Publishing Secrets: A Case Study on the Balancing of Press Freedom and Public Interests in European Human Rights Jurisprudence
การเปิดเผยข้อมูลลับของทางราชการ: การศึกษาแนวคำพิพากษาของศาลสิทธิมนุษยชนยุโรปในการสร้างสมดุลระหว่างเสรีภาพของสื่อมวลชนและผลประโยชน์ของรัฐ*

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Abstract

The European Court of Human Rights has frequently been criticised for methodical weakness and especially for how it balances rights against public interests. This article demonstrates that the Court's jurisprudence is acceptably consistent but lacks conceptual clarity. Janneke Gerards' recommendation of the

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classic proportionality test to improve the Court's balancing approach is therefore well founded. Whether the proportionality test is also practically compatible with the Court's jurisprudence becomes the next pertinent question. This analysis is based on a review of Article 10 cases in which states restricted freedom of the press by enforcing secrecy laws to protect public interests. A case review suggests that the Court tacitly uses some elements of proportionality in an unstructured manner. It is argued that the Court's reasoning may be systematised and ordered through the three-step test of proportionality. However, the test's third step (proportionality in the narrow sense) may be difficult to be reconciled with the Court's prevalent interpretation of its margin of appreciation doctrine.

Keywords: secrecy, press freedom, human rights, balancing, proportionality

บทคัดย่อ

ศาลสิทธิมนุษยชนยุโรปมักจะถูกวิพากษ์วิจารณ์ถึงการวิเคราะห์หลักทางกฎหมายที่ไม่ชัดเจน โดยเฉพาะกรณีการรักษาสมดุลระหว่างสิทธิกับประโยชน์สาธารณะ บทความนี้มุ่งชี้ให้เห็นว่า แนวคำพิพากษาศาลสิทธิมนุษยชนยุโรปมีความสม่ำเสมอ เป็นไปในทิศทางเดียวกัน แต่ขาดการอธิบายถึงหลักกฎหมายเบื้องหลังคำพิพากษา Janneke Gerards เสนอแนะให้นำการประเมินตามหลักความได้สัดส่วนตามรูปแบบดั้งเดิมมาปรับใช้กับการตัดสินคดีของศาลสิทธิมนุษยชนยุโรป เพื่อสร้างสมดุลระหว่างสิทธิกับประโยชน์สาธารณะ บทความนี้ได้วิเคราะห์คำพิพากษาศาลสิทธิมนุษยชนยุโรปคดีตามข้อ 10 ที่เกี่ยวกับการจำกัดสิทธิของสื่อมวลชนโดยกฎหมายการห้ามเปิดเผยข้อมูลอันเป็นความลับของทางราชการ ผลปรากฏว่า ศาลสิทธิมนุษยชนยุโรปมักนำหลักความได้สัดส่วนมาปรับใช้เพียงบางองค์ประกอบในลักษณะที่ไม่ได้เป็นระบบ บทความนี้ได้โต้แย้งว่าการให้เหตุผลของศาลสิทธิมนุษยชนยุโรป อาจทำให้เป็นระบบและมีระเบียบขึ้นได้ผ่านการทดสอบสามขั้นตอนตามหลักความได้สัดส่วน อย่างไรก็ดี อาจเป็นการยากที่จะทำให้ขั้นตอนที่สามของการทดสอบ (หลักความได้สัดส่วนในความหมายอย่างแคบ) กลมกลืนไปกับหลัก margin of appreciation ซึ่งเป็นหลักที่ใช้อย่างแพร่หลายในศาลสิทธิมนุษยชนยุโรป

คำสำคัญ: ข้อมูลอันเป็นความลับของทางราชการ เสรีภาพของสื่อมวลชน สิทธิมนุษยชน การสร้างสมดุล หลักความได้สัดส่วน

I. Introduction

"He who cannot dissimulate cannot reign."[1] The words attributed to France's King Louis X are as true today as they were in the 15th century. Despite comprehensive, and partly successful, efforts to enhance governmental transparency and openness in most of the world, informational asymmetry remains a main source of state power. Governments and parliaments invoke interests such as national security, international relations, or the integrity of administrative proceedings to limit access to public information or justify interference with media access to confidential material. Although in recent years, the general trend has been in favour of transparency, the proper balance between secrecy and publicity continues to be much debated.[2]

Disparity of information also plays a role in the relationship between courts and litigants, as well as between courts and the general public. Whether a court's jurisprudence is subject to legal scrutiny and critique by practitioners and academics, and whether decisions are at least somewhat predictable depends on the level of transparency in legal reasoning. If balancing of interests takes place in a black box with no knowledge conveyed of internal workings or implementation, a court's decisions may appear to be based on mythology. They cannot be criticised, as underlying propositions, assumptions, and perspectives remain opaque. A court may shield itself from substantial scrutiny by concealing arguments behind a veil of mystery. Today, such uncontrollable exercise of power would surely undermine acceptance of a court's decisions.

Transparency in judicial reasoning is a key variable in state-people relations, calling for critical examination of court methodology. Well-structured methods

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[1] Qui nescit dissimulare, nescit regnare. Translated by Voltaire as Qui ne sait dissimuler ne sait pas régner; see Voltaire, "Œuvres Complètes," (Paris: Garnier 1878), p.176, accessed 19 April 2019, from https://fr.wikisource.org/wiki/Page:Voltaire_-_%C5%92uvres_compl%C3%A8tes_Garnier_tome15.djvu/186.

[2] See the seminal works of Georg Simmel, "The Sociology of Secrecy and Secret Societies," American Journal of Sociology, Vol. 11, No. 4, 441, P.441 (1906); Sissela Bok, Secrets – On the Ethics of Concealment and Revelation, (New York: Vintage, 1982); Lawrence Quill, Secrets and Democracy – From Arcana Imperii to WikiLeaks, (London: Palgrave Macmillan, 2014); see also Wouter Hins and Dirk Voorhoof, "Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights," European Constitutional Law Review, Vol. 3, No. 1, 114, p.114 (2007).

consistently applied provide clear guidance for future cases[3] and alleviate the power imbalance between judges and litigants. Alec Stone Sweet and Jud Mathews observe about proportionality:

> Once [argumentation frameworks are] in place, the court will know, in advance, how the parties to an intra-constitutional dispute will plead, and each side will know how the court will proceed to its decisions. (...) [F]idelity on the part of the court to a particular framework will entrench that mode of argumentation as constitutional doctrine. To the extent that arguing outside of the framework is ineffective, skilled legal actors will use the framework, thereby reproducing and legitimising it.[4]

Asymmetry of information and power is the backdrop of this investigation into the reasoning of the European Court of Human Rights (ECtHR, the Court). This article argues that the Court's balancing approach lacks conceptual clarity and, therefore, largely fails to establish a coherent precedential standard. The analysis is based on ECtHR decisions dealing with freedom of expression (Article 10 of the Convention) in cases where governments restricted press freedom to protect public interests by enforcing secrecy laws.

When, in this category of cases, the Court is called to decide whether a particular restriction of Article 10 is necessary in a democratic society, comprehensive balancing is prescribed of rights and public interests in the light of the case as a whole.[5] This balancing operation is not unique to Article 10. It is also required in a similar fashion by Article 8 (Right to respect for private and family life), Article 9 (Freedom of thought, conscience and religion) and Article 11 (Freedom of assembly and association), which, under slightly varying conditions, allow only such restrictions that are "necessary in a democratic society". The present analysis is therefore suitable to illuminate a more general issue of the Court's jurisprudence.

