



**TRANSPARENCY OF JUDICIAL
AUTHORITY & MEDIA COVERAGE
ON COURT PROCEEDINGS**

Press and
justice is a key
issue in each
society and
even more in
a democratic
one

due to:

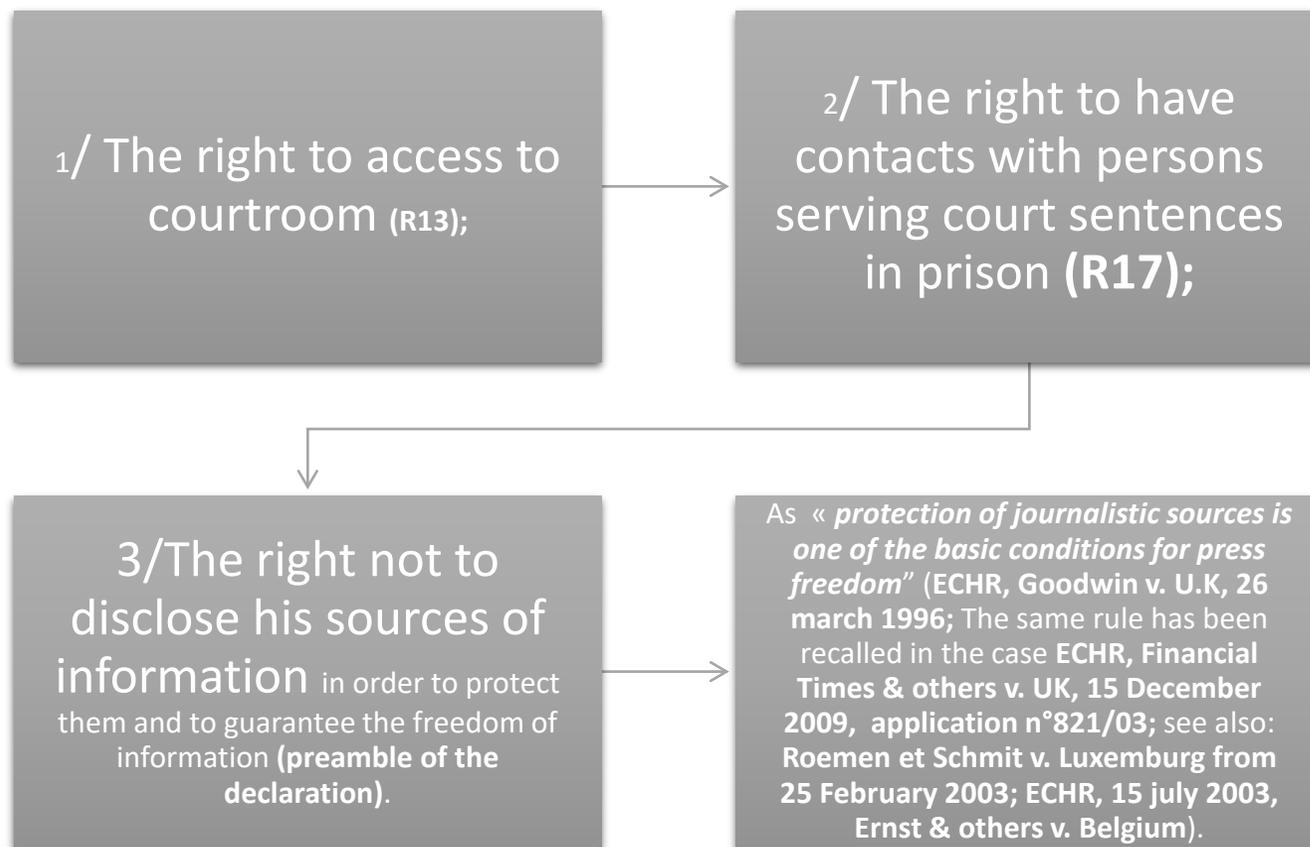
-the principle
of freedom of
speech;

- The principle of a
public justice

Preamble of the
Recommendation
2003-13 of the
Committee of
Ministers on the
provision of
information through
the media in relation
to criminal
proceedings

*“making the deterrent function of criminal Law
visible as well as in ensuring public scrutiny of the
functioning of the criminal justice system”*

To implement this principle of freedom of information, the journalist should have 3 rights:



| 2 questions

how to inform
journalists ?

with whom
sources or
documents ?

