

European Court of Human Rights judgments on the right to freedom of expression

Bulletin LXII: PUBLICATION OF MATERIAL FROM CRIMINAL INVESTIGATIONS AND PROSECUTIONS

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Journalists sometimes obtain material from criminal investigations or prosecutions. Such material may be 'leaked' to them from police or sources within judicial administration, and sometimes concerns issues of great public interest – particularly when the trial or investigation concerns a high profile public figure. Are they allowed to publish such materials? Under principles established by the European Court of Human Rights, and guidelines issued by the Council of Europe, this depends heavily on the circumstances of the individual case. While the journalist's right to freedom of expression is an important right, and is further added to by the right of the public to be informed on issues of public interest, counterbalancing interests are the right to privacy of all persons whom the information concerns as well as the right to a fair trial and the public interest in the proper administration of justice.

This bulletin summarises the main European Court of Human Rights judgments, Council of Europe guidance as well as a very brief overview of the state of the law in some European countries.

European Court of Human Rights decisions

- *Dupuis and Others v. France*, application no. 1914/02, 7 June 2007: conviction for publishing material from investigation when this was already widely reported on elsewhere violated right to freedom of expression

This concerned the conviction of two journalists for using material obtained from a judicial investigation in their book which reported on illegal phone tapping, orchestrated by the French President's office and directed at journalists, lawyers and other high profile individuals. The French Courts found the two journalists guilty of the offence of using information obtained through a breach of the confidentiality of the investigation, or of professional confidentiality, and that publication of the material could be detrimental to the right to a fair trial of the deputy director of the President's private office (who had been placed under formal investigation for the illegal phone tapping campaign). They were fined €750 and ordered to pay €7,500 in compensation.

Restating first the importance in a democratic society of the right to freedom of expression, the European Court noted that the book concerned a debate of considerable public interest, and

that the deputy director of the President's office was a public person who was involved in politics at the highest level. The public had a legitimate interest in being informed about the trial, and in particular, about the facts dealt with or revealed in the book. While the Court agreed that the protection of the judicial process was a legitimate aim and needed safeguarding both with regard to the fair trial rights of the individuals concerned and because of the wider public interest in maintaining the proper administration of justice, the Court also noted that at the time the book was published, the case had been widely covered in the media and the individual circumstances of the deputy director had been well-publicised. The Court questioned whether there was still an interest in confidentiality when much of the information had already been made public. The Court also noted that including the material added to the accuracy and credibility of the story, providing evidence of its accuracy and authenticity, and that this was in line with journalistic rules of ethics. Noting, finally, that the journalists' conviction could have a chilling effect on media freedom in the country generally, it held that the journalists' conviction violated the right to freedom of expression.

- ***Draksas v. Lithuania***, application no. 36662/04, judgment of 31 July 2012: **failure to protect content of an intercepted phone call violated right to respect for private life**

This concerned several alleged violations of the right to respect for privacy of a senior Lithuanian politician, including the leaking to the media of a telephone conversation which had been recorded as part of a judicial investigation into his possible involvement in criminal activities. He complained to the European Court of Human Rights, having unsuccessfully challenged this in the domestic courts, that the leaking of this telephone conversation violated his right to respect for private life.

The Court observed that, despite legal provisions designed to protect the right to privacy, in actual practice Mr Draksas's right to privacy had not been respected. While the Court observed that the public has a right to be informed about matters of public interest, the State authorities were under a duty to ensure that material obtained via covert methods is protected. Noting also that the source of the 'leak' had never been identified, which was an aggravating factor in the eyes of the Court, it held that Mr Draksas's right to respect for privacy had been violated.

