



The Legal Limits of Journalism

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Abstract

The freedom of expression and information is guaranteed by Article 10 of the European Convention of Human Rights and also by many other international conventions and national constitutions. This freedom is not without limits and the limits are imposed where it affects the the rights of other subjects and state secrets. This paper aims to treat the legal limitations of the journalism. It aims to give an answer to these questions; Does the right of information has limits? How this right is limited? Which is the report between public information and the state secrets? Which is the report between information and the protection of the secret during a criminal investigation? Which is the report between information and private life? For giving an answer to those questions, we will look mostly the international law, using the analytic and synthetic methods.

Keywords: freedom of information, state secrets, secret of investigation, private life

1. Introduction

The right to freedom of expression is a right guaranteed to everyone. It includes the right to hold opinions and receive and disseminate information and ideas without interference by public authorities.¹ In the article 19 of the The International Covenant on Civil and Political Rights (ICCPR) is written that;

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.²

In democracies, journalists enjoy protected rights and privileges that ensure the freedom to establish diverse media outlets, to move in public to collect facts and views, to disseminate news, and to demand accountability. In turn, journalists must be responsible. They must operate with a clear conscience and transparent objectives.³ Journalists took on the role of professionals who were qualified to determine the public's interests and needs. They claimed to represent

¹ Guidelines on Safeguarding Privacy in the Media, FREEDOM OF EXPRESSION, THE ROLE OF THE MEDIA AND RESPONSIBLE JOURNALISM, Council of Europe, October 2018, p. 7

² The International Covenant on Civil and Political Rights ("ICCPR") 1966, article 19

³ Miklós Haraszti, *The Media Self-Regulation Guidebook. The OSCE Representative on Freedom of the Media Vienna 2008*, p. 22

these interests using impartial, scientific methods to justify this claim.⁴ The freedom of information and expression is not without limits. Limits are imposed not to block the function of the information but to protect other people's rights and also the state secrets that are important for the public order. We will see those limits from the international legislations.

2. The Limits of Press for Reason of National Security

Many international conventions foresee the limitation of information to protect public order and human rights. The UN Human Rights Council ("HRC") of 1966 has recognized that *the rights of freedom of expression and freedom of the press can be restricted or limited for reasons of national security*.⁵ It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- a. For respect of the rights or reputations of others;
- b. For the protection of national security or of public order (*ordre public*), or of public health or morals.⁶

The Johannesburg principles approved in 1996 provided that;

Everyone has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice. *The exercise of the rights may be subject to restrictions on specific grounds, as established in international law, including for the protection of national security*. It also provides that; *No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government.*⁷ *This means that the restrictions must not be arbitrary or case by case but provided by the national law of the country, to prevent the censure of press by political power.*

Parliamentary Assembly of the Council of Europe Resolution 1551 (2007) Fair trial issues in criminal cases concerning espionage or divulging state secrets provides that, the state's legitimate interest in protecting official secrets *must not become a pretext to unduly restrict the freedom of expression and of information*. It recalls the importance of freedom of expression and of information in a democratic society, in which it must be possible to freely expose corruption, human rights violations, environmental destruction and other abuses of authority.⁸

The Tshwane Principles (2013) addressed the balance between national security and the right to information. These Principles were drafted by 22 organizations and academic centres (listed in the Annex) in consultation with more than 500 experts from more than 70 countries.⁹ In consultation with;

- United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression
- the UN Special Rapporteur on Counter-Terrorism and Human Right
- the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information
- the Organization of American States (OAS) Special Rapporteur on Freedom of Expression
- the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media.¹⁰

According to those principles; The government, and only the government, bears ultimate responsibility for national security, and thus only the government may assert that information must not be released if it would harm national security.¹¹ *"National security" should be defined precisely in national law, in a manner consistent with the needs of a*

4 Rebecca M Rice, 2021. "Questions of Professional Practice and Reporting on State Secrets: Glenn Greenwald and the NSA Leaks." *Secrecy and Society* 2(2). DOI: <https://doi.org/10.31979/2377-6188.2021.020207> <https://scholarworks.sjsu.edu/secrecyandsociety/vol2/iss2/75>

5 DEFENCE HANDBOOK FOR JOURNALISTS AND BLOGGERS *On freedom of expression and freedom of information principles in international law*, 2014, p. 219

