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MEDIA COVERAGE OF COURT ACTIVITY IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Freedom of expression and justice are two key concerns of the Council of Europe.

This is understandable in that the effectiveness of each of these rights – the right to freedom of expression and the right to justice – is a measure of the effectiveness of democracy.

The right to a fair trial is guaranteed by Article 6 of the Convention, while the right to freedom of expression is enshrined in Article 10.

But what happens when the press focuses its attention on justice and plays its role of *"democratic watchdog"* as regards the administration of justice?

Reading the aforementioned two articles, we see that freedom of expression is not unlimited, and that the limits laid down are there to maintain *"the authority and impartiality of the judiciary"* as provided for in the second paragraph of Article 10 of the Convention.

While Article 6 does not comprise any restriction on the right to a fair trial, Article 10.2 enumerates an extensive series of measures which could legitimately restrict freedom of expression insofar as they are necessary in a democratic society.

This paper will therefore first of all identify the restrictions on the freedom of expression in relation to the judiciary **(I)**, applying both to journalists outside the judicial world and to the staff and officers of the court **(B)**, aimed at maintaining the authority and impartiality of the judiciary and the right to a fair trial **(A)**.

Having identified these restrictions, we shall stress the fact that in relation to the principle of the freedom of expression, guaranteed by the Convention, the restrictions in question must be strictly applied, in order to ensure that the principle of freedom of expression is given maximum effectiveness.

Accordingly, above and beyond the legitimate aim of ensuring the right to a fair trial and maintaining the authority and impartiality of the judiciary, such restrictions must prove to be necessary in a democratic society **(II)**.

This means that they must satisfy a pressing social need **(A)** and that the measures adopted must be proportionate **(B)**.

The restriction on the principle therefore finds its legitimacy in the principle itself. If it deviates from this principle, the need for it becomes less and less justifiable.

I. RESTRICTIONS ON THE PRINCIPLE OF FREEDOM OF EXPRESSION IN JUDICIAL MATTERS

There are two dimensions to restrictions on the freedom of expression in judicial matters, and this is true with regard to the basis for the restrictions and to the people affected by them.

Accordingly, these restrictions are incumbent both on journalists, outside the world of the judiciary, and on the staff and officers of the court **(B)**. **Supervision of what can be said therefore applies to those both within and outside the judicial system.**

Moreover, the purpose of these restrictions will be to guarantee the authority and impartiality of the judiciary and the right to a fair trial **(A)**. Here again, there are **two dimensions to the restriction: first, protection of the institution and its authority, and second, protection of the individual and his or her rights vis-à-vis the institution.**

A. The two dimensions of the basis for the restriction

These restrictions relating to the freedom of the press to cover judicial activity are explicitly provided for by the Convention.

Article 10 provides that freedom of expression may be restricted for the purposes of *"maintaining the authority and impartiality of the judiciary"*.

Similarly, Article 6 provides that *"the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."*

Accordingly, there are two purposes behind the restrictions on the freedom of expression:

- to protect the judicial system;
- to protect individuals vis-à-vis this system.

A-1. Protecting the system

This consists of protecting the functioning of the system and the reputation of its members.

Functioning of the system

The archetypal example is the *Sunday Times v. the United Kingdom* case of 26 April 1979 (violation).

In this case there had been an injunction not to publish certain information in the press during the thalidomide case (a medicine which had had harmful effects on pregnancies). This measure was taken on the basis of contempt of court.

The restriction sought to make the interests of justice superior to those of the press and the public's right to information. It was provided for by law and pursued a legitimate aim, but was it necessary?

Another example is the *Weber v. Switzerland* case of 22 May 1990 (violation).

During a press conference, a Swiss journalist had disclosed information regarding an ongoing court case, in violation of the confidentiality of the investigation. He was given a fine.

The Court found that there had been a violation of Article 10 in that this information had been disclosed at a previous press conference and, accordingly, there had no longer been any need to keep secret facts of which the public was already aware.

These examples show that the judicial system seeks to ensure that any press intrusion does not prevent its proper functioning.

The main problem is that judicial time does not equate to journalists' time. Information is like fish, it must be consumed fresh.

Which is why it is important for the court to issue press releases on progress in a case, thereby making it possible to strike an appropriate balance between the right to information and the right to a fair trial.

The Council of Europe encouraged such a practice in principle 6 of the recommendation of 10 July 2003 by the Committee of Ministers on the provision of information through the media in relation to criminal proceedings.

Protecting the reputation of its members

Protecting the system also means protecting the reputation of its members.

Accordingly, the European Court of Human Rights has had to assess the necessity for judicial proceedings initiated against journalists who have been critical of judges and the decisions the latter had taken.

