Court Decisions in Georgia: How to Negotiate the Minefield Between Access and Respect for Privacy

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Introduction

For many years now, an apparent conundrum has lurked just beneath the surface among European jurisdictions. In the Common Law countries – namely the United Kingdom and Ireland – full court decisions, including the names of the parties, are generally accessible to the public. In the rest of Europe, governed by the civil law, however, such decisions are normally published only with the names of the parties redacted. The apparent rationale for the former is the idea of open justice, while in the latter group of countries the idea of personal data protection reigns supreme.

Despite this massive rift in practice, and the underlying differences in interpretation of fundamental rights that it reflects, the matter has never properly come to the fore. It has not even been debated robustly, let alone been the subject of a direct challenge before the European Court of Human Rights. The Institute for Development of Freedom of Information (IDFI),[1] based in the small country of Georgia, where commitment to both openness and privacy is strong, has started to push this issue to the forefront leading to a vibrant ongoing public policy debate with various both civil society and official stakeholders coming down on different sides of the debate.

There are, of course, some important glosses to both the Common Law and civil law practices noted above. In Common Law countries, for example, the default practice is to replace the names of children litigants with initials, while the United Kingdom has gone even further and created a presumption that such trails will themselves be closed, a practice the European Court of Human Rights has approved.[2] And many civil law countries do disclose full transcripts, including names, of cases at the highest level of courts. However, there are also cases where civil law countries have

[1] See https://idfi.ge/en for their English website or https://idfi.ge/ge for the Georgian version.
[2] See

sought to remove the names of prosecutors and sometimes even of judges from court decisions in the name of personal data protection.

Crosscutting these practices is the principle of open justice, enshrined in Article 6(1) of the European Convention on Human Rights (ECHR),[3] according to which civil and criminal court proceedings should take place in public and, furthermore, the decision should be pronounced publicly. This leads to the apparently contradictory result that the media may attend and report widely on a high-profile trial – and in Georgia the Organic Law of Georgia on Common Courts even gives the media the right to broadcast court cases – while at the same time the reasoning of the judge in the case may be available only with the names of the parties removed.

This paper explores the competing issues raised by this debate, looking at the way the European Court of Human Rights has addressed conflicts between freedom of expression and the included right to information, on the one hand, and privacy, on the other. It will highlight the general principles involved and also review what the Court has said about this balancing in the specific context of court actions.

1. Access to Information as a Human Right

Today, it is firmly recognised that the right to access information held by public authorities – or the right to information (RTI) – is protected as a human right under international law, part of the right to freedom of expression. This recognition is, however, relatively recent, which may explain why conflicts around access to court decisions have not so far come before the European Court of Human Rights.

It is clear that at the time of the adoption of the ECHR in 1950, and of its international counterpart, the *International Covenant on Civil and Political Rights* (ICCPR),[4] in 1966, the right to information was neither recognised as an independent human right nor deemed to be included in the right to freedom of expression. However, progressive interpretation has led to the right to information being understood as embedded in the language of international guarantees of the right to freedom of expression.

An early statement along these lines was the 1999 Joint Declaration of the (then) three special international mandates on freedom of expression – the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media and the Organization of American States (OAS) Special Rapporteur on Freedom of Expression – which included the following statement:

[3] Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953.
[4] UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.

> Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.[5]

They followed this up with an even clearer statement in their 2002 Joint Declaration:

> The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.[6]

Similar early recognition of the right can be found in the *Inter-American Declaration of Principles on Freedom of Expression*,[7] the *Declaration of Principles on Freedom of Expression in Africa*[8] and Recommendation No. R(2002)2 of the Committee of Ministers of the Council of Europe on access to official documents, which is devoted entirely to this issue.[9]

Formal recognition of the right to information by international courts came somewhat later. The first such court to recognise the right was the Inter-American Court of Human Rights, in the 2006 case of *Claude Reyes and Others v. Chile*.[10] In that case, the Court held that the right to freedom of expression, as enshrined in Article 13 of the ACHR, included the right to information, stating:

