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*The rights to freedom
of expression and privacy
in the Council of Europe's instruments –
a dynamic and precarious balancing act*

Fundamentals of the balancing act

The rights to freedom of expression and to privacy – and in the scope of private life protection of personal data – are both protected under the European Convention on Human Rights. The two rights may go hand in hand – unfortunately mostly in cases of both rights being interfered with, for example when confidentiality of journalistic sources is endangered, or when surveillance software is installed by the State to monitor and censor websites – but more often than not these two rights come into conflict and must be weighed against each other.

The conflict inherent in balancing freedom of expression and the right to privacy invariably presents some complex legal issues. So much so that, in judicial context, the exercise requires careful consideration of a number of criteria and detailed reasoning before a conclusion can be drawn.

The most important of those criteria is public interest. Only matters which affect the public to such an extent that it may legitimately take an interest in them can justify encroachments on privacy. Those include, but are not limited to various political and socio-economic topics, protection of public health, safety or environment, protection of national security, use of public money, etc.

On a practical level, defining public interest and reconciling freedom of expression with privacy is a constant dilemma faced by journalists and other media actors in their everyday work. It is a question of law, but also one of journalistic ethics.

In law, the two rights – freedom of expression and privacy – have been placed on the same footing by the European Court of Human Rights [Council of Europe 1993: 8, 10], meaning that neither of them will automatically be given priority; they will be weighed against each other on a case-by-case basis.

The right to freedom of expression protected by Article 10 of the European Convention on Human Rights is widely recognised as an essential element of a democratic society and a precondition for its progress and for each individual's self-fulfilment. Going beyond information and ideas that are favourably received or regarded as inoffensive or with indifference, the right to freedom of expression extends to – in the words of the European Court – information that could offend, shock or even disturb.

On the other side of the coin we all have a right to live privately away from unwanted attention, as well as to develop relationships with other human beings. The scope of this right protected by Article 8 of the European Convention may vary depending on how intensely our work, profession, events in our life or even family relationships intertwine with public affairs, but we all have a right to enjoy private matters, and especially intimate relations – away from the prying eyes.

Somewhat paradoxically, we have never been more aware of the importance of privacy than today, when it seems that we have, to a large extent, renounced it. Technological advancements of the last decades and the accompanying process of societal transformation have resulted in unprecedented political, economic and cultural connectedness. The internet has become a *conditio sine qua non* of modern information, communication, education, entertainment, shopping and multiple other services.

However, the more we engage with online environment, the more online platforms we use, the more digital traces we leave. There is not only what we choose to release into the world wide web, those traces also include the histories of our Google searches, credit card purchases, “likes” on Facebook, as well as any movement with smartphones. This information is extremely valuable to companies, because understanding our needs and desires can help them focus their advertising on just the right people. Likewise, it is important for political actors who can use it to reach out to potential voters, also by means of targeting individuals with messages adapted to their personal interests.

Personal data is rapidly becoming one of the most valuable things in society, and one of the most monetisable ones.

Judicial balancing act – European Court of Human Rights

How do these modern-day digital conundrums translate into the case-law of the European Court of Human Rights?

One example is a last year's Grand Chamber judgment in the case of *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* concerning a wholesale publication of individuals' tax information in a newspaper and via an SMS service [European Court of Human Rights 2017]. Under the Finnish law, data on taxation are accessible to the public; however, the manner in which it was published, that is as alphabetical lists featuring only this information without any broader journalistic context, were found first by the domestic courts and ultimately by the Strasbourg Court to not contribute to a debate of public interest. The Court held that the personal data collected and published by the applicant companies had not been processed for a solely journalistic purpose. Therefore, the right of Finnish taxpayers to privacy prevailed over the newspaper's and audience's freedom of expression.

Another, very recent example involves the question of whether personal data published online should be able to remain there permanently or should they enjoy a limitation period. In 2014, the European Court of Justice ruled that the citizens of the European Union had a "right to be forgotten" [Reichert 2014], in the sense that irrelevant and out-dated personal details should be removed from search engines upon request.

However, as we will see, not all personal data benefit from this measure. Again, the result hinges on the assessment of public interest for the information to remain in the public domain. In the case of *M.L. and W.W. v. Germany*, the European Court of Human Rights [2018] ruled on a request of two brothers who had several years ago been convicted of a murder of a public figure. The media reports on the events in question were still accessible on websites of different media. The Court noted that it was primarily on account of search engines that the information made available by the media could be obtained by the internet users. However, the search engines merely amplified the scope of the interference; it was, ultimately, the decision of the media outlets to publish and maintain this material on their website.

The Court agreed with the domestic courts that while the applicants had considerable interest in no longer being confronted with their convictions, the public had an interest in being informed about a topical event, and also in being able to conduct research into past events. As to the publication of personal details such as full names, the Court reiterated that Article 10 of the Convention left it to journalists what details ought to be published, provided that these decisions corresponded to the profession's ethical norms.

