

National Security and Freedom of Expression under the ECHR: Rethinking the European Court of Human Rights' General Approach

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This article by **Adele Gatt Livori** was previously submitted as part of PBL3019 and is being published with the author's permission. It explores the delicate balance between national security and freedom of expression under Article 10 of the European Convention on Human Rights. By examining key judgments such as *Observer and Guardian*, *Bluf!* and *Big Brother Watch*, it argues that the European Court of Human Rights has adopted an inconsistent and overly deferential stance towards states. The article calls for a more principled and transparent approach, one that narrows the concept of national security and ensures stronger protection for free expression across Europe.

TAGS: National Security, European Court of Human Rights, Freedom of Expression

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Introduction

Article 10 of the European Convention on Human Rights (ECHR) deals with Freedom of Expression, a right which is considered as one of the essential foundations of a democratic society.¹ A reading of the said Article within the Convention shows that this right to receive and impart information is not an absolute right as there exist an exhaustive number of circumstances when a restriction may be imposed on this freedom.² Among such restrictions is the ground of National Security, a ground which, following 9/11, has been 'invoked more and more, with many being concerned that this legitimate aim is being abused by Governments'.³

Striking a balance between Freedom of Expression and National Security seems to be a challenging task for the European Court of Human Rights (ECtHR), especially in light of the wide margin of appreciation which is awarded to states with regards to national security. Thus, this paper, through the analysis of the legal framework and the ECtHR's approach through case law, aims to pinpoint the principles underlying the ECtHR's decisions and provide a critical perspective on the matter.

Legal Framework

The first paragraph of Article 10 of the ECHR dealing with Freedom of Expression states that 'everyone has the right to freedom of expression'. However, the said right comes with its own set of limitations stipulated under the second paragraph.⁴ These limitations state that in order to restrict one's freedom of expression, the restriction must be 'prescribed by law and ... necessary in a democratic society' and must be:

*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 rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*⁵

Thus, for an act not to constitute a violation of Article 10 with regard to national security, it must be an act prescribed by law, necessary in a democratic society and done in the interest of preserving the country's

¹ Council of Europe, 'Freedom of Expression' (Human Rights Convention) <<https://www.coe.int/en/web/human-rights-convention/expression>> accessed 12 December 2024.

² Rachel Baldacchino, 'Restricting Freedom of Expression in the Interest of National Security, Territorial Integrity and Public Safety' (LL.B thesis, University of Malta 2017).

³ *ibid.*

⁴ European Convention on Human Rights, Article 10.

⁵ *ibid.*

national security. The limitation that it must be prescribed by law has the purpose of ensuring that no abuse by the executive takes place. In order to determine whether interference is lawful, 'one must first ascertain whether the domestic legal system of the state permits the infringement'.⁶ One must also ascertain whether the provision which permits the said is accessible to the public, precise, and there exist the appropriate safeguards to prevent against abuse.

Apart from being prescribed by law, a limitation on the right to freedom of expression must also be necessary in a democratic society. In fact, the ECtHR holds that a restriction must be justified by a pressing social need:

*In determining whether this need is real, the Court must take into consideration various aspects, such as the particular facts of the case as well as the political and social situation of the country at the time of the case.*⁷

Most often, the ECtHR accepts that the aim for suppression of freedom of expression was legitimate. However, it struggles in accepting that 'all the restrictions imposed were required in a democratic society'.⁸

When interpreting Article 10 of the ECHR, one must keep in view the fact that contracting states to the Convention are awarded a wide margin of appreciation when it comes to national security. This doctrine is one of the most important aspects of the Convention, as 'it gives a Contracting State the opportunity to apply the Convention according to its legal system whilst respecting its principle objectives'.⁹ This is highlighted in *Hadjianastassiou v Greece*,¹⁰ whereby the Court stated that a 'certain margin of appreciation should be left to the national authorities with regard to national security...for the disclosure of classified military information'.¹¹ However, while the said doctrine was accepted by the ECHR in this instance, this does not mean that the doctrine is applied in an unrestricted manner. One ought to keep in mind that is always up to the Court to determine whether or not the domestic authorities have gone over and above the discretion awarded to them.¹²

⁶ Baldacchino (n 2).

⁷ *ibid.*

⁸ *ibid.*

⁹ *ibid.*

¹⁰ *Hadjianastassiou v Greece* App no 12945/87 (ECtHR, 16 December 1992).

¹¹ Council of Europe, 'Guide on Article 10 of the European Convention on Human Rights: Freedom of Expression' (updated 31 August 2022) <<https://www.coe.int/en/web/human-rights-convention/expression>> accessed 16 December 2024.

¹² Baldacchino (n 2).

Analysis of the ECtHR's Approach and the Underlying Principles

The cases decided by the ECtHR are an important key in order to properly analyse the said Court's approach when it comes to cases dealing with freedom of expression and national security. In fact, it is through the case law of the ECtHR together with Article 10 of the Convention that various principles utilised in such cases emerge.

