

**The right to freedom of expression of
bloggers, citizen journalists and other new media workers**

by

Douwe Korff

*Emeritus Professor of International Law, London Metropolitan University
Associate, Oxford Martin School, University of Oxford*

June 2022

The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.

Declaration of the Rights of Men, 1789

Freedom of expression constitutes one of the essential foundations of [a 'democratic society'], one of the basic conditions for its progress and for the development of every man. Subject to [only such restrictions as are 'necessary in a democratic society'], it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.

European Court of Human Right, *Handyside* judgment, 1991

As citizen journalists are by nature more isolated, they are more vulnerable to attack than professional journalists. However, citizen journalists enjoy less protection than their counterparts in traditional media, as they do not have the support of media organizations and networks, in particular the organizational resources, including lawyers and financial resources, which can help shield them from harassment.

UN Special Rapporteur on freedom of opinion and expression, 2010

As stipulated in Human Rights Council resolution 12/16 (para. 5 (p) (i)), the following types of expression should never be subject to restrictions: discussion of government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups.

UN Special Rapporteur on freedom of opinion and expression, 2011

The right to freedom of expression of bloggers, citizen journalists and other new media workers

1. Introduction

The right to freedom of expression is one of the cornerstones of the international human rights edifice, recognised in the 1948 Universal Declaration of Human Rights (Article 19) and the regional treaties that built on that including the UN International Covenant on Civil and Political Rights (also Article 19). It is guaranteed under the European Convention on Human Rights and in the EU Charter of Fundamental Rights in identical terms, as follows:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

(ECHR, Article 10(1), last sentence about licensing of “broadcasting, television and cinema enterprises” omitted; Article 11(1) CFR)

Measures interfering with (limiting) this right are permitted but must:

- be “**prescribed by law**” – i.e., based on *clear, precise and publicly accessible* rules that are *foreseeable* in their application;
- serve a “**legitimate aim**” in a democratic society (see below); and
- be “**necessary**” and “**proportionate**” to that legitimate aim.

(See Article 10(2) ECHR; cf. Article 52 CFR, which adds that any limitations on any of the rights protected by the Charter must also “**respect the essence**” of the relevant right.)

Interferences can take the form of “*formalities, conditions, restrictions or penalties*”: they all limit the right and must all be judged by the above criteria. More generally, **they must not allow for the imposition of arbitrary restrictive measures** – such as are enabled in particular by unduly vague wording in laws allowing the imposition of restrictions.

The legitimate aims for the protection of which restrictions may be imposed on freedom of expression are exhaustively listed in the second paragraph of Article 10 ECHR; they comprise: “*the interests of national security, territorial integrity or public safety, ... the prevention of disorder or crime, ... the protection of health or morals, ... the protection of the reputation or rights of others, ... preventing the disclosure of information received in confidence, [and] ... maintaining the authority and impartiality of the judiciary.*”¹

¹ Article 52(1) of the EU Charter of Fundamental Rights refers more broadly to “objectives of general interest recognised by the [European] Union or the need to protect the rights and freedoms of others.” However, the third paragraph adds that:

“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

In practice, under the CFR, restrictions on freedom of expression must therefore not exceed what is permissible under the Convention, and must therefore also serve one of the legitimate aims listed in Article 10 ECHR.

There is extensive case-law of the European Court of Human Rights on Article 10, clarifying each of these terms and requirements, and detailed guidance on this is available from the Council of Europe and academic sources.²

In applying the above criteria to any particular case of an alleged interference with the right to freedom of expression, the European Court of Human Rights (“the Court”) takes a number of matters into account including:

- the position of the person exercising the right to freedom of expression – in particular, whether the person was a journalist, politician, or otherwise someone partaking in public debate – and the privileges and duties that may entail;
- the issue in relation to which the right to freedom of expression was exercised – in particular, whether the issue was one of general public interest or merely a trivial or private matter and the impact of any relevant publication;
- the weight of any relevant other interests affected (i.e., of the legitimate aim for which the restriction was imposed);
- whether the expressions in question related to facts or constituted value-judgments; and
- the manner and tone in which the alleged victim expressed his- or herself.

Also important is the severity of any restriction or penalty imposed on anyone – and in particular the press and investigative reporters – exercising their right to freedom of expression. As the Court put it in *Cumpănă And Mazăre*:³

The nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10. The Court must also exercise the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern.

...