Here, the principle established by the Court in the *Barfod v. Denmark* case of 22 February 1989 is that one must not overlook *"the great importance of not discouraging members of the public, for fear of criminal or other sanctions, from voicing their opinions on issues of public concern."*

Moreover, as the Court pointed out in the Nikula v. Finland case, *"the limits of acceptable criticism may in some circumstances be wider with regard to civil servants exercising their powers than in relation to private individuals. It cannot be said, however, that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to criticism of their actions. Civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks. It may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty"* (ECHR, 21 March 2002, *Nikula v. Finland*; ECHR, 21 January. 1999, *Janowski v. Poland* [GC], No. 25716/94, §33, ECHR 1999-I).

Nonetheless, in relation to judges, the Court held that *"their attitude, including outside the courts, and especially when making use of their position as judges, may constitute a legitimate concern of the press and contributes to the debate on the administration of justice and the moral integrity of the guarantors thereof"* (ECHR, 28 September 2004, Sabou and Pircalab v. Romania – *unofficial translation*).

In the Barfod case, the Court nevertheless held that there had been no violation constituted by the applicant's conviction for defamation of two lay judges in relation to their judgment in a sensitive case having political overtones.

The same conclusion was reached in the *Prager & Oberschlick v. Austria* case of 26 April 1995 where the Court held that the very harsh criticism of the personal and professional integrity of the judge was in bad faith and did not comply with journalistic ethics.

In contrast, in the *De Haes & Gijsels v. Belgium* case of 24 February 1997, where two journalists had been convicted for defamation of Appeal Court judges, the Court held that *"journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation."* For its part, the Commission had stated that *"the general interest in public discussion, even when the use of offensive or unpleasant language is involved, carries more weight, if its purpose is serious, than the legitimate aim of protecting another person's reputation."*

The Court therefore assesses on a case-by-case basis the necessity for convicting journalists in order to safeguard the reputation of judges and seeks to identify, in practice, the legitimacy of the aim pursued by the journalist and whether he or she acted in good faith (ECHR, 28 September 2004, *Sabou and Pircalab v. Romania*: in this particular case, the Court noted that there had been a factual basis and that sources had been verified by interviewing the individuals cited).

Sometimes, making an assessment is very complicated, as can be seen in the *Perna v. Italy* case.

In a judgment of 25 July 2001, the Court found that the conviction of a journalist for defamation (in that he had criticised the political militancy of a judge, comparing it to an oath of obedience) constituted a violation of Article 10.

In its judgment of 6 May 2003, the Grand Chamber held that there had been no violation of Article 10 given that the applicant had at no point attempted to prove the veracity of his allegations and had, in contrast, made critical judgments which could not be proved, even though the applicant had claimed that the head of the Palermo public prosecutors' office was acting in line with a strategy to ensure that the Italian Communist Party gained control of all Italian public prosecutors' offices.

However, above and beyond protection of the institution, restrictions on freedom of expression may also seek to protect individuals vis-à-vis the judicial system.

A-2 Protecting the individual vis-à-vis the judicial system

This concerns guaranteeing an individual's right to a fair trial, and therefore the effectiveness of Article 6 of the Convention.

A perfect example of this principle is to be found in the *Worm v. Austria* case of 27 August 1997.

A journalist had been fined for publishing an article which could have exerted influence on the outcome of criminal proceedings involving a former minister.

The Court stated that *"provided that it does not overstep the bounds imposed in the interests of the proper administration of justice, reporting, including comment, on court proceedings contributes to their publicity and is thus perfectly consonant with the requirement under Article 6 § 1 of the Convention that hearings be public"*.

Nonetheless it found that in this case there had been no violation of Article 10 since the *"bounds imposed in the interests of the proper administration of justice"* had been overstepped since the comments made had been capable of exerting influence on the outcome of the proceedings.

The same desire to protect the individual was in evidence in the *News Verlags GmbH & CoKG v. Austria* judgment of 11 January 2000.

In this case, a publisher had been prohibited from publishing photographs of a defendant in criminal proceedings with captions describing him as the perpetrator of the crimes in question.

The aim pursued was therefore clearly to guarantee the right to the presumption of innocence as laid down in Article 6 of the Convention.

Nevertheless, the Court found that there had been a violation of Article 10 *"having regard to (…) the domestic courts' finding that it was not the pictures used by the applicant company but only their combination with the text that interfered with B.'s rights, the Court finds that the absolute prohibition on the publication of B.'s picture went further than was necessary to protect B. against defamation or against violation of the presumption of innocence. Thus, there is no reasonable relationship of proportionality between the injunctions as formulated by the Vienna Court of Appeal and the legitimate aims pursued*."

B. The two professional categories in question

The restriction on freedom of expression applies both to journalists, outside the judicial system, and to the staff and officers of the courts.

B.1 Journalists

In the *Loersch & nouvelle association du Courrier v. Switzerland* case (European Commission, 24 February 1995), the Commission found that the fact of making the granting of accreditation to a journalist subject to certain conditions did not in itself constitute an interference with the right to receive and impart information.

