

**Legal opinion / expert testimony in the case of**  
**Rocio San Miguel Sosa and others v. Venezuela, in the case nr. 12.923**  
**by Dirk Voorhoof**  
2 February 2017

-1. I am Dirk Voorhoof, prof. emeritus at Ghent University, Belgium. I'm a member of the [Executive Board of the European Centre for Press and Media Freedom \(ECPMF\)](#) and of the [Human Rights Centre](#) at the **Law Faculty of Ghent University**. I have been teaching for more than 25 years courses on Media Law, Copyright Law and Journalism & Ethics at Ghent University and since 2005 I'm lecturing European Media Law at the **University of Copenhagen, Denmark (UCPH)**. From 1995 to 2005 I was a member of the Federal Commission for Access to Administrative Documents in Belgium, and the last ten years I was a member of the Flemish Media Regulator ([VRM](#)). I have also written a series of legal opinions and participated in seminars and conferences as an expert for the **Council of Europe**, all in relation with media law, access to information, freedom of expression and media and journalism. I'm a member of Legal Human Academy, of the [CMPF Scientific Committee](#), Robert Schuman Centre for Advanced Studies, European University Institute, Florence, the [Global FOE&I @Columbia experts network](#), Columbia University, New York, and the [Committee of Experts on Internet intermediaries \(MSI-NET\)](#) of the Council of Europe. I have written books, articles and reports on developments regarding freedom of expression, media and journalism in Europe, including in [Iris](#), [legal newsletter of the European Audiovisual Observatory](#), [Auteurs & Media](#) and [Mediaforum](#). Some of my recent publications include: "Freedom of Expression, Media and Journalism under the European Human Rights System: Characteristics, Developments, and Challenges", in P. MOLNÁR (ed.), *Free Speech and Censorship Around the Globe*, Central European University Press, Budapest - New York, 2015, 59-104; "Freedom of Journalistic Newsgathering, Access to Information and Protection of Whistle-blowers under Article 10 ECHR and the standards of the Council of Europe", in Council of Europe, *Journalism at Risk. Threats, challenges and perspectives*, Council of Europe, Strasbourg, 2015, 105-143; "Freedom of Expression and the Right to Information : Implications for Copyright", in C. GEIGER (ed.), *Research Handbook on Human Rights and Intellectual Property*, Edward Elgar Publ., Cheltenham – Northampton, 2015, 331-353. I'm also the co-author of the free online [e-book](#) *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights* (also available in French and German. A new 2017 version is to be made available at the website of the [European Audiovisual Observatory](#)). Actually I'm co-organising a Conference on Promoting Dialogue between the European Court of Human Rights and the Freedom of Expression Community, Strasbourg 24 March 2017, <https://ecpmf.eu/events/ecpmfcthr2017>

Most of my research output and publications (of which some in English) are online available at <https://biblio.ugent.be/person/801000461819>.

I have also conducted research and participated in a research project with regard the **protection of human rights in the employment relation**, in which I specifically focused on the right to freedom of expression and information. This resulted in several publications in books, legal journals or reports<sup>1</sup>.

---

<sup>1</sup> Dirk Voorhoof and Patrick Humblet, "The Right to Freedom of Expression in the Workplace under Article 10 ECHR" in Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds.), *The European Convention of Human Rights and the Employment Relation*, Hart Publishing, Oxford, 2013, 237-286; Dirk Voorhoof and Patrick Humblet, "Human Rights and the Employment

-2. I have been requested by the Inter-American Court of Human Rights to prepare this expert declaration in **the case of Rocio San Miguel Sosa and others v. Venezuela, in the case nr. 12.923**, and I have read the Commission's report on the merits of this case, OEA/Ser.L/V/II.156, Doc. 21 of 28 October 2015.

-3. It is the first time I'm requested as an expert for assistance in a procedure before the Inter-American Court of Human Rights. I have never been in Venezuela, and **I have no contacts** with the government, nor with any other Venezuelan authorities, nor with the applicants or their counsels in the case at issue. I only learnt about the case through the documents send to me by the Inter-American Commission on Human Rights.

-4. I have been invited by the Inter-American Court on Human Rights to prepare a legal opinion/expert testimony focusing on **the right to (political) freedom of expression and information of civil servants**, i.e. *"on the international human rights standards applicable to the right to freedom of expression of public servants, specifically in terms of the scope of right of those servants to maintain and express opinions of a political nature, with reference to international and comparative jurisprudence and doctrine"* (Resolution issued by the President of the IACtHR on 20 December 2016)<sup>2</sup>.

This report will focus on **the right to (political) freedom of expression and information of civil servants** from the perspective of **Article 10 of the European Convention on Human Rights and Fundamental Freedoms** (hereafter ECHR)<sup>3</sup>, presenting and analyzing the relevant case law of the **European Court of Human Rights** (hereafter ECtHR), the ECtHR being perceived as the *"centre of*

---

Relation. The Right to Freedom of Expression at Work", in X., *Proceedings of the International Conference on the European Convention on Human Rights and the Employment Relation, Actes du Colloque "La convention européenne des droits de l'homme et la relation de travail"*, CNRS and Strasbourg University, 30-31 January 2014, 33 p., [http://europa-cnrs.unistra.fr/fileadmin/upload/DUN/europe\\_en\\_mutation/Documents/e-publi/E-publi CEDH et la relation au travail - D Voorhoof P Humblet v0-1.pdf](http://europa-cnrs.unistra.fr/fileadmin/upload/DUN/europe_en_mutation/Documents/e-publi/E-publi CEDH et la relation au travail - D Voorhoof P Humblet v0-1.pdf) and <http://europa-cnrs.unistra.fr/publications/les-e-publi/e-publi-des-unites/>; Dirk Voorhoof and Jacques Englebert, "La liberté d'expression syndicale mise à mal par la Cour européenne des droits de l'homme", (ECtHR 8 December 2009, Aguilera Jiménez e.a. v. Spain), *Revue Trimestrielle des Droits de l'Homme*, 2010/83, 733-747; Dirk Voorhoof and Ronan O' Fathaigh, "Grand Chamber Judgment on Trade Union Freedom of Expression", *Strasbourg Observers Blog*, 14 September 2011, <http://strasbourgobservers.com/2011/09/14/grand-chamber-judgment-on-trade-union-freedom-of-expression/#more-1143> and Dirk Voorhoof, "Is the protection of "public welfare" an inherent and justified restriction on the right to freedom of expression? Comment on the Sixth Periodic Report by the Japanese Government under Article 40 ICCPR (April 2012) and the judgment of 7 July 2011 of the Supreme Court in the case of Mr. Katsuhisa Fujita", *Legal Opinion on request of Human Rights Organisations Group, Japan*, 28 March 2013, as part of the monitoring procedure by the UN Human Rights Committee, <http://wind.ap.teacup.com/people/html/20130328voorhoof.japan.fujita.pdf> and [http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/JPN/INT\\_CCPR\\_NGO\\_JPN\\_14887\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/JPN/INT_CCPR_NGO_JPN_14887_E.pdf)

<sup>2</sup> [http://www.corteidh.or.cr/docs/asuntos/sanmiguel\\_sosa\\_20\\_12\\_16.pdf](http://www.corteidh.or.cr/docs/asuntos/sanmiguel_sosa_20_12_16.pdf)

<sup>3</sup> Article 10 ECHR : 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. See also Dirk Voorhoof, "Freedom of Expression, Media and Journalism under the European Human Rights System: Characteristics, Developments, and Challenges", in Peter Molnàr (ed.), *Free Speech and Censorship Around the Globe*, Central European University Press, Budapest - New York, 2015, 59-104 and -, Freedom of Expression under the European Human Rights System. From Sunday Times (n° 1) v. U.K. (1979) to Hachette Filipacchi Associés ("Ici Paris") v. France (2009), *Inter-American and European Human Rights Journal / Revista Interamericana y Europa de Derechos Humanos*, 2009/1-2, 3-49.

*gravity of human rights in Europe*<sup>4</sup>, while also referring to the standards of the right to political freedom of expression (of public servants) under Article 19 of the **UN Covenant on Civil and Political Rights** (hereafter ICCPR)<sup>5</sup>.

- **First** this report examines the preliminary question whether **signing a statement or a petition in a political context**, such as a petition to carry out a recall referendum on the term of office of a head of state, is to be considered as an act of exercising the right to express a (political) opinion (by a civil servant or employee in the public sector), guaranteed by Article 19.2 ICCPR and/or Article 10 § 1 ECHR.
- **Second** it will analyze under what circumstances a termination of employment contract or dismissal of an employer or civil servant is to be regarded as **an interference with the right to freedom of expression**, and in particular in case the public authority or employer bring forward that the termination of contract or dismissal is unrelated to the exercise of the right to freedom of expression by the employee or civil servant.
- **Next** this report will focus on the (limits of the) **right to political freedom of expression** in the employment relation, including the public sector, and on the (limitations of the) right to express political, critical or non-neutral opinions about the head of state, the government or other public institutions. Therefore it will elaborate on the criteria and conditions that may justify an interference with the right to (political) freedom of expression of public servants and employees in the public sector. It will also clarify in what circumstances an interference with this right **amounts to a violation of Article 19 ICCPR or Article 10 ECHR**, with references to the UN Human Rights Committee General Comment No. 34 “Article 19. Freedoms of opinion and expression”<sup>6</sup> and especially analyzing and reporting the relevant case law of the European Court of Human Rights<sup>7</sup>.