In the *Observer and Guardian and Sunday Times Cases*,¹³ a memoir published by a former MI5 agent gave a detailed account of the illicit operations carried out by the Secret Service which were considered to amount to a National Security threat. Injunctions were issued prior to and following the publication of the book. Although the ECtHR decided that prior to the publication, the injunctions were mostly justified, it also held that following publication, 'the permanent injunctions were not necessary as the interests of national security could no longer be protected once the book had been published'.¹⁴ Thus, the principle of necessity is seen being applied in this case. Similarly, in *Bluf! v the Netherlands*,¹⁵ which concerned the seizure and withdrawal from circulation of an issue of a magazine publishing an already published old internal report from the Netherlands security services, the ECtHR held that 'protecting the information as a state secret was no longer justified and the withdrawal from circulation of issue no. 267 of Bluf! was no longer necessary in order to achieve the legitimate aim pursued',¹⁶ and therefore, the means used were not deemed as necessary.

In *Stoll v Switzerland*,¹⁷ the applicant, a journalist, was sentenced to the payment of a fine for having disclosed a confidential report by the Swiss Ambassador to the press. The ECtHR found no violation of article 10, stating that the 'intention had not been to inform the public on a topic of general interest but to make the ambassador's report the subject of needless scandal'.¹⁸ Thus, the principle of necessity was deemed to be missing in this scenario. Another very relevant case to the necessity principle is *The Big Brother Watch Case*, wherein programmes of surveillance and intelligence-sharing between the USA and the United Kingdom were revealed, with the court finding a violation of Article 10.¹⁹ In this case, the ECtHR stressed the

¹³ *Observer and Guardian v the United Kingdom* App no 13585/88 (ECtHR, 26 November 1991); *The Sunday Times v The United Kingdom* App no 6538/74 (ECtHR, 26 April 1979).

¹⁴ Baldacchino (n 2).

¹⁵ *Vereniging Weekblad Bluf! v the Netherlands* App no 16616/90 (ECtHR, 9 February 1995).

¹⁶ European Court of Human Rights, 'Research Division - National Security and European Case-Law' (*Council of Europe*, 2013) <<https://rm.coe.int/168067d214>> accessed 14 December 2024.

¹⁷ *Stoll v Switzerland* App no 69698/01 (ECtHR, 10 December 2007).

¹⁸ Dominika Bychawska-Siniarska, *Protecting the Right to Freedom of Expression under the European Convention on Human Rights: A Handbook for Legal Practitioners* (Council of Europe 2013).

¹⁹ *Big Brother Watch and Others v the United Kingdom* App nos 58170/13, 62322/14 and 24960/15 (ECtHR, 25 May 2021).

importance of constant domestic assessment to ensure that necessity and proportionality measures are being taken at each stage of the process.²⁰

In cases under Article 10, proportionality is deemed to be of great importance. In fact, 'it is generally when examining the proportionality criterion that the Court finds a violation of Article 10'.²¹ This can be seen not only in the above-mentioned case,²² but also in many others. For example, in *Grigoriades v Greece*,²³ where a letter from an officer to his superior vehemently criticising the army earned him a three-month prison sentence, the Court found this to be disproportionate, given that the letter had not been published and therefore had had no impact on military discipline.²⁴

Similarly, in *Ceylan v Turkey*,²⁵ where a trade union president had denounced state terrorism against the Kurdish people in an article and was charged with encouragement to commit violence, the Court concluded that there was no such evidence and thus 'the applicant's conviction had been disproportionate'.²⁶ *Koc and Tambas v Turkey*,²⁷ also dealt with the publication of articles. In this case, they implicated the Ministry of Justice with regards to inhumane treatment and death in prison, which similarly to the above the articles, could not be interpreted as inciting violence or insurrection and thus, 'the Court considered the sentence of three years as disproportionate'.²⁸ *Senar v Turkey* was also decided along the same principles.²⁹

Also dealing with proportionality is *Sürek v Turkey (no. 1)*.³⁰ This concerned the publication of letters from readers accusing the Government of complicity in massacres of Kurdish populations.³¹ However in such case, the Court took into account proportionality in terms of the leniency of the penalty.

The means used is also relevant in terms of proportionality. This was evident in *Karatas v Turkey*,³² whereby the applicant had been convicted of publishing a book of poetry using highly aggressive language and inciting the Kurds to resist Turkish repression.³³ The Court considered the form of

²⁰ European Court of Human Rights Press Unit, 'Factsheet – Protection of Journalistic Sources' (ECtHR, January 2024) <https://www.echr.coe.int/documents/d/echr/fs_journalistic_sources_eng> accessed 11 December 2024.

²¹ Research Division (n 16).

²² *Big Brother Watch and Others v the United Kingdom* (n 19).

²³ *Grigoriades v Greece* App no 24348/94 (ECtHR, 25 November 1997).

²⁴ Research Division (n 16).

²⁵ *Ceylan v Turkey* App no 23556/94 (ECtHR, 8 July 1999).

²⁶ Research Division (n 16).

²⁷ *Koç and Others v Turkey* App no 35211/08 (ECtHR, 13 July 2021).

²⁸ Baldacchino (n 2).

