

The European Court of Human Rights and the right to freedom of expression and information on the internet

Freedom of
expression in the
digital environment

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Intro



Judicial dialogue: ECtHR and IACtHR

IACtHR *Claude Reyes a.o. v Chile*, 19 Sept 2006

ECtHR Grand Chamber
Magyar Helsinki Bizottság v Hungary, 8 Nov 2016

Access to public documents

ECtHR (par. 146): It is also 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



ECtHR case law and Internet



Case law of the European Court of Human Rights - last 16 years

New dimensions, applications and liabilities

Increasing amount of cases

Much more to come

Hudoc combining 'freedom of expression' and 'internet' over 250 relevant judgments, and more than 60 relevant (mostly inadmissibility) decisions

About 130 cases 'communicated' in the pipeline

Article 10 ECHR



Everyone has the right to freedom of expression
No interference by public authorities

But also **duties and responsibilities** than can justify formalities, conditions, restrictions or penalties

3 step test : cumulative conditions restricting interferences

- Legal basis
- Legitimate aim
- Necessary in democratic society

Declaration CoE 2003 on Freedom of Expression and the Internet

Principle 1

Member states should not subject content on the Internet to restrictions which go further than those applied to other means of content delivery

Freedom of expression on-line is equal to freedom of expression off-line

What is illegal off-line is also illegal on-line

ECtHR : Same principles Policies and responsibilities may differ

Same principles for online freedom of expression of a blogger as when assessing the role of a free press in ensuring the proper functioning of a democratic society
(*Rebechenko v Russia*)

Due to '*technology's specific features*' the **policies** governing reproduction of material from the **printed media and the Internet may differ**

(*Editorial Board of Pravoye Delo and Shtekel v Ukraine*)

Because of the '*particular nature of the Internet*', the **duties and responsibilities may differ to some degree**

(*Delfi AS v Estonia and Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary*)

ECtHR : protection and guidance regarding online freedom of expression



Specific features

Blocking of websites or accounts : access rights

Integrity of internet archives

Protection of journalists' sources in the digital environment

Offensive, radical and extremist online content related to public interest

Liability of online platforms for users' comments and hyperlinks; anonymity

Overbroad blocking orders

Ahmet Yildirim v Turkey, 2012
Google Sites



Cengiz and Others v Turkey, 2015
YouTube



Cengiz a.o. v Turkey (2015)



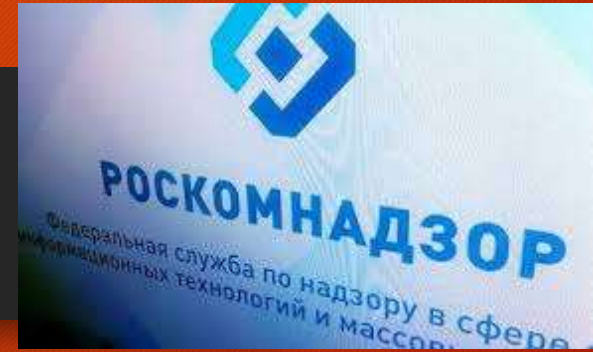
Blocking affected the right to receive and impart information and ideas by the applicants as active *internet users*

The Internet plays an important role in enhancing the public's *access to news and facilitating the dissemination* of information in general

User-generated expressive activity on the Internet provides an *unprecedented platform* for the exercise of freedom of expression

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

Four Russian cases (23 June 2020)



Different types of blocking orders by Roskomnadzor (Telecom Regulator) on request of the Prosecutor General.

ECtHR: Targeting online media or websites with *blocking measures* because they are critical of the government or the political system can never be considered a necessary restriction on freedom of expression.

The *wholesale blocking of access* to a website is an *extreme measure* to be compared to banning a newspaper or television station.