Moreover, in exercising their right to criticise the judicial system, journalists may expose themselves to convictions for defamation. This was the substance of the *Perna v. Italy* case.

The European Court of Human Rights therefore assesses whether the conviction at national level was necessary in a democratic society, and in so doing will look at whether the journalist concerned acted in good faith, as it was asked to do by the Committee of Ministers in its recommendation of 10 July 2003 on the provision of information through the media in relation to criminal proceedings.

However, these players who are not part of the judicial system are not the only ones to whom restrictions on freedom of expression in judicial matters apply.

B.2 Staff and officials of the courts

Staff and officials of the courts are also subject to restrictions on their freedom of expression.

Judges

Judges can be dismissed in the event of abuse of their right to freedom of expression adversely affecting the authority and impartiality of the judiciary.

In an inadmissibility decision of 6 April 2000 in the *Altın v. Turkey* case (application No. 39822/98, inadmissible), the Court held that the confidence of the public in the independent administration of justice must not be impaired on account of conduct on the part of a law officer.

In that case, a public prosecutor had been removed from office following his political statements against the Minister of the Interior and a political party.

The Court noted that the public prosecutor, despite a number of warnings, continued to act contrary to the impartiality which his post required, showing no discretion in his political comments and, in addition, failing to comply with the profession's regulations governing sick leave.

Accordingly, the solution reached in the *Vogt v. Germany* case[1] did not apply.

A similar finding was reached in the *Pitkevich v. Russia* case, with the application being held to be inadmissible by decision of 8 February 2001 (application No. 47936/99).

In that case, the Court found that the dismissal of a judge was based on her political and religious proselytism in her official activities and not in her private life.

Lawyers

Lawyers, who are law officers but not state civil servants, are also subject to restrictions on their freedom of expression.

[1] ECHR, 26 September. 1995, Vogt v. Germany, Series A No. 323: the Court found that the teacher's dismissal for membership of the German communist party was disproportionate in view of the fact that her professional work was beyond reproach.

In one case, the European court found that there had been no violation of Article 10 as a result of the Lawyers' Supervisory Board taking disciplinary measures against the applicant for the latter's criticism of the Board in the course of a press conference relating to the detention of one of his clients (ECHR, 20 May 1998, *Schöpfer v. Switzerland*).

The Court noted that the applicant had first of all publicly and seriously criticised the proceedings and only subsequently lodged an appeal before the domestic Court of Appeal.

It went on to state that *"freedom of expression is secured to lawyers too, who are certainly entitled to comment in public on the administration of justice, but their criticism must not overstep certain bounds. In that connection, account must be taken of the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession"* (for a similar principle, cf ECHR, 21 March 2002, *Nikula v. Finland*, *Reports of Judgments and Decisions* 2002-II*; Amihalachioaie v. Moldova*, No. 60115/00, § 27, ECHR 2004-III; ECHR, Grand Chamber, 15 December 2005, Kyprianou v. Cyprus, Application No. 73797/01; ECHR, 3rd Section, 24 January 2008, *Isabelle Coutant v. France*, Application No.17155/03, inadmissible).

It should, however, be noted that the case-law of the Court makes a distinction between judges and public prosecutors.

As the Court states, *"this difference should provide increased protection for statements whereby an accused criticises a prosecutor, as opposed to verbally attacking the judge or the court as a whole"* (ECHR, 21 March 2002, *Nikula v. Finland)*. Prosecutors' duty of tolerance is consequently higher than that of judges.

II. RESTRICTIONS ON THE FREEDOM OF EXPRESSION AND THE DEMOCRATIC NECESSITY OBLIGATION

The limits to freedom of expression are legitimate in principle if they satisfy the requirements of Article 10.2, namely to maintain *"the authority and impartiality of the judiciary"*.

Nonetheless, they will be accepted by the Court only if they prove to be necessary to guarantee the existence of a democratic society.

Given that justice is public and delivered on behalf of the people, it must – like any other institution of democracy – be open to criticism and show tolerance.

This need for restriction must be strictly assessed in order to guarantee the effectiveness of the principle of freedom, to which it constitutes an exceptional departure.

Moreover, as the Court stated in the *Sunday Times v. the United Kingdom* case, "**the scope of the domestic power of appreciation is not identical as regards each of the aims listed in Article 10 (2) (art. 10-2)**. The Handyside case concerned the 'protection of morals'. The view taken by the Contracting States of the 'requirements of morals', observed the Court, 'varies from time to time and from place to place, especially in our era', and 'State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements' (p. 22, para. 48). **Precisely the same cannot be said of the far more objective notion of the 'authority' of the judiciary. The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area. This is reflected in a number of provisions of the Convention, including Article 6 (art. 6), which have no equivalent as far as 'morals' are concerned. Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation**" (ECHR, 26 April 1979, Sunday Times v. the United Kingdom).