² See in particular:

- European Court of Human Rights, [Guide on Article 10 of the European Convention on Human Rights – Freedom of expression](https://echr.coe.int/Documents/Guide_Art_10_ENG.pdf) (part of the Court’s own Case-Law Guides series), updated version, 30 April 2021, available at: https://echr.coe.int/Documents/Guide_Art_10_ENG.pdf
- David Harris, Michael O’Boyle, Ed Bates, and Carla Buckley, [Harris, O’Boyle, and Warbrick: Law of the European Convention on Human Rights](#), 4th ed., OUP 2018, Chapter 13.
- Dominika Bychawska-Siniarska, [Protecting the Right to Freedom of Expression under the European Convention On Human Rights – A handbook for legal practitioners](https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814), Council of Europe, Strasbourg, 2017, available at: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>
- Toby Mendel, [Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights](https://rm.coe.int/16806f5bb3), Council of Europe, Strasbourg, undated (2013?), available at: <https://rm.coe.int/16806f5bb3>

³ ECtHR, grand chamber judgment in *Cumpănă And Mazăre v. Romania*, 17 December 2004, paras. 111 and 113 – 115, extensive references to other cases omitted.

Although the Contracting States are permitted, or even obliged, by their positive obligations under Article 8 of the Convention ... to regulate the exercise of freedom of expression so as to ensure adequate protection by law of individuals' reputations, they must not do so in a manner that unduly deters the media from fulfilling their role of alerting the public to apparent or suspected misuse of public power ... Investigative journalists are liable to be inhibited from reporting on matters of general public interest – such as suspected irregularities in the award of public contracts to commercial entities – if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment or to a prohibition on the exercise of their profession.

The chilling effect that the fear of such sanctions has on the exercise of journalistic freedom of expression is evident. This effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed on [the applicants in that case], who, as the Court has held [earlier in the judgment], were undeniably entitled to bring to the attention of the public [a matter of significant public interest].

Although sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence

In the case at hand, the applicants had been sentenced to seven months imprisonment and barred from working as journalists for one year for defamation of an individual in the context of a debate on a matter of legitimate public interest, and this was held to violate Article 10.

The Court's views fully chime with the statements of the UN Rapporteur on Freedom of Expression, quoted at the beginning of this paper and drawing on Human Rights Council resolution 12/16, para. 5 (p), that:⁴

[T]he following types of expression should never be subject to restrictions: discussion of government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups.

As the Court makes clear, this applies *a fortiori* to particularly severe restrictions and punishments such as imprisonment or bars from working as a journalist.

⁴ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, UN General Assembly Document A/66/290, 10 August 2011, para. 42, available at: <https://digitallibrary.un.org/record/710170?ln=en>

The UN Human Rights Council Resolution 12/16 on Freedom of Opinion and Expression of 12 October 2009 is available at: <https://www.right-docs.org/doc/a-hrc-res-12-16/>

2. “The press”

In the case-law of the European Court of Human Rights (ECtHR or “the Court”), “the press” and “official” journalists have traditionally been given special protection:⁵

[The principles underpinning the right to freedom of expression] are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".

At the same time:⁶

[W]hoever exercises his freedom of expression undertakes "duties and responsibilities" the scope of which depends on his situation and the technical means he uses. The Court cannot overlook such a person's "duties" and "responsibilities" when it enquires, as in this case, whether "restrictions" or "penalties" were conducive to the "protection of morals" which made them "necessary" in a "democratic society".

The same applies in other contexts, i.e., whether restrictions or penalties imposed on someone exercising their right to freedom of expression were necessary and proportionate in relation to any of the other legitimate aims listed in the second paragraph of Article 10 ECHR.

In that regard, it should be noted that, as the Court held in the same paragraph:

Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to [only such restrictions as are ‘necessary in a democratic society’, as provided for in paragraph 2 of Article 10], it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.

Three matters are important in that respect. First of all, the manner and tone in which issues are presented: a calm, considered report based on diligent research is more deserving of Article 10 protection than a hyped, opinionated one based on unchecked rumours or inuendo (although the latter is also not completely unprotected). Secondly, a distinction must be drawn between the imparting of facts (which are capable of objective proof) and opinions and value-judgments (which are not). And third, journalists must act in “good faith” and exercise due “professional diligence”. As summarised in the Council of Europe Handbook on Article 10:⁷

⁵ ECtHR, plenary judgment in *Sunday Times v. the United Kingdom* (2), 26 November 1991, para. 50.