- ***Pinto Coelho v. Portugal***, application no. 28439/08, judgment of 28 June 2011: **failure of domestic courts to take into account public interest in media report on criminal proceedings violated right to freedom of expression**

This concerned a Portuguese journalist who broadcast a report showing that the former director-general of the criminal investigation department, who had recently been dismissed, had been charged with a breach of secrecy of judicial proceedings. For several months the press had been reporting that the director-general could have been responsible for leaking information about a case concerning the accounts of a private university and a commercial company. As part of her report, Ms Pinto Coelho showed viewers a facsimile copy of the indictment and the public prosecutor's document opening the investigation. She was prosecuted for publishing "copies of documents in the file of proceedings prior to a first-instance judgment", and sentenced to a fine of €400.

The European Court of Human Rights held that the conviction violated the journalist's right to freedom of expression. It reiterated that the press had the task of imparting information and ideas on all matters of public interest, although it had to be careful not to violate the rights and

interests of others. The Court also noted that when reporting on matters before the courts, the media should refrain from publishing anything that might prejudice the chances of a person receiving a fair trial or undermine the confidence of the public in the role of the courts. However, in Ms Pinto Coelho's case, the Court pointed out that the report in question clearly dealt with a matter of public interest, because the person concerned was the director-general of the judicial police. The Portuguese courts had not taken into account the importance of the right to freedom of expression, nor had they considered whether the broadcast of the documents prejudiced the investigation or the defendant's right to a fair trial.

- ***Wirtschafts-Trend" Zeitschriften-Verlagsgesellschaft v. Austria (No. 2)***, application no. 62746/00, judgment of 14 November 2011: conviction for naming of criminal suspect in early stages of criminal investigation did not violate right to freedom of expression

This concerned a report in a magazine about a preliminary criminal investigation into the conduct of three police officers who had accompanied an individual deported to Nigeria, and who had died during the flight under circumstances that were unclear. The incident received high coverage in the media and evoked a debate on deportation practices. The article set out conflicting statements and quoted one of the officers. While throughout the article the police officers concerned had been anonymised, the full name of one of them was given in an eye-catching position directly above the headline. He filed a claim for intrusion of privacy and the newspaper was ordered to pay him €1,816 (25,00 Austrian shillings).

The European Court held that this did not violate the newspaper's right to freedom of expression and declared its application inadmissible as being 'manifestly ill-founded'. It noted that while the article certainly concerned an issue of public concern and had sparked a political debate on the lawfulness of deportation practices, there was no justification for publishing the full name of the police officer concerned while criminal investigations were still pending at a very early stage. The Court noted that the Austrian courts had wished to protect the police officer from 'trial by media' and took into account that the magazine had not been prevented from reporting about other aspects of the case, and that the amount awarded had been modest.

- ***A.B. v. Switzerland***, application no. 56925/08, 1 July 2014: conviction for publication of documents from judicial investigation violated right to freedom of expression

This concerned a journalist who had reported on the criminal proceedings against someone who had run over and killed three pedestrians and injured eight others. The report described the defendant's background, gave a summary of the questions asked by the police and the investigating judge and the defendant's replies and was illustrated by a number of photographs of letters that had been sent to the investigating judge. The journalist was convicted of publishing confidential documents and fined €2667. He appealed to the European Court of Human Rights.

The European Court of Human Rights held that the conviction violated the right to freedom of expression. It recalled that the public has a right to be informed of criminal proceedings. The Court considered that the domestic courts had confined itself to finding that both the premature disclosure of the statements and the letters from the accused to the judge had damaged the right of the defendant to be presumed innocent and to have a fair trial. However, the main hearings in the trial had not taken place until two years later, and the documents discussed in the article

were by then considered to be of secondary importance. Furthermore, the Court found it important that the trial was conducted before professional judges, not a lay jury. In these circumstances, the Court did not agree that publication of the materials could have influenced the defendant's trial. The Court also noted that the defendant could himself have sued for invasion of privacy, but had not done so.

- ***Du Roy and Malaurie v. France***, application no. 34000/96, judgment of 3 October 2000: **ban on reporting on criminal proceedings violated right to freedom of expression**

This concerned the conviction of a journalist and the director of a newspaper who had reported on the proceedings brought by a company that managed hostels for immigrant workers against one of its former directors. They were convicted under a French law, which prohibited any reporting on proceedings instigated by an individual.