-5. The option to examine in this report the impact of **Article 19 ICCPR** on the right to freedom of expression, is because the Bolivarian Republic of Venezuela acceded and ratified the ICCPR on 10 May 1978 and is bound to the respect of the human rights guaranteed by the UN Covenant on Civil and Political Rights<sup>8</sup>. Therefore this report includes references to the case law of the UN HRC applying Article 19 ICCPR as reflected in the UN HRC General Comment No. 34 on the freedoms of

---

<sup>4</sup> Dean Spielmann, president of the Court in 2014, at the opening address of the *Dialogue between Judges* 2014, [http://www.echr.coe.int/Documents/Dialogue\\_2014\\_ENG.pdf](http://www.echr.coe.int/Documents/Dialogue_2014_ENG.pdf), p. 5.

<sup>5</sup> Article 19 ICCPR: 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

<sup>6</sup> General Comment No. 34, Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34, UN HRC 12 September 2011, at <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>

<sup>7</sup> As the mandate and perspective of this report is not to analyse the facts and legal aspects of the case of Rocio San Miguel Sosa and others v. Venezuela, nr. 12.923 under Article 13 ACHR, the aspects referred to in the additional questions referred to by the Secretariat of the IACHR in its communication of 20 January 2017 (DOC CDH-3-2016/40) will be integrated in the report and examined from the international framework as mentioned, that is Article 19 ICCPR and Article 10 ECHR.

<sup>8</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en)

opinion and expression.<sup>9</sup> The reason to focus on the application of **Article 10 ECHR**, is because the case law of the ECtHR with regard the right to freedom of expression and information is extensive and elaborated<sup>10</sup> and is therefore an interesting instructional basis for analyzing issues affecting the right to freedom of expression, also outside the jurisdiction of the ECtHR. As the Bolivarian Republic of Venezuela is no member State to the ECHR, this report's ambition is to facilitate and contribute to the interaction and **"judicial dialogue"**<sup>11</sup> **between the IACtHR and the ECtHR.**

The ECtHR's Grand Chamber judgments in the cases of *Mamatkulov and Askarov v. Turkey*, 4 February 2005, Appl. nos. 46827/99 and 46951/99 (paras. 49-53, 112, 116 and 124) and *Marguš v. Croatia*, 27 May 2014, Appl. no. 4455/10 (paras. 56-66, 111, 131 and 138) illustrate pertinently how the ECtHR refers to, takes into consideration or is inspired by the reasoning in the jurisprudence of the IACtHR. The European Court's Grand Chamber has also referred to the Inter-American Court's case law and/or the Inter-American Commission reports or submissions in cases involving the right to freedom of expression such as in *Stoll v. Switzerland*, 10 December 2007, Appl. no. 69698/01 (paras. 43 and 111), *Palomo Sánchez and Others v. Spain*, 12 September 2011, Appl. nos. 28955/06, 28957/06, 28959/06 and 28964/06 (paras. 25-26 and 56), and *Baka v. Hungary* (paras. 84-85, 114 and the joint concurring opinion of judges Pinto de Albuquerque and Dedov<sup>12</sup>).

In its recent Grand Chamber judgment in the case of *Magyar Helsinki Bizottság v. Hungary*, 8 November 2016, Appl. no. 18030/11 (Grand Chamber), the ECtHR refers explicitly to the jurisprudence of the IACtHR in support of the right of access to public documents as a right guaranteed under Article 13 of the American Convention on Human Rights. The Court quotes extensively from the IACtHR judgment in the case of *Claude Reyes et al. v. Chile* (19 September 2006). Referring to these and other international standards of law and jurisprudence, the ECtHR broadened the scope of the right of freedom to expression under Article 10 ECHR as to include, under circumstances, a right of access to public documents. The Grand Chamber considered that it was "instructive" *"for the Court's inquiry to have regard to the developments concerning the recognition of a right of access to information in other regional human-rights protection systems. The most noteworthy is the Inter-American Court of Human Rights' interpretation of Article 13 of the American Convention on Human Rights, as set out in the case of Claude Reyes et al. v. Chile, which expressly guarantees a right to seek and receive information. The Inter-American Court considered that the right to freedom of thought and expression included the protection of the right of access to State-held information"* (para. 146).

---

<sup>9</sup> Notice that also in some recent cases, the Grand Chamber of the ECtHR refers to Article 19/20 ICCPR and the UN HRC General Comment No. 34 for interpreting the scope and application of Article 10 ECHR: ECtHR Grand Chamber *Perinçek v. Switzerland*, 15 October 2015, Appl. no. 27510/08, paras. 66-73 and 265 (on memory laws and denial of genocide) and ECtHR Grand Chamber *Magyar Helsinki Bizottság v. Hungary*, 8 November 2016, Appl. no. 18030/11, paras. 38-41 and 140-143 (on access to public documents).

<sup>10</sup> See J. Casadevall, E. Myjer, M. O'Boyle and A. Austin (eds.), *Freedom of Expression: Essays in Honour of Nicolos Bratza*, Wolf Legal Publishers, 2012 and Dirk Voorhoof, "Freedom of Expression, Media and Journalism under the European Human Rights System: Characteristics, Developments, and Challenges", *l.c.*, 59-104. See also Jan Oster, *European and International Media Law*, Cambridge University Press, 2016.

<sup>11</sup> See Christiana Domínguez, "Inter-American Court of Human Rights and European Court of Human Rights. From Observation to Interaction of Human Rights", in Yves Haeck, Oswaldo Ruiz-Chiriboga and Clara Burbano-Herrera (eds.), *The Inter-American Court of Human Rights. Theory and Practice, Present and Future*, Intersentia 2015, 739-749 and Amrei Müller (ed.), *Judicial dialogue and human rights*, Cambridge University Press, 2017.

<sup>12</sup> After substantially referring to the case-law of the UN HRC and the IACtHR, the concurring opinion states that the approach developed by the ECtHR in the case at issue *"is borne out by the above-mentioned case-law of the Human Rights Committee and the Inter-American Court of Human Rights"*.

This “**judicial dialogue**” is also reflected in the reports and submissions of the Inter-American Commission on Human Rights<sup>13</sup> and in the jurisprudence of the IACtHR, including on issues regarding the right to freedom of expression. The IACtHR has indeed a long history of referencing to judgments of the ECtHR to support its own opinions and decisions. On issues regarding freedom of expression, the IACtHR in its early cases referred to the ECtHR jurisprudence to establish the basic understanding of this right and its limitations. Notably, in the advisory opinion 5/85, the IACtHR applied the ECtHR’s reasoning of the case *Sunday Times v. the United Kingdom* (6 April 1979) to develop a framework for permissible limitations under Article 13 of the American Convention<sup>14</sup>. In the case *Ricardo Canese v. Paraguay* (2004) and in subsequent cases on conflicts between the right to freedom of expression and the protection of the reputation of politicians and public figures, the IACtHR integrated the ECtHR’s case law in its reasoning to support the heightened importance of the right to freedom of expression for a democratic society and in the context of elections, including the higher degree of tolerance for criticism regarding a politician<sup>15</sup>. In other cases, such as in *Kimel v. Argentina* (2 May 2008)<sup>16</sup>, the IACtHR relied on the case law of the ECtHR (*Mamère v. France* and *Castells v. Spain*) to accept the admissibility of criminal defamation, while also emphasizing with reference to the Grand Chamber judgment in *Cumpănă and Mazăre v. Romania* that “the imposition of a prison sentence for a press offense will be compatible with journalists’ freedom of expression as guaranteed by Article 10 of the Convention, only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence”. More recently, in the case of *Lopez Lone et al. v. Honduras* (5 October 2015) concerning the right of members of the judiciary to freedom of expression and political participation, the IACtHR referred to the cases *Wille v. Liechtenstein* (28 October 1999, para. 64), and *Kudeshkina v. Russia* (26 February 2009, para. 86) and it stated that “(t)he European Court has pointed out that certain restrictions on the freedom of expression of judges are necessary in all cases where the authority and impartiality of the judiciary could be questioned”<sup>17</sup>. While this principle did not impede the ECtHR both in *Wille v. Liechtenstein* and in *Kudeshkina v. Russia* to conclude to the finding of violations of the judges’ right to freedom of expression under Article 10 ECHR, the IACtHR on its turn found a breach of Article 13 ACHR in the case of *Lopez Lone et al. v. Honduras*, emphasizing that “in times of serious democratic crisis, such as occurred in the present case, the rules that ordinarily restrict the right to participate in politics are not applicable to the actions of judges in defence of the democratic order” (para. 174).

This report aims to bring the (recent developments in the) case law of the ECtHR, where relevant for the adjudication in the case at issue, under the attention of the IACtHR, with the assumption that the characteristics, reasoning and findings by the ECtHR in analogue cases may be considered “instructive” for the IACtHR, being mindful of the similarities and differences between Article 10 ECHR and Article 13 ACHR<sup>18</sup> and being aware that any inspiration from or reference to other

---

<sup>13</sup> See e.g. the reference to ECtHR’s judgment in the case of *Radio Twist v. Slovakia* (broadcasting of illegally obtained copy of telephone conversation between two senior state officials) in the Commission’s report on the merits of the case of *Rocio San Miguel Sosa and others v. Venezuela*, in the case nr. 12.923, OEA/Ser.L/V/II.156, Doc. 21 of 28 October 2015, nr. 56.