6 *The International Covenant on Civil and Political Rights ("ICCPR")* 1966, article 19

7 THE JOHANNESBURG PRINCIPLES ON NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION. *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information*, U.N. Doc. E/CN.4/1996/39 (1996) Article 19. London 1996

8 Resolution 1551 (2007) *Fair trial issues in criminal cases concerning espionage or divulging state secrets*
Author(s): Parliamentary Assembly Origin - Assembly debate on 19 April 2007 (17th Sitting) (see Doc. 11031, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Pourgourides). Text adopted by the Assembly on 19 April 2007 (17th Sitting).

9 GLOBAL PRINCIPLES ON NATIONAL SECURITY AND THE RIGHT TO INFORMATION ("THE TSHWANE PRINCIPLES") finalized in Tshwane, South Africa issued on 12 June 2013, 1

10 *Ibidem*, i

11 *Ibidem* p.5

democratic society.¹² The government asserts or confirms that the release of such information could cause harm to national security.¹³ No restriction on the right to information on national security grounds may be imposed unless the government can demonstrate that: (1) the restriction (a) is prescribed by law and (b) is necessary in a democratic society (c) to protect a legitimate national security interest; and (2) the law provides for adequate safeguards against abuse, including prompt, full, accessible, and effective scrutiny of the validity of the restriction by an independent oversight authority and full review by the courts.¹⁴

The Council of Europe's Committee of Ministers has published recommendations discussing the relationship between freedom of expression and concerns related to national security.¹⁵ In 2013, the European Parliament issued a Resolution on the freedom of press and media in the world. The Resolution recognized that governments have the primary responsibility for guaranteeing and protecting freedom of the press and media. According to the Resolution, "a balance between national security issues and freedom of information must be struck in order to avoid abuses and guarantee the independence of the press and media".¹⁶

The OSCE went on to state that "by pitting free speech concerns and security issues against each other we run the risk that both will be conquered. We may find ourselves with no security and no rights. Consequently, all measures that aim to increase security must be accompanied by meaningful counterweights that protect human rights. In short, we must have effective and transparent mechanisms for civilian oversight of new security measures.¹⁷ The international law put some limits to state secrets because they may be used to hide corruption from public and media. So the state secrets must be very well reregulated by law.

In many states are made the necessary laws to punish the journalists in case, they publish state secrets. For example, in England, journalists should be treated in the same way as those who leak information and those committing espionage offences. It also looked at whether maximum sentences should be increased from 2 to 14 years.¹⁸ Under the Protection of Specially Designated Secrets Act (SDS), in Japan the whistleblowing civil servants face up to 10 years in prison and the journalists who work with them could face up to five years for leaking state secrets.¹⁹ As long as the state secrets are necessary for the protection of the security of the state and that of the public, they must be very well regulated by law and the media should be very careful with their publication.

3. Media Must Not Publish the Criminal File Under Investigation or the Data of Suspected Persons

The publication of the investigation file by journalists in the name of freedom of speech is a criminal offense because it can also cause the murder of the witness and can also damage the evidences against the criminals who may remain free and continue to commit other crimes. In many new democratic states this is not fully understood by journalists who sometimes try to justify those publications with the freedom of expression and publication, falling into conflict with the judicial power, which actually has all the rights to protect the investigation and the life of people, that are irresponsibly put at high risk.

Media should not publish personal data of a witness to a criminal act.²⁰ Evidences in national and international criminal proceedings may be kept confidential for a number of reasons. These reasons include well-substantiated fears for the safety of witnesses or victims and their families and well-founded fears for the safety of other prosecution informants who could not be protected against acts of retaliation.²¹ The Recommendation of the Committee of Ministers

¹² *Ibidem*, p. 4

¹³ *Ibidem* article 2, p. 5

¹⁴ *Ibidem*, article 3, p. 6

¹⁵ DEFENCE HANDBOOK FOR JOURNALISTS AND BLOGGERS *On freedom of expression and freedom of information principles in international law*, 2014, p. 225

¹⁶ *Ibidem*, p. 226

¹⁷ *Ibidem*, p. 227

¹⁸ Charlotte Tobitt, UK journalists could be jailed like spies under proposed Official Secrets Act changes,

2021 <https://pressgazette.co.uk/news/official-secrets-act-reform-harsher-penalties-for-journalists/>

¹⁹ Japan's state secrets law, a minefield for journalists, Masatomo Norikyo/CPJ Guest Blogger on November 4, 2014.