Balancing act inherent in the standard-setting instruments

This being said, the Council of Europe enacts the balancing act between the two rights not only through the Court judgments, but also through a number of other instruments. There are numerous standards arising from the Council's conventions, recommendations and declarations in the area of freedom of expression, access to information and data protection. These standards, on the one hand, take inspiration in the Court's case-law, but on the other hand, also inform the Court's decisions.

As already explained, the manner in which freedom of expression and privacy are enjoyed – but also threatened – today is very different than it was a few years ago.

The Council of Europe aims to develop a comprehensive framework of instruments to address threats to these rights and to ensure that interference with them is prescribed by law, necessary and proportionate.

An important step in this process constitutes the Modernised Convention for the Protection of Individuals with Regard to the Processing of Personal Data [Council of Europe 2018], which seeks to reinforce respect for human rights in the predominantly digitalised world by safeguarding the right of every individual to control his or her personal data and the processing of such data. The Convention lays down some new principles (e.g. expansion of the scope of sensitive data, notification of serious security breaches, requirement of transparency of processing, information to data subjects) and clarifies some established ones (clear provision of legal basis for processing of personal data), in order to effectively address the challenges resulting from the new information and communication technologies.

It is also worth noting that with these technologies, a number of new actors – search engines, social media, news aggregators – have entered the arena of freedom of expression, privacy and data protection. They distribute various types of content

on their websites, but also manage and edit it. Their decisions direct what we see when we make a search in Google, what news appear on our Facebook newsfeeds, what books and music and tv shows we are recommended to see, and buy, on Amazon. While the tech giants may not be equated with traditional news publishers, they play a vital role in steering our informational, social and economic interests and choices. And they do that by collecting, storing, analysing – and selling – our personal data.

To provide a solid, human-rights based legal framework in which these internet platforms are to operate, this year our member states, united in the Committee of Ministers, agreed on a set of rules directing their activities. Recommendation [Council of Europe 2018] on roles and responsibilities of internet intermediaries establishes a legal frame for these companies to operate in, and provides some fundamental safeguards for the freedom of expression and privacy of individuals who use the platforms. The platforms are also encouraged to assess the rights impacts of new technologies before they are used, and significantly increase transparency and accountability in all their dealings.

Not surprisingly, the new technologies have also profoundly changed the way media are made and experienced. People obtain most of their news and other information online, over social media websites and blogs, as quickly as possible and preferably free of charge. New actors in the media ecosystem have eliminated the traditional journalistic filters of accuracy, fact-checking and separation of opinion from fact. The platforms seized a large part of advertising funds which previously went to traditional media, which, in its turn, contributed to cost cuts especially in investigative journalism (the most expensive form of journalism). It also created a breeding ground for sensationalist reporting deemed to bring in more money.

On a more positive note, these trends have also demonstrated the value of accurate, credible information for informed decision making and, generally, for an informed society.

Balancing act in practice – Guidelines on safeguarding privacy in the media

In the context of the work that our organisation carries out with various stakeholders in the areas of privacy, data protection and media freedom, a need was expressed for some concrete guidance to journalists than that found in the abstract codes of ethics. We were asked to provide examples and basic reasoning as to which journalistic methods, or actions, can be justified – or not – and why that is so.

While it is not the role of the Council of Europe to act as an ethical adjudicator, we are an organisation dedicated to the protection of the rule of law. Therefore we decided to provide concrete examples of journalistic “dos” and “don’ts” through a collection of the Court’s decisions, with some basic explanations as to the main grounds.

The Guidelines on safeguarding privacy in the media [Council of Europe 2018], approved by both the Consultative Committee of the Convention 108 and the Steering Committee on Media and Information Society not two weeks ago, resolve a number of so-called “borderline” situations, where ethical considerations spill over into the legal arena. Nevertheless, the Guidelines are not a legal document and introduce no new standards, but rather serve as a guide of practical advice.

As to the structure, the Guidelines are divided into two major parts. The first one deals with privacy issues in the exercise of core journalistic activities, while the second concerns the application of data protection principles in the context of journalism.

The first part spells out the basic notions involved in the balancing of freedom of expression and privacy, providing some insight into what constitutes private life, what entails media freedom, how consent is incorporated in the media work. Of course, they also include some examples of how far the public interest may extend, especially in matters of personal concern. It also presents the criteria involved in the Court’s balancing test (contribution to a debate in general interest, role of the person concerned and role of the subject of the report, prior conduct of the person concerned, the method of obtaining information, content, form, consequences – sanctions) and addresses some specific issues of private life.

Secondly, the data protection part sets out the rules to be complied with by journalists in the processing of personal data, be it in the context of editorial content or non-editorial content.

Hopefully, these guidelines will help journalists fulfil their role of providing timely, accurate and relevant information and thus reclaim the essential traits of quality journalism. But at the same time, they showcase the dynamic relationship between two Convention rights which acquire new dimensions as the society changes, and also require new approaches to their protection.

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