<sup>14</sup> [http://corteidh.or.cr/docs/opiniones/seriea\\_05\\_ing.pdf](http://corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf), para. 46 and 69.

<sup>15</sup> [http://corteidh.or.cr/docs/casos/articulos/seriec\\_111\\_ing.pdf](http://corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf), paras. 83, 89, 90 and 102.

<sup>16</sup> [http://corteidh.or.cr/docs/casos/articulos/seriec\\_177\\_ing.pdf](http://corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf), para. 78.

<sup>17</sup> [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_302\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_302_esp.pdf), para. 170. See also

<https://globalfreedomofexpression.columbia.edu/cases/!%CF%8Cpez-lone-others-v-honduras/>

<sup>18</sup> Notice e.g. that Article 10 § 1 ECHR does not include a right to “seek” information, while in *Magyar Helsinki Bizottság v. Hungary*, 8 November 2016, Appl. no. 18030/11, the ECtHR (Grand Chamber) recognizes, under certain circumstances, a right to seek and have access to documents held by public authorities under Article 10 ECHR. And although the wording is substantially different, both Article 10 § 2 ECHR and Article 13.3 ACHR are limiting the possibility of direct or indirect

international instruments of human rights protections should not have a restrictive effect on the enjoyment of the rights guaranteed by the ACHR<sup>19</sup>.

-6. I confirm that I understand and have complied with my duty to the Inter-American Court of Human Rights to provide **independent assistance to the Court on matters within my expertise**.

## Analysis / Legal opinion

**-1. Is signing a statement or petition in a political context, such as a petition to carry out a recall referendum on the term of office of a head of state, to be considered as an act of exercising the right to express a (political) opinion, by a civil servant or employee in the public sector, guaranteed by Article 19.2 ICCPR and/or Article 10 § 1 ECHR?**

-1.A. First of all it is observed that the right to **freedom of expression in the political arena of a democracy**<sup>20</sup> is at the very centre of the rights protected under Article 19 ICCPR and Article 10 ECHR.

### Article 19 ICCPR

In a recent UN report it is stated that

*"The United Nations has long promoted the idea that expression is fundamental to public participation and debate, accountability, sustainable development and human development, and the exercise of all other rights. Indeed, expression should provoke controversy, reaction and discourse, the development of opinion, critical thinking, even joy, anger or sadness - but not punishment, fear and silence"*<sup>21</sup>.

The UN HRC, in its General Comment nr. 34, states:

*"2. Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions. 3. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights. 4. Among the other articles that contain guarantees for freedom of opinion and/or expression, are articles 18, 17, 25 and 27. The freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association, and the exercise of the right to vote".*

The General Comment nr. 34 has clarified that

---

interferences with the right to freedom of expression. Article 13 ACHR provides: "1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. (...) 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions".

<sup>19</sup> See IACtHR Advisory Opinion OC-5/85 of 13 November 1985, paras. 43-52, at

[http://corteidh.or.cr/docs/opiniones/seriea\\_05\\_ing.pdf](http://corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf)

<sup>20</sup> See IACtHR, Advisory Opinion OC-5/85, emphasizing the fundamental nature of freedom of expression for the existence of a democratic society: "Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free" (para. 70).

<sup>21</sup> Report of the UN Special Rapporteur on the promotion and protection of freedom of opinion and expression, 6 September 2016, [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/71/373](http://www.un.org/ga/search/view_doc.asp?symbol=A/71/373)

*“the value placed by the Covenant upon uninhibited expression is particularly high, in the circumstances of public debate in a democratic society concerning figures in the public and political domain” (para. 34).*

### Article 10 ECHR

The ECtHR, at several occasions, has emphasized the crucial value of the right to freedom of political expression in a democratic, pluralist and tolerant society:

*“Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”. As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly”<sup>22</sup>.*

The Court considered that

*“although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position (...). Pluralism and democracy must be based on dialogue and a spirit of compromise, necessarily entailing various concessions on the part of individuals or groups of individuals, which are justified in order to maintain and promote the ideals and values of a democratic society (...) Respect by the State of the views of a minority by tolerating conduct which is not per se incompatible with the values of a democratic society or wholly outside the norms of conduct of such a society, far from creating unjust inequalities or discrimination, ensures cohesive and stable pluralism and promotes harmony and tolerance in society (...)”<sup>23</sup>.*

Furthermore, according to the ECtHR :

*“There is little scope under Article 10 § 2 of the Convention for restrictions on political speech or debate on matters of public interest (...)”<sup>24</sup>.*

- 1.B. Next it needs to be examined whether **signing a statement or petition** in a political context, such as a petition to carry out a recall referendum on the term of office of a head of state, is to be considered as a relevant act of exercising the right to express a (political) opinion by a civil servant or employee in the public sector, guaranteed by Article 19.2 ICCPR and/or Article 10 § 1 ECHR. This question concerns **two aspects**: what kind of forms of expression are protected under Article 19.2 ICCPR and Article 10 § 1 ECHR (*ratione materiae*), and can civil servants or persons with an employment contract in the public sector rely on the right to freedom of political expression, i.e. in terms of applicability of Article 19 ICCPR and Article 10 ECHR *ratione personae*?

#### **-1.B.I. Ratione materiae**

### Article 19 ICCPR

According to the UN HRC General Comment nr. 34 (para. 11-12), Article 19.2 ICCPR

*“requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and*

---

<sup>22</sup> See the ECtHR Grand Chamber judgments in *Palomo Sánchez a.o. v. Spain*, 12 September 2011, App. Nos. 28955/06, 28957/06, 28959/06 and 28964/06, para. 53, and ECtHR Grand Chamber *Baka v. Hungary*, 23 June 2016, Appl. no. 20261/12, para. 158. See also recently ECtHR, *Karapetyan and others v. Armenia*, 17 November 2016, para. 44 (cfr. *infra*).

<sup>23</sup> ECtHR *Gough v. the United Kingdom*, 28 October 2014, Appl. no. 49327/11, para. 168.

<sup>24</sup> ECtHR Grand Chamber *Sürek v. Turkey (no. 1)*, 8 July 1999, Appl. no. 26682/95, para. 61 and ECtHR Grand Chamber *Morice v. France*, 23 April 2015, Appl. no. 29369/10, para. 125. See also recently: ECtHR *Tavares de Almeida Fernandes and Almeida Fernandes v. Portugal*, 17 January 2017, Appl. no. 31566/13, para. 55.

article 20. It includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights (..)".

The General Comments nr. 34 clarifies that Article 19.2 ICCPR

*"protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art. Means of expression include books, newspapers, pamphlets, posters, banners, dress and legal submissions"*.

**The issuing of a statement**, *in casu* in support of a national strike, is considered by the UN HRC as a form of protected expression under Article 19 ICCPR<sup>25</sup>.

### Article 10 ECHR

The field of application of Article 10 § 1 ECHR is very broad according to the ECtHR's case law, and it includes all kinds of formats or platforms of channels of expressing, forwarding and receiving ideas and opinions, including opinions expressed in an interview, in press releases, posters or leaflets<sup>26</sup>, including lodging a complaint or forwarding documents to the authorities<sup>27</sup> and all kind of forms of expressive conduct or symbolic speech<sup>28</sup>. Expressing a political opinion can indeed take many forms, including wearing a symbol<sup>29</sup>, or displaying in public at a location adjacent to Parliament, several items of clothing representing the "dirty laundry of the nation". The ECtHR considered that "this action – which the applicants described as a "performance" – amounts to a form of political expression"<sup>30</sup>. A statement, uttered in the presence of journalists, calling to boycott Israeli products, is a form of political expression under the protection of Article 10 § 1 ECHR<sup>31</sup>. In a recent judgment the ECtHR found that a state interference, *in casu* a conviction for defamation, because of the reading out of a letter at a public meeting, containing criticism of a public official and demanding for his resignation<sup>32</sup>, amounted to a violation of Article 10 ECHR<sup>33</sup>. At several occasions the ECtHR has reiterated that "*Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed*"<sup>34</sup>.

---

<sup>25</sup> UN HRC Communication No. 518/1992, *Sohn v. Republic of Korea*, Views adopted on 18 March 1994.

<sup>26</sup> ECtHR *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, 19 December 1994, Appl. no. 15153/89; ECtHR *Fuentes Bobo v. Spain*, 29 February 2000, Appl. no. 39293/98; ECtHR *Kudeshkina v. Russia*, 26 February 2009, Appl. no. 29492/05; ECtHR *Taffin v. France*, 19 February 2010, Appl. no. 42396/04; ECtHR *Andrushko v. Russia*, 14 October 2010, Appl. no. 4260/04; ECtHR Grand Chamber *Mouvement raëlien Suisse v. Switzerland*, 13 July 2012, Appl. no. 16354/06; ECtHR *PETA Deutschland v. Germany*, 8 November 2012, Appl. no. 43481/09; ECtHR *Erdoğan Gökçe v. Turkey*, 14 October 2014, Appl. no. 31736/04 and ECtHR *Annen v. Germany* 26 November 2015, Appl. no. 3690/10.