<https://cpj.org/2014/11/japans-state-secrets-law-a-minefield-for-journalists/>

²⁰ JOURNALIST ETHICS COMMITTEE RECOMMENDATIONS ON THE PROTECTION OF PRIVACY IN MEDIA COVERAGE prepared by representatives of journalists, mass media associations, other NGOs, national experts, etc. and Council of Europe experts, 2021, p. 10

²¹ Sabine Swoboda, Confidentiality for the protection of national security interests, *Dans Revue internationale de droit pénal* 2010/1-2 (Vol. 81), pages 209 à 229

to member states on the provision of information through the media in relation to criminal proceedings *in the article 16 is forseen the 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.²²

Accordingly media shall *avoid representing publicly a person as guilty before he/she has been convicted by a tribunal*. In particular, reports should specify whether the accused person has pleaded guilty or not guilty. A confession of guilt should never be presented as proven guilt.²³ The presumption of innocence is an integral part of the right to a fair trial. The media must not prejudge the presumption of innocence.

It is journalistic best practice not to mention the full names of a suspected or accused person, and use instead pseudonyms or initials, unless that person has manifestly made his/her involvement in the particular case public, for example, by denying all charges. Name and/or picture of a suspect or an accused (or any other detail that would make identification possible for anybody not belonging to his/her circle of close relatives or intimate friends) can be published only if there is an overriding public interest in identification.²⁴ In reality, it happens that the face, the identity of an arrested person is spread in all the media, damaging his private life, the well-being of his family, but also the judicial process. Many people who have been declared not guilty by the court are still in online newspaper news and years after, many times with their full face and name. The media does not remove those files without the insistence of the lawyers of the affected persons. Those people unfairly remain as problematic in public eye, seriously damaging their personal lives and their relationship with society.

4. The Protection of Private Life

The article 12 of the Universal Declaration of Human Rights provided that; No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.²⁵ The article 17 of the International Covenant on Civil and Political Rights provided that, no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.²⁶

In Recommendation of the Committee of Ministers of the Council of Europe on the right of reply in the new media environment, is fully relevant in the context of private life coverage as it allows for a rapid publication of a counterstatement to contested facts. In relation to information concerning individuals published in any medium, the individual concerned shall have an effective remedy against the publication of facts and opinions which constitute:

- i. an interference with his privacy except where this is justified by an overriding, legitimate public interest, where the individual has expressly or tacitly consented to the publication or where publication is in the circumstances a generally accepted practice and not inconsistent with law;
- ii. an attack upon his dignity, honour or reputation, unless the information is published with the express or tacit consent of the individual concerned or is justified by an overriding, legitimate public interest and is a fair criticism based on accurate facts. Nothing in the above principles should be interpreted to justify censorship.²⁷

The right to private life is guaranteed to everyone. The notion of private life is a broad term with no strict definition, covering but not limited to the physical and psychological integrity of a person and multiple aspects of a person's identity, such as gender identification and sexual orientation, name or elements relating to a person's right to their image. A person's reputation is also part of the right to private life. Private life extends to the right to freely establish and develop relationships (including romantic ones) with other human beings. In addition, information relating to medical conditions,

22 COUNCIL OF EUROPE COMMITTEE OF MINISTERS Recommendation Rec(2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings (Adopted by the Committee of Ministers on 10 July 2003 at the 848th meeting of the Ministers' Deputies)

23 JOURNALIST ETHICS COMMITTEE RECOMMENDATIONS ON THE PROTECTION OF PRIVACY IN MEDIA COVERAGE..p. 9

24 *Ibidem*, p.9

25 Universal Declaration of Human Rights, 1948, article 12

26 Article 17 of the International Covenant on Civil and Political Rights 1966

27 Resolution (74) 26 on the right of reply - position of the individual in relation to the press. (Adopted by the Committee of Ministers on 2 July 1974, at the 233rd meeting of the Ministers' Deputies)

home addresses, fathering a child out of wedlock and sexual activities are considered to fall within the sphere of private life. The right to privacy means that everyone, private and public figures, have the right to live privately away from unwanted attention (subject to some exceptions).²⁸