> In respect of the facts of the present case, the Court considers that article 13 of the Convention, in guaranteeing expressly the rights to "seek" and "receive" "information", protects the right of every person to request access to the information under the control of the State, with the exceptions recognised under the regime of restrictions in the Convention.[11]

The UN Human Rights Committee was relatively late to recognise the right clearly. However, in its 2011 General comment it did just that, stating:

> Article 19, paragraph 2 embraces a right of access to information held by public bodies.[12]

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[5] 26 November 1999. The special mandates have adopted a Joint Declaration every year since then. These are all available at: http://www.osce.org/fom/66176?page=1.
[6] 6 December 2004.
[7] Adopted by the Inter-American Commission on Human Rights at its 108th Regular Session, 19 October 2000. See paragraph 4.
[8] Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002. See Principle IV.
[9] 21 February 2002. It should be noted that this document focuses more on the content of the right to information than on specifically recognising it as a human right.
[10] 19 September 2006, Series C, No. 151.
[11] *Ibid.*, Paragraph 77.
[12] General comment No. 34, 12 September 2011, para. 18.

The trajectory on this at the European Court of Human Rights is an interesting contrast. In a series of early cases, starting with *Leander* v. *Sweden*[13] in 1987, the Court basically refused to recognise a right to information as part of the right to freedom of expression, stating repeatedly:

> [T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access… nor does it embody an obligation on the Government to impart… information to the individual.[14]

Finally, in 2009, just a few years after the *Claude* decision by the Inter-American Court of Human Rights and probably prompted at least in part by that decision, the European Court finally changed direction and started, albeit via a rather convoluted line of reasoning, to lay the groundwork for recognising a right to information based on Article 10 of the ECHR.[15] In the years since then, it has tried to clarify its jurisprudence.

Matters now seem to be relatively settled with a Grand Chamber decision in November 2016, *Magyar Helsinki Bizottság v. Hungary*.[16] In that case, the Court made it clear that, unlike under Inter-American jurisprudence, in Europe there is no freestanding right to information. Instead, the right is contingent on the applicant needing the information "to enable his or her exercise of the freedom to 'receive and impart information and ideas' to others".[17] In other words, the purpose of the request for information must be to support the exercise of the right to freedom of expression as traditionally understood.

The Court also added three other conditions. First, the "information, data or documents to which access is sought must generally meet a public-interest test"[18] or, perhaps more clearly, the applicant must seek the information for a public interest purpose. Second, and closely related to the above, it is necessary that the role of the applicant in terms of "'receiving and imparting' [the information] to the public assumes special importance".[19] Finally, the information must be "ready and available" in the sense that the public authority already has it and does not need to collect it.[20] This last condition is widely incorporated into right to information legislation, but the two other conditions are not.

In short, the Court has recognised a right to information as part of the right to freedom of expression, albeit with some rather important limitations. However, the

[13] 26 March 1987, Application no. 9248/81.
[14] *Ibid.*, para. 74.
[15] *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application no. 37374/05.
[16] 8 November 2016, Application no. 18030/11.
[17] *Ibid.*, para. 158.
[18] *Ibid.*, para. 161.
[19] *Ibid.*, para. 164.
[20] *Ibid.*, para. 169.

fact that this basic recognition was not clarified until late 2016 has meant that there has been relatively little opportunity to elaborate on the scope of the right or how it measures up against other rights. To help understand how this might work, we must look to general principles set out by the Court for dealing with situations where there are conflicts between rights.

2. General Principles on Balancing Privacy and Freedom of Expression

It seems conceptually clear that, at least when considering two rights which are not of an absolute nature – such as privacy and freedom of expression – courts would have to engage in some sort of balancing, based on the test for limitations or restrictions on those rights, when determining which should prevail in any situation where they come into conflict. This would appear to be particularly compelling where the legal test for restricting the rights was nearly identical, as is the case for privacy and freedom of expression, respectively, according to Articles 8(2) and 10(2) of the ECHR.