⁶ ECtHR, plenary judgment in *Handyside v. the United Kingdom*, 7 December 1976, para. 49.

⁷ Dominika Bychawska-Siniarska, Protecting the Right to Freedom of Expression under the European Convention On Human Rights – A handbook for legal practitioners (footnote 2, above), section 6.9, on pp. 79 – 80. Cf. the Court’s own summary of its approach in *Stoll v. Switzerland*, judgment of 10 December 2007, para. 103 (with reference to earlier case-law, here omitted):

“Paragraph 2 of Article 10 does not ... guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Hence, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide ‘reliable and precise’ information in accordance with the ethics of journalism.”

The defence of good faith must be accepted by courts in cases of defamation, which essentially concern facts. If, at the time of publication, a journalist had sufficient reasons to believe that a particular piece of information was true, he/she should not be sanctioned. The news is a “perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.”⁸ A journalist should therefore only be required to make a reasonable check and to assume in good faith the accuracy of the news. Another argument in this respect concerns the lack of intent, on the part of the journalist, to defame the alleged victim. As long as the journalist believed the information to be true, such intent is lacking and therefore the journalist’s conduct may not be sanctioned under provisions prohibiting intentional defamation; it is intentional defamation that is provided for in criminal law.

Additionally, journalists should not only act in good faith, but they should also demonstrate diligence and professionalism in the collection of information, and facts, in particular, should be verified by reliable sources. When “the circumstances indicated a higher probability of inaccuracy in the submissions of persons who were the source of information for the journalist, a particularly meticulous verification of the truthfulness of the allegations was necessary”.⁹ National courts should always verify the diligence with which the journalistic material was collected. The same standard would be applicable to other professional groups enjoying freedom of expression, for example film makers.¹⁰

Although the first paragraph in the above quote specifically relates to defamation, the requirement of good faith and due diligence is undoubtedly relevant in all contexts, including in relation to reporting on alleged political or social improprieties, corruption, or similar issues.

However, the lines are not easy to draw, and the issues overlap. Thus, on the first point, journalists can voice “hard-hitting criticism” and express themselves in a “polemical and even aggressive tone” and still be protected by Article 10.¹¹ Similarly, a published selection of poems can contain “pathos and metaphors” and “aggressive passages” – but as long as, in the specific context, they cannot be said to constitute incitement to hatred or violence, their publication, too, should not be suppressed.¹²

Furthermore, whereas claims of fact can in certain circumstances (such as in relation to alleged defamation) be subjected by national courts to a requirement that the person claiming those facts prove their veracity – and a denial of the *exceptio veritatis* to a defendant in a case of alleged insult to the government can therefore constitute a violation of the Convention¹³ – value-judgments are by their very nature incapable of objective proof – and to demand proof in relation to such judgments is therefore incompatible with the Convention.¹⁴ Moreover,

⁸ [ECtHR], *The Sunday Times v. the United Kingdom (No. 2)*, 26 November 1991, paragraph 51. [original footnote]

⁹ [ECtHR], *Stankiewicz and Others v. Poland*, 14 October 2014, paragraph 58. [original footnote]

¹⁰ [ECtHR], *Braun v. Poland*, 4 November 2014. [original footnote]

¹¹ See, respectively, ECtHR, grand chamber judgment in *Sürek V. Turkey (No. 4)*, 8 July 1999, para. 58, and ECtHR, chamber judgment in *De Haes And Gijssels V. Belgium*, 24 February 1997, para. 48.

¹² ECtHR, grand chamber judgment in *Karataş V. Turkey*, 8 July 1999, para. 49.

¹³ ECtHR, chamber judgment in *Castells v. Spain*, 23 April 1992, paras. 47 – 49.

¹⁴ Cf. ECtHR, plenary judgment in *Oberschlick v. Austria*, 23 May 1991, paras. 62 – 64.

requirements to provide proof of factual allegations should not be unreasonable or impossible in the circumstances.¹⁵

As reiterated in a later case:¹⁶

[A]s part of their role of a “public watchdog”, the media's reporting on “‘stories’ or ‘rumours’ [on a matter of legitimate public concern – DK] – emanating from persons other than the applicant – or ‘public opinion’” is to be protected where they are not completely without foundation.