Arbitrary, excessive and no effective remedy in terms of judicial review

Violations of Article 10 ECHR

Vladimir Kharitonov v. Russia; OOO Flavus and Others v. Russia, Bulgakov v. Russia and Engels v. Russia

Engel v. Russia, 23 June 2020

Neutrality of filter-bypassing technologies



Suppressing information about the technologies for accessing information online on the grounds they may incidentally facilitate access to extremist material is no different from seeking to restrict access to printers and photocopiers because they can be used for reproducing such material.

The blocking of information about such technologies interferes with access to all content which might be accessed using those technologies

Information technologies are content-neutral (storing and accessing data and information) : order to remove/blocking website violated Article 10 ECHR

Access rights to the internet

Cengiz ao v Turkey (2015)
access right of active internet users



Kalda v Estonia (2016) and Jankoskvis v Latvia (2017)
Ramazan Demir v Turkey (2021)

right of access to certain websites in prison

public-service value of the Internet and its importance for the enjoyment of a range of human rights

security risks in general not sufficient to refuse access



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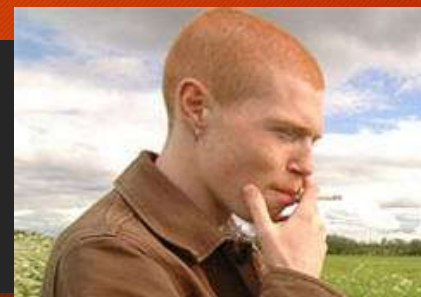
Liability of online platforms for users' comments and hyperlinks; anonymity

Sanctions for radical and critical online speech

Violations of Article 10 ECHR

- *Savva Terentyiv v Russia, 2018*
- *Mariya Alekhina ao v Russia, 2018 (Pussy Riot)*
- *Rebechenko v Russia, 2019*
- *Kablis v Russia, 2019*
- *OOO Flavus ao v. Russia, 2020*

Savva Terentyiv v Russia (2018)



Terentyev's blog did not pose '*a clear and imminent danger*' attempting to incite hatred or violence against Russian police officers

The blog had only a *minor impact*, as it drew seemingly very little public attention and it remained *only one month online*

Conviction violated Article 10 ECHR

Rebechenko v Russia (2019)

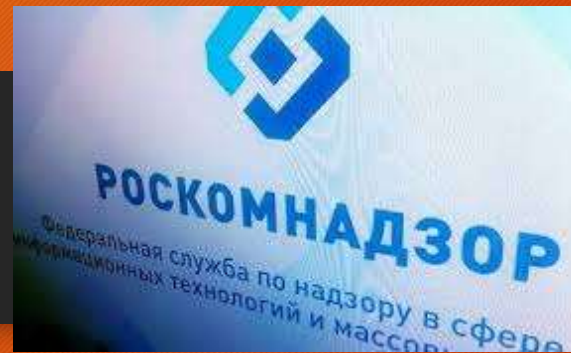


Video on YouTube with a series of critical comments about a speech by public official (Ms F), commenting on the relations between Russia and Ukraine

Blogger as “*public watchdog*”

Conviction for defamation violated Article 10 ECHR

Vague, excessive,
arbitrary, lack of
judicial review



Making large quantities of information inaccessible substantially restricts the rights of Internet users and can have *a significant collateral effect* on the material that has not been found to be illegal

Dangers of prior restraint and abuse of power curtailing freedom of expression on the Internet: breach of Article 10 ECHR

Kablis v Russia, 30 April 2019 and OOO Flavus v. Russia, 23 June 2020

But no online ‘hate speech’

Conviction for ‘hate speech’: no violation Art. 10 ECHR



Féret v Belgium (2009, incitement to discrimination against foreigners, online)

Abedin Smajić v Bosnia and Herzegovina (2018, online incitement to national, racial and religious hatred and violence, very sensitive matter of the ethnic relations in post-conflict Bosnian society)

Richard Williamson v Germany (2019, Holocaust denial YouTube and TV)

Lilliendahl v Iceland (2020, homophobic hate speech via the internet; comments were ‘serious, severely hurtful and prejudicial’, also recalling that discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour).