In practice, indeed, the European Court of Human Rights has consistently engaged in a form of balancing when these two rights come into conflict. As it stated in a leading case based on Article 8:

> That protection of private life has to be balanced against the freedom of expression guaranteed by Article 10 of the Convention.[21]

It may be noted that a case giving rise to a conflict between freedom of expression and privacy may appear before the Court as a claim of a breach of either of these rights. Indeed, very similar cases could appear before the Court from different countries on the basis of different rights where, for example, courts in one country had given priority to privacy and courts in another to freedom of expression. It is clear that the coherence of the system of protection of rights under the ECHR demands that the result would be the same regardless of how such a case appeared before the Court. In other words, the balancing exercise undertaken by the Court should not depend on whether it is assessing a restriction on privacy in favour of freedom of expression or a restriction on freedom of expression in favour of privacy.

It may also be noted that conflicts between freedom of expression and privacy may arise either in the context of direct State action to limit one or the other – for example where a State either provides or refuses to provide access to private information – or in the context of actions by private actors which invade privacy[22] –

[21] *Von Hannover v. Germany*, 24 June 2004, Application no. 59320/00, para. 58.

[22] Theoretically a private actor could also assert privacy in a way that denied freedom of expression although it is believed that no such case has come before the Court and even hypothetical examples of this are hard to conceive of. It may be noted that purely private actors are not covered by the right to information, although private actors may be covered where they are operating with public funding or are pursuing public functions.

such as where a newspaper publishes private information about an individual. The Court has made it clear that, at least in certain circumstances, States are under a positive obligation to protect individuals against privacy invasions by non-State actors, the so-called horizontal application of rights. Where such cases give rise to conflicts between privacy and freedom of expression, the Court has also made it clear that the same balancing approach needs to be undertaken:

> The boundary between the State's positive and negative obligations under Article 8 does not lend itself to precise definition; the applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the relevant competing interests.[23]

Another key point in relation to balancing privacy with freedom of expression is that the ECHR protects privacy and not personal data. Indeed, the text of the Convention nowhere refers to the idea of personal data, which is in some respects much wider than privacy.

There is, to be sure, a close relationship between these two concepts and several core personal data protection principles can be derived directly from the notion of privacy. For example, in a number of decisions the Court has held that the collection of private information engages concern for private life.[24] In the case of *Leander* v. *Sweden*, mentioned above, the Court held that both the storing and the release of information relating to private life represented an interference with privacy.[25] The Court has also held that the dissemination of private information may engage privacy concerns.[26] And, in at least some cases, notably *Rotaru v. Romania*, the Court has referred to the right to refute incorrect information.[27]

At the same time, leading decisions of the Court make it clear that just because information is personal data does not mean that a privacy interest is automatically engaged. *S. and Marper v. the United Kingdom*, decided by a Grand Chamber of the Court, addressed the issue of storage of certain types of information by the authorities. The Court recognised that the information in question was personal data, but then spent some time assessing whether the storage of such information represented a breach of the right to privacy, after stating:

> [I]n determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained.[28]

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[23] *Von Hannover v. Germany (no. 2)*, 7 February 2012, Applications nos. 40660/08 and 60641/08, para. 99.
[24] See, for example, *Murray v. the United Kingdom*, 28 October 1994, Application No. 14310/88, para. 86.
[25] Note 13. See also *Rotaru v. Romania*, 4 May 2000, Application No. 28341/95.
[26] See, for example, *Z. v. Finland*, 25 February 1997, Application No. 22009/93, para. 94.
[27] Note 25, para. 46.
[28] 4 December 2008, Applications nos. 30562/04 and 30566/04, para. 67.

In another Grand Chamber decision, *Magyar Helsinki Bizottság v. Hungary*, the Court considered a request for the "names of public defenders and the number of times they had been appointed to act as counsel in certain jurisdictions." The Court rejected the idea that this information, although undoubtedly personal data, was in any sense private, stating:

> For the Court, the request for these names, although they constituted personal data, related predominantly to the conduct of professional activities in the context of public proceedings. In this sense, public defenders' professional activities cannot be considered to be a private matter.[29]

As a result of its finding that the information was not private, there was no need to engage in a balancing exercise between the right to freedom of expression (in that case in its aspect of a right to information) and the right to privacy.[30] Instead, the freedom of expression interest in that case simply dominated.

