article 10

- 1 = Bulgaria, Finland, Greece, Iceland, Latvia, Portugal and Russia
- 2 = Germany, Poland, Romania and Switzerland
- 3 = France

10 = Turkey



- + **Violations Article 8**
Surveillance of journalist/NGO
Roman Zakharov v. Russia, 4 December 2015
- + **Non violations Article 8 in media defamation case**
Caragea v. Romania, 8 December 2015
- + **Violations Article 3 (violence against journalists)**
Uzeyir Jafarov v. Azerbaijan, 29 Januari 2015
Emin Huseynov v. Azerbaijan, 7 May 2015
- + **Violations Article 11, demonstration, collectif freedom of expression**

ARTICLE 10 ECHR IN 2015

Also series of controversial findings of non-violation Article 10

Pentikäinen v. Finland

Delfi AS v. Estonia



DELFI

***Satakunnan
& Satamedia
v. Finland***



ISSUES ARTICLE 10 ECHR



1. Defamation cases
2. Hate speech, denial of genocide/Holocaust and the application of the 'abuse clause' (Art.17 ECHR)
3. Privacy and data protection
4. Internet access
5. Access to public documents
6. Gathering of news and information by journalists
7. Whistle-blowing
8. Liability online newsplatform for UGC
9. Crime and court reporting
10. Safety of journalists (Art. 3: procedural/substantive)

+ Criminal sanctions and “chilling effect”

CASES 2015 +

Robust protection of journalistic freedom reporting on matters of public interest (*defamation cases/privacy*)

“The **most careful scrutiny** on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of **discouraging the participation of the press in debates over matters of legitimate public concern**”.

CASES 2015 +

Violations of Article 10 ECHR

Erla Hlynisdóttir v. Iceland (no. 3), 2/6/2015



The right of the media to report on ongoing court cases on the basis of available and correct information (cocaine smuggling)

Niskasaari and Otavamedia Oy v. Finland, 23/6/2015

Journalist criticising manipulative character of TV-documentary



Morar v. Romania, 7/7/2015

Political satire in *Academia Cașavencu* about presidential candidate (spy for Securitate)



CASES 2015 +

The right to freedom of expression of lawyers

“a lawyer should be able to draw the public’s attention to **potential shortcomings in the justice system** and that the judiciary could benefit from **constructive criticism**”

Morice v. France, 23/4/2015 (Grand Chamber)

Interview in *Le Monde*, factual basis, criticizing judges in a case in which Morice acted as a defence lawyer

See also Bono v. France, 15/12/2015

No violation of Art.10 however in:

Fuchs v. Germany, 27/2/2015 (dec.)

Reprimanded for allegations of manipulations by expert, no evidence

Peruzzi v. Italy, 30/6/2015

Criminal conviction for defamation of a judge, no factual basis

The logo for the French newspaper Le Monde, featuring the name in a stylized, blackletter font.

CASES 2015 +

Balancing privacy (Art. 8) and FoE (Art. 10) with the **six criteria** in cases of defamation of public persons

1. contributing to a debate of general interest
2. how well-known is the person and the subject of the report/documentary
3. that person's prior conduct
4. the method of obtaining the information and its veracity
5. the content, form and repercussions
6. the penalty imposed (proportionality)

Examples of violation Art. 10 or non-violation Art. 8

CASES 2015 +

Couderc/Hachette Filipacchi Ass.v. France, 10/11/2015 (GC)

The right of the mother and the child to express their opinion on issue related to the rights of the illegitimate child of Albert II Monaco

“ ... the Court cannot ignore the fact that the disputed article was a means of expression for the interviewee and her son. (..) The interview thus raised a question of public interest, but also concerned competing private interests ”



Violation of Art. 10 (= no priority Art. 8, *in casu*)

Schau mal, lieber Dieter,
so einfach schreibt man
super Bücher.