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[3] Frank Coffin, "Judicial Balancing: The Protean Scales of Justice," New York University Law Review, Vol. 63, No.1, 16, p.33 (1988).

[4] Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism," Columbia Journal of Transnational Law, Vol. 47, No. 1, 72, p.89 (2008).

[5] See, for instance, ECtHR, 20 November 2012, Application No. 39315/06, Telegraaf Media Nederland Landelijke Media B.V and others v. The Netherlands, para.124.

In the case material under investigation, the judges profess to determine whether the restriction corresponds to a pressing social need, if it was proportionate to the legitimate aim pursued, and if justifications by national authorities were relevant and sufficient.[6] The Court also vows to take into account control exercised by domestic jurisdictions as well as applicant conduct.[7] Other Council of Europe (CoE) bodies adhere to the notion of proper balance as well. In a 2007 resolution, the CoE's Parliamentary Assembly called on the Court (and member states' courts, as well)

> "to find an appropriate balance between the state interest in preserving official secrecy on the one hand, and freedom of expression and of the free flow of information on scientific matters, and society's interest in exposing abuses of power on the other hand."[8]

However, how exactly the balancing of interests is to be conducted in practice, remains subject to the Court's discretion.

II. Critique of balancing in human rights jurisprudence

Many critics have levelled charges against balancing rights and public interests in general and against the Court's approach in particular. The basic question of whether balancing is acceptable *per se* has lost practical significance, since the method has been widely adopted by courts throughout the world.[9] Yet, traditional concerns remain relevant as a backdrop to more recent criticism of ECtHR jurisprudence and the proportionality test.

The ECtHR considers that the search for a fair balance is "inherent in the whole of the Convention."[10] although the principle is not cited explicitly in the Convention text. Alastair Mowbray has shown that the Court applies the principle of

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[6] *Ibid*, para.123.

[7] ECtHR, 19 January 2016, Application No. 49085/07, Görmüs and others v. Turkey, para.52.

[8] Council of Europe Parliamentary Assembly, Resolution 1551 (2007), para.9.

[9] See Stone Sweet and Mathews, *supra note* 4; Moshe Cohen-Eliya and Iddo Porat, "Proportionality and the Culture of Justification," American Journal of Comparative Law, Vol. 59, No. 2, 463, p.467 (2011).

[10] ECtHR, 23 September 1982, Application No. A 52 (1982), Sporrong and Lönnroth v. Sweden, para.69.

fair balance in cases covering almost all Convention rights.[11] Mowbray ascribed two special functions to the principle within the Court's jurisprudence: firstly, the principle enables the Court to assess proportionality of respondent state conduct, and secondly, it provides a mechanism for the Court to determine if the respondent state is subject to an implied positive obligation arising from the Convention.[12] The latter function is less relevant to this investigation than the connection between balancing and proportionality.

Still, the very method of balancing rights against public interests has long been subject to criticism. Among prominent critics is T. Alexander Aleinikoff, who held that, "to a large extent, the balancing takes place inside a black box."[13] Aleinikoff particularly misses an objective scale to measure opposing interests. He discusses possible grounds upon which weights may be assigned to interests – including history, social consensus, and contribution to achievement of constitutional goals – but concludes that there just is no objective scale ready to be employed. Aleinikoff significantly adds that balancing involves considering all relevant interests, whether traceable to the constitution or society at large, which transforms any interest implicated by a constitutional case into a constitutional interest.[14]

Touching upon this point, Jürgen Habermas has denounced the confusion of rights ("norms") and interests ("values"). According to Habermas, this results in a cost-benefit analysis, all too often at the expense of rights. Because of their deontological character, rights should be ranked higher and must not compete with other interests at the same level of priority (rights as trumps[15]). Otherwise, the "danger of irrational rulings increases, because functionalist arguments then gain the upper hand over normative ones."[16] Habermas insists that the legal character of rights must fit into a "unified system designed to admit exactly one right solution

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[11] Alastair Mowbray, "A Study of the Principle of Fair Balance in the Jurisprudence of the ECtHR," Human Rights Law Review, Vol. 10, No. 2, 289, p.289 (2010).

[12] *Ibid*, pp.308 - 311.

[13] Thomas Alexander Aleinikoff, "Constitutional Law in the Age of Balancing," Yale Law Journal, Vol. 96, No. 5, 943, p.976 (1987).

[14] *Ibid*, p.977.

[15] Ronald Dworkin, Taking Rights Seriously, (Cambridge: Harvard University Press, 1977), p.193.

[16] Jürgen Habermas, Between Facts and Norms, (Cambridge: MIT Press, 1996), pp.256 - 260.

for each case."[17] This criterion is the most contentious point of the Habermas-Alexy Debate. Robert Alexy, a strong proponent of the "law of balancing" differs from Habermas in considering rights as optimisation requirements, or as principles, not rules.[18] Unlike Habermas, Alexy insists that the balancing of rights and public interests – by assessing the intensity of interference, the degrees of importance of rights and interests involved and how they interrelate – remains a rational operation. Alexy even expresses this operation mathematically by a weight formula. He does, however, concede that concrete weight assigned to a specific right or interest always depends on prior propositions which must be justified by argument. According to Alexy, the inherent method to properly balance rights and public interests is the proportionality test.[19]

Most recent critiques of balancing have been based on arguments akin to those of Aleinikoff and Habermas. Başak Çalı argues that differences in kind between interests and values are not susceptible to weighing on a single scale, particularly not if public interests are assigned a greater weight solely because they are significant to a greater number of people. She blames the proportionality test for lacking any empirically quantifiable scale as well as any effective mechanism to assess legitimacy of proposed aims.[20] Stavros Tsakyrakis submits that individual or governmental interests should, in principle, not compete on par with rights, and that, based upon moral distinctions between right and wrong, some interests should be dismissed outright from the balancing exercise.[21] And Bart van der Sloot argues that balancing fuels a utilitarian understanding of human rights, whereas proper understanding should be deontological, relying upon a hierarchy of principles.[22]

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[17] *Ibid*, p.261.

[18] Robert Alexy, A Theory of Constitutional Rights, (Oxford: Oxford University Press, 2002), pp.47, 102.

[19] Robert Alexy, "Constitutional Rights and Proportionality," Revus, Vol. 22, No. 1, 51, pp.60 - 63 (2014).

[20] Başak Çalı, "Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions," Human Rights Quarterly, Vol. 29, No. 1, 251, p.251 (2007).

[21] Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights?," International Journal of Constitutional Law, Vol. 7, No. 3, 468, pp.470 - 471 (2010).

[22] Bart van der Sloot, "The Practical and Theoretical Problems with Balancing," Maastricht Journal of European and Comparative Law, Vol. 23, No. 3, 439, p.439 (2016).

These serious criticisms lead us to question and review propositions of balancing and the proportionality test. Nonetheless, as Frank Coffin justly observes, no apparent alternatives are available for use.[23] To be sure, the proportionality test cannot eliminate subjectivity from decision-making. Alexy's mathematical weight formula may be unhelpful in any practical sense. Coffin underlines that judicial decision-making inherently involves choice at a "moment of truth".[24] alluding to prior propositions acknowledged by Alexy. When such propositions and value judgments are justified transparently, and the ranking of interests is based on general principles,[25] the influence of subjective motives may be mitigated. In any case, the textual basis provides an ultimate boundary for any balancing exercise.[26]

Turning to specific criticisms of the ECtHR balancing approach, Aileen McHarg diagnoses a lack of doctrinal clarity and misses principled justification, denouncing the "laconic and formulaic character" of the Court's judgments. She criticises the Court's unsystematic "oscillation" between factual inquiries into the necessity of interference and more substantive evaluations, finding that "cases almost never fall neatly into categories in which *either* the consequence for the public interest *or* the impact of the interference on the right is treated as conclusive."[27] According to Steven Greer, the Court's "thinly reasoned" ad-hoc decisions lack constitutional authority as judges rarely explore the Convention's "deep constitutional values". Echoing Aleinikoff and Habermas, Greer demands that rights should be given clearer priority against public interests.[28]

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[23] Frank Coffin, *supra note* 3, p.20.