‘Hate speech’, not only includes speech which explicitly calls for violence or other criminal acts, but can also include attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population

Kilin v. Russia (11 May 2021)

Nationalist video and song “Russia 88” en “Glory to Russia”
Posted on Vkontakte (social media platform)

Conviction for incitement to extremist activities (18 months, suspended)

No violation Art. 10 ECHR (intention of incitement)

EHRM: a specific feature of ‘hate speech’ is that it may be intended to incite, or can reasonably be expected to have the effect of inciting, others to commit acts of violence, intimidation, hostility or discrimination against those targeted by it.



Positive obligations with impact on Art. 10 ECHR



BEIZARAS AND LEVICKAS v. LITHUANIA 14 JAN 2020

Lithuanian authorities have not fulfilled their positive obligations to protect the targeted persons against homophobic hate crimes, which amounted to discrimination (Art. 14) and breach of privacy (Art. 8 + breach of Article 13)

The Lithuanian authorities had refused to initiate pre-trial investigations into the reported messages on Facebook inciting to hatred and violence based on sexual orientation.

The positive obligation by state authorities to secure the effective enjoyment of the rights and freedoms under the ECHR is of particular importance for persons holding unpopular views or **belonging to minorities, because they are more vulnerable to victimisation.**

Authorities are to combat hate speech and homophobic hate crimes, applying criminal law, as a justified and necessary interference with the right to freedom of expression



Fouad Belkacem v Belgium, 27 June 2017 (Dec.)

Conviction for hate speech justified

The ECtHR agrees with the domestic courts' finding that Mr Belkacem, through his recordings and video messages on the Internet (YouTube) had sought to stir up hatred, discrimination and violence towards all non-Muslims. Convicted to a suspended term of one year and six months' imprisonment and to a fine of EUR 550.



ECtHR: Mr Belkacem had attempted to *deflect Article 10 of the Convention from its real purpose* by using his right to freedom of expression for ends which were manifestly contrary to the spirit of the Convention. Although the abuse clause of Article 17 is only applicable on an exceptional basis and in extreme cases, it is applicable in the case at issue. Accordingly Belkacem could not claim the protection of Article 10 ECHR.

ARTICLE 17 ECHR !!!

Lenis v Greece, 27 June 2023

Conviction for hate speech justified



ECtHR once again confirmed that in a democratic society there can be no tolerance for stirring up hatred, discrimination or violence against LGBTI people.

Lenis was a **senior officer of the Orthodox Church** and his homophobic statements were reproduced by multiple websites, media outlets and social media.

Gender and sexual minorities required **special protection** from hateful and discriminatory speech because of the marginalisation and victimisation to which they have historically been, and continue to be, subjected.

Lenis' expressions and statements disseminated through his personal blog spot, amounted to the **gravest form of hate speech and incitement to violence against homosexuals**.

Applying the abuse clause of Article 17 ECHR, the ECtHR found that Lenis could not claim the benefit of the right to freedom of expression as guaranteed by Article 10 ECHR.

Application of Art. 17 ECHR, abuse clause !

ECtHR : protection and guidance regarding online freedom of expression



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Online media archives, de-indexing and the right to be forgotten (RTBF)



Biancardi v Italy (25 Nov 2021)

Online media archive, editor held liable under civil law for not de-indexing an article at the level of its media platform, on request of private individuals named in the article

No violation of Article 10 ECHR

Not only Internet search engine providers (by de-listing) but also the administrators of newspaper or journalistic archives accessible through the Internet could be required to de-index documents, applying a right to be forgotten

Access to (news) archives in danger?

Online news archive, alteration of content / anonymisation and the RTBF

LE SOIR

Grand Chamber *Hurbain v Belgium* 4 July 2023

Online media archive, court order of anonymisation of online version of 20 year old press article because of right to be forgotten of non-public person

The right to be forgotten in certain circumstances can prevail over the integrity of online news archives and the right to freedom of expression and information

ECtHR Grand Chamber : order did not violate Article 10 ECHR

Hurbain v Belgium 4 July 2023

LE SOIR

ECtHR emphasized the need to preserve the integrity of press archives, and therefore applied the following criteria in assessing the RTBF

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

Integrity of (news) archives in danger?