The relevant point here is that just because information constitutes personal data does not mean that the right to privacy is engaged. As is clear from the *Magyar Helsinki Bizottság v. Hungary* decision, freedom of expression normally trumps non-privacy engaging personal data because the latter is not a protected human right. Of course this was might not apply where other interests – such as national security – where engaged.

The Court has generally recognised that privacy is a broad right, citing the following quotation repeatedly in its judgments:

> The Court notes that the concept of "private life" is a broad term not susceptible to exhaustive definition.[31]

At the same time, as is clear from the cases above, it does not extend as far as personal data, which covers any data which may be linked to a private individual.[32] It is probably fair to say that one should assume, by default, that personal data is private, and then apply relevant principles to rule this out for certain types of data. Some of the decisions of the European Court of Human Rights shed light on some general principles regarding when personal data might not be deemed to be personal in nature.

The case of *Axel Springer AG v. Germany* involved the intersection between privacy and the right to reputation, with a Grand Chamber of the Court noting that the latter was "part of the right to respect for private life". The Court also held:

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[29] Note 16, para. 194.
[30] *Ibid.*, para. 196.
[31] See, for example, *S. and Marper v. the United Kingdom*, note 28, para. 66.
[32] Sometimes with the additional requirement that the data be subject to automatic processing and/or other conditions.

> Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence.[33]

In *Társaság A Szabadságjogokért v. Hungary*, which involved freedom of expression in relation to a request for information, the applicant organisation had eventually excluded personal data relating to a Member of Parliament from the scope of its request, which was about a constitutional complaint lodged by the MP. However, the Court made a powerful statement about limitations on the scope of privacy in relation to personal data of individuals holding public positions:

> [T]he Court finds it quite implausible that any reference to the private life of the MP, hence to a protected private sphere, could be discerned from his constitutional complaint. It is true that he had informed the press that he had lodged the complaint, and therefore his opinion on this public matter could, in principle, be identified with his person. However, the Court considers that it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights, alleging that their opinions on public matters are related to their person and therefore constitute private data which cannot be disclosed without consent. These considerations cannot justify, in the Court's view, the interference of which complaint is made in the present case.[34]

This aligns with the holding in *Magyar Helsinki Bizottság v. Hungary*, where the Court rejected the idea that at least certain information about the work of public defenders, although personal data, was private. In the same case, the Court also noted, in relation to whether or not personal data was private in nature, that, "a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor in this assessment".[35]

3. Specific Standards for Balancing Privacy and Freedom of Expression

It is beyond the scope of this paper to engage in a comprehensive assessment of the balancing exercise that needs to be undertaken when privacy and freedom of expression interests come into conflict. In any case, this may not be relevant because international courts have not so far analysed the approach towards such balancing in the specific context of the right to information as an aspect of freedom of expression, no doubt because this has only been recognised relatively recently. The purpose of this section of the paper, therefore, is to set out some of the main considerations involved in the balancing that courts, and especially the European Court of Human Rights, undertake when these rights come into tension.

The core principles underlying the balancing exercise, at least where an expressive (as opposed to a right to information) interest under Article 10 of the ECHR conflicts

[33] 7 February 2012, Application no. 39954/08, para. 83.
[34] Note 15, para. 37.
[35] Note 16, para. 193.

with privacy, were set out by a Grand Chamber of the European Court of Human Rights in the case of *Von Hannover v. Germany (no. 2)*. However, it is useful to look back to the earlier case of *Von Hannover v. Germany* to gain a fuller understanding of the considerations the Court outlined.

In the first Von Hannover case, which involved the publication of photos of the Princess of Monaco, the German Courts had held that she was a figure of contemporary society "*par excellence*" (*eine "absolute" Person der Zeitgeschichte*)[36] and, as such, had very limited privacy outside of her home. They did, however, hold that the publication of certain photos of her with her children represented a breach of the right to privacy.

In contrast, the European Court of Human Rights referred to the idea that, in "certain circumstances, a person has a 'legitimate expectation' of protection and respect for his or her private life",[37] the same notion that it later came back to in the *Magyar Helsinki Bizottság* case (see above at footnote 34 and surrounding text). Furthermore, the task of the Court was to engage in a balancing between the privacy interests of the applicant and the freedom of expression interests of those publishing and viewing the photos.

