Foreword

Dear Readers,

Welcome to the 6th and final edition of CPG’s online Magazine COM of 2017.

As we are approaching the final month of what has been a very successful year 2017, I would first of all like to take the opportunity to thank everyone involved in our work this year. If you were able to attend one or more of our events over the past ten months, I do hope you thoroughly enjoyed yourself and have found the contents of the events as useful and thought-provoking as I have. I also hope you enjoy our published materials, including of course the COM, but also our newsletter “Asia in Review (AiR)”, which we have launched this year. If you haven’t subscribed to it yet, make sure to do so via our website at www.cpg-online.de.

With that being said, COM 6 brings you brief event reports on the CPG events of the past couple of months, including both our annual conference on the Global Commons and the Governance of Unappropriated Spaces as well as our yearly Winter Academy on Human Rights and Development. Other events covered topics regarding International Refugee Law, The Federal Elections in Germany 2017, Teaching the Holocaust in Asia, and Contemporary US-China Relations.

The article section of this issue features two articles. CPG’s Dr. Lasse Schuldt in his piece explores the jurisprudence of the European Court of Human Rights in cases of searches and seizures of journalistic material after confidential information has been disclosed. The second article by Senior Research Fellow at the International Institute for Trade and Development, Pawawadee Tanodomdej, deals with the protection of e-consumers in ASEAN and the harmonisation of e-commerce law.

COM 6 closes with our regular announcements on people, selected past and future events, scholarship opportunities and a job market.

Feel free to get in touch if you have any concerns, suggestions or any kind of feedback you would like to share with us. In any case, enjoy this issue of our Online Magazine!

Henning Glaser
Director, German-Southeast Asian Center of Excellence for Pubic Policy and Good Governnace (CPG),
Faculty of Law, Thammasat University

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8 September 2017, Faculty of Law, Thammasat University

On 8 September 2017, Jennifer Prestholdt, Deputy Director and Director of International Justice Program of The Advocate for Human Rights, gave a CPG Special Lecture on the topic “International Refugee Law: US Practice and Current Challenges to Refugee Protection” at the Faculty of Law, Thammasat University. In her lecture, she provided insights into the international legal framework of refugee protection and the challenges international refugee law faces, taking the US as a case study. Jennifer has extensive experience in the field and “The Advocate of Human Rights” organisation has been working on and creating programmes at the forefront of advocacy for Human Rights for over 30 years. The highly instructive lecture was followed by a lively Q & A session.

Workshop: Childhood Vulnerabilities
29 September 2017, S.D. Avenue Hotel, Bangkok

On 29 September 2017, the German-Southeast Asian Center of Excellence for Public Policy and Good Governance (CPG) together with Hanns Seidel Foundation, organised a workshop on “Childhood Vulnerability” at S.D. Avenue Hotel in Bangkok. The workshop brought together several NGOs from Thailand to present, share and explore ongoing projects, ideas and opportunities pertaining to problems in the field of childhood vulnerabilities. The workshop’s focus was on abuse and exploitation of children, sexually or
otherwise, but also included discussions of issues regarding precarious situations affecting children such as homelessness or lack of access to basic needs. The workshop’s aim was twofold: On the one hand, it provided an opportunity for relevant actors to connect and share an overview of ongoing projects, as well as sharing best practices and exploring particular difficulties and how these can be overcome or mitigated. On the other hand, the workshop provided a forum to collect ideas and discuss angles for future projects, based on what has already been done, achieved or tried.

Discussion Forum: “The General Elections in Germany 2017: Results and Resolutions”
2 October 2017, Faculty of Law, Thammasat University

On 2 October 2017, the German-Southeast Asian Center of Excellence for Public Policy and Good Governance (CPG) and the Embassy of the Federal Republic of Germany Bangkok jointly organised the discussion forum “The General Elections in Germany 2017: Results and Resolutions” at the Faculty of Law, Thammasat University, Bangkok. After the opening remarks, delivered by H.E. Peter Prügel, Ambassador of the Federal Republic of Germany, CPG Director Henning Glaser shared his views on the elections and broader trends and patterns evolving in its wake with his presentation on “Prime Ministerial Government and Political Party Leadership in Germany – Background and Outlook after the 2017 Elections”. The highly instructive opening session of the event provided a fruitful background for the following moderated panel discussion, which led into a deeper discussion on causes and consequences of the election results. The discussants were Georg Gafron, Head, Thailand Office, Konrad Adenauer Foundation; Karl-Peter Schönfisch, Head, Thailand/Laos Office, Hanns Seidel Foundation; Stine Klapper, Head, Thailand Office, Friedrich Ebert Foundation; Katrin Bannach, Head, Myanmar and Thailand Programmes, Friedrich Naumann Foundation for Freedom, Regional Office for Southeast and East Asia Bangkok; H.E. Kasit Prionmya, former Minister of Foreign Affairs of Thailand and Ambassador to Germany and Dr. Sombat Benjasirimongkul, Phuket Rajabhat University, alumnus Hamburg University. The panel was moderated by CPG Program Officer Jan Kliem. Participants of the forum took the opportunity to engage with the panelists and comment on and question particularly dominant policies that played decisive roles in forming voter’s opinions prior to the election on September 24. Many of the issues gravitated around the question of integration of refugees, who have been coming to Europe and Germany in larger numbers since 2015. This, in turn, has led to the strengthening of a newly formed, contentious party, the Alternative für Deutschland (AfD), which was elected into the federal German parliament for the first time. Through the lively discussion at the event, it transpired that there is both a sense of worry with regards to some of the policies and ideas this new party stands for, but also a sense of confidence, for the debate in Germany takes place firmly within the boundaries of Germany’s democratic system and challenges to the fundamental structure of German society and politics will be successfully dealt with within these very boundaries. The discussants also shared their views on challenges and opportunities in forming a new government in Germany, and that Thailand as well as other international partners and friends can largely expect continuity in German foreign policy.
Workshop: “Teaching the Holocaust and Literature in Asia”
5 October 2017, Faculty of Law, Thammasat University

