

***Seminar on the European Protection of Freedom of Expression:  
Reflections on Some Recent Restrictive Trends***

**Strasbourg, 10 October 2008  
A Seminar at the European Court of Human Rights**

**Université Robert Schuman, Strasbourg  
Ghent University  
Open Society Justice Initiative**

**Some conclusions and outlook**

**By Dirk VOORHOOF**

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After a long day of interesting, challenging and lively presentations and debate, it is time to formulate some final observations before closing today's conference.

A bit more than a year ago Constance Grewe, Mario Oetheimer and I decided to organise a conference that should focus on certain peculiar developments in Strasbourg's freedom of expression case law as there were some signals - perhaps weak signals at that time - suggesting that the European Court of Human Rights was taking a divergent approach in some cases on press freedom, and in particular on the "duties and responsibilities" of the media and journalists.

That was in early autumn 2007. It was – just like today – a sunny day in Strasbourg. Symbolically, however, some darks clouds have appeared ever since.

In the weeks and months that followed, the initial indications regarding a shift in the Court's case law became overwhelmingly obvious signals.

Let us recall some of the cases we discussed today:

**Lindon, Otchakovsky-Laurens and July v. France (Grand Chamber), 22 October 2007**  
**Stoll v. Switzerland (Grand Chamber), 10 December 2007**  
**Rumyana Ivanova v. Bulgaria, 14 February 2008**  
**Alithia Publishing Company Ltd. & Constantinides v. Cyprus, 22 May 2008**  
**Backes v. Luxembourg, 8 July 2008**  
**Soulas a.o. v. France, 10 July 2008**  
**Flux (n°6) v. Moldova, 29 July 2008**  
**Cuc Pasco v. Romania, 16 September 2008**  
and most recently **Leroy v. France, 2 October 2008,**

the last judgment dealing with a 9/11-cartoon whose message, according to its author, was criticizing US imperialism, while the French courts and the European Court of Human Rights concluded that the essence of the message of the cartoon was condoning and glorifying terrorism.

In each of the above mentioned cases the Court found no violations of Article 10 as the “interferences”, convictions and sanctions challenged by the applicants, were, according to the Court, legitimately, pertinently and sufficiently based on the “duties and responsibilities” which are inherent in the exercise of the freedom of expression (paragraph 2 of Article 10).

The outcome and rationale of the judgments in which the Court has recently found no violation of freedom of expression have raised serious concerns regarding the level of protection of press freedom in Europe compared to the ‘traditional’ high standards of Strasbourg case law in this matter. Some of these judgments were not only critically analyzed by academics and NGO’s advocating freedom of expression, but also from within the Court, where during the last year some of the dissenting judges, on several occasions, pulled the alarm bell regarding the ‘new’ approach adopted by the Court in applying the test of necessity in a democracy. The discussion is especially focusing on the notion of whether democracy is best served with more or less freedom of expression and on the notion of ‘responsible’ investigative or critical journalistic reporting. The dissenting opinions in *Stoll v. Switzerland* referred to a “*dangerous and unjustified departure from the Court’s well established case-law concerning the nature and vital importance of freedom of expression in democratic societies*”. In the case of *Lindon a.o. v. France*, the dissenters criticized the findings and the assessment of the Grand Chamber and described the majority’s approach in this case as “*a significant departure from the Court’s case-law in matters of criticism of politicians*”. In the case of *Flux nr. 6 v. Moldova*, the dissenters expressed concern that “*that this judgment of the Court has thrown the protection of freedom of expression as far back as it possibly could*”, making it “*a sad day for freedom of expression*”. It became obvious that also within the Court some of the above mentioned judgments have initiated a robust debate on the relation between press freedom, democracy and duties and responsibilities of media and journalists.

The reports, presentations and interventions of today have analysed, argued and demonstrated that there is a “restrictive trend” in the Court’s recent case law, confirming the concerns expressed in the title of the event. Depending on a more optimistic or pessimistic attitude, the perception can only gradually differ.

Some have qualified the changing approach of the Court, initiated by the Grand Chamber, as a “quantum shift” (Gavin Millar) or as “une inflexion”, a turn in the Court’s case law (Patrick Wachsmann). The perception can be that this shift has happened already or that such a restrictive trend is actually underway, but the material analysed and debated today has demonstrated that at least some, if not most of the above mentioned judgments, provide legitimate reasons for serious concern regarding the future of freedom of expression in Europe. Some of the Court’s judgments reflect a willingness to treat public figures’ personal rights, in particular to “dignity” and honour and reputation, as at least equal in importance to the right to the free speech right. In some judgments the protection of personal interests may be obscuring the wider importance of public interest speech. In other judgments priority has been given to the protection of secret or confidential information and to the interest of the state or a country’s foreign policy interest, neglecting the public watchdog function of the media. Another worrying trend is that Article 8 (*right to privacy*) is more often invoked for additional justification of interferences in freedom of

expression, also in cases of protection of the reputation of politicians and public figures in relation to their political or public life.