[24] *Ibid*, p.25; see also Aharon Barak, "Proportionality and Principled Balancing," Law & Ethics of Human Rights, Vol. 4, No. 1, 1, p.8 (2010); Alec Stone Sweet and Jud Mathews, *supra note* 4, p.76.

[25] Aharon Barak, *ibid*; Steven Greer, "Constitutionalizing Adjudication under the European Convention on Human Rights," Oxford Journal of Legal Studies, Vol. 23, No. 3, 405, p.413 (2003).

[26] Frederick Schauer, "Balancing, Subsumption, and the Constraining Role of Legal Text," Law & Ethics of Human Rights, Vol. 4, No. 1, 33, p.33 (2010).

[27] Aileen McHarg, "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights," Modern Law Review, Vol. 62, No. 5, 671, p.692 (1999).

[28] Steven Greer, *supra note* 25, p.428; Steven Greer, "Balancing and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate," Cambridge Law Journal, Vol. 63, No. 2, 412, pp.417 - 418 (2004).

Concrete proposals have been made to improve the Court's balancing test. Stijn Smet suggests a multi-factorial balancing test consisting of seven criteria, based on qualitative comparison of reasons.[29] Despite abiding uncertainty over the exact distinction between some of his criteria,[30] Smet aims to construct "nets of reasons" which must be mutually compared. His method is showcased by applying it to two cases, but it is unlikely to produce replicable results, leaving even more gateways for individual value judgment than the principle of proportionality.

III. Proposal to use the proportionality test in ECtHR jurisprudence

Janneke Gerards' proposal to adopt the classic, and comparably stricter, three-step proportionality test at the ECtHR level appears more workable. It is practice-proven through use by the German Federal Constitutional Court, Canadian Supreme Court, and other constitutional courts.[31] Gerards argues that the classic test provides needed clarity. She mainly juxtaposes the ECtHR's understanding of "necessary" ("pressing social need") and understanding of the same term in the classic proportionality test, where it may be translated as "least restrictive means".[32]

The Court's balancing approach may indeed be improved by concise ordering of arguments, following the proportionality test. The test may serve as a useful blueprint to increase transparency and foreseeability with its clear three-step structure. It focuses on the restriction of rights as a main point of reference throughout the entire assessment.[33] In the proportionality test, balancing is done by consistently pursuing the question of whether a particular restriction may be legally

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[29] Stijn Smet, "Conflicts between Human Rights and the ECtHR. Towards a Structured Balancing Test" in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights. Conflict or Harmony?*, (Oxford: Oxford University Press, 2017), pp.38 - 57.

[30] For instance, the core-periphery criterion appears to be a sub-category of the impact criterion, and the difference between the core-periphery criterion and general interest criterion is not made entirely clear.

[31] Stone Sweet and Mathews, *supra note* 4.

[32] Janneke Gerards, "How to improve the necessity test of the European Court of Human Rights," International Journal of Constitutional Law, Vol. 11, No. 2, 466, p.466 (2013).

[33] Robert Alexy, *supra note* 18.

justified.[34] Within this structure, elements of irrationality (among the concerns of Aleinikoff and Habermas) may be reduced, and priority can be given to rights (following the ideas of Habermas and Greer).

The three steps are usually described as follows: first, a test of suitability or effectiveness; second, a necessity test; and third, a test of proportionality in the narrow sense. An additional preparatory step may be to define the goal pursued by the restriction and ask whether it be generally legitimate in terms of constitutional values and public policy.

Let us have a look at the three individual steps. Firstly, a test of suitability inquires whether the chosen measure can contribute in some way to reach the defined goal. The measure must at least facilitate to achieve its goal. Otherwise it is discarded as ineffective. Secondly, a necessity test asks whether the authority's measure was in fact the least restrictive among equally effective measures. If less burdensome alternatives might have been chosen, then the choice was unnecessary. Thirdly, a test of proportionality in the narrow sense asks whether the restriction can be justified when comparing the concrete benefit for the pursued goal to the concrete impact on rights. This final step is often referred to as "balancing" and asks whether the restriction's purpose outweighs the interference normatively. Here, the legal practitioner needs to decide which of the two weighs heavier in the concrete case.

To see if the proportionality test is practically compatible with the Court's jurisprudence, ECtHR decisions from three decades in the field of freedom of the press vs. public interests protected by secrecy laws are analysed. The Court's reasoning in a string of judgments is evaluated to find whether arguments used by the Court may be assigned to individual steps of the proportionality test.

IV. Press freedom vs. public interests in secrecy cases

In the Panama Papers, the Luxembourg Leaks and WikiLeaks, secret information was published by newspapers, online media and other publication platforms. Prior to, and parallel with, these developments, the Court dealt with cases where journalists, editors, or media companies published confidential

[34] Janneke Gerards, *supra note* 32, p.470.

information and thus became the subject of state interference. Editorial offices were searched, journalistic material seized, publishing companies enjoined not to publish, damages paid, and journalists punished under criminal law. In defence of their rights, the affected media workers invoked freedom of expression, and more specifically press freedom, under national constitutional law and, after failing on the domestic level, under the European Convention on Human Rights (Article 10). In a series of decisions, the Court had the opportunity to clarify conditions under which press freedom may be restricted to protect public interests by the enforcement of secrecy laws.

The Court tended to find violations of Article 10 where severe restrictions of press freedom coincided with comparably weak public interests. In turn, the Court refrained from finding violations if rights had only been lightly restricted to protect grave public interests. The Court always found violations where public authorities ordered journalists to reveal sources or hand over research material.[35] In searches and seizures at editorial offices or journalists' homes, the Court also consistently found violations.[36] A restriction threatening the protection of journalistic sources always resulted in a violation. Where the state's response was limited to prohibiting further distribution or ordering payment of damages, or where journalists were sentenced to small fines and short or suspended prison terms for handling or publishing confidential information, mixed results occurred.[37]

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[35] ECtHR, 27 March 1996 (Grand Chamber), Application No. 17488/90, Goodwin v. United Kingdom (violation); 15 December 2009, Application No. 821/03, Financial Times Ltd. and others v. United Kingdom (violation); 22 November 2007, Application No. 64752/01, Voskuil v. The Netherlands (violation); 22 November 2012, Application No. 39315/06, Telegraaf Media Nederland Landelijke Media B.V and others v. The Netherlands (violation).

[36] ECtHR, 9 February 1995, Application No. 16616/90, Vereniging Weekblad Bluf! v. The Netherlands (violation); 25 February 2003, Application No. 51772/99, Roemen and Schmit v. Luxembourg (violation); 15 July 2003, Application No. 33400/96, Ernst and others v. Belgium (violation); 27 November 2007, Application No. 20477/05, Tillack v. Belgium (violation); 12 April 2012, Application No. 30002/08, Martin and others v. France (violation); 28 June 2012, Application No. 15054/07 and 15066/07, Ressiot and others v. France (violation); 16 July 2013, Application No. 73469/07, Nagla v. Latvia (violation); 19 January 2016, Application No. 49085/07, Görmüs and others v. Turkey (violation).

