The AIRE Centre
Advice on Individual Rights in Europe

CIVIL RIGHTS DEFENDERS

annual regional
RULE OF LAW FORUM
for south east europe

Fourth Annual Regional Rule of Law Forum for South East Europe

17th and 18th March 2017
Tirana, Albania, Sheraton Hotel

Report

1. Introduction

The Fourth Regional Rule of Law Forum for South East Europe was held on the 17th and 18th of March 2017 in Tirana, Albania, at the Sheraton Hotel.

This annual Forum, set up by the AIRE Centre and Civil Rights Defenders in March 2014, brings together senior representatives from the highest courts, institutions and non-governmental organisations across the region. The aim is to encourage regional cooperation in the strengthening of the rule of law and respect for human rights, and to assist the countries of South East Europe in the process of EU integration. That the Forum is now in its fourth year is a testament to the value of the event and is indicative of the sustained, if not growing, interest in the protection of the rule of law and human rights in the region. This year's Forum was organised with the support of the UK Foreign and Commonwealth Office, Government of Sweden, the Regional Cooperation Council and Deutsche Gesellschaft fur Internationale Zusammenarbeit (GIZ) (German Corporation for International Cooperation).

The focus for the fourth Forum was Freedom of Expression under Article 10 of the ECHR, and its relationship with the Article 6 right to a fair trial and the Article 8 right to respect for private life. The right to freedom of expression is a fundamental right in a democratic society, but its relationship with these other rights whilst often complimentary, can also be contentious. These relationships are challenging for domestic judges and legal practitioners to navigate, but striking the right balance is essential in a democratic society. It is for this reason that this was the chosen topic for this year's Forum.

Albania, Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro and Serbia, as well as Turkey and Russia, were represented at the Forum. Participants from these countries included both current

and former judges of the European Court of Human Rights (ECtHR or Court), Presidents and judges of the national Supreme Courts and Constitutional Courts, Presidents and members of national Judicial Councils, Directors of Judicial Training Academies and Institutions, Government Agents before the ECtHR, representatives of NGOs and prominent legal experts.

Over one and a half days, panel discussions, interactive working groups and presentations took place giving participants opportunities to meet and contribute to discussions.

2. Overview

The Forum organisers, **Biljana Braithwaite,** Programme Manager for the Western Balkans at the AIRE Centre, and **Goran Miletic,** Programme Director for the Western Balkans at Civil Rights Defenders, welcomed all participants to the event.

Opening speeches by distinguished guests followed: **Bashkim Dedja,** President of the Constitutional Court of Albania, **Xhezair Zaganjori,** President of the Supreme Court of Albania, **Guido Raimondi,** President of the ECtHR (speech read by **Ledi Bianku,** judge at the ECtHR), **Sean Melbourne,** Deputy Head of Mission from the UK to Albania, **Johan Ndisi,** Ambassador of Sweden in Tirana, and **Margreet Goelema,** Advisor, GIZ Open Regional Fund for Southeast Europe – Legal Reform.

Sir Michael Tugendhat, former judge at the High Court of Justice of England and Wales addressed the Forum on the application by national judges of ECHR case law on freedom of expression and its restrictions.

Four ECtHR judges – **Ledi Bianku** (Albania), **Ksenija Turkovic** (Croatia), **Nebojsa Vucinic** (Montenegro) and **Branko Lubarda** (Serbia) – and one former judge - **Mirjana Lazarova Trajkovska** (Macedonia) – formed a panel moderated first by former judge **Dragoljub Popovic** (Serbia) on the first day and then by **Aida Grgic,** lawyer at the ECHR, the following day when the discussion was continued. The panel addressed freedom of expression of the judiciary, media reporting on judicial issues and hate speech on the internet, in politics and in media. National judges and domestic practitioners were afforded an opportunity to ask questions and share their experiences.