Declaration on
the provision of
information
through the
media in relation
to criminal
proceedings
10th of July 2003

*“Considering the possibly conflicting interests protected by **Articles 6, 8 and 10** of the Convention and the **necessity to balance** these rights in view of the facts of every individual case, with due regard to the supervisory role of the European Court of Human Rights in ensuring the observance of the commitments under the Convention”*

This means that you have:

- To inform on the basis of article 10;

- In respect of the right to a fair trial guaranteed by article 6;

- And in respect also of article 8 which rules the right to privacy.

Absolute/ Non absolute

Freedom of expression

right to privacy

This is not the case of the right to a fair trial.

are not absolute, as they both have limits in their paragraph 2.

Therefore, we will have to deal with rights and duties for the journalist



Rights of journalist - Recommendation

Principle 1 - Information of the public via the media

The public must be able to receive information about the activities of judicial authorities and police services through the media. **Therefore, journalists must** be able to freely report and comment on the functioning of the criminal justice system, subject only to the limitations provided for under the following principles.

Sunday Times
v. UK,
judgment of
26 April 1979,
application no.
6538/74.

The Court concluded that the injunction ordered against the newspaper “*did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention*”.

Facts: at the request of the company, the Attorney General asked the court to issue an **injunction against the newspaper**, arguing that the **publication of the announced article about Thalidomide will obstruct justice**. The injunction was **granted** and *Sunday Times* refrained from publication.

The higher
quality the
information
will be, the
higher
protection the
editor will get

Von Hannover v. Germany (24 June 2004).

In this case, the European Court considered that:

§ 63 “a **fundamental distinction** needs to be made between **reporting facts** – even controversial ones – **capable of contributing to a debate in a democratic society** relating to politicians in the exercise of their functions, for example, **and reporting details of the private life of an individual** who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of “watchdog” in a democracy by contributing to “impart[ing] information and ideas on matters of public interest (see *Observer and Guardian*, loc. cit.), it does not do so in the latter case”.

1st Question
yourself about
what the Court
calls “*the
informative value
of the publication*”
(ECHR, 02 october
2012, Mitkus v.
Latvia)

Under European case Law, **has an
informative value:**

1/ pertinent topics on the **publicity of
court proceedings** (see *Z v. Finland*,
25 February 1997, § 99, Reports
1997-I);

2/ pertinent topics on **the quality of
the work of the judiciary** (see *Sabou
and Pircalab v. Romania*, no. 46572/99,
§ 39, 28 September 2004)

has no informative value:

1

a photograph published in the context of reporting on pending criminal proceedings has no such informative value (see *Khuzhin and Others v. Russia*, 23 October 2008, no. 13470/02; same solution: *Gurguenidze v. Georgia*, 17 October 2006, no. 71678/01, § 39: photo of a person who was accused in the accompanying magazine article of having stolen the unpublished manuscript of a well-known Georgian writer);

2

violation of protected personal data, not least medical ones: *Biriuk v. Lithuania*, 25 November 2008, no. 23373/03: about a promiscuous Gitana suffering AIDS).

The criteria

*“The considerations to be taken into account when appraising the degree of interference with a person’s private life are **the extent of that person’s pre-existing public exposure and the nature of the information** disclosed about that person “(ECHR, 02 october 2012, Mitkus v. Latvia).*

Facts: In this case, the applicant had asked not to be filmed or photographed during the trial (§ 135).

The Criteria

“political reporting and serious investigative journalism” has an informative value as *“sensationalist reporting”* needs less care

“Such reporting does not attract the robust protection of Article 10 afforded to the press. As a consequence, in such cases, freedom of expression requires a more narrow interpretation” (ECHR, 10 May 2011)

Mosley v. U.K, no. 48009/08)

Facts: *News of the World* a Sunday newspaper published on its front page an article headed *“F1 boss has sick Nazi orgy with 5 hookers”*)

Limits to limits: the chilling effect

Mind the chilling effect on freedom
of expression

**ECHR, 10 May 2011 Mosley v. U.K,
no. 48009/08.**

Mosley upheld that the lack of pre-
notification requirement in UK for
publishing pictures and information
was a violation of article 8.