Media may interfere with the private life of public figures without their consent only when there is an overriding public interest justifying exposure to the public. Such interference should be proportional and not go beyond what is necessary to satisfy a legitimate public interest. According to consistent case law of the European Court of Human Rights, politicians have to expect a lower degree of protection of their privacy; as the Court stated "it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights"²⁹ However mere curiosity or sensationalism can never justify infringement of the right to respect for private life. In assessing whether there is a public interest justifying an interference with the right to respect for private life, the focus must be, as stated by the European Court of Human Rights, "on whether the publication is in the interest of the public and not whether the public might be interested in reading it"³⁰

As a general rule, personal information should not be made public without the consent of the concerned person. Consent is an important element in determining whether a publication of a detail from private life interferes with the right to privacy. That being said, information about individuals can also be published without consent if there is an overriding public interest, if the disclosure of information is justified by a general interest or concern, which is considered to prevail over the considerations of the concerned individual's privacy. The concept of public interest may therefore constitute an "alternative justification" for a publication.³¹ *Individuals have the right to refuse publication of their image and to object to the recording, conservation and reproduction of the image by another person. Journalists should, in principle, secure the consent of the person concerned at the time the picture is taken and not simply if and when it is published.* Otherwise an essential attribute of personality (the image) is dependent on third parties and the person concerned has no control over it.³² Publishing photos with accompanying commentaries relating exclusively to details of private life, when without consent and especially when taken secretly from a distance, are likely to infringe the right to privacy of public figures. It is not necessarily considered that such photos contribute to a debate of general interest. This standard is even stricter in cases concerning private individuals.³³

Playing no role in public life, ordinary persons enjoy a greater level of respect of their private life. As a matter of principle, their personal data should not be published without their consent. At the same time while obtaining such consent a journalist must clearly explain which personal data will be published, by whom and in which form. The mere fact that personal data of ordinary persons have already been published by other media does not justify by itself their repeated publication. For the dissemination of such information without the consent of the ordinary person, there must be a prevailing public interest that justifies such re-publication.³⁴

Media may collect and disseminate information about the private life of public figures with their consent. Journalists should not use deceptive methods to obtain such consent.³⁵ No media is authorized to publish personal data, take private photos, record videos and publish them without a person's consent. In many countries where the protection of private life is not in the public culture and ethics, this routine has become normal, where many people's lives are unfairly damaged in the public eye. It even sometime reaches the point where these people are bullied, mocked and laughed at by powerful television programs. If the invasion of privacy constitutes a legal injustice, the elements for demanding redress exist, since already the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation.³⁶ National laws provide penalties and compensation for victims when the media violates privacy, but rarely do people go to court to protect themselves.

28 *Guidelines on Safeguarding Privacy in the Media*, 2018, p. 11

29 JOURNALIST ETHICS COMMITTEE RECOMMENDATIONS ON THE PROTECTION OF PRIVACY IN MEDIA COVERAGE..

30 *Ibidem*

31 *Guidelines on Safeguarding Privacy in the Media*, 2018, p. 11

32 *Ibidem*, p. 21

33 *Ibidem*, p. 9

34 JOURNALIST ETHICS COMMITTEE RECOMMENDATIONS ON THE PROTECTION OF PRIVACY IN MEDIA COVERAGE..p. 4

35 *Ibidem*

36 Samuel D. Warren, Louis D. Brandeis, *The Right to Privacy*. *Harvard Law Review*, Vol. 4, No. 5 (Dec. 15, 1890), pp. 193-220 (28 pages) <https://doi.org/10.2307/1321160>, p. 213

5. Conclusions

This paper aimed to address the limits of journalism in their publications, limits that are often not respected by them, in the name of freedom of speech. In fact, freedom has limits when in front are the interests of the state and the human rights. So media is limited in publishing state secrets because they are important for national and public security, with condition that they must be very well defined by law. Also, media is not allowed to publish secrets from the criminal files that are under investigations. They must not prejudice the criminal process and also they must not declare the arrested as guilty or non guilty. The media is limited to interfere and publish parts of the private life, except when the private life of a public person has an impact on the public sector.

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