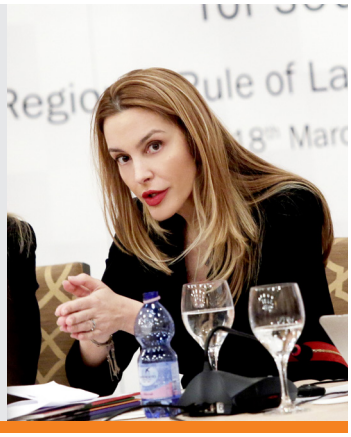
Catharina Harby, Senior Legal Consultant at the AIRE Centre later introduced the division of all participants into four working groups – two groups of judges from the ECtHR and national judges, the first discussing media reporting on judicial issues and the second discussing freedom of expression and hate speech on the internet, politics and the media; one group of Government Agents, Judicial Training Centres and Institutions discussing raising awareness for freedom of expression; and the final group of NGO representatives and legal experts, discussing the main challenges relating to free expression. All groups reported their findings in a session held jointly with all participants.

The Forum ended with a summary of the conclusions reached and the next steps to be taken by participants and organisers.

3. Opening speeches

Freedom of expression is a universally recognised fundamental right. It is vital in informing political debate and fostering public accountability and transparency in government. It is essential to individual dignity and personal fulfilment. Where free expression conflicts with other rights, domestic judges are tasked with conducting a delicate balancing exercise. This difficult task requires an in-depth understanding of current jurisprudence.

Biljana Braithwaite
Programme Manager for the Western Balkans at the AIRE Centre

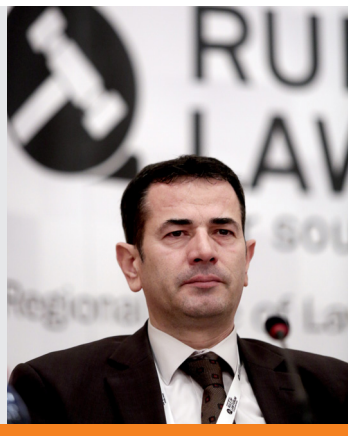


Freedom of expression must be an absolute priority in every democratic society. Without it, we cannot talk about the advancement of the respect for human rights. Regardless of the fulfilment of ECHR standards in other countries, the countries of South East Europe must abide by their obligations to push for full implementation of ECHR standards in accordance with the practice of the ECtHR.

Goran Miletic
Programme Director for the Western Balkans at Civil Rights Defenders

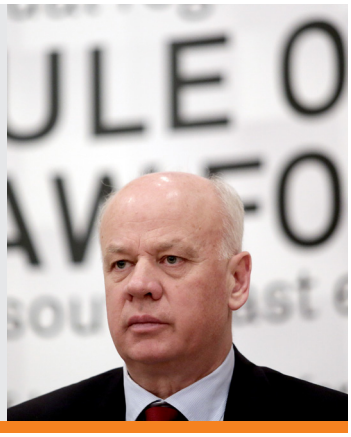
The media has an important function in checking how public duties are conducted and funds are managed. Courts must inform the public through print and other media on matters of high public interest. There is room to improve the relationship with the media, to reformat it, and ensure that courts remain open and transparent in the protection of the Constitution.

Bashkim Dedja
President of the Constitutional Court of Albania



The ECHR was established to guarantee peace, stability and international security. Its impact has been extraordinarily great, not only in new countries after 1990 but with the important changes in South East and Eastern Europe as well as further afield.

Xhezair Zaganjori
President of the Supreme Court of Albania



It is clear that freedom of expression is key to the development, dignity and fulfilment of individuals, is a core component of a country that values the rule of law, and is the foundation of an open and inclusive society. The focus of this Forum is the fundamental importance of Article 10 of the ECHR, but also its interesting and often contentious relationship with other human rights.

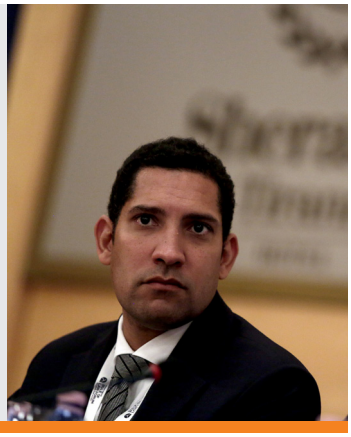
Guido Raimondi
President of the ECtHR (speech read by Ledi Bianku, Judge of the ECtHR)

Freedom of expression is an issue of critical importance for long established democracies such as the UK as well as newly established ones such as Albania. Political parties must exercise freedom of expression responsibly, to secure and sustain a political atmosphere allowing voters to properly evaluate the choices in front of them so that votes are cast on facts and policies, not rhetoric.