Such a rule should have a devastating
effect on Freedom of expression

a ban is not
necessary
when the
information is
already
available

(ECHR, 26 nov. 1991, **Observer & Guardian v. U.K** and
ECHR, 26 nov. 1991, **Sunday Times v. U.K.**: about the
Spycatcher case; ECHR, 09 february 1995, **Vereniging
Weekblad Bluf ! v. Netherlands**: information about
counterintelligence services).

A ban on a
civil action in
criminal
courts violates
art. 10

Du Roy and Malaurie v. France 03rd of October 2000 :
same decision about a conviction for having published
information in link with a civil action, about French political
persons suspected of fraudulent acts, because « *it totally
hinders the right of press to inform the public about
matters which can take part of public interest, although
concerning a criminal proceeding with civil action* ».

A right to criticize the judiciary

De Haes and Gijssels v. Belgium, 24th of February 1997, rec. 1997-II, §47 : violation of article 10 by an order for 2 journalists to pay damages for libel in respect of several appeal court judges because the reproaches publicated by the journalists were similar to an opinion « *whose truth, by definition, is not susceptible of proof* ».

July & Liberation v. France, 14th of February 2008 (critical opinion on the judicial inquiries which follows the death of a French judge in Djibouti)

Morice v. France, 23 April 2015, Morice v. France

(violation - (unanimously))

(same case about the death of a French judge in Djibouti. Critical opinion of the Lawyer on the judicial inquiries)

Civil servants & tolerance

This means that civil servants have to tolerate criticisms more than a normal citizen (**Nikula v. Finland, 21th of march 2002, no. 31611/96, § 48, ECHR 2002-II ; Saaristo & autres v. Finland, 12th of oct. 2010**).

Duties for journalists...and the State

*Principle 2 of the
Recommendation
- Presumption of
innocence*



“Respect for the principle of the presumption of innocence is an integral part of the right to a fair trial. Accordingly, opinions and information relating to on-going criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused”.

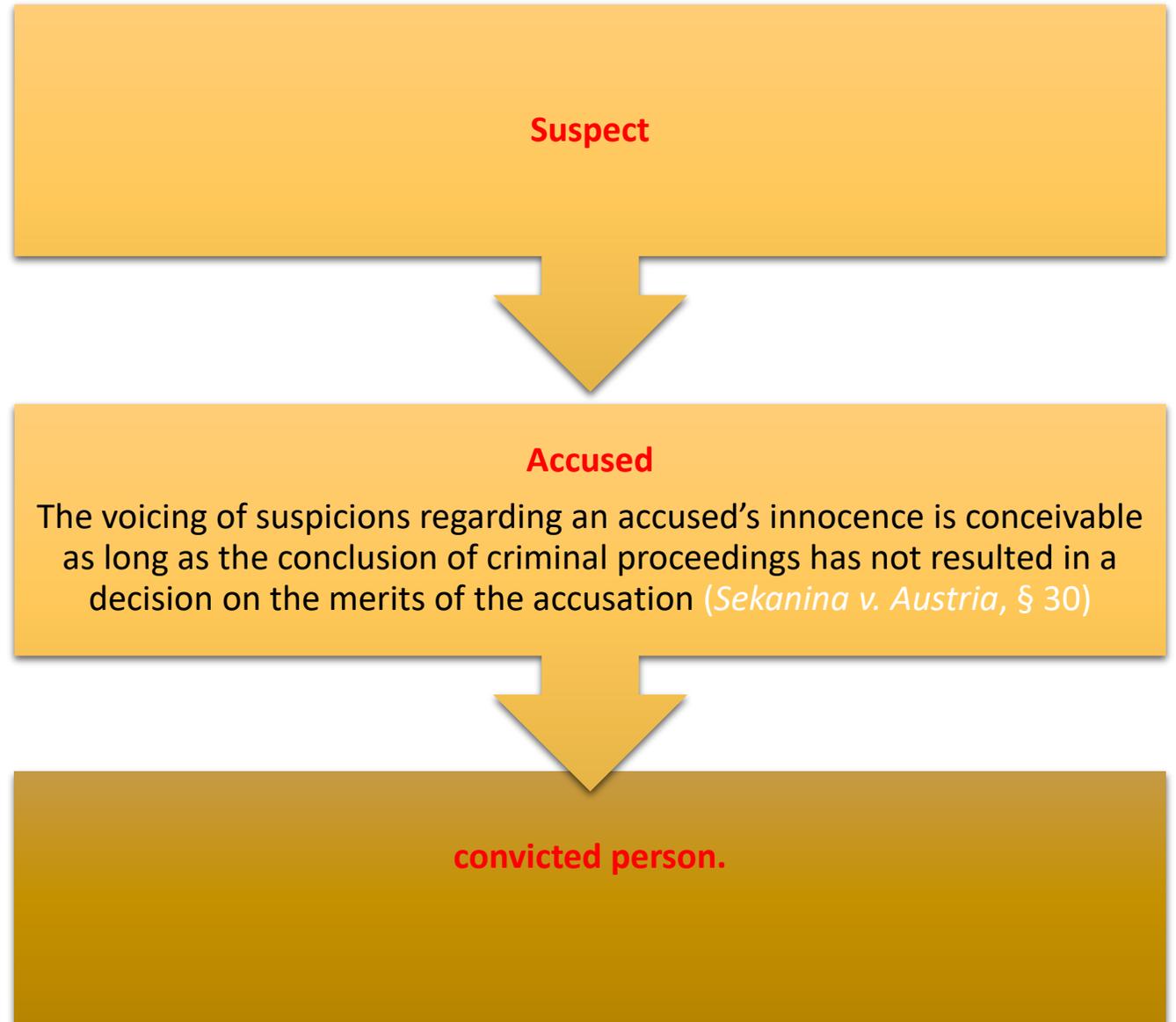
Allenet de
Ribemont v.
France, 10
February 1995
*(Application
no. 15175/89):*