The Court distinguished between purely private material and information in which there was some public interest, stating:

> The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "impart[ing] information and ideas on matters of public interest, it does not do so in the latter case. [references omitted][38]

In holding that there had been a breach of the right to privacy, which was not justified by reference to a freedom of expression interest, the Court noted:

> The situation here does not come within the sphere of any political or public debate because the published photos and accompanying commentaries relate exclusively to details of the applicant's private life.[39]

Significantly, the photos showed the Princess doing things like skiing, riding a horse and tripping on a beach, hardly matters of legitimate interest to the wider public. It was, therefore, the complete absence of any underlying public interest in the distribution of the photos that dictated the result.

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[36] Note 21, paras. 19, 21, 23 and 25.
[37] *Ibid.*, para. 51.
[38] *Ibid.*, para. 63.
[39] *Ibid.*, para. 64.

In the second Von Hannover case, the Court came to a different conclusion. While it continued to rule out photos in which the public interest was purely salacious, such as of her skiing or at society events, it held that pictures showing her with her sick father, the reigning Prince of Monaco, were different. In relation to those photos, the European Court agreed with the German courts:

> [T]he press was therefore entitled to report on how the prince's children reconciled their obligations of family solidarity with the legitimate needs of their private life.[40]

In other words, once the photos touched on relations between the monarch and his children, a sufficient public interest had been engaged to override the right to privacy.

In coming to this conclusion, the Court elaborated five factors that needed to be taken into account, namely:

- The contribution of the information in question to a debate of general interest. This was broad in scope, encompassing not only politics and crime (which was explicitly mentioned by the Court), but also art and sports.
- The role or function of the person involved, and how well known they were.
- The prior conduct of person and, in particular, whether this somehow invited or justified the coverage.
- The nature and style of the report and the extent of its distribution.
- The circumstances in which the information was gathered, including whether there was consent for this and the degree of intrusion involved.[41]

What is interesting about the case is the relatively low-level nature of the public interest involved. While the behaviour of children vis-à-vis a high-ranking political figure during his or her illness does have some public interest elements, these are hardly very weighty in nature. They cannot, for example, be equated with the actions of an official in the course of his or her duties, or matters related thereto, or even, at least in many cases, the actions of a private individual who is, temporarily, caught up in a situation of public concern. As a result, the case appears to suggest that even a minor public interest will result in freedom of expression trumping privacy.

This is not inappropriate. Freedom of expression interests, at least in the context of debates about matters of general interest, the first factor elaborated by the Court above, are public interests and they should normally overcome the privacy interests of one or a small number of persons. Put differently, the balancing needs to take into account the broader social value of freedom of expression, and not just the narrow interests of the person or party imparting the information.

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[40] Note 23, para. 117.
[41] *Ibid.*, paras. 109-113.

It may be noted that a very similar balancing exercise is hard-wired into international standards regarding the right to information. Those standards suggest that information should be made public unless two conditions are met. First, the disclosure of the information would harm a protected interest, including privacy. Second, the overall public interest, taking into account all of the circumstances, favours secrecy (often referred to as the public interest override). Although the Von Hannover cases were about expressive interests rather than the right to information, they appear to call for a very similar balancing approach to that conducted by courts in many countries under the public interest override.

4. Application of These Principles to Court Decisions

It should be noted, at the outset of this part of the paper, that it is a fundamental principle of human rights that court hearings and decisions should be public. The relevant part of Article 6(1) of the ECHR states:

> In the determination of his civil rights and obligations or of any criminal charge against him…. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The requirement that decisions should be pronounced publicly does not admit of any derogation or exception. Furthermore, it is clear that this refers to the entire judgment, not just the operative or deciding part of it. In the case of *Ryakib Biryukov v. Russia*, the operative part of the decision was read out, but not the full reasoning. The European Court of Human Rights held that this was a breach of Article 6(1), noting:

> The Court considers that the object pursued by Article 6 § 1 in this context – namely, to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial – was not achieved in the present case, in which the reasons which would make it possible to understand why the applicant's claims had been rejected were inaccessible to the public.[42]

The European Court has, however, never pronounced on the specific question of whether or not this includes the names of the parties to the case. The Court has accepted that it might be necessary, specifically for national security reasons, to redact some information from a decision, as long as the main decision was made available. In *Raza v. Bulgaria*, it noted:

> However, the complete concealment from the public of the entirety of a judicial decision in such proceedings cannot be regarded as warranted. The publicity of

[42] 17 January 2008, Application no. 14810/02, para. 45.