In relation to “official” journalists – which in the present context can be read as journalists working for a recognised public medium such as a newspaper or radio or television station – the relevant duties are often spelled out in “professional codes” or “codes of [journalistic] ethics”, or less formally subsumed under the rubric “responsible journalism”. Such journalists will moreover be subject to editorial control by editors and lawyers, and to professional disciplinary measures (and legal action) if their reporting falls short of the relevant standards.

However, in the age of the Internet, social media and ubiquitous means of capturing information including audio and visual images, many more actors feel called upon to report on matters of public interest (as well as on trivial issues – but so does the “official” press of course).¹⁷

This is discussed in the next section. In section 4, I discuss the – to date, rather limited – case-law of the European Court of Human Rights, relevant to the present paper. In the final section, I discuss how the developing new standards can – and in my opinion should be – applied by the Court (while noting that those standards are not out of line with the case-law).

3. “new media actors”

Over the last two decades, considerable attention has been given to the question of how the international guarantee of freedom of expression and of freedom to seek, receive and impart information should be applied to the new media actors. In 2010, the UN Special Rapporteur on freedom of opinion and expression, then Frank La Rue, looking back at activities over previous years (from 2004), highlighted:¹⁸

the phenomenon of citizen journalism and the risks that non-professional journalists also encounter in exercising their legitimate right to freedom of expression.

In times of armed conflict, internal disturbance or natural disaster [and other contexts such as “documenting and disseminating sensitive information, even during times of peace”]: see below – DK], ordinary citizens may become engaged in reporting activities.

¹⁵ ECtHR, chamber judgment in *Thorgeir Thorgeirson V. Iceland*, 25 June 1992, para. 65.

¹⁶ ECtHR, section judgment in *Timpul Info-Magazin And Anghel V. Moldova*, 27 November 2007, para. 36 (with reference to the paragraph in *Thorgeir Thorgeirson V. Iceland*, noted in the previous footnote).

¹⁷ See Douwe Korff and Ian Brown, Chapter 6: *Social media and human rights*, in: Human rights and a changing media landscape, Council of Europe, Strasbourg, December 2011, available at: <https://www.coe.int/t/commissioner/source/prems/MediaLandscape2011.pdf>

¹⁸ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, UN General Assembly Document A/65/284, 11 August 2010, paras. 61 - 66, available at: <https://digitallibrary.un.org/record/690063>

Such persons are usually referred to as “citizen journalists”. **While there is no universal definition of citizen journalism as such, the concept is usually understood as independent reporting, often by amateurs on the scene of an event, which is disseminated globally through modern media, most often the Internet** (for example, through photo- or videosharing sites, blogs, microblogs, online forums, message boards, social networks, podcasts, and so forth). New technologies have provided unprecedented access to means of global communication, and have therefore introduced new means of reporting on news and events around the world.

Citizen journalists are not trained professional journalists. At times, citizen journalism has been criticized as being unreliable or lacking objectivity. Nevertheless, **the importance of this new form of journalism cannot be underestimated. Indeed, through a participatory approach, citizen journalists contribute to the creation of a richer diversity of views and opinions, including information about their communities and groups in need of particular attention, such as women, indigenous people and minorities, and play a critical watchdog role in countries where freedom of the press is not a reality.** More important, they can provide an immediate, insider’s view of a conflict or catastrophe, whereas professional journalists may not be granted access to places where hostilities unfold or may have to travel for days before reaching a disaster zone or area.

A. Trends

Whether at the scene of a dramatic event or documenting and disseminating sensitive information, even during times of peace, **citizen journalists often face risks similar to those faced by professional journalists**, including acts of reprisal for their reporting activities. Citizen journalists have been subjected to acts of harassment and intimidation, including death threats, attacks against their physical integrity, arbitrary arrest and detention, prosecution, prison sentences and/or fines, and even assassination. Acts of harassment and intimidation often include repeated and unsupported police summonses, the targeting of their families, smear campaigns to discredit them and travel bans and other restrictions on movement.

As citizen journalists are by nature more isolated, they are more vulnerable to attack than professional journalists. However, citizen journalists enjoy less protection than their counterparts in traditional media, as they do not have the support of media organizations and networks, in particular the organizational resources, including lawyers and financial resources, which can help shield them from harassment.

Since 2004, the Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression have sent numerous urgent appeals and letters of allegations to Member States on behalf of individuals whose rights were violated because they expressed themselves via the Internet, often on blogs. ...