*“Freedom of expression, guaranteed by Article 10 (art. 10) of the Convention, includes the freedom to receive and impart information. Article 6 para. 2 (art. 6-2) cannot therefore prevent the authorities from informing the public about criminal investigations in progress, **but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected.**” (§ 38).*

Importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence (*Daktaras v. Lithuania*, § 41; *Arrigo and Vella v. Malta* (dec.); *Khuzhin and Others v. Russia*, § 94).

This means for the journalist to use the good words

(*Zollmann v. the United Kingdom* (dec.); *Ismoilov and Others v. Russia*, § 160 and 166 ;*Nešťák v. Slovakia*, § 89)



Quality from
judicial
authority and
police services
is recalled in
the principle 3
of the
recommendati
on

Principle 3 - Accuracy of information

“Judicial authorities and police services should **provide** to the media **only verified information or information which is based on reasonable assumptions**. In the latter case, this should be clearly indicated to the media”.

No prejudice to a fair trial/No undermining of the judiciary

“This must be borne in mind by journalists when commenting on pending criminal proceedings since the limits of permissible comment may not extend to statements which are likely to **prejudice**, whether intentionally or not, **the chances of a person receiving a fair trial** or to **undermine the confidence of the public in the role of the courts in the administration of criminal justice.**”

(Worm v. Austria, 29 August 1997, § 50, Reports of Judgments and Decisions 1997-V; Campos Dâmaso, cited above, § 31; Pinto Coelho v. Portugal, no. 28439/08, § 33, 28 June 2011; and Ageyevy v. Russia, no. 7075/10, §§ 224-225, 18 April 2013)

the quality will be

1/accuracy;

2/ without discrimination in making available the official information (R4 & R5);

This means the best way to deliver is through press releases and press conferences by authorised officers and without commercial purposes (R7).

Also, announcements of scheduled proceedings (hearings/indictments/charges) should be made available to journalist (R15).

3/ And the information should be provided regularly in long criminal proceedings which have gained the particular attention of the public (R6).

4/ Nevertheless, there is one exception to the delivery of information: when "providing information which bears a risk of substantial prejudice to the fairness of the proceedings" especially for criminal proceedings involving juries and lay judges (R10).

On this point, the accused should have "an effective legal remedy" if he can show that the provision of information is likely to result in a breach of the right to a fair trial (R11).

Duties of Journalist: General rules

The first one is not to fall under the provisions of § 2 of article 10 and to infringe the other rights without necessity, i.e without a pressing social need and a proportionality (**D8**).

To act in good
faith with
ethics

the journalist has to **to write in good faith** and
in accordance with the ethics of the
profession of journalist (**ECHR, Flux v.
Moldova (no. 6), 29 July 2008, no. 22824/04,
§ 26)**)

Facts: article not based on investigations but
merely quoted an anonymous letter.