On October 5, 2017 CPG organised a workshop on “Teaching the Holocaust and Literature in Asia” at the Faculty of Law, Thammasat University. As speaker, CPG invited Benjamin Ivry, University Expert in English Language and International Exchange, Thammasat University. Benjamin presented on an array of available literature on the Holocaust and explored how the subject can be approached in a Thai cultural context. He alluded to challenges, opportunities and the ongoing relevance of the subject matter. The participants included Thammasat University lecturers, students and CPG staff members who contributed to an interesting Q&A session with the speaker.

CPG Winter Academy on Human Rights & Development 2017
16-26 October, Thammasat University, Faculty of Law

From 16 to 20 October 2017, CPG, in cooperation with the National Human Rights Commission of Thailand (NHRC) and with the support of Hanns Seidel Foundation (Thailand/Laos office) organized the CPG Winter Academy on Human Rights & Development 2017 at the Faculty of Law of Thammasat University in Bangkok.

The CPG Winter Academy is a yearly one-week intensive course and provides comprehensive and in-depth knowledge on fundamental questions and current issues of human rights and development in theory and practice. It offers lectures, seminars, panel discussions, workshops and debates by internationally recognized scholars, practitioners, and representatives from international and state organizations as well as from non-governmental organizations. The Academy is conducted in English and is suitable for students, young academics, practitioners and other interested persons who want to enhance their knowledge in the respective fields. Topics covered include human rights theories, institutions and mechanisms of human rights protection, migration and refugees, child protection, human rights in business, internet and privacy, sustainable development, development financing, public participation and local government, good governance and anti-corruption, and energy development and environmental justice.

On Monday, 16 October 2017, Henning Glaser, CPG Director, opened the Academy with his presentation on “The Concept, Development and Critique of Human Rights”. He was followed by Duc Quang Ly, Ph.D, CPG Project Manager, and Lasse Schuldt, Ph.D, DAAD Lecturer of Law, who engaged in a discussion titled “Debating Rights”. Michael Hayes, Ph.D, Institute of Human Rights and Peace Studies, Mahidol University, then informed the participants about “Mechanisms of Human Rights Protection”. In the afternoon, two panel discussions introduced main actors of human rights protection. The first panel on “National Human Rights Commissions and International Organizations” consisted of Angkhana Neelapajjit, Commissioner, National Human Rights Commission of Thailand, Jacqueline Ann C. De Guia, Director for Public Affairs and Strategic Communication, Human

The second Academy day, Tuesday, 17 October 2017, was opened by Michael Bäk, Advisor to the United Nations Resident Coordinator, Bangkok, and his lecture “Introduction to Development”. He was followed by a panel discussion on “The International Political Economy of Development”. The panelists were Philipp Dupuis, Minister Counsellor, Head, Economic and Trade Section, Delegation of the European Union to Thailand, Pasha L. Hsieh, Ph.D, Associate Professor of Law, Singapore Management University School of Law, and H.E. Kasit Piromya, National Reform Steering Assembly, former Foreign Minister of Thailand.

In the afternoon, Elodie Beth, Regional Advisor, Governance and Peacebuilding, UNDP Bangkok Regional Hub, Fadiah Nadwa Fikri, C4 Center, Melangor, Malaysia, and David Lyman, Partner, Tilleke & Gibbins, Bangkok, discussed “Legal Infrastructure for Development: Good Governance and Anti-Corruption”. After that, the topic of “Development, Good Governance and Global Law” was debated by Henning Glaser, CPG Director, and Lasse Schuldt, Ph.D, DAAD Lecturer of Law.

Wednesday, 18 October 2017, was opened by a panel discussion on “Human Rights and Migration” consisting of Naparat Kranratthananuit, Ph.D, Institute for Human Rights and Peace Studies, Mahidol University, and Kohnwilai Teppunkoonngam, Thailand Institute of Justice, Project Manager, Transnational Organized Crime. The rest of the day featured the topic of “Abuse, Exploitation and Trade of Children”. The first panel on this topic consisted of representatives of non-governmental organizations. These were Jompon Pitaksantayothin, Ph.D, Faculty of Social Science and Humanities, Mahidol, Sudarat Sereewat, FACE Foundation Thai-

land, Andrea Varrella, ECPAT International, Bangkok Office, and Moden Yi, Community Engagement Team Leader, APLE Cambodia. Then, the following panel took the view of law enforcement. The panelists were Bruno Desthieux and Apichart Hattsin, Crimes Against Children, Vulnerable Communities, Organized and Emerging Crime Directorate, INTERPOL Liaison for Asia and South Pacific, and Joseph Fonseca, Special Agent, Southeast Asia Regional Assistant Legal Attaché, Embassy of the United States of America in Bangkok.

In the afternoon, the participants went on a joint trip, and in the evening, everybody joined for a dinner cruise on the Chao Phraya river.