Sean Melbourne
Deputy Head of UK Mission, Albania

Judicial institutions have a crucial role in the protection of freedom of expression. On one hand, protecting the fundamental right of someone to free speech and on the other hand, protecting victims from hate speech. Sweden will continue to support initiatives in place for journalists to do their job and for citizens to provide information about their concerns.

Johan Ndisi
Ambassador of Sweden in Tirana



GIZ supports the rule of law, encouraging regional cooperation and assisting European integration. Promoting the implementation of the ECHR is a core aim and is done by GIZ through regional and bilateral projects including judicial training and study visits to the ECtHR.

Margreet Goelema
Advisor, GIZ Open Regional Fund for Southeast Europe – Legal Reform

4. Hanging in the balance: Freedom of expression and justified restrictions – how a national judge applies the case law of the European Court of Human Rights

Sir Michael Tugendhat, former judge at the High Court of Justice of England and Wales, began by emphasising that a judge speaks in the name of the State, that is, in the name of the people in a democracy. The decisions that judges are called upon to make are often unpopular with the people and even more unpopular with others in authority, but as he said "the freedom of expression applies to everybody". He differentiated between the domestic legal system and the ECtHR and said that the ECtHR is not a Court of Appeal. National courts must have their own procedures for applying and distinguishing ECHR rights; this can be a difficult task.

He then discussed the issue of open justice. Judges may decide to hold some or all of the proceedings in camera or to prevent media reporting in order to protect the right to privacy of a party. The judge's duty, however, is to resist derogations when the interests of the public, who as a group are not represented, outweigh the interests of the parties; orders restricting open justice, he said, should be rare. He reaffirmed that open justice promotes the value of the rule of law because it is clear from court reports of open proceedings whether or not the law is indeed being applied. He stated that "nobody speaks for the public if they [the media] don't".

He then confirmed that the freedom of expression often conflicts with the right to a fair trial and the right to privacy. At every instance of conflict between rights, a balancing exercise is called for, as neither right is seen as automatically taking precedence over the other. He said that where values are in conflict, the national court must focus on the comparative importance of the specific interests being claimed and consider justifications for intervening with each right and assess the proportionality of any measures.

Finally, he observed that the structured approach adopted by English judges today is the correct one in a case of conflicting rights and could be adapted whenever rights were in conflict. According to him, the ECHR has brought this structure to the UK and in doing so has had a huge impact. He observed that the ECHR has in fact affected the laws of all its signatories and he concluded that "it has done so...in a way that has contributed to justice and the rule of law, which is what we [judges] are concerned about."

5. Main Discussions and Conclusions

5.1 Panel Discussions with Judges from the Strasbourg Court

5.1.1. Freedom of expression and the judiciary – considering issues such as freedom of expression of judges, and criticism of courts and judges by lawyers acting in a case and other interested parties – discussing main issues in the region and the case law of the European Court of Human Rights

This panel discussion was aimed at considering the freedom of expression of judges and the criticism of courts and judges by lawyers in a case and other interested parties.

Dragoljub Popovic, moderating, set out the challenge for the judiciary in keeping abreast of technological developments, given the number of cases concerning the internet. He suggested that judges should look to both national and international sources of law to inform and support their reasoning.

Mirjana Lazarova Trajkovska referred to the importance of the case *Selmani and others v Macedonia,* 9 February 2017. Similar cases have followed before the courts in Macedonia. The case addressed the right of journalists to impart information about parliament, as well as the right of a fair trial. The parliamentary security services and Constitutional Court had claimed it was necessary for security services to protect the physical integrity of those present. The Court found a violation as the public had the right to receive information about what was occurring in parliament.

Judge Turkovic referred to *Žugić v Croatia,* 31 May 2011, and *Radobuljac v Croatia,* 28 June 2016. These were cases involving challenges of contempt of court decisions. There was no violation in *Žugić* as the sanction had been proportionate. In *Radobuljac,* however, there was a violation of Article 10 and the deciding factor was that the judge who had made the decision on contempt was the one who had been offended in the first instance. Judge Turkovic also mentioned *Stojanović v Croatia,* 19 September 2013, in which the ECtHR considered that Article 10 was not engaged as the applicant had denied writing the materials in issue. However, he had been put in custody because he was alleged to have written these words. Judge Turkovic considered that this would indeed indirectly have a chilling effect on the freedom of expression.