CASES 2015 +

Dieter Bohlen v. Germany Ernst August von Hannover v. Germany 19/2/2015

Concerns **humorous tobacco advertisements** with first names and references to events associated with the applicants. Priority was to be given to the right to freedom of expression of the tobacco company (BAT). The **dismissal of the applicants' claim (based on their right of privacy and reputation, Art. 8 ECHR)** for financial compensation **was justified** as they already had obtained the suspension of the distribution of the advertisements at issue.

No violation of Art. 8 (= priority Art. 10, *in casu*)

War das Ernst?
Oder August?



Lucky Strike. Sonst nichts.

Bei 60-Seckenschnittfilter-Packungen gilt nicht die Kennzeichnung. Die Packung einer Zigarette dieser Marke enthält 1.1 mg Nikotin und 0.9 mg Koffein (je nach Zigarettenherstellung).



CASES 2015 +

Caragea v. Romania, 8/12/2015

Journalist acquitted : no defamation of CEO of commercial company

Had Romanian authorities failed to protect his reputation, as part of the right to privacy provided for by Article 8 of the Convention?

ECtHR :

No failure to protect reputation of a CEO allegedly involved in fraude (formal complaints, investigations, but no indictment)

- factual basis, not about his private life, but as manager
- although “some statements in the article are potentially provocative, written in an inappropriate language”
- journalistic freedom covers exaggeration and provocation



CASES 2015 +



Robust protection of freedom of political speech

“the Swiss courts appear to have **censured** the applicant for voicing **an opinion** that diverged from the established ones in Switzerland” “the interference took the serious form of a **criminal conviction**”

Perinçek v. Switzerland, 15/10/2015
(Grand Chamber 10/7) - denial of Armenian genocide

Article 17 only on “an exceptional basis and in extreme cases”
(But: ECtHR Dieudonné M'Bala M'Bala 20/10/2015)

Holocaust is facts, Armenian massacre still discussion

Robust speech, but no incitement to hatred or violence

References to International law, incl. UNHRC Comments nr. 34

CASES 2015 +



Right of access to the Internet

Cengiz a.o. v. Turkey, 1/12/2015

Blocking order of YouTube for period of more than 2 years, because some 10 videos on You Tube were considered insulting to the memory of Atatürk, affected the right to receive and impart information and ideas by the applicants as **active internet users**.

YouTube as important source of communication and a **platform permitting the emergence of citizen journalism** which could impart political information not conveyed by traditional media

*AWARD 2015
Best litigation*



CASES 2015 +



Other Turkish cases

Atılgan a.o. v. Turkey, 27/1/2015

“the practice of banning the future publication of entire periodicals on the basis of section 6 (5) of Law no. 3713 went beyond any notion of “necessary” restraint in a democratic society” (propaganda for illegal organisations)

Bayar et Gürbüz v. Turkey (n° 2), 3/2/2015

Özçelebi v. Turkey, 23/6/2015

Belek et Velioğlu v. Turkey, 6/10/2015

Müdür Duman v. Turkey, 6/10/2015

Dilipak v. Turkey, 15/9/2015

CASES 2015 +

Right of access to public documents

Guseva v. Bulgaria, 17/2/2015



ECtHR confirmed its growing line of authority to the effect that Article 10 can be relied on to contest a refusal to grant a **journalist** or **NGO official information** on a matter of public interest (treatment of stray animals/animals' rights).

Public watchdog role of media and NGOs.

Refusal by mayor to provide the information interfered with the preparatory stage of the **process of informing the public**, and therefore impaired the applicant's right to impart information.



CASES 2015 +

Gathering of news and information **Haldimann a.o. v. Switzerland** **24/2/2015**

The **use of hidden camera** by the journalists was aimed at providing public information on a **subject of general interest**, whereby the person filmed was targeted not in any personal capacity but as a professional broker. The Court found that the interference with the **private life** of the broker had not been serious enough to override the **public interest** in information on **denouncing malpractice** in the field of insurance brokerage. A decisive factor was that the journalists had disguised the broker's face and voice and that the interview had not taken place on his usual business premises.