[37] ECtHR, 26 January 1991, Application No. 13585/88 (Plenary Session), Observer and Guardian v. United Kingdom (partly no violation); 21 January 1999 (Grand Chamber), Application No. 29183/95, Fressoz and Roire v. France (violation); 3 October 2000, Application No. 34000/96, Du Roi and Malaurie v. France (violation); 25 April 2006, Application No. 77551/01, Dammann v. Switzerland (violation); 19

1. The Court's reasoning

When deciding cases involving conflicts between Article 10 and public interests or other Convention rights, the Court usually separates its assessment into three main parts: The restriction must be prescribed by law; it must pursue a legitimate aim; and it must be "necessary in a democratic society". Legitimacy of aims and criteria demanding that restrictive measures be prescribed by law do usually not cause any problems.[38] Relevant arguments to create a "fair balance" relate to whether a specific interference is necessary in a democratic society. Within that category, arguments are not readily standardized, – which has led to criticisms of "ad-hoc" reasoning by Greer and others.[39]

To be sure, the Court has developed several tests to solve conflicts between freedom of expression and *opposing rights*. For instance, in cases involving conflicts between freedom of expression and the right to privacy (Article 8) in the field of celebrity news, the Court demands consideration of whether the publication contributed to a debate of general interest; how well-known the person concerned was; what the subject of the report was; what the prior conduct of the person concerned was; how the information was obtained; whether the information was true; what the content, form and consequences of the publication were; and how severe the sanction imposed was (*Axel Springer* test).[40] When freedom of

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December 2006, Application No. 62202/00, Radio Twist A.S. v. Slovakia (violation); 7 June 2007, Application No. 1914/02, Dupuis and others v. France (violation); 10 December 2007 (Grand Chamber), Application No. 69698/01, Stoll v. Switzerland (no violation); 24 April 2008, Application No. 17107/05, Campos Dâmaso v. Portugal (violation); 19 January 2010, Application No. 16983/06, Laranjeira Marques da Silva v. Portugal (violation); 28 June 2011, Application No. 28439/08, Pinto Coelho v. Portugal (violation); 24 January 2012, Application No. 32844/10 and 33510/10, Seckerson v. United Kingdom and Times Newspapers Ltd. v United Kingdom (no violation); 22 March 2016, Application No. 48718/11, Pinto Coelho v. Portugal (No. 2) (violation).

[38] Useful clarifications can be found in ECtHR, 14 September 2010 (Grand Chamber), Application No. 38224/03, Sanoma Uitgevers B.V v. The Netherlands, paras.96 - 99; Telegraaf Media Nederland Landelijke Media B.V and others v. The Netherlands, *supra note* 35, paras.97 - 102.

[39] See above II.

[40] ECtHR, 7 February 2012 (Grand Chamber), Application No. 39954/08, Axel Springer AG v. Germany, paras.90 - 95; a similar test is found in ECtHR, 7 February 2012 (Grand Chamber), Application No. 40660/08, 60641/08, Hannover v. Germany (No. 2), paras.109-113. The cases dealt with the publication of personal information and photos, respectively, in German tabloid magazines.

expression and privacy collided in genocide denial cases, the Court called for an examination of the nature of the impugned statements; the (historical, geographical and time) context of the interference; the extent to which the impugned statements affected the rights of the members of the respective community; the existence or lack of consensus among the states parties; whether the interference was required under international law obligations; the method employed by domestic courts to justify the applicant's conviction; and the severity of the interference (*Perincek* test).[41]

For cases in which privacy rights are backed up by secrecy laws, the Court's *Bédat* decision set the standard. In that case, in which an article about a criminal investigation into a fatal road accident quoted from interrogations and interviews of the accused person, the Court balanced Articles 8 and 10 by considering how the applicant journalist came into possession of the information at issue; what the content of the impugned article was; to what extent the impugned article contributed to a public-interest debate; how the impugned article influenced criminal proceedings; to what extent the accused's private life was infringed; and whether the penalty imposed was proportionate (*Bédat* test).[42]

Whereas these standards appear relatively elaborated, the Court has developed a somewhat less detailed test for cases where freedom of expression and a *public interest* – as opposed to another Convention right – needed to be balanced. In the landmark decision of *Stoll v Switzerland*, where newspaper reports on international negotiations over compensation for Holocaust victims quoted from a sensitive and confidential strategic paper drawn up by an Ambassador, the Grand Chamber considered the interests at stake (confidentiality interests against the public interest to publish the articles); the review of the measure by the domestic courts; the conduct of the applicant; and whether the penalty imposed was proportionate (*Stoll* test).[43]

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[41] ECtHR, 15 October 2015 (Grand Chamber), Application No. 27510/08, Perincek v. Switzerland, paras.229 - 273.

[42] ECtHR, 29 March 2016 (Grand Chamber), Application No. 56925/08, Bédat v. Switzerland, paras.56 - 81; affirmed by ECtHR, 1 June 2017, Application No. 68974/11, 2395/12, 76324/13, Giesbert and others v. France, paras.86 - 102; extended to cover also the privacy rights of third parties by ECtHR, 6 June 2017, Application No. 22998/13, Y v. Switzerland, paras.63 - 97.

[43] ECtHR, Stoll v Switzerland, *supra note* 37, paras.113 - 161.

Although the Grand Chamber decision in *Stoll* had the potential to streamline the Court's uneven reasoning in secrecy cases where states restricted freedom of the press to protect *public interests*,[44] the *Stoll* test, in fact, exercised only limited influence on subsequent Chamber jurisprudence. Thus, in *Campos Dâmaso*, *Laranjeira*, *Pinto Coelho (No. 1 and No. 2)*, *Seckerson and Times*, *Martin*, *Ressiot*, *Telegraaf* and *Nagla*, the respective Chambers either refrained from referring to *Stoll* altogether, or they referenced the decision generally without actually applying the test.[45] It was only the Second Section's Chamber judgment in *Görmüs* which adopted and affirmed the test for finding Turkey in violation of Article 10.[46]

Hence, for the balancing exercise between freedom of the press and public interests, the Court's Grand Chamber not only developed a less elaborated standard when compared to the test employed when two Convention rights are in conflict, but the relevant *Stoll* test also remained largely unapplied. What was necessary in a democratic society, continued to be determined in an ad-hoc manner by the Court's Chambers. Moreover, when Article 10 was balanced against a variety of interests, the Court's method left unanswered whether the Convention right assumed initial priority (Habermas, Greer) when put into relation with a public interest.

The reasons as to why the Court has generally, also in other cases and in jurisprudence related to other Conventions rights, refrained from adopting a more consistent method remain speculative. It may be due to the fact that the Court's judges are nationals of 47 countries with differing legal systems and traditions. Institutional and personal dynamics but also national and cultural biases are likely to play important roles as they can influence doctrinal stances.[47] However, it is

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[44] See the pre-Stoll ECtHR decisions in Observer and Guardian v. United Kingdom, *supra note* 37; Vereniging Weekblad Bluf! v Netherlands, *supra note* 36; Ernst and others v. Belgium, *supra note* 36; Radio Twist A.S. v Slovakia, *supra note* 37; Dupuis and others v France, *supra note* 37; Voskuil v. The Netherlands, *supra note* 35; Tillack v. Belgium, *supra note* 36.

[45] See *supra notes* 35-37 for references to these Chamber decisions. In Guja, the Court developed still another test for application in whistle-blower scenarios, ECtHR, 12 February 2008 (Grand Chamber), Application No. 14277/04, Guja v. Moldova, paras.73 - 77.