On Thursday, 19 October 2017, Sirikan Charoensiri, Thai Lawyers for Human Rights, Mark Daly, Partner, Daly & Associates, Hong Kong, and James Gomez, Regional Director, Amnesty International, Southeast Asia and Pacific Regional Office, discussed the work of human rights lawyers under the topic “Human Rights from the Coal Face”. They were followed by a panel on “Human Rights and Business”, consisting of Golda S. Benjamin, Southeast Asia Researcher and Representative (Philippines), Business and Human Rights Research Center, and Livio Sarandrea, Programme Specialist Rule of Law, UNDP Bangkok Regional Hub. The afternoon session started with the topic “Self-Development – Public Participation and Local Government” and presentations by Katrin Bannach, Friedrich Naumann Foundation for Freedom, Bangkok Office, and Jonathan Liljeblad, Ph.D, Senior Lecturer of Law, Swinburne University of Technology. After that, Terry van Gevelt, Ph.D, Assistant Professor, Department of Politics and Public Administration, Hong Kong University, and Carl Middleton, Ph.D, Faculty of Political Science, Chulalongkorn University, discussed development challenges and policies under the topic “Affordable and Clean Energy vs. Economic Growth?”

The last Academy, Friday, 20 October 2017, started with a lecture by Arthit Suriyawongkul, Thai Netizen Network, on “Human Rights and the Internet”. Then, Ingwer Ebsen, Professor, Faculty of Law, Goethe University Frankfurt, spoke about “Social Protection and Social Security: Concepts, International Standards, Challenges”. Finally, Niels...
From 20-22 October 2017, CPG hosted its 8th Annual International Conference on the topic “The Global Commons and the Governance of Unappropriated Spaces” at the Royal Orchid Sheraton Hotel Bangkok. The conference offered an interdisciplinary forum to discuss and evaluate one of the most pressing issues in international politics and law today. 11 International Relations and International Law experts from 9 countries were invited as speakers and joined by 13 highly distinguished discussants and chairs who led the panels as well as open floor discussions following the individual presentations.

The conference’s opening event was held on Friday evening, 20 October, at the Royal Orchid Sheraton Hotel and included welcoming remarks by Peter Prügel, Ambassador of the Federal Republic of Germany, Prinya Thaewanarumitkul, Vice Rector, Thammasat University, Ingwer Ebsen, Professor, Faculty of Law, Goethe University Frankfurt am Main and Henning Glaser, Director, German-Southeast Asian Center of Excellence for Public Policy and Good Governance (CPG), Faculty of Law, Thammasat University. The opening remarks were followed by a cocktail reception which concluded the evening.

The first conference day on 21 October opened with introductory remarks to the topic of the conference and provided essential background on the importance of the conference theme and on frameworks within which the issue can and will be addressed over the course of the event. Subsequent to these remarks by Henning Glaser, Director, German-Southeast Asian Center of Excellence for Public Policy and Good Governance (CPG), Faculty of Law, Thammasat University, all speakers of the day were invited to take the stage and provide the essence of their presentations in a short, summarising statement to set the frame for all panels and presentations later in the day. In the order of appearance, the speakers were Wallace C. Gregson, Senior Director, China and the Pacific, Center for the National Interest, former Assistant Secretary of Defense, USA, who presented on the question “Is the Post-WW II International Order Still Viable?”; Mika Aaltola, Director, Global Security Research Programme, The Finnish Institute of International Affairs, Finland, speaking on “Geopolitics of Global Commons from Obama to Trump”; Kriangsak Kittichaisaree, Judge, The Interna-
day, making their governance an essential interest of every nation that aspires to play a leading role in the global order.

The second conference day once again began with a concise summary statement of each speaker about their presentations. The speakers of the first panel on “Cyber Space: Norms, Power and Governance” were Nicholas Tsagourias, Professor, School of Law, The University of Sheffield, United Kingdom, presenting on “Cyberspace and Sovereignty”; Anders Henriksen, Head, Centre for International Law, Conflict and Crisis, University of Copenhagen, Denmark, speaking about “Creating Norms in Ungoverned Spaces: Lessons from Cyberspace”; and Tim Aistrop, Postdoc Research Fellow, Australian Centre for Cyber Security, School of Humanities and Social Sciences, University of New South Wales Canberra, Australia, who discussed “Cyber Security and Political Information”. The panel was chaired by Natthanicha Lephilibert, Krisdika Counsel, Office of the Council of State and discussed by both Klaus Larres, Professor, Department of History, North Carolina University, Chapel Hill; and Virot Ali, Lecturer, Faculty of Political Science, Thammasat University. The following panel focused on “Global Commons and International Law” and benefited hugely from the vast experience and expertise of Kriangsak Kittiachaiseree and Niels Petersen who both provided excellent presentations, chaired and discussed by Warawit Kanithasen, Senior Research Fellow, CPG, and Iain Cowie, Lecturer, Faculty of Law, Thammasat University, respectively. Pokpong Srisanit, Associate Professor, Faculty of Law, Thammasat University chaired the concluding panel of the day on “Armed Conflict and the Governance of Transitional Spaces” in which Marwaan Macan-Marear, Asia Correspondent, Nikkei Asian Review discussed the presentation by Noemi Gal-Or. During the presentations and following discussions, it was pointed out that new strategies are essential to deal with the “tragedy of the commons” on a global scale and that a more fragmented order of international relations has, from a US point of view, replaced the single organising principle of the “Communist Challenge” since the end of the cold war. The global commons are a vital aspect in what constitutes global power today.
“Space Security” by Theresa Hitchens, Senior Research Associate, Center for International and Security Studies at Maryland, University of Maryland, USA, which was chaired by Thitirat Thipsamritkul, Lecturer, Faculty of Law, Thammasat University, and discussed by Supot Mityodwong, Head, Military Legislation Division, Office of the Judge Advocate General, Royal Thai Air Force. A highlight of the day were the intense discussions on the increasing importance of both outer- and cyberspace in possible conflict scenarios. NATO has clearly appreciated the magnitude of cyber-attacks, stating their potential to trigger NATO’s collective defense article 5. Conflict involving the destruction or manipulation of satellites has been highlighted as becoming increasingly likely and governance of outer space needs to be prioritised on any major power’s security agenda.