<sup>27</sup> ECtHR Grand Chamber *Guja v. Moldova*, 12 February 2008, Appl. no. 14277/04; ECtHR *Kayasu v. Turkey*, 13 November 2008, Appl. nos. 64119/00 and 76292/01; ECtHR *Frankovic v. Poland*, 16 December 2008, Appl. no. 53025/99; ECtHR *Heinisch v. Germany*, 21 July 2011, Appl. no. 28274/08 and ECtHR *Sosinowska v. Poland*, 18 October 2011, Appl. no. 10247/09.

<sup>28</sup> ECtHR *Szel a.o. v. Hungary*, 16 September 2014, Appl. no. 44357/13; ECtHR *Murat Vural v. Turkey*, 14 October 2014, Appl. no. 9540/07; ECtHR *Gough v. the United Kingdom*, 28 October 2014, Appl. no. 49327/11; ECtHR, *Novikova a.o. v. Rusland* 26 April 2016, Appl. nos. 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13 and ECtHR *Szanyi v. Hungary*, 8 November 2016, Appl. no. 35493/13.

<sup>29</sup> ECtHR *Vajnai v. Hungary*, 8 July 2008, Appl. no. 33629/06 and ECtHR, *Fáber v. Hungary*, 24 July 2012, Appl. no. 40721/08, in which the Court considered that displaying a symbol as expressing a political view is a form of protected speech under Article 10 ECHR.

<sup>30</sup> ECtHR *Tatár and Fáber v. Hungary*, 12 June 2012, Appl. nos. 26005/08 and 26160/08, para. 36.

<sup>31</sup> ECtHR *Willem v. France*, 16 July 2009, Appl. no. 10883/05.

<sup>32</sup> ECtHR *Lykin v. Ukraine*, 12 January 2017, Appl. no. 19382/08.

<sup>33</sup> Notice that the right to vote (or to take part in a referendum) under Article 3 of the first Protocol to the ECHR is also related to the right to freedom of expression. See also Venice Commission, *Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Publication of Lists of Voters having participated in Elections*, 17 October 2016, CDL-AD(2016)028.

<sup>34</sup> ECtHR *De Haes and Gijssels v. Belgium*, 24 February 1997, Appl. no. 19983/92, para. 48.



In *Karapetyan and others v. Armenia*<sup>35</sup> the Court considered Article 10 ECtHR applicable with regard to the reaction and sanction by the public authorities because of the expression of a political view in a public statement by civil servants of the Ministry of Foreign Affairs. In that statement the applicants had expressed their concern with the situation created in Armenia and the alleged fraud of the election process (in 2008), which, according to the statement “*shadow the will of our country and society to conduct a civilised, fair and free presidential election*”. The statement continued : “*As citizens of Armenia, we demand that urgent steps be undertaken to call into life the recommendations contained in the reports of the international observation mission, as well as other prominent international organisations. Only by acting in conformity with the letter and spirit of the law can we create democracy and tolerance in Armenia and earn the country a good reputation abroad*”. The ECtHR found that the applicants’ dismissal from their posts as a result of this statement “**clearly constituted**” an interference with their right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention<sup>36</sup>.

### -1.B.II. Ratione personae

Both Article 19.2 ICCPR and Article 10 § 1 ECHR guarantee the right to freedom of expression and information “**to everyone**”.

#### Article 19 ICCPR

According to the General Comment nr. 34 of the UN HRC,

*“(t)he obligation to respect freedoms of opinion and expression is binding on every State party as a whole. All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party. Such responsibility may also be incurred by a State party under some circumstances in respect of acts of semi-State entities. The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities” (para. 7).*

The General Comment nr. 34 emphasizes that Article 19 ICCPR places a particularly high value upon uninhibited expression “*in the circumstances of public debate in a democratic society concerning figures in the public and political domain*” (nr. 34), hence protecting all those who participate in public debate on matters in the political domain.

#### Article 10 ECHR

The case law of the ECtHR of the last 20 years affirms that employees in the private or public sector and civil servants can invoke fundamental rights within the labour environment or in fulfilling their tasks in the public sector<sup>37</sup>. In *Vogt v. Germany* the Grand Chamber clarified that

---

<sup>35</sup> *Karapetyan a.o. v. Armenia*, 17 November 2016, Appl. no. 59001/08, par. 36 (non-final judgment, still open for referral to Grand Chamber, *cfr. infra*). In this case, the ECtHR came to the conclusion that the interference with the applicants’ right to freedom of expression finally did not amount to a violation of Article 10 ECHR. The case *Karapetyan a.o. v. Armenia* differs however on substantial aspects from *Rocio San Miguel Sosa and others v. Venezuela*, see *infra*.

<sup>36</sup> *Ibid*, par. 36. This judgment delivered by the Chamber of the first section of the ECtHR will be more thoroughly analyzed in the third chapter of this report, explaining and highlighting the specific circumstances of the case, which resulted (provisionally) in the finding that the interference at issue did not amount to a violation of Article 10 ECHR.

<sup>37</sup> Dirk Voorhoof and Patrick Humblet, “The Right to Freedom of Expression in the Workplace under Article 10 ECHR” in Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds.), *The European Convention of Human Rights and the Employment*

*“civil servants do not fall outside the scope of the Convention. In Articles 1 and 14 (art. 1, art. 14), the Convention stipulates that “everyone within [the] jurisdiction” of the Contracting States must enjoy the rights and freedoms in Section I “without discrimination on any ground”. Moreover Article 11 para. 2 (art. 11-2) in fine, which allows States to impose special restrictions on the exercise of the freedoms of assembly and association by “members of the armed forces, of the police or of the administration of the State”, confirms that as a general rule the guarantees in the Convention extend to civil servants”<sup>38</sup>.*

Employees, members of the administration of the State and civil servants have the right to freedom of expression, at the workplace and outside the workplace. Since the ECtHR made clear *“that Article 10 applies also to the workplace, and that civil servants (...) enjoy the right to freedom of expression”<sup>39</sup>*, the application of Article 10 ECHR to employees, both in the public and private sector, can no longer be disputed under the ECHR<sup>40</sup>. Whether the applicants are civil servants and have the status as “public officials”, or are employed at a Ministry or another public institution or public agency under a regular or statutory labor agreement does not affect their right to freedom of expression<sup>41</sup>. In *Baka v. Hungary* the Grand Chamber confirmed this approach in holding that *“civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention”<sup>42</sup>*.

According to the ECtHR *“civil servants enjoy the freedom to express their opinions and ideas under Article 10 of the Convention, like all other individuals”*, and therefore *“Contracting States must allow a certain space in domestic public debate, even in difficult times, for the participation of civil servants, in particular where their experience and expertise may be conducive to an informed debate on issues of public interest and importance”<sup>43</sup>*.

The Grand Chamber in *Baka v. Hungary* leaves no doubt that *“(t)he Court has recognised in its case-law the applicability of Article 10 to civil servants in general (...)”<sup>44</sup>*.

The case law of the ECtHR shows that freedom of expression pursuant to Article 10 ECHR applies both to civil servants, as employees of public authorities or as public officials or judges, and to employees in the private sector. Comparative law-research has also shown that rules in labour contracts, in labour codes or norms applicable to public servants, governing the exercise of freedom

---

*Relation*, Hart Publishing, Oxford, 2013, 237-286. See also T. Novitz and C. Fenwick, “The Application of Human Rights Discourse to Labour Relations: Translation of Theory into Practice”, in C. Fenwick and T. Novitz (eds.), *Human Rights at Work*, Oxford, Hart Publishers, 2010.

<sup>38</sup> ECtHR Grand Chamber *Vogt v. Germany*, 28 September 1995, Appl. no. 17851/91, para. 43.

<sup>39</sup> See ECtHR Grand Chamber *Vogt v. Germany*, 28 September 1995, Appl. no. 17851/91, para. 53; *ECtHR Fuentes Bobo v. Spain*, 29 February 2000, Application no. 39293/98, and ECtHR *Kudeshkina v. Russia*, 26 February 2011, Appl. no. 29492/05, para. 85. See also ECtHR *Peev v. Bulgaria*, 26 July 2007, Appl. no. 64209/01; ECtHR *Heinisch v. Germany*, 21 July 2008, Appl. no. 28274/08 and ECtHR Grand Chamber *Palomo Sánchez a.o. v. Spain*, 12 September 2011, Appl. nos. 28955/06, 28957/06, 28959/06 and 28964/06. See also *Karapetyan a.o. v. Armenia*, 17 November 2016, Appl. no. 59001/08, para. 47.

<sup>40</sup> ECtHR *Heinisch v. Germany*, 21 July 2011, App. no. 28274/08, para. 44 : *“The Court recalls in this context that in a number of cases involving freedom of expression of civil or public servants, it has held that Article 10 applied to the workplace in general”*, and *“It has further found that Article 10 of the Convention also applies when the relations between employer and employee are governed, as in the case at hand, by private law and that the State has a positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals”*.