[46] ECtHR, Görmüs and others v. Turkey, *supra note* 36, paras.51 - 75.

[47] Erik Voeten, "Politics, Judicial Behaviour, and Institutional Design" in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics*, (Oxford: Oxford University Press, 2011), pp.61 – 76; See, for the European Court of Justice, Mark Dawson, "How

argued below that the Court's margin of appreciation doctrine may be a major obstacle in this respect.

2. Towards proportionality

The adoption of the classic proportionality test would enable a clear focus on the restriction of the right and its justification. Rather than evaluating the involved interests on a principally equal footing, the proportionality test could position the Convention right in the centre of the evaluation, limiting restrictions to the extent necessary and proportionate. The right, though not a trump, may receive a principled advantage. Moreover, the clear separation between the test of necessity and the test of proportionality in the narrow sense prevents the mix-up of factual assessments with the weighing of rights and public interests.

For these reasons, the Court's recurring arguments and patterns of reasoning, both pre- and post-*Stoll*, are evaluated for their potential location within the proportionality test. The assessment will move from arguments relevant for the test of suitability or effectiveness to those which can be adopted for necessity and, finally, for proportionality in the narrow sense.

The preparatory zeroth step of proportionality, inquiring whether a particular interest pursued by a state authority constitutes a legitimate goal, is largely subject to evaluation by the respective member state itself, following the margin of appreciation doctrine. As will be shown when addressing proportionality in the narrow sense, the Court has accepted many different interests, and rarely outright discarded any public concern, a priori. Therefore, the preparatory step of the proportionality test is evidently performed by the Court, but the level of control exercised remains low, due to the margin of appreciation doctrine.

2.1 Suitability arguments

The test for suitability or effectiveness asks whether measures applied by state authorities helped to achieve the goal pursued. In this respect, the Court consistently held that searches, seizures, or criminal liability imposed upon journalists at a time when the impugned information was no longer secret violated

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Does the European Court of Justice Reason? A Review Essay on the Legal Reasoning of the European Court of Justice," European Law Journal, Vol. 20, No. 3, 423, p.423 (2014).

Article 10. Relevant cases are *Observer and Guardian*, *Bluf!*, *Fressoz and Roire*, *Dammann*, *Dupuis*, *Campos Dâmaso*, *Telegraaf* and *Görmüs*. The threat to the public interest was so reduced as to be practically non-existent in these cases. Restrictive measures could no longer attain their goal effectively under any circumstances.

For instance, in *Bluf!*, the editorial staff of a magazine acquired a quarterly report by the security service of the Netherlands. Before the magazine was able to publish the report, its premises were searched, and the entire print run of the issue seized. The Court noted that the report was no longer confidential, as the head of the Security Service himself admitted, since separate items of information included in it had been declassified. Other publishers had already printed the report and diffused it widely in Amsterdam.[48]

Or in *Fressoz and Roire*, where an editor and a journalist were held criminally liable for breach of professional confidence. They had illustrated an article about Jacques Calvet, then-chairman and managing director of Peugeot, with a reproduced copy of a tax assessment document declaring his income. The Court held that the impugned information was already available to the public, since local taxpayers could consult a list of residents liable for tax in their municipality with details of taxable income and liability. Therefore, the information was not confidential.[49]

2.2 Necessity arguments

On the question of whether a particular measure was the least restrictive one – the second step of the proportionality test – the Court makes such an inquiry when it discusses the severity of a restriction. If state authorities had alternative, equally effective measures at their disposal, the Court found violations of Article 10. This occurred in *Goodwin*, *Financial Times*, *Roemen and Schmit*, *Ernst*, *Ressiot*, *Martin*, *Voskuil*, *Telegraaf*, *Nagla,* and *Görmüs*. The necessity test is thus already part of the Court's reasoning and could readily be adopted in the three-step proportionality test.

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[48] ECtHR, Vereniging Weekblad Bluf! v. Netherlands, *supra note* 36, paras.41 - 45.

[49] ECtHR, Fressoz and Roire v. France, *supra note* 37, para.53.

Assessment of factual necessity played a major role in cases where protection of journalistic sources was affected. Orders to reveal informants or hand over research material which could lead to disclosure of sources have been found in consistent violation of Article 10.[50] In *Telegraaf*, for example, a newspaper had published an article claiming that state secrets from a Dutch secret service branch circulated among the criminals of Amsterdam. The internal investigations department of the Dutch National Police Force ordered the newspaper to surrender documents containing information on operational activities. The Court held that disclosure orders were not necessary as the "culprits could be found simply by studying the contents of the documents and identifying officials who had access to them."[51]

Searches and seizures at editorial offices or journalists' homes have also been found in consistent violation of press freedom, as potentially leading to sources being revealed.[52] In *Roemen and Schmit*, a journalist published an article stating that a member of the government had been convicted of tax fraud. The article was based on official documents. The journalist's home and workplace were searched. The Court noted that the aim of the operation was "to identify those responsible for an alleged breach of professional confidence", so that the measures came within the sphere of source protection. Again, the Court decided that the measures were factually not necessary as domestic authorities had failed to properly investigate the leaks internally.[53]

In *Ernst*, the workplaces of four journalists were searched. Documents, discs, and hard drives were seized. Searches and seizures were part of criminal investigations into continuous information leaks at the Public Prosecutor's office.

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[50] ECtHR, Goodwin v. United Kingdom, *supra note* 35; Financial Times Ltd. and others v. United Kingdom, *supra note* 35; Voskuil v The Netherlands, *supra note* 35; Telegraaf Media Nederland Landelijke Media B.V and others v. The Netherlands, *supra note* 35.

[51] ECtHR, Telegraaf Media Nederland Landelijke Media B.V and others v. The Netherlands, *supra note* 35, para.129.

[52] ECtHR, Vereniging Weekblad Bluf! v. The Netherlands; Roemen and Schmit v. Luxembourg, *supra note* 36; Ernst and others v. Belgium, *supra note* 36; Tillack v Belgium; Martin and others v. France, *supra note* 36; Ressiot and others v France, *supra note* 36; Nagla v. Latvia, *supra note* 36; Görmüs and others v. Turkey, *supra note* 36.

[53] ECtHR, Roemen and Schmit v. Luxembourg, *supra note* 36, para.52.

The Court found that the Belgian government had failed to show that, in absence of the impugned searches and seizures, it would not have been able to investigate leaks emanating from the office of the Public Prosecutor. The Court further noted that it was "struck by the massive character of the operation" executed simultaneously at eight locations by 160 police officers.[54]

In *Martin*, journalists had published articles quoting from a provisional auditing report alleging the mismanagement of the Languedoc-Roussillon region under the leadership of a certain politician. Investigations into a suspected violation of professional secrets led to editorial offices being searched by the police. Documents and hard drive copies were seized. The Court held that the primary goal of the search, conducted eight months after the publication, was to disclose the identity of the informant. The judges decided that the search was not necessary, as the French government had failed to prove that no other method of investigation was available.[55]

The factual necessity test is one of the Court's major argumentative instruments for assessing the severity of restrictive measures. Moreover, the protection of journalistic sources lies at the core of press freedom. In *Voskuil*, where a journalist was detained for 17 days, the Court denounced the "far-reaching measures [that] cannot but discourage persons who have true and accurate information relating to wrongdoing of the kind here at issue from coming forward and sharing their knowledge with the press in future cases."[56] In *Goodwin,* a case that involved the protection of a private interest, the Grand Chamber held:

> Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom,

[54] ECtHR, Ernst and others v. Belgium, *supra note* 36, paras.101 - 102.