Subsequent to all panel discussions, the respective chairs opened the floor to questions from the audience. The very active and interested participants made for highly relevant and lively debates throughout both conference days, which aided to raise the quality of the event to the standard that was achieved. The interesting, relevant and therefore highly successful conference was concluded by Ingwer Ebsen, delivering his final remarks.
International Seminar: “Contemporary US-China Relations: Trump and the Assertive Middle Kingdom”
24 October 2017, S.D. Avenue Hotel, Bangkok

On October 24, 2017 CPG organised an international seminar on “Contemporary US-China Relations: Trump and the Assertive Middle Kingdom”. As speakers, CPG was pleased to welcome Richard M. Krasno Distinguished Professor at University of North Carolina -Chapel Hill, Prof. Klaus W. Larres, and CPG Program Officer Jan Kliem. Prof. Larres gave a detailed presentation on US President Donald Trump’s relationship with China and embedded his remarks in the underlying geopolitical as well as historical realities that inform both Chinese and US foreign policy today. Crucially, he argued against the likelihood of the “Thucydides-Trap”, which suggests near-inevitability of conflict between an established and a rising power. After thoroughly exploring the cornerstones of the relation between President Trump and China, he went on to also share some insights on the relationship between Germany’s Chancellor Angela Merkel and China. Jan Kliem in his presentation explored some possible motivations behind China’s increasingly assertive posture in International Relations with a particular focus on Chinese island-building efforts in the South China Sea. He then elaborated on factors dominating the US foreign policy discourse and explained both more and less hawkish approaches that are discussed regularly. Jan offered some insights into aspects of the discourse that are less discussed, such as the practicality of UNCLOS in the South China Sea or some historic comparisons with the US foreign policy of the 19th century which feature little in most of the discourse. Both presentation were followed by engaging discussions with the audience, reflecting both the interest in and relevance of the event.
E-Consumer Protection in ASEAN at the Crossroads: Challenges in the Harmonization of E-Commerce Law

Papawadee Tanodomdej, Senior Research Fellow, the International Institute for Trade and Development (ITD)

1. Introduction

E-commerce has disrupted the way the retail industry works. It provides both opportunities and threats for businesses and consumers. Businesses are able to initiate a global distribution and face no constraints on shelf space, while consumers have a variety of products or service offers enabling them to buy products or services at a reasonable price. On the other hand, when buying online, consumers face various risks such as unsecured online payments, product unsafety and inaccessible dispute settlement.

ASEAN realizes both the potential of e-commerce for its economic integration and the uncertainty that consumers encounter. ASEAN members, hence, agreed on the e-ASEAN Framework Agreement strengthening an ecosystem for e-commerce to thrive. One of its strategies includes the enhancement of consumer trust in online shopping.

It has been 17 years since the adoption of the e-ASEAN Framework Agreement in 2000. The e-consumer protection issue has been re-highlighted in the ASEAN Economic Community Blueprint 2025 by suggesting the harmonization of consumer rights and protection laws relating to e-commerce. Each ASEAN member had to develop its own strategy to protect e-consumers in the era of online complexity, aiming at the promotion of cross-border e-commerce in ASEAN while holding consumer protection at the core.

This article examines the development of ASEAN e-consumer protection in Thailand and Malaysia, and presents the missing elements for achieving a practical e-consumer protection.

2. Origins of ASEAN e-consumer protection

ASEAN, unlike the European Union, applies its unique method in exercising its functions. The term “ASEAN way” refers to an informal decision-making consisting of compromise, consensus and consultation. The ASEAN instruments usually have non-binding force except certain instruments relating to economic integration.

Since ASEAN attempts to liberalize its regional market, the ASEAN Economic Community (AEC) Blueprint 2015 stipulated 4 strategic goals for ASEAN to achieve by 2015: (a) a single market and production base, (b) a highly competitive economic region, (c) a region of equitable economic development, and (d) a region fully integrated into the global economy. Consumer protection was integrated as a core implementation under a highly competitive economic region. ASEAN members acknowledged that consumer protection could not be precluded in the measures taken to achieve its integration. Consequently, this AEC blueprint established the ASEAN Committee on Consumer Protection (ACCP) to serve as the focal point for the implementation and monitoring of consumer protection in ASEAN.

Since its inauguration in 2007, the ACCP has been endowed with a limited authority to tackle the cross-border consumer protection issues. Protection alerts initiated by the ACCP are utilized for informing the ASEAN consumers about unsafe or poor-quality products. The ACCP also strives to create a redress mechanism for cross-border consumers in ASEAN in 2015. However, until now the ACCP merely shares information on the consumer protection agencies in the ASEAN member states.

E-consumer protection has been concretely conceptualized in the e-ASEAN Framework Agreement in 2000. This agreement puts forward the improvement of the competitiveness of ASEAN’s ICT sector and ultimately the realization of e-ASEAN in both public and private sectors. In order to establish the practical e-ASEAN and to align with a people-centered approach, member states shall adopt e-commerce regulatory and legislative frameworks that create trust and confidence for consumers. To this end, at least four measures have to be undertaken: 1) expeditiously put into place national e-commerce laws and policies based on international norms; 2) adopt measures to protect intellectual property rights arising from e-commerce; 3) take measures to promote personal data protection and consumer privacy; and 4) encourage use of alternative dispute resolution mechanisms for online transactions.