<sup>41</sup> See also ECtHR *Peev v. Bulgaria*, 26 July 2007, Appl. no. 64209/01; ECtHR *Heinisch v. Germany*, 21 July 2008, Appl. no. 28274/08 and ECtHR *Frankovicz v. Poland*, 16 December 2008, Appl. no. 53025/99.

<sup>42</sup> ECtHR Grand Chamber *Baka v. Hungary*, 23 June 2016, Appl. no. 20261/12, paras. 140 and 162. See also ECtHR Grand Chamber *Guja v. Moldova*, 12 February 2008, Appl. no. 14277/04, para. 70.

<sup>43</sup> ECtHR *Karapetyan a.o. v. Armenia*, 17 November 2016, Appl. no. 59001/08, para. 58. See also ECtHR Grand Chamber *Baka v. Hungary*, 23 June 2016, Appl. no. 20261/12, paras. 139, 140 and 162.

<sup>44</sup> ECtHR Grand Chamber *Baka v. Hungary*, 23 June 2016, Appl. no. 20261/12, para. 140.

of expression of staff members may be imposed on public officials, “whether or not they have “civil servant” status”<sup>45</sup>.

## **-2. Under what circumstances a termination of employment contract or dismissal of an employer or civil servant is to be regarded as an interference with the right to freedom of expression, particular in case the public authority or employer argues that the termination of contract or dismissal is unrelated to the exercise of the right of freedom of expression by the public sector employee or civil servant?**

At several occasions the ECtHR has considered dismissals, termination of employment contract or disciplinary sanctions of employees or civil servants not only as interferences with their right to freedom of expression protected under Article 10 ECHR, but also as violations of this right (*cf. infra*)<sup>46</sup>. In *Heinisch v. Germany* the Court considered “that the applicant’s dismissal, as confirmed by the German courts, on account of her criminal complaint against her employer constituted an interference with her right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention”<sup>47</sup>.

In some cases the ECtHR disagreed with the national government’s argumentation that the dismissal, termination of contract or other disciplinary measure was unrelated to the exercise of the applicants’ (civil servants’) right to freedom of expression<sup>48</sup>. In such cases the ECtHR examines whether the interference or measure complained of is to be considered as a reaction or sanction because of the expression of certain opinions or statements uttered by the applicant as public official, civil servant, or judge<sup>49</sup>. Therefore the ECtHR determines the **real character and scope of the measure** by putting it in **the context of the facts of the case**. The Court in such circumstances therefore “deems it necessary to recall the sequence of events”, an approach that is clearly illustrated in the 2016 Grand Chamber’s judgment in *Baka v. Hungary*<sup>50</sup>. In *Baka v. Hungary* the Hungarian authorities argued that there had been no interference with the applicant’s freedom of expression, since the termination of his mandate as President of the Supreme Court “had no relation to the opinions expressed by him. The fact that the public expression of his opinions pre-dated the termination of his mandate was not sufficient to prove that there was a causal relationship between them”<sup>51</sup>. According to the Hungarian Government Mr. Baka’s “mandate had been terminated because of the fundamental changes in the functions of the supreme judicial authority in Hungary. The function to which he had been elected (comprising a mixture of administrative and judicial functions) had ceased to exist upon the entry into force of the new Fundamental Law of Hungary” (para. 131).

The Grand Chamber of the ECtHR however disagreed with this point of view :

*“in cases concerning disciplinary proceedings, removal or appointment of judges, the Court has had to ascertain first whether the measure complained of amounted to an interference with the exercise of the applicant’s freedom of expression – in the form of a “formality, condition, restriction or penalty” (..). In order to answer this question, the scope of the measure must be determined by putting it in the context of the facts of the case and of the relevant legislation”* (paras. 141 and 143).

---

<sup>45</sup> ECtHR Grand Chamber *Palomo Sánchez a.o. v. Spain*, 12 September 2011, App. Nos. 28955/06, 28957/06, 28959/06 and 28964/06, para. 28),

<sup>46</sup> For an overview see, Dirk Voorhoof and Patrick Humblet, “The Right to Freedom of Expression in the Workplace under Article 10 ECHR”, *I.c.*, 237-286.

<sup>47</sup> ECtHR *Heinisch v. Germany*, 21 July 2011, App. no. 28274/08, para. 45.

<sup>48</sup> ECtHR *Wille v. Liechtenstein*, 28 October 1999, Appl. no. 28396/95; ECtHR *Kudeshkina v. Russia*, 26 February 2011, Appl. no. 29492/05 and ECtHR Grand Chamber *Baka v. Hungary*, 23 June 2016, Appl. no. 20261/12.

<sup>49</sup> Although the judiciary is not part of the ordinary civil service, it is considered part of typical public service: ECtHR Grand Chamber *Baka v. Hungary*, 23 June 2016, Appl. no. 20261/12, para. 104. See also Venice Commission, *Report on the Freedom of Expression of Judges*, 23 June 2015, Strasbourg, Opinion n°806/2015, Doc CDL-AD (2015)18.

<sup>50</sup> ECtHR Grand Chamber *Baka v. Hungary*, 23 June 2016, Appl. no. 20261/12, para. 143-152.

<sup>51</sup> ECtHR Grand Chamber *Baka v. Hungary*, 23 June 2016, Appl. no. 20261/12, para. 131.

Such an examination by the ECtHR is held “in the light of the general principles emerging from its case-law on the assessment of evidence”, in which the Court applies the standard of proof “beyond reasonable doubt” (para. 143). The Court “adopts those conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts in their entirety and from the parties’ submissions. According to its established case-law, **proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact**” (para. 143).

After having examined **the sequence of events in their entirety**, the Grand Chamber came to the view that “there is prima facie evidence of a causal link between the applicant’s exercise of his freedom of expression and the termination of his mandate. This is corroborated by the numerous documents submitted by the applicant which refer to the widespread perception that such a causal link existed” (para. 148).

The Court *inter alia* referred to several speeches, to a letter to the President of the Republic and the Prime Minister, and to a public communiqué issued by the applicant. In these speeches and in its statements the applicant, in his capacity as President of the Supreme Court and the National Council of Justice, publicly expressed his views on various legislative reforms affecting the judiciary and in which he “strongly criticized” some of the proposals and stated that the reform would lead to ““excessive”, “unconstitutional” and “uncontrollable” powers” (para. 145).

The ECtHR is also “of the view that once there is prima facie evidence in favour of the applicant’s version of the events and the existence of a causal link, the burden of proof should shift to the Government. This is particularly important in the case at hand, since the reasons behind the termination of the applicant’s mandate lie within the knowledge of the Government and were never established or reviewed by an independent court or body” (para. 149).

The ECtHR in *Baka v. Hungary* came to conclusion “that the Government has failed to show convincingly that the impugned measure was prompted by the suppression of the applicant’s post and functions in the context of the reform of the supreme judicial authority. Accordingly, it agrees with the applicant that the premature termination of his mandate was prompted by the views and criticisms that he had publicly expressed in his professional capacity” (para. 151).

Therefore the termination of the applicant’s mandate constituted an interference with the exercise of his right to freedom of expression, as guaranteed by Article 10 of the Convention (para. 153)<sup>52</sup>.

**-3. What are the limits of the right to political freedom of expression for employees and civil servants when expressing political, critical or non-neutral opinions about the head of state, the government or other public institutions and what are the relevant criteria and conditions that may justify an interference with the right to (political) freedom of expression of civil servants or employees in the public sector? Or formulated in another way: in what circumstances an**

---

<sup>52</sup> For a similar approach, see also ECtHR *Wille v. Liechtenstein*, 28 October 1999, Appl. no. 28396/95 and ECtHR *Kudeshkina v. Russia*, 26 February 2011, Appl. no. 29492/05. See in contrast ECtHR (decision) *Harabin v. Slovakia*, 20 November 2012, Appl. no. 58688/11, paras. 149-154: the disciplinary offence of which the applicant had been found guilty did not involve any statements or views expressed by him in the context of a public debate. The Court accordingly concluded that the disputed disciplinary measure did not constitute an interference with Article 10 rights and declared the relevant complaint inadmissible as being manifestly ill-founded. In *Jokšas v. Lithuania* the ECtHR could not conclude that the applicant was punished for the expression of his opinions. The Government had argued that the termination of his military service was discharged in accordance with the domestic law for having reached retirement age, and not because of the criticism he had expressed in an article in a newspaper. The Court found that the applicant’s discharge from professional military service once he had reached retirement age did not amount to an interference with the exercise of his right to freedom of expression: *Jokšas v. Lithuania*, 12 November 2013, Appl. no. 25330/07, para. 74.

## **interference with the right to (political) freedom of expression of public servants amounts to a violation of Article 19 ICCPR or Article 10 ECHR?**

### Article 19 ICCPR

The General Comment No. 34 clarifying the application of Article 19 ICCPR refers to the UN HRC General Comment No. 25 “on participation in public affairs and the right to vote”, in which it elaborated on the importance of freedom of expression for the conduct of public affairs and the effective exercise of the right to vote. It also states that “*the free communication of information and ideas about public and political issues (...) is essential*” (para. 20).

Article 19.3 ICCPR expressly states that the exercise of the right to freedom of expression carries with it **special duties and responsibilities**. For this reason two limitative areas of restrictions on the right are permitted, which may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals (para. 21). This provision lays down

*“specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated”* (para. 21).