Judge Vucinic addressed the *Pejovic v Montenegro* decision, in 2015. This referred to criticism of the court, and considered the proper administration of the court. The national courts in that case had not

taken into account that the level of allowed criticism against judges, as public servants, is very high. Further, the national courts had not taken into account the interests of the public.

Judge Lubarda focused on *Bodrožić v Serbia,* 23 June 2009 and *Filipović v Serbia,* 20 November 2007. In *Bodrožić,* the issue was a defamation case against a journalist in which a violation was found. The risk of criminal conviction and the penalties for criticisms of public figures is likely to deter journalists from contributing to public decisions on issues affecting the life of the community. He stated that while recourse to criminal proceedings should be considered proportionate only in very exceptional circumstances, journalists should still seek to meet ethical standards in their work. Moreover, the limit of acceptable criticism is higher when the target is a politician, as was seen in *Filipović.* In *Bodrožić,* while the applicant's expression did contain mockery, it could not be considered to require the severe sanction of a criminal conviction.

Judge Bianku addressed the situation in Albania, stating that while there have been no cases before the ECtHR against Albania in respect of Article 10, this does not mean that Albania does not suffer issues in respect of free expression. Rather, lawyers in Albania need to raise these issues correctly in domestic courts and at the ECtHR level. He gave the example of one case in which the parties had not characterised their claims as violations of freedom of expression even though the case concerned the burning of flags and the demolition of voting stations which has resulted in imprisonment. Judge Bianku also referred to *MGN Limited v UK,* 18 January 2011, in which the ECtHR considered the margin of appreciation accorded to the decisions of national courts.

5.1.2. Panel discussion: Media reporting on judicial issues, and freedom of expression and hate speech on the internet, in politics and media – issues raised in working groups, the case law of the European Court of Human Rights: best practice and possible solutions – challenges ahead from Strasbourg and national court

The second panel discussion was directed towards media reporting on judicial issues, hate speech, and best practice which prompted a dynamic discussion among the participants. Judge Lubarda referred to *Gusinskiy v Russia,* 19 May 2004, the first case in which a violation of Article 18 was found. The ECtHR found that the applicant had been remanded in custody for criticising the government and attempting to disseminate what he believed to be true information. His liberty had been restricted for purposes other than bringing him before reasonable authority.

One participant emphasised that even if the positions in different countries did not align, in articulating dilemmas, it could encourage countries to engage in further analysis and reflection and so the exchange of experience in judicial bodies but also in the forum, civil society and the media should be strongly supported. The participant raised the question of whether it was necessary for judges to examine classified information when matters of national security are concerned, or whether a judge could count on a statement of security agencies that an individual was a threat to national security.

In response, **Judge Bianku** underlined that the lawfulness of the measure requires that the court have information and assess whether there are genuine national interests and security interests in deportation. The executive cannot withhold this information, even if the information should be withheld from the media and the general public. **Nuala Mole,** stated that when the UK government tried to introduce security cleared senior judges, the response from the judiciary was that this was totally unacceptable and in contravention of the role of the judiciary.

A further question raised the issue of contempt of court and access to public documents. There was concern that an excessive burden would be placed on the judiciary if they had to make available docu-

ments to journalists on a regular basis. **Judge Vucinic** stated that States must adopt legislation about accessibility of documents and adopt measures to aid the functioning of the judicial and State apparatus.

Another participant enquired as to the extent to which ECtHR judges were aware of commentary and criticism of their judgments. **Judge Vucinic** responded by stating that criticism of the ECtHR is a form of dialogue and very useful to judges. ECtHR judges are public figures and must be subjected to wider criticism than ordinary persons. **Mirjana Lazarova Trajkovska** stated that the judges are interested when it comes to interaction with academics, NGOs, legal experts and State representatives who have criticised ECtHR case law. **Judge Bianku** concluded this panel discussion by stressing that judges should consider criticisms of the ECtHR and extrajudicial debate in order to improve its effectiveness. He stated that whilst "we [judges] are temporary here at the Court, the system is here to stay."