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Limited liability for intermediaries/platforms

Magyar Tartalomszolgáltatók Egyesülete (MTE) and Index.hu Zrt
v Hungary, 2016

Limited liability for defamation (users' comments)

Magyar Jeti Zrt v Hungary, 2018

Limited liability for hyperlinks



Standard Verlagsgesellschaft mbH v. Austria (no. 3), 2022

Protection of the users' right to anonymity

Limited liability for defamatory UGC



No liability when platform removes UGC defamatory content upon actual knowledge / after notice

Only liability for 'clearly unlawful comments': obligation to remove or block without delay such content, even without notice from the alleged victim or from third parties
(*Delfi AS was 'hate speech'*)



More liability may have *foreseeable negative consequences on the comment environment of an Internet portal*

Such consequences may have, *directly or indirectly, a chilling effect on the freedom of expression on the Internet*

Regard must be had to the *specificities of the style* of communication on certain Internet portals

ECtHR guidelines for future cases

MTE and Index.HU
Zrt v Hungary

- (1) the context and content of the impugned comments
- (2) the liability of the authors of the comments
- (3) the measures taken by the website operators and the conduct of the injured party
- (4) the consequences for the injured party and
- (5) the consequences for the applicants.

More guidelines and principles



Recommendation CM/Rec(2018)2

of the Committee of Ministers to member States on
the *roles and responsibilities of internet intermediaries*

7 March 2018

Legitimate interference: ‘Hate speech’



Delfi AS v. Estonia (GC 2015): risk, harm, worldwide dissemination, long term effect, unlawful speech - liability of private actor

‘the risk of harm posed by content and communications on the Internet (..) is certainly higher than that posed by the press, as unlawful speech, including hate speech and calls to violence, can be disseminated as never before, worldwide, in a matter of seconds, and sometimes remain persistently available online’.

‘the ability of a potential victim of hate speech to continuously monitor the internet is more limited than the ability of a large commercial internet news portal to prevent or rapidly remove such comments’

“clearly unlawfull comments” / hate speech

Grand Chamber Sanchez v France 15 May 2023



The ECtHR found that the criminal conviction of a politician for failing to promptly delete hate speech, that was **posted by others**, from his public Facebook account, did not violate the right to freedom of expression as guaranteed under Article 10 ECHR

While a degree of exaggeration, or even provocation, is permitted in political speech, remarks capable of arousing a feeling of rejection and hostility towards a community fall outside the protection guaranteed by Article 10 ECHR. Politicians and political parties can propose solutions to the problems linked to immigration, but in doing so they must avoid advocating racial discrimination and resorting to vexatious or humiliating remarks or attitudes, as such conduct might trigger reactions among the public that would be detrimental to a peaceful social climate and might undermine confidence in the democratic institutions.

Grand Chamber Sanchez v France 15 May 2023



When making a Facebook “wall” accessible to the general public, a politician experienced in communication to the public must be aware of the greater risk of excessive and immoderate remarks that might appear and necessarily become visible to a wider audience. The ECtHR found this “without doubt a major factual element”, directly linked to the deliberate choice of Mr Sanchez, who was not only a politician campaigning in the run-up to an election but also a professional in matters of online communication strategy.

Can such an approach lead to overbroad censorship and chilling effect?

Strict liability for hate speech not only for commercially run professional platforms (Delfi)?

Why not enough that authors have been effectively prosecuted/convicted?

Limited liability for hyperlinks



The very purpose of hyperlinks is to allow Internet-users to navigate to and from online material and to contribute to the *smooth operation of the Internet by making information accessible* through linking it to each other.