For the purposes of Article 19.3 ICCPR, a norm for to be characterized as a “law”, must be formulated “*with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution*” (para. 25).

Most importantly, “*restrictions must be “necessary” for a legitimate purpose*”. General Comment No. 34 clarifies that “*when a State party invokes a legitimate ground for restriction of freedom of expression, it **must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat***” (paras. 33-35). It is up to a State party in any given case, to “*demonstrate in specific fashion the precise nature of the threat to any of the enumerated grounds listed in paragraph 3 that has caused it to restrict freedom of expression*” (para. 34).

The UN HRC has also pointed out that restrictions on “*political discourse*” cause for concern and that “*in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high*”.

The General Comment No. 34 emphasizes that

*“all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition”* (paras. 37-38).

### Article 10 ECHR

As a starting point, it needs to be reiterated that the ECtHR, at several occasions, has emphasized the crucial value of the right to freedom of political expression in a democratic, pluralist and tolerant society. According to the ECtHR there is little scope under Article 10 § 2 ECHR for restrictions on political speech or debate on matters of public interest (*see supra*).

The crucial issue is to know where the limits and restrictions of the employee's right to freedom of expression are to be situated, as the exercise of this freedom carries with it "duties and responsibilities" (Article 10 § 2 ECHR). Indeed, Article 10 § 1 ECHR stipulates the principle of the right to freedom of expression, while Article 10 § 2 ECHR, by referring to "duties and responsibilities" that go together with the exercise of this freedom, opens the possibility for public authorities to interfere with this freedom by way of formalities, conditions, restrictions and even penalties. Yet, the main characteristic of Article 10 § 2 ECHR is that, by imposing three conditions that need to be cumulatively fulfilled, it substantially reduces the possibility of interference with the right to express, receive and impart information and ideas. Interferences by public authorities with the right to freedom of expression are only allowed under the strict conditions that they must be "**prescribed by law**", must have a "**legitimate aim**" and finally and most decisively, must be "**necessary in a democratic society**". The most important question that is to be answered in concrete cases refers to the "*pressing social need*", in order to pertinently and sufficiently justifying the (proportionate character) of an interference with the right to freedom of expression, as being necessary in a democratic society.

This report does not further elaborate on the conditions of "prescribed by law"<sup>53</sup>, or whether an interference at issue pursued one or more of the legitimate aims under Article 10 § 2 ECHR<sup>54</sup>. However, in case a dismissal or termination of employment is effectively to be considered as an implicit or hidden sanction and hence as an interference with an employee's or civil servant's right to freedom of expression, both these conditions under Article 10 § 2 ECHR must be fulfilled. When a termination of contract is presented as the exercise of a discretionary contractual power by the employer, - this being eventually a veil of legality for the true motivation to punish the applicant employees or civil servants for their expression of a political opinion, by signing a petition with a political message -, this termination of contract or employment is to be regarded as an implicit sanction, constituting an interference with the right to freedom of expression of the applicant. In such circumstances it is up to the national authorities to clearly identify the legal basis and to motivate pertinently the legal aim of the interference at issue<sup>55</sup>. Subsequently it is up to the ECtHR to evaluate whether the interference at issue is prescribed by law and pursued a legitimate aim, in accordance with its standard case law on this matter. In cases where there are clear doubts whether the interference at issue was prescribed by law and pursued a legitimate aim, it can still be

---

<sup>53</sup> In only a few freedom of expression cases the ECtHR came to the conclusion that the condition "prescribed by law," which includes foreseeability, precision and publicity or accessibility and which implies a minimum degree of protection against arbitrariness, was not fulfilled. See Dirk Voorhoof, "Freedom of Expression, Media and Journalism under the European Human Rights System: Characteristics, Developments, and Challenges", *l.c.*, footnote 6.

<sup>54</sup> In the case of *Rocio San Miguel Sosa and others v. Venezuela*, case nr. 12.923, "the government has argued that the rescission of the contracts of the alleged victims was not a punishment, but rather involved the simple application of a contractual clause pursuant to the law", while no motivations were given as to the real reason of the termination of contract. However, as the termination of the contract is to be qualified as a reaction imposing an implicit sanction under the excuse of applying a discretionary power, it is to be considered as an indirect restriction and hence an interference with the right to freedom of expression of the applicants: see the Inter-American Commission's report OEA/Ser.L/V/II.156, Doc. 21 of 28 October 2015, para. 166

<sup>55</sup> It is doubtful whether in the case of *Rocio San Miguel Sosa and others v. Venezuela* any of the legitimate aims listed in Article 10 § 2 ECHR can be taken into consideration. It would indeed be hard to justify the dismissal of the applicants as being based on "the interests of national security, territorial integrity or public safety", or "for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

considered relevant and important to examine whether the impugned interference was “necessary in a democratic society”<sup>56</sup>.

In order to evaluate the third and decisive condition on the necessity in a democratic society, the ECtHR will look at all the elements of the case, taking into considerations a set of criteria. The ECtHR’s task is to determine whether the applicants’ dismissal corresponded to a “pressing social need” and whether it was “proportionate to the legitimate aim pursued”.

In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 ECHR and, moreover, that they based their decisions on an acceptable assessment of the relevant facts. In cases related to interferences with the right to freedom of political expression in an employment relation of public service, the most relevant criteria are<sup>57</sup>:

1. *The content of the opinion or publication, bearing in mind whether or not the opinion contributes to a public debate or relates to a matter of public interest*
2. *The medium or platform in which the statements were made public*
3. *The social context of the statements, including the timing or political situation*
4. *The nature of the employee’s position within the public service*
5. *The manner in which the opinions or statements were expressed*
6. *The spontaneous or non-spontaneous nature of the opinions or statement*
7. *The impact on the relationship with the employer or the State, including the comparative assessment or balancing of the duty of loyalty and the right to freedom of expression*
8. *The procedural guarantees and the type of judicial control regarding the interference at issue*
9. *The gravity of the sanction in respect of the (concrete) consequences for the employee*
10. *The possible ‘chilling effect’ flowing from a State authority or an employer’s interference with an employee’s freedom of expression.*

While the protection of Article 10 ECHR extends to the workplace in general and to public servants or staff members working in the public sector in particular (*cfr. supra*), employees and civil servants at the same time owe to their employer a **duty of loyalty, reserve and discretion**<sup>58</sup>. The ECtHR has made it clear however that civil servants do have the right to freedom of expression as an individual and that they have **the right to participate in public discussions, precisely because of their involvement or expertise they can make an important contribution to the debate in society on matters of public interest**<sup>59</sup>. At the same time civil servants can be subjected to far-reaching limitations on their freedom of expression, notably when because of the nature of their office or position they handle secret, confidential or sensitive information. A civil servant working at the Ministry of Defence or a soldier leaking or revealing secret military information will find it hard to

---

<sup>56</sup> ECtHR Grand Chamber *Baka v. Hungary*, 23 June 2016, Appl. no. 20261/12, paras. 153-157.

<sup>57</sup> For a more extensive list of criteria, but not all of them relevant within the context of this report, see Dirk Voorhoof and Patrick Humblet, “The Right to Freedom of Expression in the Workplace under Article 10 ECHR”, *I.c.*, 284-285. See also Dirk Voorhoof and Patrick Humblet, “Human Rights and the Employment Relation. The Right to Freedom of Expression at Work”, in X., *Proceedings of the International Conference on the European Convention on Human Rights and the Employment Relation, Actes du Colloque “La convention européenne des droits de l’homme et la relation de travail”*, CNRS and Strasbourg University, 30-31 January 2014, 33 p., [http://europa-cnrs.unistra.fr/fileadmin/upload/DUN/europe\\_en\\_mutation/Documents/e-publi/E-publi\\_CEDH\\_et\\_la\\_relation\\_au\\_travail\\_-\\_D\\_Voorhoof\\_P\\_Humblet\\_v0-1.pdf](http://europa-cnrs.unistra.fr/fileadmin/upload/DUN/europe_en_mutation/Documents/e-publi/E-publi_CEDH_et_la_relation_au_travail_-_D_Voorhoof_P_Humblet_v0-1.pdf) and <http://europa-cnrs.unistra.fr/publications/les-e-publi/e-publi-des-unites/>

<sup>58</sup> ECtHR *De Diego Nafria v. Spain*, 14 March 2002, Appl. no. 46833/99.

<sup>59</sup> ECtHR *Wille v. Liechtenstein*, 28 October 1999, Appl. no. 28396/95; ECtHR *Wojtas-Kaleta v. Poland*, 16 July 2009, Appl. no. 20436/02 and ECtHR *Vellutini and Michel v. France*, 6 October 2011, Appl. no. 32820/09.

invoke his or her right of freedom of expression.<sup>60</sup> Judges are also subject to special restrictions<sup>61</sup>, due to the necessity of maintaining public confidence in the judiciary and upholding the perception of impartiality.