(Emphases added)

The following year, in 2011, the Human Rights Committee, established under the UN International Covenant on Civil and Political Rights (ICCPR), issued its “General Comment” on Article 19 of the Covenant that guarantees freedom of opinion and expression. In it, the Committee also emphasised that:¹⁹

¹⁹ UN Human Rights Committee, General Comment No. 34 on Article 19: Freedom of opinion and expression, UN Document CCPR/C/GC/34, 12 September 2011, para. 44, available at: <https://www.refworld.org/docid/4ed34b562.html>

Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of selfpublication in print, on the internet or elsewhere, and general State systems of registration or licensing of journalists are incompatible with paragraph 3 [the limitation clause in Article 19 – DK]. Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events. Such schemes should be applied in a manner that is nondiscriminatory and compatible with article 19 and other provisions of the Covenant, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors.

(Emphases added)

In 2015, the next UN Special Rapporteur on freedom of expression, David Kaye, addressed the issue in further detail in relation to the right to confidentiality and protection of sources, but in terms that clearly have wider application, and with reference to a range of authoritative sources:²⁰

Confidential sources rely on others to invoke the right to confidentiality on their behalf. Historically, States have enabled a professional class of journalists to invoke the right, but the revolution in the media and in information over the past 20 years demands reconsideration of such limitations. Article 19, which protects freedom of expression through any media, requires that States take into account a contemporary environment that has expanded well beyond traditional print and broadcast media. The protection available to sources should be based on the function of collection and dissemination and not merely the specific profession of “journalist”. The practice of journalism is carried out by “professional full time reporters and analysts, as well as bloggers and others who engage in forms of self publication in print, on the Internet or elsewhere” (Human Rights Committee, general comment No. 34, para. 44) [Set out above – DK].

Today, journalists and other “**social communicators**” may claim the right of confidentiality for the source.²¹ **Persons other than journalists inform the public and carry out a “vital public watchdog role”.** International bodies increasingly use terms more general than “journalist”, such as “**media professionals**” or “**media workers**”.²² The African Commission on Human and Peoples’ Rights refers to “**media practitioners**”²³ and the Organization for Security and Cooperation in Europe Representative on Freedom of the Media refers to “**new participants in journalism**”.²⁴ **All those terms demonstrate an understanding that those performing the same journalistic functions should enjoy the right to protect sources. The Council of Europe has defined the term “journalist” functionally as “any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of**

²⁰ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, UN General Assembly Document A/70/361, 8 September 2015, paras. 17 – 20, available at: <https://digitallibrary.un.org/record/805706?ln=en>

²¹ See Inter American Commission on Human Rights, Declaration of Principles on Freedom of Expression, principles 8 and 13. [original footnote]

²² See, for example, Human Rights Council resolutions 27/5 and 21/12; General Assembly resolution 68/163; and Security Council resolution 1738 (2006). [original footnote]

²³ See the Declaration of Principles on Freedom of Expression in Africa, principle XV. [original footnote]

²⁴ See 2nd Communiqué on Open Journalism. Available at www.osce.org/fom/128046?download=true. [original footnote]

mass communication”.²⁵ For the purposes of source protection – when, as the Norwegian Supreme Court has noted, the broadest protection should be available²⁶ – **any person or entity involved in collecting or gathering information with the intent to publish or otherwise disseminate it publicly** should be permitted to claim the right to protect a source’s confidentiality. Regular, professional engagement may indicate protection, but its absence should not be a presumptive bar to those who collect information for public dissemination.²⁷

Two categories, for example, expand beyond officially recognized journalists. First, there are those who most closely reflect the professional engagement in collection and dissemination: **members of civil society organizations who conduct research and issue findings, and researchers academics, independent authors, freelance writers and others who regularly participate in gathering and sharing information publicly**. It is common for such people to adopt and publish methodologies that underscore the degree of professionalism upon which their work depends. Many non governmental organizations are themselves publishers of well sourced content that, in form and substance, is virtually identical to the work of the press, often the result of thorough research, in the field reporting and analysis.²⁸ It is common for human rights researchers to rely upon sources who require confidentiality for safety.²⁹ Recognizing a broad scope of protection, the European Court of Human Rights indicated that **“non governmental organisations, like the press, may be characterised as social ‘watchdogs.’ In that connection their activities warrant similar Convention protection to that afforded to the press”**.³⁰ The Information Commissioner’s Office in the United Kingdom of Great Britain and Northern Ireland granted a **non governmental organization**, Global Witness, an exemption from the national Data Protection Act because **its work, and those of other non media organizations, “constitutes a journalistic purpose even if they are not professional journalists and the publication forms part of a wider campaign to promote a particular cause”**.³¹ In Canada, a judge of the Superior Court of Quebec upheld a researcher’s right to protect confidential information.³²