The journalist and the director complained to the European Court of Human Rights, which held that this violated the right to freedom of expression. While noting that journalists who report on ongoing criminal proceedings must respect the rights of the parties involved, the Court observed that in this case – which concerned a prosecution instigated by a private party – there was an absolute ban on reporting. The Court noted that under French law there are many other mechanisms to protect the rights of those involved in criminal proceedings, and held that the absolute ban on reporting violated the right to freedom of expression.

- ***Craxi (No. 2) v. Italy***, application no. 25337/94, judgment of 17 July 2003: **failure to prevent leaking to the media of phone calls intercepted as part of judicial investigation violated right to respect for private life**

This concerned a former Prime Minister of Italy who had been charged with corruption, dishonest receipt of money, concealment of dishonest gain and illegal financing of political parties. He did not appear at trial and he was sentenced to prison in absentia. The public prosecutor obtained an order for Mr Craxi's telephone calls between Italy and his home to be intercepted. A specialist branch of the Italian police intercepted his calls between 20 July and 3 October 1995, and transcripts of some of these calls were read out in court. The media subsequently published these together with other parts of the transcripts which had not been read out in court. Craxi applied to the European Court of Human Rights that this violated his right to respect for privacy.

The European Court of Human Rights observed that some of the conversations published in the press had been of a strictly private nature and had had little or no connection with the criminal charges brought against Craxi. The Court considered that there had been no "pressing social need" to publish them. It found that the conversations had not been formally made available to the press, but that the publication had instead been "likely to have been caused either by a malfunction of the registry or by the press obtaining the information from one of the parties to the proceedings or from their lawyers." Whichever of these ways the media had obtained the information, the Italian state had failed to safeguard Mr Craxi's right to respect for privacy. The Court held that "public figures are entitled to the enjoyment of the [right to privacy] on the same basis as every other person. In particular, the public interest in receiving information only covers facts which are connected with the criminal charges brought against the accused. This must be borne in mind by journalists when reporting on pending criminal proceedings, and the press should abstain from publishing information which are likely to

prejudice, whether intentionally or not, the right to respect for the private life and correspondence of the accused persons.”

Council of Europe guidance

Council of Europe Recommendation Rec(2003)13, “on the provision of information through the media in relation to criminal proceedings”, states that (relevant excerpts are quoted only):

- “the media have the right to inform the public due to the right of the public to receive information, including information on matters of public concern, under Article 10 of the Convention, and that they have a professional duty to do so;
- ... the rights to presumption of innocence, to a fair trial and to respect for private and family life under Articles 6 and 8 of the Convention constitute fundamental requirements which must be respected in any democratic society;
- Stressing the importance of media reporting in informing the public on 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”;

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.

Principle 2 - 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.

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.

Principle 4 - Access to information

When journalists have lawfully obtained information in the context of on-going criminal proceedings from judicial authorities or police services, those authorities and services should make available such information, without discrimination, to all journalists who make or have made the same request.

Principle 5 - Ways of providing information to the media

When judicial authorities and police services themselves have decided to provide information to the media in the context of on-going criminal proceedings, such information should be provided on a non-discriminatory basis and, wherever possible, through press releases, press conferences by authorised officers or similar authorised means.

Principle 6 - Regular information during criminal proceedings

In the context of criminal proceedings of public interest or other criminal proceedings which have gained the particular attention of the public, judicial authorities and police services should inform the media about their essential acts, so long as this does not prejudice the secrecy of investigations and police inquiries or delay or impede the outcome of the proceedings. In cases of criminal proceedings which continue for a long period, this information should be provided regularly.

Principle 7 - Prohibition of the exploitation of information

Judicial authorities and police services should not exploit information about on-going criminal proceedings for commercial purposes or purposes other than those relevant to the enforcement of the law.