The case law of the ECtHR demonstrates however that even in those cases the restrictions or sanctions have to be **relevant** and **proportionate**, and that restrictions, disciplinary measures or other sanctions can indeed be considered to be an unlawful infringement of the right to freedom of expression of military personnel, civil servants, judges or employees in the public sector<sup>62</sup>. Although the ECtHR does not disregard the duty of “loyalty, reserve and discretion”, the Court has emphasised the **context of the public debate** in which the civil servants’ or the judges’ statements took place. According to the ECtHR generalisations and exaggeration are intrinsic to political speech. It matters that allegations and critical statements are based on facts. The ECtHR also refers to the “chilling effect” of the fear for sanctions on the exercise of the freedom of speech<sup>63</sup>. Furthermore, “Contracting States must allow a certain space in domestic public debate, even in difficult times, for the participation of civil servants, in particular where their experience and expertise may be conducive to an informed debate on issues of public interest and importance”<sup>64</sup>.

The ECtHR has usually considered **dismissal** from employment or termination of contract to be a very harsh measure, particularly when other more lenient and more appropriate disciplinary sanctions could or should have been envisaged<sup>65</sup>. In *Fuentes Bobo v. Spain* the ECtHR held that the dismissal of an employee because of criticism on his employer is a sanction indicating “une sévérité extrême, alors que d'autres sanctions disciplinaires, moins lourdes et plus appropriées, auraient pu être envisagées”<sup>66</sup>. In assessing the gravity of the sanction the Court took into account that the dismissal without any compensation had extremely far-reaching consequences for the employee concerned.<sup>67</sup>

In evaluating the (non)compliance with Article 10, the ECtHR must look at the impugned interference “in the light of the case as a whole”, while attaching particular importance to the office held by the applicants, the form and content of their statements and the context in which they were made<sup>68</sup>.

---

<sup>60</sup> ECtHR *Hadjianastassiou v. Greece*, 16 December 1992, Appl. no. 12945/87 and ECtHR *Pasko v. Russia*, 22 October 2009, Appl. no. 69519/01.

<sup>61</sup> See ECtHR *Wille v. Liechtenstein*, 28 October 1999, Appl. no. 28396/95, para. 64 and ECtHR *Kudeshkina v. Russia*, 26 February 2009, Appl. no. 29492/05, para. 86. The ECtHR emphasised that “it (is) incumbent on public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question”. See also ECtHR Grand Chamber *Baka v. Hungary*, 23 June 2016, Appl. no. 20261/12, para. 164. Notice that this approach regarding the restricted scope of the right of freedom of expression of judges, did not prevent the ECtHR finding a violation of Article 10 in *Wille v. Liechtenstein*, *Kudeshkina v. Russia* and *Baka v. Hungary*.

<sup>62</sup> ECtHR *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*, 19 December 1994, Appl. no. 15153/89; ECtHR *Wille v. Liechtenstein*, 28 October 1999, Appl. no. 28396/95; ECtHR *Fuentes Bobo v. Spain*, 29 February 2000, Appl. no. 39293/98 and ECtHR *Wojtas-Kaletka v. Poland*, 16 July 2009, Appl. no. 20436/02.

<sup>63</sup> ECtHR *Kudeshkina v. Russia*, 29 February 2009, Appl. no. 29492/05. See also ECtHR *Wille v. Liechtenstein*, ECtHR Grand Chamber *Guja v. Moldova* and ECtHR Grand Chamber *Baka v. Hungary*.

<sup>64</sup> ECtHR *Karapetyan a.o. v. Armenia*, 17 November 2016, Appl. no. 59001/08, para. 58. See also ECtHR Grand Chamber *Baka v. Hungary*, 23 June 2016, Appl. no. 20261/12, paras. 139, 140 and 162.

<sup>65</sup> See ECtHR *Fuentes Bobo v. Spain*, 29 February 2000, Appl. no. 39293/98; ECtHR Grand Chamber *Guja v. Moldova*, 12 February 2008, Appl. no. 14277/04; ECtHR *Kudeshkina v. Russia*, 29 February 2009, Appl. no. 29492/05 and ECtHR Grand Chamber *Baka v. Hungary*, 23 June 2016, Appl. no. 20261/12.

<sup>66</sup> ECtHR *Fuentes Bobo v. Spain*, 29 February 2000, Appl. no. 39293/98, para. 49.

<sup>67</sup> ECtHR *Fuentes Bobo v. Spain*, 29 February 2000, Appl. no. 39293/98, para. 49.

<sup>68</sup> ECtHR Grand Chamber *Baka v. Hungary*, 23 June 2016, Appl. no. 20261/12, para. 166 and ECtHR *Karapetyan a.o. v. Armenia*, 17 November 2016, Appl. no. 59001/08, para. 51.



*Karapetyan a.o. v. Armenia*<sup>69</sup> concerns a case of a dismissal of four civil servants working for the Ministry of Foreign Affairs in Armenia for issuing a public statement in breach of the Rules of the Diplomatic Service Act. In the statement at issue the applicants had expressed their concern with the situation created in Armenia after the February 2008 elections and the alleged fraud of the election process, which, according to the statement “*shadow the will of our country and society to conduct a civilised, fair and free presidential election*”. And the statement continued : “*As citizens of Armenia, we demand that urgent steps be undertaken to call into life the recommendations contained in the reports of the international observation mission, as well as other prominent international organisations. Only by acting in conformity with the letter and spirit of the law can we create democracy and tolerance in Armenia and earn the country a good reputation abroad*” (para. 10). The names of the applicants, with the indication of their office, appeared under the statement. The statement was reported by several mass media outlets in Armenia.

In *Karapetyan a.o. v. Armenia* the ECtHR found that the dismissal of the applicants from their posts was an interference with their right to freedom of (political) expression<sup>70</sup>, but it found no violation of Article 10 ECHR, considering “*the particular circumstances of the present case as a whole*” (para. 59). The Court concluded:

“*As to the sanction, the Court considers that the dismissal of the applicants, although severe, did not constitute a disproportionate measure taking into account the particular circumstances of the case and the available options under domestic law. Against this background, and taking account of all of the elements described above, the Court finds that the Government have demonstrated that the measures taken against the applicants were based on relevant and sufficient grounds and were proportionate to the legitimate aim pursued. The Court accordingly finds that there has been no violation of Article 10 of the Convention*” (paras. 60-62).

It also recalled that

“*in view of the particular history of a Contracting State, the national authorities may, so as to ensure the consolidation and maintenance of democracy, consider it necessary to have constitutional safeguards to achieve the aim in a democratic society of having a politically neutral body of civil servants, including the diplomatic corps, by restricting the freedom of civil servants to engage in political activities*” (paras. 49 and 59).

Because this judgment refers explicitly and repeatedly to the **particular circumstances of the case** and to the **particular history and situation in Armenia** (in 2008), it is important to highlight these specific facts and particular characteristics of the case at issue, in contrast with those in the case of *Rocio San Miguel Sosa and others v. Venezuela*

- In *Karapetyan a.o. v. Armenia* there is no ambiguity on the contents of a specific legal norm on which the dismissal of the diplomats was based. **The Diplomatic Service Act** clearly provides that a diplomat shall be dismissed from office if he violates the restrictions enumerated in section 44 of the Act. According to section 44, subsection 1, point (c), of the Diplomatic Service Act, a diplomat has no right to use his **official capacity and work facilities** for the benefit of parties and non-governmental organisations (including religious ones), or in order to

---

<sup>69</sup> ECtHR *Karapetyan a.o. v. Armenia*, 17 November 2016, Appl. no. 59001/08. As mentioned, the judgment in *Karapetyan a.o. v. Armenia* has not become final yet : a request for referral introduced under the terms of Article 43 ECHR extends this period of the judgment not being final, until either the panel rejects the request to refer under Article 43, or the Grand Chamber decides the case by means of a final judgment. A panel of five judges of the Grand Chamber shall accept the request (only) if the case raises a serious question affecting the interpretation or application of the Convention, or a serious issue of general importance. Notice that the judgment of the chamber of the First section of the ECtHR is controversial and subject to critical academic comment, cfr. *infra*. According to our information, a request by the applicants, that the case be referred to the Grand Chamber, under the terms of Article 43 ECHR, has been issued.

<sup>70</sup> Cfr. *supra*, sub chapter 1. of this report. The ECtHR held that : “*the applicants’ dismissal from their posts as a result of their statement issued on 24 February 2008 clearly constituted an interference with their right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention*” (para. 36).

carry out other political or religious activity (para. 24 and 37-43). Hence the inference was **prescribed by law** and the applicants should or could have been aware of the consequences of their act. The ECtHR finds that the possibility that a diplomat could be dismissed on the basis of Section 44 of the Diplomatic Service Act cannot be regarded as unforeseeable. The Act was enacted to cover professional conduct of diplomats, who formed a **specific and restricted group**. The ECtHR therefore agrees with the Armenian Government that the applicants, who were all professional diplomats and who had worked in this field for more than 10 years, could not therefore claim to be ignorant of the content of the said provision.