Consequently, the Court verifies whether there is a pressing social need and whether the measure taken in this respect is proportionate.

A. The requirement for a pressing social need

In order to be necessary in a democratic society, the restriction must first of all correspond to a pressing social need.

An illustration of this requirement, if the measure in question is to be considered *"necessary in a democratic society",* can be found in the cases of *Sunday Times v. the United Kingdom* of 26 April 1979 and *Nikula v. Finland* of 21 March 2002.

In the *Sunday Times v. the United Kingdom* case, the Court stated that *"the interference complained of* [an injunction prohibiting publication of a further article on the ground that it constituted contempt of court] ***did not correspond to a social need sufficiently pressing*** *to outweigh the public interest in freedom of expression within the meaning of the Convention. The Court therefore finds the reasons for the restraint imposed on the applicants not to be sufficient under Article 10 (2) (art. 10-2). That restraint proves not to be proportionate to the legitimate aim pursued; it was not necessary in a democratic society for maintaining the authority of the judiciary.*

68. There has accordingly been a violation of Article 10 (art. 10)"

In the *Nikula v. Finland* case, the facts were the following:

A lawyer had been convicted for defamation on the ground that, as defence counsel, she had criticised the decisions taken by the public prosecutor to bring charges against a particular person (which had prevented her client from questioning the latter as a witness) and not to bring charges against another (who had therefore been able to testify against her client).

The Court stated first of all that it *"would not exclude the possibility that, in certain circumstances,* ***an interference with counsel's freedom of expression in the course of a trial could also raise an issue under Article 6 of the Convention with regard to the right of an accused client to receive a fair trial****. 'Equality of arms' and other considerations of fairness therefore also militate in favour of a free and even forceful exchange of argument between the parties. The Court nevertheless rejects the applicant's argument that defence counsel's freedom of expression should be unlimited."*

It subsequently raised the important principle of immediate intervention by the judge to ensure the proper conduct of the proceedings, stating

"In that connection, the Court would stress the duty of the courts and the presiding judge to direct proceedings in such a manner as to ensure the proper conduct of the parties and above all the fairness of the trial – ***rather than to examine in a subsequent trial the appropriateness of a party's statements in the courtroom****."*

Lastly, it stated that *"even though the fine imposed on her was therefore lifted, her obligation to pay damages and costs remained. Even so, the threat of an ex post facto review of counsel's criticism of another party to criminal proceedings – which the public prosecutor doubtless must be considered to be – is difficult to reconcile with defence counsel's duty to defend their clients' interests zealously.* ***It follows that it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the potential "chilling effect" of even a relatively light criminal penalty or an obligation to pay compensation for harm suffered or costs incurred****.*

55. ***It is therefore only in exceptional cases that restriction – even by way of a lenient criminal penalty – of defence counsel's freedom of expression can be accepted as necessary in a democratic society****. Both the Acting Prosecuting Counsel's decision not to bring charges against the applicant and the minority opinion of the Supreme Court suggest that the national authorities were also far from unanimous as to the existence of sufficient reasons for the interference now in question.* ***In the Court's view such reasons have not been shown to exist and the restriction on Ms Nikula's freedom of expression therefore failed to answer any "pressing social need****."*

The Court accordingly found that the domestic measures taken constituted a violation of Article 10.

B. The requirement for the restriction to be proportional

Once the pressing social need has been demonstrated, it has to be verified that the measure is proportional for it to be considered necessary in a democratic society.

An illustration of this verification can be seen in the *Du Roy & Malaurie v. France* case (ECHR, 3 October. 2000, Reports No. 252).

In this case, two journalists had been found guilty of publishing information concerning applications to join criminal proceedings as a civil party, prohibited under French legislation since 1931. The article concerned certain questionable activities in connection with the French political scene.

The Court noted that this prohibition was general and absolute, but that it did not apply to criminal proceedings in pursuance of an application by the public prosecutor's office.

In the Court's view, *"such a difference in the treatment of the right to inform does not seem to be based on any objective grounds, yet wholly impedes the right of the press to inform the public about matters which, although relating to criminal proceedings in which a civil-party application has been made, may be in the public interest."*

The Court therefore found that the criminal conviction of the journalists was not proportionate and concluded that there had been a violation of the Convention.

Conclusion

Any measure restricting freedom of expression must be regarded as an exception to a fundamental principle guaranteed by the Convention, namely the freedom of expression.

Insofar is it concerns an exception to a principle, it must invariably be strictly interpreted by the European Court, applying the criteria set out in Article 10.2.

Accordingly, national authorities must give meticulous thought to any restriction to the freedom of expression in order to guard themselves against any subsequent ruling against them by the European Court of Human Rights.