The ECtHR cannot accept a strict or objective liability for media platforms embedding, in their editorial content, a hyperlink to defamatory or other illegal content: such an objective liability ‘*may have, directly or indirectly, a chilling effect on freedom of expression on the Internet*’

Magyar Jeti Zrt v Hungary, 2018

Limited liability for hyperlinks Disclaimer



The ECtHR finds that an objective liability for hyperlinking ‘may have foreseeable negative consequences on the flow of information on the Internet, impelling article authors and publishers to refrain altogether from hyperlinking to material over whose changeable content they have no control.’

However the ECtHR did not exclude that ‘in certain particular constellations of elements’, the posting of a hyperlink may potentially engage the question of liability, for instance where a journalist does not act in good faith in accordance with the ethics of journalism and with the diligence expected in responsible journalism.

Magyar Jeti Zrt v Hungary, 2018

Protection of the users' right of anonymity

Standard Verlagsgesellschaft mbH v Austria (no. 3)

7 Dec 2021

The applicant media company complained that court orders imposing an obligation to disclose data revealing the identity of users who had posted comments on its Internet news portal had infringed its freedom of expression as guaranteed by Article 10 ECHR.

The ECtHR found a **breach of Article 10 ECHR**: the Austrian courts had not sufficiently considered the users' right of anonymity and the interest of the media company to protect the users as the authors of the comments, while the comments on the Internet news platform were part of a political debate, without being hate speech or otherwise clearly unlawful (**lack of balancing**).



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Bulk interception of communications

ECtHR Grand Chamber Big Brother Watch ao v UK (25 May 2021)

Several violations of the ECHR in the UK's Regulation of Investigative Powers Act (RIPA 2000*) for **bulk interception of communications**, including a violation of the journalists' right to protect their sources

ECtHR refers to the '*potential chilling effect*' of any perceived interference with the confidentiality of journalists' communications

* Replaced by the Investigatory Powers Act 2016 (IPA 2016)



Bulk interception of communications

Specific complaint with regard to Article 10 ECHR by the Bureau of Investigative Journalism and the journalist Alice Ross

ECtHR finds that the bulk surveillance regimes in the UK, including access by the authorities to **journalists' communication data** from communication service providers, **did not provide sufficient protection for journalistic sources** or confidential journalistic material

Violation of Article 10 ECHR

Big Brother Watch ao v. UK

Distinction

1. Warrant to search (targetted) into a journalists' communication:

Needs *ex ante* decision by judge/court/independant body
and only when « overriding requirement in the public interest »

2. Bulk interception of communications, that might include journalists's communications

Bulk interceptions *as such* is allowed, but must contain **sufficient safeguards**, in particular when access has been obtained to confidential journalistic material

However, insufficient safeguards were in place to ensure that once it became apparent that a communication which had not been selected for examination through the deliberate use of a selector or search term known to be connected to a journalist nevertheless contained confidential journalistic material, **it could only continue to be stored and examined by an analyst if authorised by a judge or other independent and impartial decision-making body** invested with the power to determine whether its continued storage and examination was “justified by an overriding requirement in the public interest”.

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Sedletska v Ukraine, 1 Apr 2021

The right for journalists to protect their sources also prohibits the judicial authorities to have access to journalists' data stored on the server of a mobile telephone operator.



Sergey Sorokin v Russia, 30 Aug 2022

The search of a journalist's flat and the seizure of his electronic devices containing his professional information was a violation of Article 10 ECHR.

ECtHR observes the lack of procedural safeguards protecting journalistic sources. It finds in particular problematic that all of the journalist's electronic devices were seized, and that his professional information was accessed immediately, in the absence of any sifting procedure or other methods which could protect the confidentiality of the journalist's sources.



For more information about Article 10 Case law FOE, internet, media and journalists

Iris newsletter

<http://merlin.obs.coe.int/newsletter.php>

E-book case law (update 2023)

<https://rm.coe.int/iris-themes-vol-iii-8th-edition-april-2023-/1680ab1d11>