> judicial decisions aims to ensure scrutiny of the judiciary by the public and constitutes a basic safeguard against arbitrariness. Indeed, even in indisputable national security cases, such as those relating to terrorist activities, the authorities of countries which have already suffered and are currently at risk of terrorist attacks have chosen to keep secret only those parts of their decisions whose disclosure would compromise national security or the safety of others, thus illustrating that there exist techniques which can accommodate legitimate security concerns without fully negating fundamental procedural guarantees such as the publicity of judicial decisions.[43]

Although the wording of Article 6(1) seems to suggest that the judgment should be read out in court, this is impractical for a number of reasons, including that courts often do not draft the full decision until well after the trial has concluded, and that this would take far too long and be of limited utility. In recognition of this, in the case of *Pretto and Others v. Italy*, a Full or Plenary Court noted that practice on this within Europe varied:

> [M]any member States of the Council of Europe have a long-standing tradition of recourse to other means, besides reading out aloud, for making public the decisions of all or some of their courts, and especially of their courts of cassation, for example deposit in a registry accessible to the public.[44]

As a result, the Court accepted that deposit in a public registry was sufficient. However, access to the decision in the registry had to be open to the whole public "as of right", without requiring any showing of a particular interest in the decision.[45]

In practice, most European countries broadly comply with the requirement of open decisions, subject to the issue of whether this includes the names of the parties. Disclosure of the names of the parties may also be required by more general requirements of openness under Article 10 of the ECHR.

When weighing the competing interests, it is useful to consider briefly the underlying rationales for, respectively, protecting privacy and the openness of court decisions, whether pursuant to Article 6(1) or 10 of the ECHR. Different courts and even the same court in different cases have ascribed very different rationales to the former. However, in the second Von Hannover case, the Court described the rationale for privacy as being, "primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings."[46]

In Pretto, the Court described the core rationale for open justice as follows:

> The public character of proceedings before the judicial bodies referred to in Article 6 § 1 (art. 6-1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior

[43] 11 February 2010, Application no. 31465/08, para. 53.
[44] 8 December 1983, Application no. 7984/77, para. 26.
[45] *Werner v. Austria*, 24 November 1997, Application no. 21835/93, paras. 57-60.
[46] Note 23, para. 95.

> and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1 (art. 6-1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention. [references omitted][47]

It is almost impossible to summarise briefly the rationales for freedom of expression, or even the perhaps more limited rationales behind the right to information as protected by Article 10 of the ECHR. In the second Von Hannover case, the Court described the former in general terms, providing an oft-quoted cite:

> Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".[48]

One of the apparent contradictions regarding the removal of the names of parties from published court decisions is that in the vast majority of cases the trial itself is held publicly, in accordance with the requirements of Article 6(1) of the ECHR. This would, subject to certain considerations which are elaborated on below, suggest that any privacy interests had already been defeated and that there was, as a result, no further justification for removing the names of the parties from the published decision.

In other contexts, the Court has made it clear that practical realities affect the assessment of whether a restriction on freedom of expression meets the 'necessity' standard for such restrictions established in Article 10 for the ECHR. In the case of *Observer and Guardian v. the United Kingdom*, the Court was tasked with assessing a ban on publication of excerpts from the memoirs of a British spy. The Court distinguished the period prior to publication of those memoirs in the United States, when it deemed the ban to be legitimate, and the period following the United States publication. After that point, the "the major part of the potential damage … had already been done." As a result, the Court held that the ban was no longer legitimate. The clear conclusion here is that to meet the necessity part of the test, a restriction on freedom of expression must be shown to have a practical benefit, and that a theoretical or historic benefit will not suffice.