Second, **“citizen journalists” and bloggers and other media “non professionals”** engage in independent reporting and disseminate their findings through a wide variety of media, from

²⁵ Council of Europe, Committee of Ministers recommendation No. R (2000) 7, appendix, definition (a). [original footnote; in fact, the reference should be to the discussion of the definition of “journalist” and “journalism” in the Explanatory Memorandum to the COM Recommendation. See section 3.i, above]

²⁶ See Supreme Court of Norway, case No. 2013/1196, reference No. HR 2013 2170 A (2013). [original footnote]

²⁷ Posetti, “Protecting journalism sources in the digital age”. [original footnote]

²⁸ See, for example, www.hrw.org/about-our-research. [original footnote]

²⁹ See *Youth Initiative for Human Rights v. Serbia*, European Court of Human Rights, application No. 48135/06, judgement of 25 June 2013. [original footnote]

³⁰ See European Court of Human Rights, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land und forst wirtschaftlichen Grundbesitzes v. Austria*, application No. 39534/07, judgement of 28 November 2013. [original footnote]

³¹ See letter from Information Commissioner’s Office to Global Witness, 15 December 2014. Available from [www.globalwitness.org/sites/default/files/141215%20letter%20from%20ICO%20to%20GW%20\(2\)%20\(1\).pdf](http://www.globalwitness.org/sites/default/files/141215%20letter%20from%20ICO%20to%20GW%20(2)%20(1).pdf). [original footnote]

³² See *Parent and Bruckert v. Her Majesty the Queen*, Province of Quebec District of Montreal, case No. 500 36 006329 125, judgement of 21 January 2014. See also *Dotcom v. Her Majesty’s Attorney General*, Supreme Court of New Zealand, case No. [2014] NZSC 199, judgement of 23 December 2014. [original footnote]

print and broadcast to social media and other online platforms.³³ **They frequently work in ways similar or identical to, or even more rigorous than, the work of traditional journalists.** Some States have adopted rules that provide important protection for them. For example, the Irish High Court, in *Cornec v. Morrice and Ors*, found that **bloggers might claim source protection because they could constitute an “organ of public opinion” and because the right to influence public opinion would be jeopardized if they were forced to disclose their sources.**³⁴

(Emphases added)

What all the above views have in common is that in the digital age, for the purpose of applying international standards on freedom of expression, a functional, rather than a formal approach should be taken.

In the most general terms, it can be concluded that there is a growing international consensus that the special protection historically accorded to “the press” should be extended to anyone who (to use the Council of Europe phrase) “*is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication*” – especially of course if the information that is disseminated relates to matters of genuine public interest and/or involved serious research. In relation to such matters, those new media actors, like “the press” and well-known NGOs, also act as “social watchdogs” and “organs of public opinion”. To this, I would add that the same special protection that is historically accorded to “the press” in relation to the dissemination of opinions and value-judgments, should also be extended to all such new media actors.

This still leaves the question of whether, and if so, how, the “duties and responsibilities” that the Court has held rest on “the press”, should be applied to the new media actors. This relates in particular to the manner and tone used by the new actors in reporting (alleged) facts and their own value-judgments, and more in particular to their reporting on the Internet (be that through their own websites or through social media).

It is fairly typical of these new media that views are expressed in often highly charged, polemical and far from impartial ways – although some new media actors and NGOs are exemplary in the meticulousness of their research and reporting, as the UN Special Rapporteur expressly noted,³⁵ and some “official” so-called “mainstream media” (MSM) gladly indulge in biased or fact-free reporting or reporting in ways that serve certain political or social agendas.