CASES 2015 +



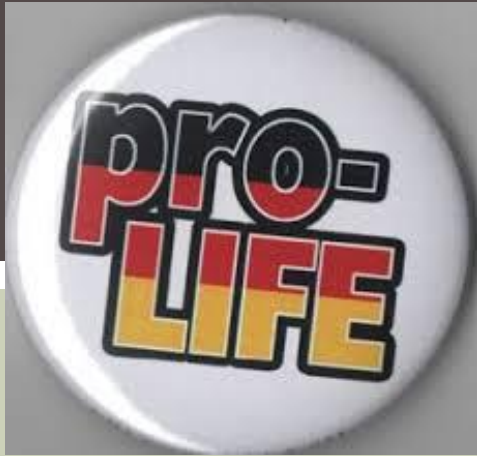
Rubins v. Latvia 13/1/2015

Dismissal of university professor after uttering criticism on university management in an email to the Rector and others = violation of Art. 10

The Court notes that this was the harshest sanction available and, disregarding the fact that the applicant took up a post in another university soon afterwards, was liable to have a serious chilling effect on other employees of the University and to discourage them from raising criticism.

See also Kharlamov v. Russia 8/10/2015

Defamation of Orel State University = violation Art. 10



CASES 2015 +

Anti-abortion leaflets / clinic / website

Annen v. Germany, 26/11/2015

Civil injunction calling two doctors “abortion doctors”, referring to ‘unlawful abortions’ and ‘babycaust’ = violation Art. 10

Highly controversial debate of public interest, raising moral and ethical issues. Referring to the Holocaust and the Nazi-regime may also be understood as a way of creating awareness of the more general fact that law may diverge from morality. Although the Court is aware of the subtext of the applicant’s statement, which was further intensified by the reference to the webpage “www.babycaust.de”, it observes that the applicant did not – at least not explicitly – equate abortion with the Holocaust.

CASES 2015 +



Violations Article 3

Violence against journalist = inhuman treatment

Positive obligations of State to protect journalists

ECtHR : “In particular, the positive obligations under Article 10 of the Convention require States to create *a favourable environment* for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear”

Uzeyir Jafarov v. Azerbaijan, 29 January 2015

Journalist attacked, no sufficient investigation (procedural)

Emin Huseynov v. Azerbaijan, 7 May 2015 (+ Art. 11)

Police brutality, no investigation (substantive + procedural)



CASES 2015

Pentikäinen v. Finland 20/10/2015

Arrest, detention, prosecution and conviction of a journalist/press photographer for not obeying police order to leave the scene of a demonstration that had turned into riot in Helsinki

“the fact that the applicant was a journalist did not entitle him to preferential or different treatment in comparison to the other people left at the scene”

“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”

No violation Art. 10 : *“this conclusion must be seen on the basis of the particular circumstances of the instant case, due regard being had to **the need to avoid any impairment of the media’s “watch-dog” role**”*

Insult and hate speech, UGC, online media platform Delfi civil damage not in breach with Article 10

- It concerned a professionally managed news portal run on a commercial basis
- the comments were highly offensive and incited to violence against a person: blatant treats to the physical integrity of L., comment were clearly unlawful
- the portal failed to prevent them from becoming public, profited from their existence, but allowed their authors to remain anonymous and, the fine imposed by the Estonian courts was not **excessive**

Case does not concern other discussion fora, social media and websites and blogs for hobby

**Obligation to remove clearly unlawful content
(also ECtHR 2/2/2016, MTE & Index.hu v. Hungary)**

CASES 2015



Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland 21/7/2015

The European Court agrees with the Finnish authorities that the applicants could not rely on **the exception of journalistic activities** of data protection law, as the publication of the large amount of taxation data them was **not justified by a public interest**. The Court accepts the approach of the Finnish Supreme Administrative Court that it was necessary to interpret Satamedia's **freedom of expression strictly in order to protect the right of privacy of the Finnish citizens**

Case referred to Grand Chamber

Compare CJEU Satamedia 16 December 2008 (Case C-3/07)