5.2 The Working Groups

5.2.1 Working Group 1A (Judges from the ECtHR and national judges – media reporting on judicial issues): This working was chaired by **Nuala Mole,** Senior Lawyer and Founder of the AIRE Centre, and **Aida Grgic,** and the group first considered public hearings. The discussion focused on proceedings concerning terrorists, and the extent to which information should be withheld, not only from the media, but from the judge conducting the proceedings. The UK cases of *Chahal v UK,* 15 November 1996, and of *A and Others v UK,* 19 February 2009. The British system now provides for special advocates who have been cleared by security authorities and who can access all the information that is on file and can thereby prepare the defence. The issue was also raised in *Abu Qatada v UK,* 17 January 2012. It was important to underline that in such cases decisions should only be made on the basis of information before the court. States cannot ask a judge to blindly accept that there are risks represented by the persons concerned and decide "in the dark" on the case of the accused.

The second point of discussion was on the presumption of innocence and press reporting. The right of citizens to learn the truth about the case, the protection of the rights of those involved, the preservation of the authority and independence of the judiciary, and the integrity of journalists were all key issues. Problems have arisen with journalists putting pictures of suspects in the media, or commenting on cases currently before the court in a way that can indirectly influence witness testimony that is yet to come. A journalist can severely prejudice proceedings in such cases. The Group concluded that it was very important that the content of the impugned article, its context, and the public interest were taken into account. Countries must take measures in order to educate the press on how to report on court cases in order for them to properly exercise their duties as journalists and in order to prevent them from wrongly infringing on the rights of others.

5.2.2 Working Group 1B (Judges from the ECtHR and national judges – hate speech on the internet, in politics and in the media): This group was chaired by **Dragoljub Popovic** and **Ana Vilfan-Vospernik,** Senior Lawyer at the Registry at the European Court of Human Rights. The case of *Delfi AS v Estonia,* 16 June 2015, involving a commercial internet portal hosting comments made by independent individuals, was discussed. The Court found no violation as a result of sanctions taken against the portal for that independent content. There was recognition that courts will have to address the internet as a form of expression and there was concern that it was not sufficient to have filters for hate speech. The very liberal position in the USA was contrasted with the slightly more rigid position of the ECtHR. There was an apprehension expressed that an application of the right to freedom of expression that is too liberal would be the wrong approach. Account needs to be taken of different cultural patterns and the size of the environment in which a regulation applies. The Group concluded that the ECtHR was very open to different interpretations of the principles which allowed for different domestic approaches.

5.2.3 Working Group 2 (Government Agents, Judicial Training Centres and Institutions – raising awareness in questions of freedom of expression): The Group was chaired by **Biljana Braithwaite** and **Catharina Harby,** and focused on how to raise awareness about ECHR standards domestically and how to ensure their proper implementation in national courts. The judiciary must be assisted in applying the ECHR more effectively at domestic level. One of the main obstacles was considered to be that the ECHR system, which in essence is based on precedent law, was not something lawyers were being trained to apply at university or later. The solutions decided upon were to produce a handbook on applying ECHR caselaw in domestic judgments, to follow that with training and then to create checklists for judges to which they can refer. These should marry ECHR case law and domestic law. The AIRE Centre offered to lead this process and once a regional handbook has been produced, it can be adapted for each jurisdiction.

Evaluating the effects of the training, which was the second topic of the conversation in this working group, is a difficult but necessary task. Judicial training institutes highlighted the need to develop evaluation methodologies which would help them assess long term effects of judicial training on ECHR, and expert support is necessary for this task. Further, it has been noticed that young judges who have gone through initial training and have used the ECHR have not had their arguments well received at appellate level, leading to an effect on their overall performance when their work is evaluated by judicial councils. Thus, ECHR training has to be organised at all levels of jurisdiction.

With respect to implementation of the Strasbourg judgments against countries in the region, the government agents spoke about difficulties they encountered in securing cooperation of relevant domestic institutions. Trainings and workshops at national level need to be carried out to raise awareness of the need to reopen proceedings or reopen investigations if that is required in order to implement specific Strasbourg judgments.