The theory that an open trial vitiates any privacy interest the parties might have vis-à-vis publication of the decision could theoretically be challenged where the contents of the decision contained distinctly more private material than was exposed during the trial itself. Normally, one would assume that the reverse was true, with the presentation of witnesses and evidence at trial being far more privacy intrusive than whatever was contained in the decision. And it is not clear how a

[47] Note 44, para. 21.
[48] Note 23, para. 101.

decision could go beyond the evidence submitted in open court, although this might be based on written material submitted to the court. Certainly this is not the case in many jurisdictions, but it might depend a bit on the approach towards drafting decisions in a given country.

There is also an important difference between a courtroom being open to the public and a decision being available to the public. Apart from a small sample of more high-profile cases, attendance at most court cases is largely limited to the media and those with a direct interest of one sort or another in the case. However, media reporting on cases means that courtrooms are far more public than the small number of people actually present may suggest. In many jurisdictions, practically all serious criminal cases receive at least some media attention. And this takes on special significance in Georgia, where broadcasters have a right to cover court proceedings.

A more serious issue arises in relation to the online publication of decisions, which is becoming more and more common, and which provides, furthermore, an enormous boost to the accessibility of these decisions. However, this also poses challenges from a privacy perspective. Outside of certain very high-profile cases, most cases are quickly forgotten, perhaps except among a small circle of acquaintances. Putting cases online gives them, at least potentially, far more profile, which raises different issues, including those associated with the right to be forgotten, which the European Court of Justice has held raises important privacy concerns.[49] There may be various ways to ensure an appropriate balance here. In Canada, for example, some courts place full decisions, with the names of parties, online in searchable databases but do not index them on popular search engines, such as Google. As a result, anyone familiar with legal materials can go to the website hosting the case database and search, but those searching the web more generally for information on a person will not find a case relating to him or her.[50]

Of course there are cases where either trials are closed or, even though they are open, the court imposes a ban on reporting on certain aspects of the case. The European Court has made it clear that this should, however, be very much the exception to the rule, and that, "such an occurrence must be strictly required by the circumstances."[51]

All cases involve some element of privacy, and it is only where this demonstrates some particular characteristic or element that it might warrant limiting the openness of or reporting on a trial. The most important example of this for reasons

[49] Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González* [2014] ECLI:EU:2014:317.
[50] This system was recently challenged when a Romanian-based website downloaded Canadian cases and demanded payment for their rapid removal. This lead to a case in Canadian courts, which ordered an alternative way to get the cases delisted from search engines. See *A.T. v. Globe24H.com*, 2017 FC 114, available at: https://www.canlii.org/en/ca/fct/doc/2017/2017fc114/2017fc114.html.
[51] *Diennet v. France*, 31 August 1995, Application no. 18160/91, para. 34.

of protection of privacy is cases involving minors. Here, even Common Law countries have a practice of regularly prohibiting media reporting of the names of child parties (or victims or witnesses) and case decisions are published using acronyms.

The United Kingdom has gone even further and created a presumption that trials involving children should be closed to the public. Although this runs counter to the general rule set out in Article 6(1) of the ECHR, in the case of *B. and P. v. the United Kingdom* the European Court of Human Rights held that it did not breach that article. An important consideration for the Court was the fact that British courts had the discretion, where the circumstances warranted it, to open up the trial to the public.[52] In this way, the possibility of engaging in a balancing between different rights was preserved.

Limits on openness or, more commonly, reporting on cases may also be imposed to protect the privacy of victims, especially of sexual assaults, whether or not they are parties to the case. Otherwise, however, trials are rarely closed simply to protect privacy (as opposed, for example to protection of national security or other interests). Even then, the European Court has made it clear that the limitation needs to be as measured as possible and restricted to what is strictly necessary to protect the privacy interest.[53]

5. Cases Involving Freedom of Expression and Matters Relating to Court Cases

Only a few cases pitting Article 10 of the ECHR – in either its expressive or right to information aspects – against the right to privacy under Article 8 of the ECHR in the context of court cases have come before the European Court of Human Rights. In the former cases, perhaps best exemplified by *Axel Springer AG v. Germany*, the Court has, at least since 2012, applied the criteria set out in the second Von Hannover case. The Axel case involved media reporting about charges against and the conviction of a television actor for the possession and use of cocaine. Applying the Von Hannover criteria, the Court had little difficulty concluding that the restrictions on reporting about this that had been imposed represented a breach of the right to freedom of expression.[54]