[55] ECtHR, Martin and others v. France, *supra note* 36, para.86.

[56] ECtHR, Voskuil v. The Netherlands, *supra note* 35, para.71.

> such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.[57]

Thus, it appears that the Court considers interferences with the core of press freedom so severe that a public interest could hardly outweigh such restriction. This form of principled balancing, invoking core protection guarantees is found in *Goodwin*, *Financial Times*, *Bluf!*, *Roemen and Schmit*, *Ernst*, *Tillack*, *Martin*, *Ressiot*, *Voskuil*, *Telegraaf*, *Nagla,* and *Görmüs*.

However, as the quote from *Goodwin* shows, the Court's balancing approach does permit that a lack of factual necessity can be compensated by overriding public interests. This is impossible under the proportionality test as factual necessity and proportionality in the narrow sense are strictly separated steps: If a restrictive measure was chosen although an alternative and less restrictive measure was available, the chosen measure was not necessary in the sense of the proportionality test. This is a purely factual question. Once we drop out on the step of necessity, the last step – proportionality in the narrow sense, i.e. the balancing of rights and interests – must not be addressed anymore. The measure would already be considered disproportionate altogether. This demonstrates one of the main differences between the Court's practice and the three-step proportionality test. The proportionality test has the advantage of separating factual inquiries from questions of weighing.

2.3 Proportionality arguments in the narrow sense

Due to its mix-up of factual and normative questions, in the cases analysed here, the Court never engaged in a balancing exercise as it would occur on the third step of the classic proportionality test. Nonetheless, several recurrent arguments put forward by the Court in its mix of reasons can be employed for the third step of test. These relate mainly to the importance of the right and the respective public interest, but also to the control exercised by domestic courts.

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[57] ECtHR, Goodwin v. United Kingdom, *supra note* 35, para.39.

a) Significance of the right

The Court assesses the significance of the right – here: freedom of the press – from general and concrete perspectives. Generally, the judges emphasise the importance of press freedom for promoting free political debate in a democratic society and especially the role of the press as public watchdog.[58] The Court considers it incumbent upon the press to impart information and ideas on matters of public interest.[59] The comprehensive protection of the press enjoys the "highest importance".[60]

The entire creative and research process as well as distribution of the information is protected.[61] Major elements of institutional protection of the press – reaching beyond the general scope of freedom of expression – comprise editorial confidentiality and protection of sources. The Court notably considers protection of journalistic sources a basic condition for press freedom and "part and parcel of the right to information, to be treated with the utmost caution".[62] Without such protection, the Court has held,[63] sources may be deterred from assisting the press in informing the public on matters of public interest.[64]

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[58] Pars pro toto: ECtHR, Goodwin v. United Kingdom, *supra note* 35, para.39; Observer and Guardian v. United Kingdom, *supra note* 37, para.59 (b).

[59] ECtHR, Observer and Guardian v. United Kingdom, *supra note* 37, para.59 (b).

[60] ECtHR, Dupuis and others v. France, *supra note* 37, para.40.

[61] Christian Mensching, Commentary to Article 10, in Ulrich Karpenstein and Franz C. Mayer (eds), Konvention zum Schutz der Menschenrechte und Grundfreiheiten: EMRK, 2nd ed., (München: C.H. Beck, 2015), para.15.

[62] ECtHR, Tillack v. Belgium, *supra note* 36, para.65.

[63] ECtHR, Goodwin v. United Kingdom, *supra note* 35, para.39; Voskuil v. The Netherlands, *supra note* 35, para.65; 8 December 2005, Application No. 40485/02, Nordisk Film & TV A.S. v. Denmark, p.10: "one of the cornerstones".

[64] The increasingly relevant question of whether bloggers can invoke special guarantees of press freedom such as source protection has finally been addressed by the Court, albeit in an obiter dictum: the "function of bloggers and popular users of the social media may be also assimilated to that of "public watchdogs" in so far as the protection afforded by Article 10 is concerned." ECtHR, 8 November 2016 (Grand Chamber), Application No. 18030/11, Magyar Helsinki Bizottság v. Hungary, para.168; also portals such as WikiLeaks may deserve a functionally similar protection, see the powerful arguments by Yochai Benkler, "A Free Irresponsible Press: Wikileaks and the Battle Over the Soul of the Networked Fourth Estate", Harvard Civil Rights-Civil Liberties Law Review, Vol. 46, No. 2, 311, pp.356 - 363 (2011).

Considerations of the general importance of press freedom rarely had a direct bearing on the outcome of cases. Concrete circumstances of cases were more pertinent. In "secrecy cases". the Court has held that press freedom assumes greater importance in circumstances in which state activities and decisions escape democratic or judicial scrutiny due to their confidential or secret nature.[65] The Court also examines if the medium's contribution, whether it be article, TV broadcast, or other communication, contributed to a public debate on a matter of general interest. The Court assigns higher weight to speech contributing to a "relevant" topic, by which a matter of general interest is meant. Press freedom has more impact if used for this purpose. The importance of the public interest invoked by a respondent state accordingly – and ironically – also functions as a yardstick to evaluate the weight of the restricted right. Put differently, the more important the story is for the public, the more difficult it will be for the state to suppress it by insisting on secrecy.

In the great majority of cases analysed here, the Court identified matters of general interest about which the press had a right to report. Examples were the legitimate interest in knowing the amount of a CEO's salary in comparison to workers' pay,[66] in overseeing whether state representatives perform their duties legally,[67] acquiring information about robbery suspects,[68] witnessing a power struggle among government leaders,[69] or following doping investigations against a cycling team.[70]

Only very rarely did the Court find no significant contribution to a public debate. For instance, in *Leempoel*, a domestic court ordered an injunction prohibiting further distribution and sale of an issue of a weekly magazine. The issue contained an article dealing with hearings of a parliamentary committee investigating the handling of the Dutroux Affair by police and judicial authorities. It quoted extensively from an investigative judge's handwritten notes prepared for a

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[65] ECtHR, Stoll v. Switzerland, *supra note* 37, para.110; Görmüs and others v. Turkey, *supra note* 36, para.48.

[66] ECtHR, Fressoz and Roire v. France, *supra note* 37, para.50.

[67] ECtHR, Roemen and Schmit v. Luxembourg, *supra note* 36, para.54.

[68] ECtHR, Dammann v. Switzerland, *supra note* 37, para.54.

[69] ECtHR, Radio Twist A.S. v. Slovakia, *supra note* 37, para.58.

[70] ECtHR, Ressiot and others v. France, *supra note* 36, para.114.

hearing, which also contained advice from third persons. A domestic court held that the documents were covered by the secret of parliamentary investigations. Although the Court noted that the work of the Dutroux Commission was a matter of general interest, it did not consider that the impugned article contributed to a public debate, as it contained scant interesting information.[71] No violation was found.

The weight of Article 10 may also depend on the reporting style. The Court has developed a doctrine of "responsible journalism"[72], invoking journalistic ideals such as accuracy, objectivity and good faith to prevent unreasonable impact on legitimate public interests. In *Leempoel*, the Court considered that the "sensationalist" article provided scant actual information.[73] Conversely, however, in *Campos Dâmaso*, *Laranjeira* and the two *Pinto Coelho* cases,[74] the Court acknowledged the journalists' care in accurately presenting the facts of criminal cases.

The Grand Chamber's landmark decision in *Stoll* is especially noteworthy. The judges emphasised that:

> 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.[75]

The Court went on to hold that the journalist's main intention was not to inform the public on a topic of general interest, but to make a confidential document the subject of "needless scandal", pointing to the respective article's reductive, truncated, and sensationalist style and its "bellicose vocabulary".[76] In *Stoll*, no violation of Article 10 was found.