In the Court's recent case law the finding of non-compliance with ethics of journalism has become an important, or even a crucial, if not decisive, argument in evaluating the necessity of an interference in freedom of expression and press freedom as guaranteed by Article 10 of the European Convention on Human Rights. In some judgments the Court shows less reluctance than it did before in determining itself how a journalist should have reported the news. The Court refers in this regard to "*ethics of journalism*", the "*standard of proper journalistic care*", the "*duties of responsible journalism*", "*best journalistic practice*", "*the customary rules of investigative journalism*" and the "*requirements of journalistic diligence*", integrating professional standards and ethics of journalism into the legal framework of Article 10 of the Convention.

Hesitations and doubts have been created around the Court's 'new' approach in Article 10 cases, at the very moment that the Court's 'classical' case law has been increasingly influencing national courts and national authorities, creating added value for freedom of expression in a democracy. An impact that became obvious both within the 47 states parties to the European Convention and outside its strict regional jurisdiction. It has been illustrated how the case law of the Strasbourg Court in the past has been an inspiring source for upholding freedom of expression in other parts of the world or how it has influenced e.g. some of the judgments of the Inter-American Court of Human Rights promoting freedom of expression in application of Article 13 of the American Convention on Human Rights, as illustrated in the report by Eduardo Bertoni.

Today's conference, opened by the Vice-President of the European Court of Human Rights and taking place in the building of the European Court in the presence of many of the Court's judges, has certainly helped us to have a better overview and to cast a sharper light on the recent developments in the Court's case law applying Article 10 of the Convention.

Several questions will need further elaboration, more study, a more thorough analysis and further reflection and debate.

Questions e.g. as:

- How to explain the changing approach in the Court's case law? Why is this happening? What factors are influencing this development? What is or has been the specific role of the Grand Chamber in this regard?
- What is or will be the impact of these recent developments? What is the impact on media lawyers dealing with freedom of expression cases or advising their clients? What will be the impact on national judges and courts at the domestic level? And what will be the impact on the continental media and journalism, will there be a 'chilling effect' for the media, for journalists in Europe? To what extent? Will investigative journalism, in particular, come under greater threat?

- What is the impact on Press Councils confronted with the convergence between journalistic ethics as professional standards and failure to observe such standards as important or decisive legal factors legitimating an interference with media freedom? Should, in this perspective, the Councils of Journalistic Ethics in Europe anticipate in the future an increased possibility that their decisions might influence the fact finding and legal reasoning of judicial authorities in both civil and criminal cases against journalists? Should the self- and co-regulatory bodies of journalistic ethics be more aware of a virtual 'second life' of their opinions and decisions? What are the possibilities, what are the options?
- Is there still a way back? How can the Court find its way back on the track of its generally very well-respected approach in cases regarding freedom of expression? How to stimulate this?

The organisers of today's conference do hope that the meeting and the exchange of opinions and information will have a process of follow up, that there will be a creative spin-off. We do hope that the signals given today will have an effect, an impact on future developments.

We need to keep the debate open, maintain a spotlight on where Strasbourg case law is going and continue addressing together the very important issue that brought us together today: NGO's, journalists, professional organisations in the media sector, Press Councils, media lawyers, academics and judges, all within their own role, possibilities and accountability towards society. We need to develop what we have started today in order to find out what can be done against tendencies decreasing protection of freedom of expression, media freedom and (investigative) journalism and stimulating responsible journalism and transparency about the '*res publica*' in a democratic society.

Instead of taking part today in the "funeral" of the *Handyside* or *Sunday Times* doctrines regarding the importance of freedom of expression in a democratic society based on broadmindedness, pluralism and tolerance -- and on a concept of society in which shocking, offending and disturbing opinions and information have their place -- we hope that today's conference has helped create a revival of this approach and will contribute to bringing to an end the restrictive trend in Article 10 case law. We hope that this conference has helped motivate all its participants to contribute, take initiatives or positive action in this regard. Let's also keep in mind and be aware of the more than hundred judgments of the European Court of Human Rights firmly supporting freedom of expression in application of Article 10 of the Convention and having created a standard that should be respected in the future.

The organisers would like to thank all those who have contributed to today's event: those who hosted the meeting, sponsored the conference, and co-organised or supported it, and especially all those who have been actively participating in this meeting. Special thanks also for the interpreters who did a fantastic job during this very long day.

I wish all of you a safe and joyful journey back to your home countries today or tomorrow or have a fine and sunny weekend in Strasbourg.

The material of this conference is and will further be posted on the conference website: [http://www-ircm.u-strasbg.fr/seminaire\\_oct2008/index.htm](http://www-ircm.u-strasbg.fr/seminaire_oct2008/index.htm)