It appears that the e-ASEAN Framework Agreement is aware of the significance to harmonize the e-commerce law among ASEAN members, while acknowledging the constraints in strengthening the scattered laws and regulations in each ASEAN country to be in the same standard. Moreover, the more ASEAN e-commerce is connected to the global e-commerce by operating under the international norms, the more possibilities there are for ASEAN e-commerce to flourish.

Apart from the e-ASEAN Framework Agreement, the conclusion of the ASEAN ICT Masterplans 2015 (2011-2015) and 2020 (2016-2020) are recognized as milestones for enhancing the e-consumer protection in ASEAN. In comparison, both plans emphasized the cooperation of ASEAN members in utilizing ICT for regional growth and expansion of commercial opportunities. The Masterplan 2020 gives priority to the development of the digital economy and a society in which people can access online technology equally and universally, and the development of secured digital markets and online communities. Hence, the recognition of online payments among business operators is one focal point. It also requires secured and convenient online payment methods for ASEAN consumers. This is deemed to lead to the proliferative advancement of electronic transaction and digital signature laws among ASEAN members.

Even though ASEAN members have agreed to accommodate e-consumer welfare through its instruments, there exists no legal enforcement mechanism pushing ASEAN members to implement the missions stipulated in both binding and non-binding instruments. Hence, the development of e-consumer protection in each ASEAN country is undertaken only if and when each ASEAN member sees economic opportunities in e-commerce. It is a challenge for ASEAN to assimilate countries with diverse development levels for a uniform e-consumer protection.

3. Progress of ASEAN Member States in harmonizing e-commerce laws for consumer protection

This article identifies the status of legal harmonization by examining the domestic laws related to e-consumer protection in Thailand and
Malaysia as these ASEAN members possess a high market potential in e-commerce. Furthermore, it focuses on the rights of e-consumers regarding pre-purchase and redress.

As prescribed in the e-ASEAN Framework Agreement, international norms are the primary source for the development of e-consumer protection in ASEAN member states. In 2015, the General Assembly, in its resolution 70/186, considered that e-commerce has become increasingly relevant to consumers worldwide and accentuated that online consumers shall have the same protection as offline consumers. However, the first instrument in this area was the Guidelines for Consumer Protection in the Context of Electronic Commerce in 1999 launched by the Organization for Economic Cooperation and Development (OECD). The basic principles laid down in the Guideline included: 1) fair business and advertising marketing practices; 2) online disclosure about the business, goods or services and transaction; 3) personal data protection for consumers; 4) secured payment; 5) equitable dispute resolution and redress; and (6) education and awareness.

With the challenges arising from e-commerce and its continuous growth, the OECD has revised its Guidelines for Consumer Protection in the Context of Electronic Commerce in 2016 to extend its application to commercial practices through which businesses enable and facilitate consumer-to-consumer transactions. A business-to-consumer transaction requires the online presence of all traders, a payment method specification and the information for product delivery.

Regarding the pre-purchase phase, the OECD Guidelines advises that the businesses engaged in e-commerce are required to provide consumers with sufficient information about its products or services offered and its identification such as the geographical address, website, e-mail address and telephone number to enable consumers to contact businesses easily and to enable regulatory and law enforcement authorities to identify and locate them.

Moreover, the OECD recognizes that the impersonality of e-commerce is propitious to unfair commercial practices. The OECD Guidelines, then, recommend that information and advertising must be true and not mislead consumers. The advertised price shown in the e-commerce platform shall not misrepresent or hide the total cost of a good or service. In addition, businesses are advocated to offer consumers the possibility to withdraw from a confirmed transaction in appropriate circumstances.

In Thailand, e-consumer protection is enshrined in the general consumer protection laws such as the Consumer Protection Act 1979, the Unfair Contract Term Act 1997 and the Direct Sales and Direct Marketing Act 2002.

The Consumer Protection Act 1979 establishes that consumers have the distinct right to be informed during the pre-purchase phase. Consumers shall be informed about the quality, quantity, potency, purity, standard and price of goods or services so as to protect the consumers against unfair trade practices. Thailand also strongly recognizes the role of the Consumer Protection Board to provide protection and redress to consumers. The definition of “consumer” is stipulated in the Unfair Contract Term Act 1997. It covers the final consumer who acquires goods or services for domestic use and not for commercial use. It is relatively debatable whether the juristic person falls into the consumer definition.

The Direct Sales and Direct Marketing Act 2002 deals with advertising in direct marketing which has similar characteristics as e-commerce. This Act requires the e-commerce businesses to be registered and provide accurate information to avoid misleading advertising.

Regarding the redress for affected consumers, the Liability for Damages Arising from Unsafe Products Act 2008 imposes strict liability for businesses to indemnify the affected consumer, whether or not the damages arise from the negligence or the intention of the business.

Malaysia has a general consumer legislation, the Consumer Protection Act 1999, to provide a minimum standard of consumer protection. Malaysia has realized various steps to increase the consumer’s confidence to shop and trade online. The amendment of the Consumer Protection Act in 2007 widened its scope to cover e-commerce transactions. In 2012, Malaysia also introduced Consumer Protection Regulations emphasizing the right to be informed of e-consumers. These laws and regulations do not specify what kind of information businesses must provide but prohibits businesses to supply misleading information related to the nature of goods or services; the characteristics of goods or services; the manufacturing process; the suitability of goods for a purpose; and the quantity of goods or services.