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[71] ECtHR, Leempoel & S.A. Ed. Ciné Revue v. Belgium, *supra note* 36, paras.72 - 73.

[72] ECtHR, Bédat v. France, *supra note* 42, para.50, with reference to ECtHR, 20 October 2015 (Grand Chamber), Application No 11882/10, Pentikäinen v. Finland, para.90.

[73] ECtHR, Leempoel & S.A. Ed. Ciné Revue v. Belgium, *supra note* 36, para.78.

[74] ECtHR, Campos Dâmaso v Portugal, *supra note* 37; Laranjeira Marques da Silva v. Portugal, *supra note* 37; Pinto Coelho v Portugal, *supra note* 37; Pinto Coelho v. Portugal (No. 2), *supra note* 37.

[75] ECtHR, Stoll v. Switzerland, *supra note* 37, para.103.

[76] *Ibid*, paras.147 - 151.

b) Significance of the public interest

According to Article 10(2), the Convention's freedom of expression can be restricted in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence (sic!), or for maintaining the authority and impartiality of the judiciary. In the cases analysed here, the Court balanced press freedom against numerous public interests. These included national security, a country's international relations, effective criminal investigations and prosecution, a fair trial and the presumption of innocence, proper conduct of civil or administrative proceedings, and tax data protection.[77] Certainly, some of these interests enjoy higher face values than others. Yet the Court did not establish a hierarchical order, but – within the scope of Article 10(2) – accepted interests put forward by the respondent state as generally legitimate. More specifically, the Court allows member states a margin of appreciation in defining their interests. In the opaque words of the Court, "this power of appreciation is not (...) unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10."[78] Although the doctrine's conceptual basis[79] will not be critically assessed here, its exact scope and repercussions in cases involving disclosure of secret information by the press remains especially obscure.

In this context, the Court justifies the margin of appreciation doctrine with specific reference to a lack of common ground among contracting states. In *Stoll*,

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[77] This list reflects most of the interests accepted as concerns justifying limitations of the right of access to official documents by the Council of Europe Committee of Ministers (CoM) in its recommendation in 2002, Recommendation Rec (2002)2, IV1.; additionally, the CoM listed nature; inspection, control and supervision by public authorities; and economic, monetary and exchange rate policies of the state.

[78] ECtHR, Telegraaf Media Nederland Landelijke Media B.V and others v. The Netherlands, *supra note* 35, para.123.

[79] See George Letsas, A Theory of interpretation of the European Convention on Human Rights, (Oxford: Oxford University Press 2007), pp.80 - 89 and 120 - 125; Urska Prepeluh, "Die Entwicklung der Margin of Appreciation-Doktrin im Hinblick auf die Pressefreiheit," Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Vol. 61, No. 4, 771, p.831 (2001).

the Grand Chamber held that rules aimed at preserving the confidentiality or secrecy of sensitive items of information and prosecuting acts running counter to that aim "vary considerably not just in terms of how secrecy is defined and how the sensitive areas to which the rules relate are managed, but also in terms of the practical arrangements and conditions for prosecuting persons who disclose information illegally."[80] The Court therefore allots to domestic courts a margin of appreciation in assessing the necessity and scope of interference because of their "direct, continuous contact with the realities of the country."[81]

However, the Court also repeatedly stated that in cases where freedom of the press is at stake, national authorities enjoy only a limited margin of appreciation to decide whether a "pressing social need" exists.[82] In addition, the Court emphasised that the "most careful scrutiny on the part of the Court" is called for when measures taken or sanctions imposed by national authorities may discourage participation by the press in debate over matters of legitimate public concern.[83] In practice, the Court nonetheless accepted public interests put forward by member states as generally legitimate.

Occasionally, the Court assigned an elevated importance to a public interest. In the joint cases of *Seckerson and Times*, the Court held that the confidentiality of judicial deliberations played an "important" and "crucial" role in maintaining judicial authority and impartiality. Considering this purpose, the absolute rule forbidding any public reproduction of jury deliberations was neither unreasonable nor disproportionate.[84] No violation was found.

By contrast, protecting the reputation of state authorities against criticism was not considered a legitimate interest.[85] For instance, in *Observer and Guardian*, British newspapers had published details of *Spycatcher*, the as-yet unpublished memoirs of a former MI5 agent, and planned to publish further undisclosed

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[80] ECtHR, Stoll v. Switzerland, *supra note* 37, para.107.

[81] ECtHR, Bédat v. Switzerland, *supra note* 42, para.54.

[82] ECtHR, Éditions Plon v. France, *supra note* 36, para.44; Stoll v. Switzerland, *supra note* 37, para.105.

[83] ECtHR, Stoll v. Switzerland, *ibid*, para.106.

[84] ECtHR, Seckerson v. U.K. and Times Newspapers Limited v U.K., *supra note* 37, paras.43 - 45.

[85] ECtHR, Observer and Guardian v. United Kingdom, *supra note* 37; Voskuil v. The Netherlands, *supra note* 35; Görmüs and others v. Turkey, *supra note* 36.

material. The Attorney General sought restraining orders, as he considered the disclosure detrimental to the service and threatening national security. Alluding to a time when the memoirs had already been published in the United States, the Court held that the purpose of the injunctions had become confined to promoting the efficiency and reputation of the intelligence service, by preserving confidences from third parties and deterring others who might be tempted to disclose MI5 information. These objectives were insufficient to justify continuation of interference.[86]

In *Görmüs*, the Court dealt with a search conducted at the premises of a weekly newspaper that had published an article revealing that the General Staff of the Turkish Armed Forces had created lists of journalists and non-governmental organisations considered either pro- or anti-military. The lists were the basis for inviting supposedly friendly journalists and non-governmental organizations (NGOs) to military events. The Court held that "excluding questions relating to the armed forces completely from the public debate is not acceptable". The judges highlighted the society's interest in the disclosure of information evidencing debatable practices by the armed forces, so that a possible loss of public confidence in the military, in the wake of disclosure, had to be accepted.[87]

c) Depth of national court's reasoning

Besides the significance of the involved rights and public interests, the Court's assessment whether national courts engaged in thorough reasoning could also be included into the third step of the proportionality test. In this respect, the judges examine whether their colleagues on the domestic level properly balanced press freedom with respective public interests. For instance, if national courts accepted absolute criminalisation of secrecy breaches without balancing the interests involved at all, the Court usually found a violation of press freedom. The Court thereby even forces national judges to set aside substantive domestic laws if necessary.

Examples for this line of argumentation may be found in cases relating to the publication of criminal investigation files. In *Campos Dâmaso*, a newspaper reported on investigations of a well-known politician. The article quoted a portion

[86] ECtHR, Observer and Guardian v. United Kingdom, *ibid*, para.69.