In that regard, the UN Special Rapporteur rightly noted that citizen journalists are by nature more isolated and more vulnerable, do not have the support of media organisations and networks (e.g., in conducting in-depth research, or receiving support from press associations,

³³ See A/65/284 [= The Special Rapporteur’s predecessor’s report, referenced in footnote 188, above – DK]; see also Council of Europe, Committee of Ministers recommendation CM/Rec(2011)7. [original footnote with clarification added]

³⁴ Irish High Court, *Cornec v. Morrice and Ors*, 2012, para. 66. See also California Court of Appeals, *O’Grady v. Superior Court (Apple)*, 2006. [original footnote]

The case is discussed in TJ McIntyre’s blog of 20 September 2012, *High Court: Bloggers can benefit from journalistic privilege*, available at: <https://www.tjmcintyre.com/2012/09/high-court-bloggers-can-benefit-from.html>

³⁵ See footnote 288, above.

etc.), and cannot draw on expensive lawyers to check their information or draft reports and protect them from harassment or legal attacks.³⁶

This clearly argues for the imposition of less onerous “duties and responsibilities” on new media actors than on “official” journalists and mainstream media organisations (although the new actors are of course not free from all duties and responsibilities).

Thus, if “official” journalists and media are allowed to voice “hard-hitting criticism” and use “polemic” and “aggressive” language (as long as this does not amount to incitement to hatred or violence),³⁷ new media actors should also be given considerable – if anything greater – license in this regard (subject to the same proviso).

Similarly, if “official” journalists and media must, under Article 10 ECHR, be allowed to report on “stories and rumours” and “public opinion” on matters of public interest, as long as those stories, rumours and opinions are “not completely without foundation”, then so, *a fortiori*, must new media actors.³⁸

New media actors, in particular any “freelance” reporters, can also not be submitted to the same demanding test for due professional diligence in carrying out pre-publication research (although NGOs will often be properly equipped to do this, and can be asked to do this).

However, new media actors, like “official” journalists, can be required to act in good faith: they do not have a license to defame or use gratuitously insulting or degrading language, or to report without any checks on totally unsupported rumours.

The above in some ways stands in juxtaposition to the recent, and increasing, demands that action be taken against “fake news” and the deliberate spreading of false reports on the Internet and through social media. However, I believe that if the above standards are properly applied, they can reconcile the two by creating a properly open space in the digital environment for good faith debate on matters of legitimate interest, while countering bad faith deliberate false reporting and the organised dissemination of false reports.

4. European Court of Human Rights cases relating to the Internet

The European Court of Human Rights has dealt with a number of Internet-related cases, but until relatively recently these have concerned mainly issues such as whether access to the Internet is a right, intermediary liability for user-generated content posted on their sites, copyright issues, and general or over-broad blocking of Internet sites – issues not considered in the present paper.³⁹

³⁶ See the quote from UNSR Frank La Rue’s 2010 report (footnote 18, above), para. 65, quoted on p 8, above.

³⁷ See section 2, above.

³⁸ See again section 2, above, and in particular the quote from the ECtHR *Timpul Info-Magazin And Anghel V. Moldova* judgment (footnote 16, above), on p. 5, above.

³⁹ See David Harris, Michael O’Boyle, Ed Bates, and Carla Buckley, Harris, O’Boyle, and Warbrick: Law of the European Convention on Human Rights (footnote 2, above), chapter 13, section 4, sub-section II, *Internet issues and licensing for broadcasting*, pp. 621 – 623.

However, the Court did notice a number of issues that are relevant to the present paper.⁴⁰ In the most general terms, as the Court's own Guide to Article 10 puts it:⁴¹

The general principles applicable to offline publications also apply online.

More specifically, in its 2015 *Delfi* judgment, the Court made the observation that, on the one hand:⁴²

in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general.

Indeed, as the Court had already noted in an earlier case:⁴³

a freely accessible popular Internet forum [is] a medium which in modern times has no less powerful an effect than the print media.

But on the other hand:⁴⁴

the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press.

In a judgment issued a few months later, the Court reiterated the above and added the following observations specifically in relation to *YouTube*, but that clearly have broader implications; it is also the first time the Court expressly referred to "citizen journalism":⁴⁵

User-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression. In this connection, the Court observes that YouTube is a video-hosting website on which users can upload, view and share videos and is undoubtedly an important means of exercising the freedom to receive and impart information and ideas. In particular, as the applicants rightly noted, political content ignored by the traditional media is often shared via YouTube, thus fostering the emergence of citizen journalism. From that perspective, the Court accepts that YouTube is a unique platform on account of its characteristics, its accessibility and above all its potential impact, and that no alternatives were available to the applicants [in the specific case].

On the issue of "duties and responsibilities", the Court observed in *Stoll* that:⁴⁶

⁴⁰ I draw in particular on the Court's own recent (2021) Guide on Article 10 of the European Convention on Human Rights – Freedom of expression (footnote 2, above), Chapter XIII, *Freedom of expression and the Internet*, pp. 99 – 107.