Another law which provides e-consumer protection is the Direct Sales and Anti-Pyramid Scheme Act (DSASA). It applies to direct offers of goods or services to consumer and also covers e-commerce transactions. The DSASA imposes the duty on businesses to provide the following information: name and registered number, address, telephone number, detail of a good or service, place and office hours for goods or services inspection, price of a good or service, delivery fee, and expected arrival time of a good.

The Consumer Protection Act renders negative rights to consumers against unfair trade practices, while the DSASA equips the e-consumer with positive rights requiring the businesses to indicate certain information on product and business identity.

In Malaysia, affected e-consumers are able to file complaints before the Tribunal of Consumer Claims (TCC) whose jurisdiction covers not only the breach of provisions in the Consumer Protection Act but also the breach of any other consumer rights.

The e-consumer protection in Malaysia and Thailand possesses a uniform feature during the pre-purchase. It requires the businesses to provide clear information about products or services and the businesses’ identity to e-consumers. The provisions related to misleading information and redress for affected e-consumers in Thailand and Malaysia are compatible with the OECD Guidelines.

4. Asymmetry of ASEAN e-consumer protection

Obtaining information enables the e-consumers to assert their rights during the pre-purchase phase. The idea of ASEAN to synchronize the different regulations of e-commerce is a stepping stone for the regional e-commerce growth. However, the cross-border e-commerce, apart from the rights to be informed and redress, still presents other challenges that ASEAN has not yet addressed, such as the conformity of products among ASEAN members and the hidden costs related to custom duties and currency conversion. The most crucial means to accomplish cross-border e-consumer protection is a regional redress mechanism. Up to date, there exist no instruments in ASEAN raising the issue of a harmonized choice of law in e-commerce cases or a mechanism offering cross-border enforcement for e-consumers. ASEAN members should equip the ASEAN Committee on Consumer Protection (ACCP) with the power to investigate, pursue, obtain and share relevant information and evidence on matters relating to cross-border commercial practices. At least, the ACCP should be able to cooperate with other ASEAN member states’ consumer protection agencies in order to enforce the rights of e-consumers.
Searching for the Leak: Press Freedom vs. Criminal Prosecution in the Jurisprudence of the European Court of Human Rights

Dr. Lasse Schultd, CPG, Faculty of Law, Thammasat University, Bangkok

Abstract

This article analyzes the jurisprudence of the European Court of Human Rights in cases of searches and seizures at journalists’ workplaces or homes, following the disclosure of confidential information. It assesses the Court’s arguments when balancing between press freedom as protected by Article 10 of the European Convention on Human Rights, and the interest of the state to protect state secrets. The initial thesis is that any search which primarily aims at finding the leak within the state apparatus is unlawful and needs to be qualified before the background of the variety of arguments employed by the Court. The article concludes with the formulation of rough guidelines as carved out by the Court’s jurisprudence.

Introduction

When journalists publish secret information, they regularly face legal consequences. The owner or possessor of the respective data, a private person or, more commonly, the state, might launch proceedings against individual journalists, editors or against the media company. Among the most common responses by state authorities are searches and seizures at the journalists’ workplaces or homes in order to investigate the breach of confidentiality. These cases involve delicate legal questions as the journalists can invoke press freedom as guaranteed by national constitutional law, whereas the state claims the necessity to protect certain information against being communicated to the public.

Within Council of Europe (CoE) member states, national courts need to pay respect not only to domestic constitutional law but also to the obligations under the European Convention on Human Rights (the Convention) as well as to the jurisprudence of the European Court of Human Rights (ECtHR, the Court). The Convention forms the standard that all CoE member states are contractually bound to uphold. The Court exercises its jurisdiction in order to ensure the observance of the engagements undertaken by the states who are parties to the Convention and the protocols thereto (Art. 19 of the Convention). Any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the contracting states can refer the matter to the Court after having exhausted all domestic remedies (Art. 34, Art. 35 (1)).

This article addresses the balance between the rights of the press (Article 10) and the interests of the state within the framework of the Convention. The analysis is based on ten decisions by the Court that dealt with searches and seizures in cases when secret information had been published by the press. These ten cases shall briefly be introduced before moving on to the legal analysis. It is to be noted that in none of the cases was any of the involved journalists found guilty of a crime. Furthermore, it shall already be mentioned that the Court found violations of Article 10 of the Convention in nine of the ten cases.

A brief overview of the case material

In Vereniging Weekblad Bluf! vs. The Netherlands, the editorial staff of the magazine “Bluf!” had come into possession of a quarterly report by the Dutch internal security service. Before being able to publish any of its content, an investigating judge ordered the applicant association’s premises to be searched and had the entire print run of the respective issue of “Bluf!” seized. The magazine was subsequently withdrawn from circulation by a court order. Criminal charges against the staff were dropped.

Searches and seizures were also conducted in the case of Roemen and Schmit v. Luxembourg. Mr. Roemen had published an article in the “Lëtzebuerger Journal” making public that a member of the government had been convicted of tax fraud. Mr. Roemen based the article on official documents that he had access to. After the minister had brought criminal charges, Mr. Roemen’s home and workplace were searched. No evidence was found. Subsequently, his lawyer’s office was also searched where the police found a piece of evidence. After initially being charged with “handling information received in breach of professional confidence” by the investigating judge, the investigation was eventually closed.

Similarly, in Ernst and others v. Belgium, the workplaces of four journalists at the newspapers “De Morgen”, “Le Soir” and “Le Soir Illustre” and at the “R.T.B.F.” TV station were searched. Documents, discs and hard drives were seized. The searches and seizures were part of criminal investigations into constant information leaks at the office of the public prosecution. No criminal charges were brought against the journalists themselves.