²⁹ *Şener v Turkey* App no 26680/95 (ECtHR, 18 July 2000).

³⁰ *Sürek v Turkey (No. 1)* App no 26682/95 (ECtHR, 8 July 1999).

³¹ Research Division (n 16).

³² *Karataş v Turkey* App no 23168/94 (ECtHR, 8 July 1999).

³³ Research Division (n 16).

publication (poetry) which has a relatively limited audience and found the conviction to be disproportionate.

In *Ozgur Gundem v Turkey*,³⁴ a newspaper was shut down following a number of attacks carried out on its premises and any person connected to the newspaper. The ECtHR held that although the charges were prescribed by law and pursued the legitimate aim of national security, 'they were not necessary in a democratic society as they were not proportionate to the aim they pursued.'³⁵ Finally, in *Pasko v Russia*,³⁶ a violation of Article 10 was found based on proportionality when pursuing the aim of national security. Mr. Pasko was a naval officer and military journalist who supplied Japanese TV and Newspaper with information 'concerning the various controversial activities which were being carried out by the Russian Pacific Fleet'.³⁷

Apart from proportionality and necessity, vital in the Court's analysis is the previously mentioned margin of appreciation which is awarded to States in terms of national security. In fact, it is often that the Court must defer to the State's definition of national security in cases of this nature, as each State is to be awarded the discretion to determine what constitutes as national security according to the state of the country and its societal needs.

Critical Perspectives

The ECtHR faces a delicate task in balancing the right to freedom of expression under Article 10 of the ECHR with the legitimate interest of protecting national security.³⁸ The doctrine of the margin of appreciation, while affording states flexibility to address unique national circumstances, has been criticized for enabling inconsistent application and potentially granting excessive deference to state authorities. Critical thinkers like Letsas argue that this approach undermines the universality of human rights by allowing states to exploit vague definitions of national security to curtail freedoms disproportionately.³⁹

The principle of necessity, as interpreted by the ECtHR, requires a 'pressing social need' for restrictions. However, the Court has been inconsistent in applying this standard. Cases such as *Observer and Guardian v UK* and *Bluf! v Netherlands* demonstrate the Court's willingness to uphold the freedom of expression when the national security rationale is no longer applicable.⁴⁰ Yet, critics like Fenwick highlight that such judgments often occur after the harm to expression has already been inflicted, thereby

³⁴ *Özgür Gündem v Turkey* App no 23144/93 (ECtHR, 16 March 2000).

³⁵ Baldacchino (n 2).

³⁶ *Pasko v Russia* App no 69519/01 (ECtHR, 22 October 2009).

³⁷ Baldacchino (n 2).

³⁸ Article 10 (n 4).

³⁹ George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26(4) Oxford Journal of Legal Studies 705.

⁴⁰ *Observer and Guardian* (n 13); *Vereniging Weekblad Bluf!* (n 15).

reducing their practical impact.⁴¹

Similarly, the Court's proportionality analysis, while providing robust protection in cases like *Grigoriades v Greece* and *Ozgur Gundem v Turkey*, has been inconsistent in others,⁴² such as *Stoll v Switzerland*,⁴³ where the journalist's intent was questioned. Barendt contends that such subjective assessments risk undermining the freedom of expression by prioritizing state interests or intent over public interest in disclosure.⁴⁴ Moreover, the ECtHR's reliance on procedural safeguards, as seen in *Big Brother Watch v UK*,⁴⁵ is a positive step but insufficient on its own.

In conclusion, whilst the ECtHR's case law reflects a commitment to balancing rights, the reliance on wide margins of appreciation and inconsistent application of necessity and proportionality weakens the protection of freedom of expression. To ensure robust safeguards, the Court must adopt a more principled and consistent approach, limiting the potential for abuse under the guise of national security and enhancing democratic accountability, possibly through a proper all-compassing definition of what constitutes national security.⁴⁶

Conclusion

Keeping order in a democratic society is a complicated task to achieve without limiting citizens' rights, especially with regards to national security. As a result, the ECtHR is often seen as trying to balance the right granted under Article 10 with confidential information that could cause paramount damage. While it does seek to find a balance, it is evident that situations arise whereby it is unable to truly balance the two, thereby ending up favouring the state over the individual in the interest of the state as a whole. In fact, it had been stated that the ECtHR 'has adopted a general approach in its case law which does not aim at achieving a balance between freedom of expression on the one hand and national security'.⁴⁷

⁴¹ Helen Fenwick, *Civil Liberties and Human Rights* (3rd ed, Cavendish Publishing 2002).

⁴² *Grigoriades v Greece* (n 23); *Özgür Gündem v Turkey* (n 34).

⁴³ *Stoll v Switzerland* (n 17)

⁴⁴ Eric Barendt, *Freedom of Speech* (1st edn, Oxford University Press 1985)

⁴⁵ *Big Brother Watch and Others v the United Kingdom* (n 19)

⁴⁶ Baldacchino (n 2).

⁴⁷ Kevin Aquilina, 'Maltese National Security Law: Definition and Human Rights Aspects' (2024) 8 *Elsa Malta Law Review* 1.



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