⁴¹ *Idem*, para. 618, p. 101.

⁴² ECtHR, grand chamber judgment in *Delfi AS v. Estonia*, 16 June 2015, para. 133, references to earlier case-law omitted.

⁴³ ECtHR, section judgment in *Fatullayev V. Azerbaijan*, 22 April 2010, para. 95.

⁴⁴ *Delfi* (footnote 42, above), para. 133.

⁴⁵ ECtHR, section judgment in *Cengiz And Others V. Turkey*, 1 December 2015, para. 52, references to earlier case-law (including *Delfi*) omitted.

⁴⁶ ECtHR, grand chamber judgment in *Stoll v. Switzerland*, 10 December 2007, para. 104. The article to which the case related, exposing a classified government document, was published in a Zürich Sunday newspaper, the *Sonntags-Zeitung*, but was widely debated on the Internet.

In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players [i.e., in the age of the Internet – DK], monitoring compliance with journalistic ethics takes on added importance.

In sum: In principle, the Court accepts that the general principles and standards applicable to offline publications also apply online. However, it notes the potentially very wide impact of a release of any report on the Internet, especially if done through mass services such as *YouTube* (or *Twitter*), and concludes from this that compliance with journalistic ethics – for which one can read here: the duty to report in good faith and on the basis of diligent research – is especially important in that context.

However, it has not yet addressed in any detail the special situation of non- or semi-professional “citizen journalists”, bloggers and commentators on social media: most of the cases it has dealt with concerned the publication online of reports by professional journalists. In the next section, I consider how that issue could be – and in my opinion, should be – addressed by the Court.

5. Conclusions

In section 3, I concluded that for the purpose of applying international standards on freedom of expression, including Article 10 ECHR, to the Internet and social media, a functional rather than a formal approach should be taken. More specifically:

The special protection historically accorded to “the press” should be extended to anyone who is regularly or professionally engaged in the collection and dissemination of information, opinions and value-judgments to the public via any means of mass communication, in particular when the information or ideas that are disseminated relate to matters of genuine public interest and/or involved serious research. In relation to such matters, new media actors, like “the press” and well-known NGOs, also act as “social watchdogs” and “organs of public opinion”.

New media actors, like “official” journalists and media, must be allowed to voice “hard-hitting criticism” and use “polemic” and “aggressive” language (as long as this does not amount to incitement to hatred or violence) – if anything greater license should be granted to them in this regard because they will often not have access to professional and legal support. And new media actors, like “official” journalists and mainstream media must be allowed to report on “stories and rumours” and “public opinion” on matters of public interest, as long as those stories, rumours and opinions are “not completely without foundation”. New media actors, in particular “freelance” reporters, should not be submitted to the same demanding test for due professional diligence in carrying out pre-publication research as are applied to “official” media (although NGOs will often be properly equipped to do this, and can be asked to exercise such diligence).

However, new media actors, like “official” journalists, can be required to act in good faith: they do not have a license to defame or use gratuitously insulting or degrading language, or to report without any checks on totally unsupported rumours (or to manufacture unsupported rumours).

This should therefore be the main check on alleged “fake news” reports: they should not be taken down unless they can be shown – at least on the balance of probabilities – to be untrue,

Douwe Korff

*Emeritus Professor of International Law, London Metropolitan University
Associate, Oxford Martin School, University of Oxford*

that is: that they were “without any foundation”. Where facts are in dispute, solid counter-reporting, rather than take-down, bans or prosecution, should be the remedy.

Nor should “fake” reports be confused with tendentious or slanted ones resting on dubious value-judgments; such reports should only be taken down if the value-judgments were defamatory and made in bad faith. Otherwise, they should simply be countered by more balanced judgments.

“Citizen journalists”, bloggers and social media commentators should be protected if they exercise their right to freedom of expression in accordance with the above-mentioned standards.

In my opinion, the above approach is fully in line with the case-law of the European Court of Human Rights to date – but this will no doubt soon be clarified in further cases, relating specifically to reporting by non- or semi-professional “citizen journalists” or bloggers, when they have been subject to “formalities, conditions, restrictions or penalties” for the exercise of their right to freedom of expression and the freedom inherent in that freedom, to “impart information and ideas without interference by public authority and regardless of frontiers.”

- o - O - o -

Douwe Korff
Cambridge, June 2022