In Tillack v. Belgium, the German magazine “Stern” had published two articles written by Mr. Tillack reporting on allegations by a European civil servant concerning irregularities in the European institutions. The Belgian judicial authorities subsequently opened a criminal investigation against Mr. Tillack suspecting him of having bribed a civil servant at the European Anti-Fraud Office (OLAF) in order to receive internal documents. His home and workplace were searched. Almost all of his working papers and tools were seized and placed under seal (sixteen crates of papers, two boxes of files, two computers, four mobile telephones and a metal cabinet). No inventory of the items seized was drawn up. No criminal charges were brought to court. The allegations against Mr. Tillack turned out to be false rumors.


3 No violation was found in ECtHR, Stichting Ostade Blade v. The Netherlands, infra note 12.

4 ECtHR, Chamber judgment of 09.02.1995, 16616/90.

5 ECtHR, Chamber judgment of 25.02.2003, 51772/99.

6 ECtHR, Chamber judgment of 15.07.2003, 33400/96.

7 ECtHR, Chamber judgment of 27.11.2007, 20477/05.
In Sanoma Uitgevers B.V v. The Netherlands, the applicant company intended to publish an article about illegal car races in the upcoming edition of the magazine “AutoWeek”. Before the date of publication, police officers and public prosecutors demanded photographic materials be handed over to them and threatened to search the whole of the company’s premises. The editor-in-chief refused and was detained for four hours on the premises. The company finally handed over the material which was seized by the police.

A number of documents were seized in a similar way in the case of Martin and others v. France. Mr. Martin and other journalists had published a number of articles in the newspaper “Le Midi Libre” quoting from a provisional auditing report alleging that the region of Languedoc-Roussillon had been mismanaged under the presidency of a certain politician. Investigations on the account of a suspected violation of professional secrets led to the offices of “Le Midi Libre” being searched by the police. Documents and hard drive copies were seized. Eventually, no criminal charges against any of the journalists have been brought to court.

Another case that reached the Court from France involved allegations of systematic doping in the “Cofidis” Tour de France cycling team. Ressiot and others v. France concerned searches and seizures at the newspapers “L’Equipe” and “Le Point” which targeted particularly the workplaces of five journalists involved in investigations on the account of a suspected violation of professional secrets led to the offices of “Le Midi Libre” being searched by the police. Documents and hard drive copies were seized. Eventually, no criminal charges against any of the journalists have been brought to court.

The case of Nagla v. Latvia was a particular case for it was characterized by the search for a letter in which the organization “Earth Liberation Front” claimed the responsibility for a bomb attack in Arnhem. The letter had been sent to the magazine “Ravage”. As the actual letter could not be found, the police took four computers, application forms of new subscribers, address wrappers, a diary, a telephone index, a typewriter, data of contact persons and other editorial materials as well as private data of the editors from the magazine’s premises. Complaints by the publishers of “Ravage” to the courts were not successful.

The recently decided case of Görmiş and others v. Turkey dealt with the search at the premises of the weekly newspaper “Nokta”. The newspaper had published an article revealing that the General Staff of the Turkish armed forces had created lists of journalists and non-governmental organisations considered to be either pro or against the armed forces. The lists were the basis for inviting “friendly” journalists and NGOs to military events. The newspaper’s premises were subsequently searched. Though Mr. Görmiş, the newspaper’s director, had handed over the requested material at the beginning of the operation, the officials seized all digital data from 46 professional and private computers.

Article 10 and press freedom

The factual recounts demonstrate the deep impact of criminal investigations on journalists and media organizations that had published secret information. Though the searches undertaken by public authorities varied in scale, all actions limited the press in the free exercise of its profession. What is more, massive searches and seizures executed in order to discover journalists’ sources may have an additional chilling effect on the future practice of the press. Before this background, the article will now discuss the Court’s assessment of searches and seizures before this background, the official seized all digital data from 46 professional and private computers.

**Scope of protection under Article 10**

In its jurisprudence, the Court emphasizes that the promotion of free political debate is a fundamental feature of a democratic society and attaches the “highest importance” to freedom of expression. Though freedom of the press is not expressly mentioned in Article 10, the Court has repeatedly highlighted the role of the press as “public watchdog” and accorded it a comprehensive protection. The Court considers it incumbent on the press to impart information and ideas on matters of public interest while also emphasizing a right of the public to receive them. Article 10 protects the whole creative and research process as well as the distribution of the information.
Whereas the text of Article 10 (“everyone”) does not indicate a differentiated personal or material scope, the Court has accorded the press an institutional protection that cannot be claimed by an individual who does not work for the press. This protection relates to, for example, editorial confidentiality, protection of sources, or access to public events for the purposes of reporting. Notably, the Court considers the protection of journalistic sources one of the basic conditions for press freedom and “part and parcel of the right to information, to be treated with the utmost caution.” Without such protection, the Court has held, sources may be deterred from assisting the press in informing the public on matters of public interest.

This special protection of the press naturally provokes the difficulty to decide who is considered part of the press. According to the traditional notion, “press” refers to periodically published printed works. However, over time press freedom’s specific guarantees have been applied to many kinds of media, including TV, radio and internet publications. The increasingly relevant question whether bloggers can invoke the special guarantees of press freedom (such as source protection), has not yet been explicitly addressed by the Court. The answer most likely depends on criteria indicating whether the blogger operates the blog comparably to a press publication. From a functional perspective, the simple criterion should be whether a blog intends to impart information (facts or opinions) to the public. That is the case, periodical blogs and one-time content uploads should in principle be treated alike as this would reflect the Court’s similar position towards printed works. Slightly different questions are posed by portals like “WikiLeaks” that offer access to edited or unedited copies of (confidential) documents. These portals usually do not explain, rate or comment on the individual content. Rather, they largely limit themselves to uploading. However, from the perspective of the public’s right to receive information under Article 10, portals such as “WikiLeaks” functionally deserve a protection similar to the press. In particular, the protection of sources is vital for them.