- It has not been disputed in this case that the interference pursued the **legitimate aim** of protecting national security and public safety as well as preventing disorder, within the meaning of Article 10 § 2 (para. 43).
- The applicants all had a **diplomatic status**, dealing with sensitive national and international issues. They occupied high-ranked posts within the Ministry of Foreign Affairs, namely Head of Press and Information Department, Head of NATO Division of Arms Control and International Security Department, Counsel of the European Department and Head of USA and Canada Division of the American Department (para. 6). The ECtHR found that the Armenian authorities were entitled to have regard to the requirement that **high-ranking civil servants with diplomatic status** such as the applicants respected and ensured the **special bond of trust** and loyalty between them and the State in the performance of their functions (para. 54-55).
- The applicants issued the statement not as individuals or individual citizens: their names **with the indication of their office**, appeared under the statement (para. 11). By indicating their official titles in the published statement, the applicants had made use of their **official capacity** (para. 56).
- According to the ECtHR, the domestic court took into account the applicants' **right to freedom of expression in its overall assessment** of the applicants' claims in a manner sufficiently in conformity with the requirements of the ECHR (para. 56).
- Viewing the particular circumstances of the present case as a whole, the Court considers that no evidence has been adduced that could call into question the respondent State's assessment in this matter: to ensure the consolidation and **maintenance of democracy** (paras. 49 and 59).
- The applicants were not dismissed because of the political content of their statement *as such*, but because of the publicity they gave to it, expressed in their function. The Government in this case has also argued that "diplomats were completely free in their political opinions as long as these were not pronounced **publicly**" and that "the statement had also been discussed in the media and this had **impaired the political neutrality and reputation** of the diplomatic staff of the Ministry of Foreign Affairs" (para. 35). In essence the applicants breached the prohibition for diplomats to use their **official capacity and work facilities for expressing a clear "political assessment of election and post-election events"** (para. 55).
- As to the sanction, the Court considers that the **dismissal** of the applicants, **although severe, did not constitute a disproportionate measure** taking into account **the particular circumstances of the case and the available options under domestic law** (para. 60).

It is to be noticed that apart from a different factual context compared to the case of *Rocio San Miguel Sosa and others v. Venezuela*<sup>71</sup>, the chamber judgment in the case of *Karapetyan a.o. v. Armenia* is not final yet. The judgment is also highly controversial, as it seems to go against some of the principles and approach in the Grand Chamber's judgment in the case of *Baka v. Hungary* (cfr. *supra*). In a **dissenting opinion judge Mirjana Lazarova Trajkovska** emphasizes that it does not emerge from the reasoning of the domestic courts what "pressing social need" existed to justify, as proportionate to the legitimate aim pursued, the protection of the Armenian State's interests over the applicants' right to freedom of expression. Moreover she notes that the Court has usually considered dismissal from employment to be a very harsh measure, particularly when other more

---

<sup>71</sup> See the Commission's report on the merits of this case, OEA/Ser.L/V/II.156, Doc. 21 of 28 October 2015, nrs. 59-109. Notice e.g. the applicants in *Rocio San Miguel Sosa and others v. Venezuela* are not high-ranked diplomats, that they have not breached a specific provision related to a diplomatic status, that they signed the petition at issue in their individual names, without making use of their official capacity or work facilities, that they have not made public (in the media) themselves their signing and support of the petition, and that signing the petition was not a public assessment of election events on their own initiative, but the participation in a petition for a presidential recall referendum, in application of a procedure provided for in the Constitution of Venezuela.

lenient and more appropriate disciplinary sanctions could or should have been envisaged, while it appears that the domestic authorities did not consider the imposition of other sanctions, but instead proceeded instantly, as a result of applicants' actions, to their dismissal from office. Furthermore, the effects of the applicants' dismissal were severe, as they were deprived of the opportunity to exercise the profession for which they had a calling, for which they had been trained and in which they had acquired skills and experience. Even taking into account the difficult political situation at the time and allowing the national authorities a certain margin of appreciation, to dismiss the applicants from their posts as diplomats was disproportionate to the legitimate aim pursued, according to the dissenting opinion. Therefore **judge Trajkovska** regrets being unable to agree to a finding of no violation of Article 10 in this case. In her view, this case should be referred to the Grand Chamber.

A similar critical comment is formulated on the blog "**Strasbourg Observers**", of the **Human Rights Centre of Ghent University**, Belgium<sup>72</sup>. According to Stijn Smet "(t)he Court's emphasis on 'a politically neutral body of civil servants' in *Karapetyan* is troublesome, because it appears to reduce civil servants to mere lackeys of the executive, rather than potential defenders of democracy. Yet, there are good reasons to consider the alternative viewpoint". He considers the majority finding in *Karapetyan a.o. v. Armenia* "worrying", because it bars senior civil servants from speaking out in defence of democracy and the rule of law. He concludes: "In her dissenting opinion in *Karapetyan*, judge Lazarova Trajkovska noted that the case 'should be referred to the Grand Chamber'. She has a point".

In this chapter (nr. 3) it has been clarified that although the ECtHR does not disregard the duty of "*loyalty, reserve and discretion*" by civil servants, the Court at several occasions has emphasised the **context of the public debate** in which statements uttered by employees in the civil sector took place. Apart from referring to the danger of a "*chilling effect*" because of the fear for sanctions on the exercise of the freedom of speech, the authorities "*must allow a certain space in domestic public debate, even in difficult times, for the participation of civil servants*". Accepting the legitimate and justified character of a dismissal or termination of contract of an employee as an interference with his or her right of freedom of expression, risks to curtail that right itself and stifle freedom of expression and public debate. It has been clarified that the characteristics and facts in the case *Karapetyan a.o. v. Armenia* are in many aspects different from those in the case of *Rocio San Miguel Sosa and others v. Venezuela*, apart from the circumstance that the judgment of the ECtHR in *Karapetyan a.o. v. Armenia* is not final yet and subject to robust controversy.

---

<sup>72</sup> Stijn Smet, "*Karapetyan and Others v. Armenia: Senior Civil Servants as Defenders of Democracy or as Lackeys of the Executive*", *Strasbourg Observers* 8 December 2016, <https://strasbourgeoiservers.com/2016/12/08/karapetyan-and-others-v-armenia-senior-civil-servants-as-defenders-of-democracy-or-as-lackeys-of-the-executive/>.

## Summary/conclusion

This report substantiates that according to the standards of Article 19 ICCPR and Article 10 ECHR, civil servants or **employees in the public sector do have a right to freedom of political expression**, and that signing a petition to carry out a recall referendum on the term of office of a head of state, is to be considered as an act of exercising **the right to express a (political) opinion**. It has also been substantiated that a dismissal, allegedly because of signing the petition at issue, **amounts to an interference with the right to freedom of expression** as guaranteed by Article 19 ICCPR and Article 10 ECHR. Therefore such an interference with the employees' or civil servants' right can only be justified under the strict conditions of Article 19.2 ICCPR and Article 10 § 2 ECHR. According to these international standards, interferences by public authorities with the right to freedom of expression are only allowed under the strict conditions that they must be **"prescribed by law"**, have a **"legitimate aim"** and finally and most decisively, they must be **"necessary in a democratic society"**. The most important and crucial issue is whether there is a *"pressing social need"*, in order to pertinently and sufficiently justifying the (proportionate character) of an interference with the right to freedom of expression, as being necessary in a democratic society.

In the General Comment nr. 34 it is emphasized that *"the value placed by the Covenant upon uninhibited expression is particularly high, in the circumstances of public debate in a democratic society concerning figures in the public and political domain"* (para. 34) and according to the ECtHR *"(t)here is little scope under Article 10 § 2 of the Convention for restrictions on political speech or debate on matters of public interest (...)"*<sup>73</sup>.

According to the ECtHR *"Contracting States must allow a certain space in domestic public debate, even in difficult times, for the participation of civil servants, in particular where their experience and expertise may be conducive to an informed debate on issues of public interest and importance"*<sup>74</sup>.

It is beyond the scope of this report to evaluate the facts in *Rocio San Miguel Sosa and others v. Venezuela*, nr. 12.923, *"in the light of the case as a whole"*, from the perspective of Article 13 ACHR. From the perspective of Article 19 ICCPR and Article 10 ECHR, when evaluating the necessity of the applicants' dismissal or termination of contract, particular importance is to be attached **"to the office held by the applicants, the form and content of their statements and the context in which they were made"**, as well as the **nature and severity of the interference**. Apart from the unclear situation whether such a measure was prescribed by law and pursues a legitimate aim under Article 19 ICCPR or Article 10 ECHR, it is not pertinently demonstrated that the measure at issue responds to a pressing social need and whether it pertinently and sufficiently can be held as being necessary in a democratic society, taking into consideration that **the right to freedom of expression, together with the right to vote, are at the very centre of the political arena of a democratic society**. The dismissal or termination of contract in such circumstances is to be considered as a **disproportionate** measure, with a severe impact on the applicants' rights and life and having a **chilling effect** on other employees in the public sector for the fear of sanctions on exercising their right to freedom of (political) expression, taking part in public debate on crucial matters within a democratic society.

---

<sup>73</sup> ECtHR Grand Chamber *Sürek v. Turkey (no. 1)*, 8 July 1999, Appl. no. 26682/95, para. 61 and ECtHR Grand Chamber *Morice v. France*, 23 April 2015, Appl. no. 29369/10, para. 125. See also recently: ECtHR *Tavares de Almeida Fernandes and Almeida Fernandes v. Portugal*, 17 January 2017, Appl. no. 31566/13, para. 55.

<sup>74</sup> ECtHR Grand Chamber *Baka v. Hungary*, 23 June 2016, Appl. no. 20261/12, paras. 139, 140 and 162 and ECtHR *Karapetyan a.o. v. Armenia*, 17 November 2016, Appl. no. 59001/08, para. 58.