Principle 8 - Protection of privacy in the context of on-going criminal proceedings

The provision of information about suspects, accused or convicted persons or other parties to criminal proceedings should respect their right to protection of privacy in accordance with Article 8 of the Convention. Particular protection should be given to parties who are minors or other vulnerable persons, as well as to victims, to witnesses and to the families of suspects, accused and convicted. In all cases, particular consideration should be given to the harmful effect which the disclosure of information enabling their identification may have on the persons referred to in this Principle.

Principle 9 - Right of correction or right of reply

Without prejudice to the availability of other remedies, everyone who has been the subject of incorrect or defamatory media reports in the context of criminal proceedings should have a right of correction or reply, as the case may be, against the media concerned. A right of correction should also be available with respect to press releases containing incorrect information which have been issued by judicial authorities or police services.

Principle 10 - Prevention of prejudicial influence

In the context of criminal proceedings, particularly those involving juries or lay judges, judicial authorities and police services should abstain from publicly providing information which bears a risk of substantial prejudice to the fairness of the proceedings.

Principle 11 - Prejudicial pre-trial publicity

Where the accused can show that the provision of information is highly likely to result, or has resulted, in a breach of his or her right to a fair trial, he or she should have an effective legal remedy.

Principle 16 - Protection of witnesses

The identity of witnesses should not be disclosed, unless a witness has given his or her prior consent, the identification of a witness is of public concern, or the testimony has already been given in public. The identity of witnesses should never be disclosed where this endangers their lives or security. Due respect shall be paid to protection programmes for witnesses, especially in criminal proceedings against organised crime or crime within the family.”

Comparative overview

Practice across Europe varies. The following is a snapshot of the legal situation in a few European countries.

Belgium

Reporting on ongoing criminal investigations is restricted, but Article 28 of the Belgian Criminal Code provides that information may be provided when this is deemed in the public interest. However, any reports should respect the right to be presumed innocent as well as the right to privacy of the victims, witnesses and any other parties involved. A guideline from the ministry of justice sets out the modalities in which information may be provided, included through formal on the record briefings as well as informal information or the provision of background information to enable journalists to understand proceedings correctly.

France

Journalists who publish materials ‘leaked’ to them by police or individuals from within the judicial investigations department may, if they publish the information, be liable as ‘accomplices’ to the civil servants who provided it – ‘leaking’ information is a criminal offence. The European Court held in the case of *Dupuis*, summarised above, that this may in some circumstances violate the right to freedom of expression.

Germany

Coverage of criminal investigations is permissible where this is in the public interest, but the media must respect the presumption of innocence. The Criminal Code prohibits literal quotations from indictments of other documents before a case is brought before a public hearing. The names of witnesses, victims or others connected with proceedings may be mentioned only in relation to serious crimes or in other cases that are of particular public interest (see Section 353 of the German Criminal Code).

Poland

The publication of any material from judicial or police investigations prior to them being disclosed at trial is a criminal offence. Journalists may report on pending criminal investigations in other ways, including by conducting their own research – but they may not publish or quote from official records. Any such reports, or reports on ongoing trials, must respect the rights of the parties involved, including the right to be presumed innocent.

Montenegro

The Criminal Procedure Code provides for the possibility of issuing an order of secrecy of the investigation, violation of which then constitutes a criminal offence (Art. 284). The Criminal Code prescribes a criminal offence Violation of Confidentiality of Procedure (Art. 391), which provides punishment for anyone who, without authorization, discloses information obtained in a court, misdemeanour, administrative or other legally defined procedure, where such information may not be publicized under law or where it has been declared secret by a competent body. Ms Snežana Jonica, MP of *Socijalistička narodna partija* (SNP), recently proposed amendments to the Law on the Special Prosecutor's Office, according to which publishing all data from the investigation procedure within competence of the Special State Prosecutor's Office, without prior consent of the Chief Special Prosecutor, i.e. publishing of any data from investigations led by the Special Prosecutor's Office when an order for keeping a secret has been issued, and the investigating judge did not allow such publication, shall constitute a criminal offence. HRA will attempt to contribute to discussion on this proposal, which has still not been set on the agenda of the relevant Parliamentary Committee.

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