Good faith: legitimate
aim and sufficient
factual basis

This means **to cross the sources**, as it has been ruled by the Court: “*diligent journalists ought to attempt to **contact the subjects of their articles** and to give those persons a possibility to comment on the contents of such articles and consent or object to the publishing of the subject’s photo*” (ECHR, 02 October 2012, *Mitkus v. Latvia*; *Polanco Torres and Movilla Polanco v. Spain*, 21 September 2010, no. 34147/06, § 50,; and, *mutatis mutandis*, *Reklos and Davourlis v. Greece*, 15 January 2009).

Fair Trial

1

1/ **The right to the presumption of innocence**

implies “*to treat in their reports both suspects and accused as innocent until not found guilty by a court of Law*”
(D3);

2

2/ The importance **not to disturb the hearings** with live reporting and recording
(D7 & R14);

3

3/ The duty **to respect the dignity and the security of the victims, claimants, suspects, accused, convicted persons and witnesses.** Protection of witnesses means not to disclose their identity unless their prior consent **(R16).**

Right to privacy (art.8 ECHR)
unless the information is of
public concern (D4)

Von Hannover v. Germany (24 June 2004).

The conclusion of the Court is that:

§ 76 **the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest.** It is clear in the instant case that they made no such contribution, since the applicant exercises no official function and the photos and articles related exclusively to details of her private life.

77. Furthermore, **the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.**

Even if such a public interest exists, as does a commercial interest of the magazines in publishing these photos and these articles, in the instant case those interests must, in the Court's view, yield to the applicant's right to the effective protection of her private life.

78. Lastly, in the Court's opinion the criteria established by the domestic courts were not sufficient to ensure the effective protection of the applicant's private life and she should, in the circumstances of the case, have had a "legitimate expectation" of protection of her private life.

79. Having regard to all the foregoing factors, and despite the margin of appreciation afforded to the State in this area, the Court considers that the German courts **did not strike a fair balance between the competing interests.**

80. There has therefore been a **breach of Article 8** of the Convention".

same solution was found in the case *Prisma Presse v. France* (ECHR, 1 July 2003)

Right to privacy but
public concern

At the opposite, you find the case **Plon
versus France (18 may 2004)**

““**the more time that elapsed, the more
the public interest** in discussion of the
history of President Mitterrand’s two terms
of office **prevailed** over the requirements
of protecting the President’s rights with
regard to medical confidentiality” and held
that there had been a **breach of Article
10 in banning the publication by
President Mitterrand’s former private
doctor** of a book containing revelations
about the President’s state of health (
*ECHR, 18 mai 2004, Editions Plon v.
France, no. 58148/00, § 53*).

Facts make the Law

the level of protection of article 10 will depend of the quality of the information i.e its contribution to the public debate

(ECHR, 06 February 2001, Tammer v. Estonia, §§ 59. ; ECHR, 11 january 2000, News Verlags GmbH & CoKG v. Austria, n° 31457/96, §§ 52 ; ECHR, 26 february 2002, Krone Verlag GmbH & Co. KG v. Austria, n° 34315/96, § 37).

Duties of Journalist:
Special rules

1/ **The right to be forgotten**, “in order not to prejudice the re-integration into society of those persons” (D5 & R18)

Also: EUCJ, 13 may 2014, Google Spain;

2/ **The right of minors and vulnerable persons** (D6).

3/ **The right of reply** (from private) and **right of correction** (from public services) in case of incorrect or defamatory media reports (R9).

conclusion

The Council of Europe is expecting a lot from self regulatory actions, i.e:

1/ To support the training of journalists in the field of Law and Court procedure (**D1 member States & D9 media & journalists**);

2/ To draw up professional ethical guidelines and standards for journalists (**D2 media & journalists**).

Indeed, self regulatory action is a good way for journalist:

1st, to do well his job;

2nd, to avoid any legal action and suit against him and his newspaper....

Necessary in a
democratic
society means
a pressing
social need
and
proportionate
measures

IN CASE OF LEGAL ACTION

Keep in mind that penalty measures should correspond to “a pressing social need” and be “proportionate”

(ECHR, 13 juill. 1995, Tolstoy Miloslavsky v. U.K; ECHR, 15th february 2005, Steel & Morris v. U.K; ECHR, 4th sect., 19 April 2011, Kasabova v. Bulgaria, appl. 22385/03, § 71; ECHR , 4th sect., 19 April 2011, Bozhkov v. Bulgaria, appl. 3316/04, § 55)