Two of the right to information cases before the Court involved claims about protection of personal data. In *Társaság A Szabadságjogokért v. Hungary*, the issue was somewhat tangential but, as noted above, the Court firmly rejected the idea that public officials could claim that their "opinions on public matters are related to their

[52] 24 April 2001, Applications nos. 36337/97 and 35974/97, para. 40.
[53] See, for example, *Diennet v. France*, note 51, para. 34, where the Court held that if the private lives of the third party patients of a doctor might be exposed, the trial could be closed for the period necessary to avoid that, but not otherwise.
[54] Note 33, para. 110.

person and therefore constitute private data".[55] It seems a relatively small step from there to conclude that the public functions of public officials, including those working in the administration of justice, could also not qualify as private. And this was largely confirmed in the case of *Magyar Helsinki Bizottság v. Hungary*, where the Court ruled that although information about the appearance of public defenders in legal cases was personal data, its disclosure did not raise a privacy interest.

Conclusion

There is clearly a need to resolve what appears to be major differences in terms of interpreting the provisions of Articles 6(1), 8 and 10 of the ECHR where they intersect. In this respect, there is a gulf of difference in the practices of Common Law and civil law courts in terms of openness around the names of parties to cases in the published decisions of those cases. This is not just a question of a different approach. It belies a fundamentally different understanding regarding the balancing of the various human rights involved, namely a fair trail, privacy and freedom of expression.

This paper is an initial foray into these issues. More work needs to be done before a comprehensive resolution of the various differences might be posited. But some initial conclusions can certainly be drawn. First, although it is contingent on the exercise of an expressive right under Article 10 of the ECHR, the right to access information held by public authorities or the right to information is clearly protected by that article, although recognition of that by the European Court of Human Rights has been relatively recent. Access to the names and status of parties to cases are not just incidental to understanding court decisions; they are key pieces of information to understanding the decision in its proper social context. As such, this would fall within the scope of the right to information, even in the limited way this has been defined by the European Court, in the vast majority of cases where requests are made to access court decisions, whether the reasons for wanting to access this information is to expose the past of a public figure, to conduct research into how courts deal with different types of parties or to analyse the performance of courts in different part of the country.

When assessing the freedom of expression interest in accessing names of parties against privacy interests in obscuring those names, it is the core human right of privacy that must be relied upon. The mere fact that this information constitutes personal data – which is vast in its scope – is not enough. The European Court of Human Rights has held on several occasions that personal data is not privacy protected, for example where it involves the professional activities, including professional opinions, of public officials or information in relation to which the individual cannot claim to have a reasonable expectation of privacy, including because it related to the commission by them of a criminal offence.

[55] See note 34 and surrounding text.

When a privacy interest comes into conflict with an Article 10 freedom of expression interest – whether of an expressive or right to information nature – courts should engage in a balancing exercise to see which interest dominates. Given the social nature of freedom of expression, even a minor public interest in allowing the information to be shared will normally dominate the privacy interest. This may be defeated in special cases, most notably where the privacy of children is involved.

In the context of a court case, where information has been exposed to the public through an open trial (including because no publication or reporting limitations have been imposed in relation to that information), obscuring the names of the parties in the published decision of that case could be justified only in highly exceptional circumstances. Given the very robust standards relating to openness of trials, this means that in the vast majority of cases, the names of the parties would be included in the public decision.

Different considerations arise in relation to cases which are published online, due to the very high degree of accessibility, and the ongoing nature of that accessibility over time, which this provides. These considerations may justify a slightly different approach for the publication of cases online.

These conclusions suggest fairly radical changes are needed to the way decisions of courts are published in many countries. This is particularly the case for civil law countries, where the practice of obscuring the names of parties to cases tends to be very widespread. But it may also be the case for Common Law countries, for example in relation to online cases, where considerations of privacy may not have been taken sufficiently into account.