[87] ECtHR, Görmüs and others v. Turkey, *supra note* 36, paras.62 - 63.

of the public prosecutor's charges. The journalist was sentenced to a modest criminal fine for violating the secret of investigations. The Court noted that neither the national courts nor the respondent government raised arguments of how publication could have affected the politician's rights.[88] Instead, courts accepted absolute criminalisation under national criminal law. In the case of *Laranjeira Marques da Silva*, an article referred to a DNA test and questioned whether proceedings against a politician were properly conducted. Again, the Court did not ask whether the publication had any negative influence on the course of criminal investigations, especially as the investigation was already closed.[89] Comparable judgments can be found in the two *Pinto Coelho* cases. In *Pinto Coelho (No.1)*, the Court observed that an "automatic" criminal liability can hardly be reconciled with freedom of expression.[90] Another case where the Court denounced absolute criminalisation of secrecy breaches was *Du Roi and Malaurie*.[91]

In the decision in *Seckerson*, which involved the publication by a newspaper of secret jury deliberations, the Court exceptionally held that absolute prohibition of such disclosures was reasonable and proportionate. It considered that, even if the matter was of general interest, such rule was a "crucial and legitimate feature of English trial law which served to reinforce the jury's role as the ultimate arbiter of fact and to guarantee open and frank deliberations among jurors on the evidence which they had heard." Facing such long-established rules, the Court refrained from identifying a lack of reasoning by the national court and found no violation of Article 10.

3. Finding the right balance

As has been shown in the preceding paragraphs, the arguments recurrently employed by the Court in the category of cases under analysis here can be reordered and assigned to the steps of the proportionality test. The division into suitability, necessity and proportionality in the narrow sense also separates factual

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[88] ECtHR, Campos Dâmaso v. Portugal, *supra note* 37, para.36.

[89] ECtHR, Laranjeira Marques da Silva v. Portugal, *supra note* 37, paras.43 - 44.

[90] ECtHR, Pinto Coelho v Portugal, , *supra note* 37, para.40; see also Pinto Coelho v. Portugal (No. 2), *supra note* 37, para.49.

[91] *Supra note* 37, para.36.

from normative assessments. Nonetheless, even if the test was adopted, the balancing of rights and interests on the level of proportionality in the narrow sense would remain a challenging task.

At the outset, the application of the proportionality test could give initial priority to rights. Within the regime of the European Convention on Human Rights, the significance of a given public interest would need to be assessed in relation to the fundamental importance of the Convention right. However, the abstract weight of a right may not say much about the balancing result.[92] Rather, the comparison between the impact on freedom of the press in the concrete case, on the one hand, and the benefit for the public interest, on the other hand, leads the way to the outcome.

Thus, a general guideline for assessing proportionality in the narrow sense can be formulated. Firstly, the abstract weight of both the Convention right and the public interest need to be stated. Here, on the one hand, the Court's words about the role of the press as a public watchdog or the utmost importance of the protection of journalistic sources can be cited. On the other hand, the significance of the public interest needs to be examined. In this regard, the Court allots the member states a margin of appreciation, though under the Court's supervision. In practice, the Court has accepted most interests put forward by the member states except for a state's interest in shielding its authorities against public scrutiny.

Secondly, the restriction's concrete impact on the right and its concrete benefits for the public interest must be examined. In short, the question "Was it really worth it?" must be answered. Regarding the impact on freedom of the press, relevant factors are the severity of the restriction (such as the search of editorial offices, the seizure of journalistic material, restraining orders, orders to pay damages, criminal punishment), whether the impugned publication contributed to a public debate, and whether it was written in accordance with the tenets of responsible journalism. According to the *Stoll* test, also the journalist's conduct and how the respective information was obtained should be considered.

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[92] Matthias Klatt and Moritz Meister, "Proportionality—a benefit to human rights? Remarks on the I·CON controversy," International Journal of Constitutional Law, Vol. 10, No. 3, 687, p.690 (2012).

As regards the concrete benefit for the public interest, the Court would need to examine how much the restriction of the right actually advanced the public interest at hand and whether this advancement justifies the restriction. In other words, the Court would need to assess the amount of "success" the measures produced and contrast it with the impact on freedom of the press. This can be challenging as it requires to measure how much a given restriction in fact served the protection of, for example, national security, a country's international relations or the state's ability to conduct effective criminal investigations and prosecution. It is unsurprising that the Court left this intricate task largely to the member states by invoking their margin of appreciation. In none of the cases analysed here did the judges assess the concrete advancement of the respective public interest by the restrictive measures.

However, any meaningful assessment of proportionality in the narrow sense needs to evaluate the actual benefits for a public interest as well. Otherwise – and despite the Court's oversight – the member state is tempted to assign disproportionate weights and exaggerate the restriction's success. The margin of appreciation doctrine is likely one of the major reasons why the Court has refrained from adopting the classic proportionality test so far: The doctrine provides not only a margin of appreciation for the member states, but also a convenient exit for the Court. A properly exercised proportionality test, by contrast, would force the Court to take a stand. The Court's actual practice illustrates how deeply the Court's often-criticised ad-hoc balancing approach is intertwined with the margin of appreciation doctrine.[93] Subsidiarity and flexibility have, so far, taken precedence over a full-fledged proportionality assessment.

This is not the place to speculate about the chances for the adoption of the three-step test by the Court. But the structural impediments laid down in the

[93] Matthias Klatt and Moritz Meister, The Constitutional Structure of Proportionality, (Oxford: Oxford University Press, 2012), p.161, analysing the Court's Otto-Preminger-Institut v. Austria judgment, hold that "the Court uses the margin of appreciation doctrine as a sort of argument prior to balancing. It does not properly engage in the three-step procedure of balancing, but rather uses the margin of appreciation in order to forgo any balancing" (emphasis in the original); see also Madhav Khosla, "Proportionality: An Assault on Human Rights? A Reply," International Journal of Constitutional Law, Vol. 8, No. 2, 298, p.303 (2010); Yutaka Arai-Takahashi, "Proportionality", in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law*, (Oxford: Oxford University Press, 2013), pp.454 - 455.

Convention's principle of subsidiarity, which has received new prominence in recent years, are considerable. Judge Spano recently described how the Court is currently entering a new historical era referred to as a 'procedural embedding phase' in which the Court will attempt to trigger increased engagement with the Convention by national authorities using a 'process-based review' mechanism.[94] This new drive for subsidiarity is in tension with goals for a practical implementation of the proportionality test. Nonetheless, the Court will also adhere to its doctrine of exercising oversight over domestic courts' interpretation and application of Convention rights. In terms of the proportionality test, this oversight should also include full assessment of proportionality in the narrow sense.

V. Conclusion

The investigation of the Court's balancing approach in cases dealing with press freedom under Article 10 has shown that the classic proportionality test is largely concealed behind the Court's ad-hoc reasoning. Recurrent arguments from the Court's jurisprudence could be reorganised and assigned to the three steps of the proportionality test. The proposal for the Court to adopt the test may be affirmed and underpinned with the findings presented here.

The Court's largely unstructured, ad-hoc approach to balancing could indeed be replaced by a more concise ordering of arguments. The classic proportionality test would provide higher levels of clarity and transparency. Whether its adoption would have led to other results in the cases discussed here remains speculative. What is more important is the adherence to the ideal that legal decision-making is not merely concerned with finding the right result by whatever means but, rather, by expounding all relevant arguments in a comprehensive and transparent manner.

The consequent use of the proportionality test would ensure that all relevant arguments are raised in each case, reducing the ad-hoc content of Court

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[94] Robert Spano, "The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law," Human Rights Law Review, Vol. 18, No. 3, 473, p.473 (2018); see also Mikael Rask Madsen, "Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?," Journal of International Dispute Settlement, Vol. 9, No. 2, 199, p.199 (2018); Leonie M. Huijbers, "The European Court of Human Rights' Procedural Approach In The age of Subsidiarity," Cambridge International Law Journal, Vol. 6, No. 2, 177, p.177 (2017).

reasoning. Moreover, the test's focus on the justification of restrictions could lay an emphasis on the pre-existing significance of Convention rights. However, the Court's margin of appreciation doctrine creates a tension with proportionality in the narrow sense, which remains an important subject of future research.