5.2.4 Working Group 3 (NGO representatives and legal experts – challenges in relation to freedom of expression): The group was chaired by **John Stauffer,** Legal Director and Deputy Executive Directors at Civil Rights Defenders, and **Ishaani Shrivastava,** Barrister at Devereux Chambers, London. The group found that most of the issues in freedom of expression were common if not identical in the region in areas including defamation, online media, access to public documents, transparency of courts and whistleblowing. Existing legislation was considered to be of a good standard, however, there is a recognised need for more regulation of the online world. The main problem was the implementation and interpretation of these standards. One example from a Bosnian court was of a judge stating that politicians need extra protection because of the very fact they were in the public eye.
The problem of powerful corporations or politicians resorting to suing newspapers resulting in lengthy and costly proceedings was one affecting all countries in the region. Such proceedings present the risk that newspapers would become financially unviable – one example was given of a newspaper forced to switch to an online-only presence because of the expense of lawsuits. There was a concern that the difficulties faced by the mainstream media was causing a proliferation of untraceable internet sites, which were becoming forums for hate speech. Employment protections for journalists were also raised as an issue. Newspapers were adopting the practice of dismissing the individual journalist responsible in the event of any lawsuit. This was leading to a "self-censorship" of journalists, in fear of economic consequences. Difficulties in accessing court decisions were also raised.

6. Conclusions and Recommendations

The following informal conclusions and recommendations have been drawn based on Forum discussions:

1. Judges need to be independent and confident in applying ECtHR case law and universities should start training younger generations early in applying ECHR standards.

2. Judges should be prepared to be subjected, as public figures, to more criticism than private individuals. Criticism of the judiciary should only be limited when Article 10(2) envisages such a restriction e.g. in order to maintain the authority and impartiality of the judiciary
3. Criminal proceedings against journalists should only be used in exceptional situations in order to prevent a "chilling effect" on the role the media play as a "public watchdog".
4. The internet and other technological developments have huge implications on free speech and the right to privacy. Judges and legal practitioners, as well as other interested parties should stay on top of any developments in this area.
5. National judges, in cases involving matters of national security, must be provided with all relevant information, confidential or otherwise, in order for them to make a determination.
6. The ECtHR judges all confirmed the importance of criticism, both positive and negative, of their jurisprudence. They welcomed all comments and suggestions, and encouraged dialogue with national courts.
7. Lawyers, national judges and judicial councils must be trained in the proper application of the Convention in order for issues to be framed in Convention language. There was also an emphasis on the need to train the media in Convention law and legal reporting.
8. Based on suggestions from judicial training institutes and government agents, the AIRE Centre is to begin working on a handbook that focuses on judicial skills such as argumentation and legal reasoning. Also included will be a breakdown of key Convention principles and checklists that relate to the structured approaches judges take when applying these principles or important articles.
9. The AIRE Centre's European human rights database should be utilised by all in training on key ECHR issues and in order to keep up to date with Court jurisprudence.
10. The AIRE Centre's and Civil Rights Defender's published guide to "Freedom of Expression and its Relationship with the Right to Respect for Private life and the Right to a Fair Trial", along with a country-by-country analysis of ECtHR jurisprudence provided to all participants should be utilised by all judges and legal practitioners in order to overcome the challenges facing the region in the application of the Convention in this area.

7. Acknowledgments

Civil Rights Defenders and the AIRE Centre would like to express a special thanks to all those who made the Forum possible: The UK Foreign and Commonwealth Office, the Government of Sweden, the Regional Cooperation Council and German International Cooperation GIZ for recognising the importance of our work and giving us the means of carrying it out; the judges from the region who sit in the ECtHR, who have been closely involved in planning the event, and support the European integration of the aspiring countries in the region; and to all participants for their involvement and contributions.

8. Rule of Law Forum 2018

This report will be published and circulated to all participants. We welcome feedback on content and format over the course of the next month to help make the Forum in 2018 a success. Please contact the CRD or the AIRE Centre with any suggestions. Based on this feedback, the organisers will propose topics for next year's forum. A consultation will be launched for selection.

Thank you to everyone for your contribution.

We look forward to seeing you in 2018.