2016 GRAND CHAMBER PENDING

1. Satakunnan Markkinapörssi Oy & Satamedia Oy v. Finland (no. 931/13), hearing 11 May 2016

No violation 10: data protection, was no journalistic activity

2. Baka v. Hungary (no. 20261/12), hearing 17 June 2015

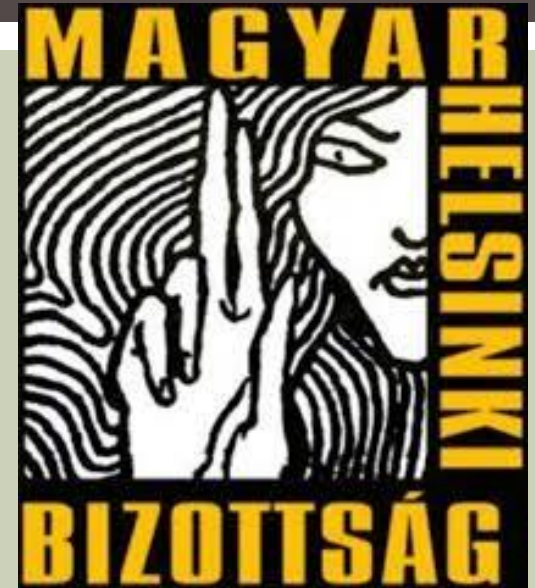
Violation 6 and 10: President Supreme Court termination of mandate following criticism on legislative reforms by Government

3. Karácsony and Others v. Hungary (no. 42461/13) and Szél and Others v. Hungary (no. 44357/13), hearing 8 July 2015

Violation 10 and 13: arrest and prosecution because of banners in parliament against Fidesz

2016 GRAND CHAMBER PENDING

4. Magyar Helsinki Bizottság v. Hungary
(no. 18030/11), hearing 4 November 2015
Refusal of access to documents held by
police departments on defending lawyers,
privacy (relinquishment to GC)



5. Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina (no. 17224/11), referred to GC 14 March 2016
Criticism on editor of radio station, defamation, Chamber found
no violation Article 10 (4/3)

2016 GRAND CHAMBER

Grand Chamber 29 April 2016 / Bédat v. Switzerland

The case concerns the fining of a journalist for publishing documents covered by investigative secrecy in a criminal case

Grand Chamber found no violation of Article 10 (15/2)

Secrecy also to be respected by journalists in order to guarantee fair trial including presumption of innocence (Art. 6 § 1 ECHR)

Privacy protection of accused person, vulnerable person in prison

Concept of “responsible journalism”

As a professional journalist he must have been aware of the confidential nature of the information which he was planning to publish

Revealed information did not contribute to debate on matter of public interest, as it was a moderate sanction without chilling effect.

SEVEN IMPORTANT ISSUES ON THE AGENDA OF FOE AND ECTHR IN 2016

Protection of journalists against violence

Newsgathering during demonstrations

Defamation: reputation & privacy + crime reporting

Whistle-blowing and protection of sources

Access to public documents

Transparency of intelligence services/anti-terror

“Strict scrutiny”-test by ECtHR / chilling effect” (VUCA)

CJEU 21/10/2015

New Media Online Austria



Videos on website newspaper as AVMS – Directive 2010?

(28. Directive does not cover electronic versions of newspapers and magazines, but...)



1. The concept of ‘programme’, within the meaning of Article 1(1)(b) of Directive 2010/13/EU (..) (Audiovisual Media Services Directive), must be interpreted as including, under the subdomain of a website of a newspaper, the provision of videos of short duration consisting of local news bulletins, sports and entertainment clips.
2. On a proper interpretation of Article 1(1)(a)(i) of Directive 2010/13, assessment of the principal purpose of a service making videos available offered in the electronic version of a newspaper must focus on whether that service as such has content and form which is independent of that of the journalistic activity of the operator of the website at issue, and is not merely an indissociable complement to that activity, in particular as a result of the links between the audiovisual offer and the offer in text form.

Impact/outcome: websites of newspapers with videos under AVMS-Directive