According to Article 10 paragraph 2, the exercise of the freedoms stipulated in the first paragraph carries with it “duties and responsibilities”. Paragraph 2 enumerates possible grounds for restrictions that, in order to pass the Court’s muster, must be prescribed by law and necessary in a democratic society. With regard to press freedom, however, the Court has translated the “duties and responsibilities” clause into the protection of journalism that is exercised “in good faith and on an accurate factual basis”; journalists shall provide “reliable and precise information in accordance with the ethics of journalism.” Moreover, in the recent Grand Chamber decision of Bédar v. Switzerland, the Court reaffirmed the previously developed notion of “responsible journalism”. The contents of the collected or disseminated information as well as a journalist’s conduct must reflect this notion of responsibility. In that regard, “the fact that a journalist has breached the law is a relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly.”

It is apparent that the Court does not strictly separate the scope of protection from the question whether a restriction is justified. Instead, the Court states that it is one of the “general principles” of freedom of expression under the Convention that “the protection afforded by Article 10 of the Convention to journalists is subject to the proviso that they act in good faith”. The Court thereby seems to mix the scope with possible reasons for a restriction. In that regard, it might be critically asked whether simple domestic laws can actually be enough to limit a freedom’s scope under the Convention. This article is, however, not the place for analyzing the Court’s methodological approach. Rather, it suffices to state that the notions of “good faith” and “responsible journalism” have to be taken into account when deciding whether a state has violated Article 10 or not. Restrictions prescribed by law

The freedoms laid down in Article 10 paragraph 1 may be subject to certain “formalities, conditions, restrictions or penalties” (paragraph 2). Furthermore, every restriction must be “prescribed by law”. With regard to the cases analyzed for the purpose of this article, this requirement has rarely caused any trouble. As a general rule under Article 10, the Court merely demands that the restriction must have “some basis in domestic law”. The Court understands the term “law” in its substantive sense. It has included both written law, encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law including judge-made law.

The Court usually limits its scrutiny to verifying whether the law was accessible and foreseeable at the material time. However, when it comes to measures restricting the protection of journalistic sources, the Court adopts a stricter approach demanding mechanisms for review by a judge or other independent and impartial decision-making body. According to the Court, it is in principle desirable to entrust supervisory control to a judge.

A relevant case in this regard is Sanoma, where a public prosecutor ordered the disclosure of journalistic sources. Though the advice of an investigating judge was sought, his involvement was merely conceded voluntarily by the public prosecutor and lacked a basis in law. Moreover, his advice was not binding. Therefore, the Court held that the prosecutor’s order was not prescribed by law in the sense of Article 10. Furthermore, it stated that any judicial review post factum could not cure these failings since the identity of the journalistic sources would have been disclosed already at that point. The Court elaborated:

“The requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing

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24 ECHR, Dapkus and others v. France, supra note 1, para. 46.
25 See the references in ECHR, Pentinkääni v. Finland, Grand Chamber judgment of 20.10.2015, 11882/10, para. 90.
26 ECHR, Bédar v. Switzerland, supra note 1, para. 50.
27 ECHR, Stoll v. Switzerland, supra note 1, para. 103.
28 ECHR, Ekin Association v. France, supra note 22, para. 44.
29 ECHR, Sanoma Uitgevers B.V. v. The Netherlands, supra 8, para. 83.
30 ECHR, Sunday Times v. United Kingdom, Plenary judgment of 06.11.1980, 05387/74, para. 49.
31 ECHR, Sanoma Uitgevers B.V. v. The Netherlands, supra note 8, para. 90.
32 ECHR, Telegraaf Media Nederland Landelijke Media B.V. and others v. The Netherlands, supra note 1, para. 98.
33 ECHR, Sanoma Uitgevers B.V. v. The Netherlands, supra note 8, paras. 96-99.
Regarding the public prosecutor’s power to order the execution of searches and seizures in cases of urgency, the Court demands an involvement of an independent judge before the seized items are examined. In the case of Nagla v. Latvia, the investigating authorities decided, almost three months after the broadcast in question and after the applicant had agreed to testify, that a search at Ms. Nagla’s home was necessary. They proceeded under the urgent procedure without the involvement of a judicial authority that could have examined the relationship of proportionality between the public interest of investigation and the protection of the journalist’s freedom of expression. The Court held that “it may be impracticable for the prosecuting authorities to state elaborate reasons for urgent searches; in such circumstances the necessary assessment of the conflicting interests could be carried out at a later stage, but in any event at the very least prior to the access and use of the obtained materials.”

Finally, another important conclusion that can be drawn from Sanoma relates to the question how severe an action of the state must be in order to be considered a restriction. In Sanoma, the editorial offices were actually not searched. However, the police detectives and public prosecutors threatened to seal and search the whole of the applicant company’s premises, if need be for an entire weekend and beyond, and remove all computers. In the given case, the threatened search would have entailed a financial damage for the applicant company as, during that weekend, articles were to be prepared for publication on the subject of the wedding of the Netherlands Crown Prince. Being faced with these facts, the Court held that it must take the threat “as seriously as it would have taken the authorities’ actions had the threat been carried out. (…) While it is true that no search or seizure took place in the present case, the Court emphasises that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources.” In the words of the Court:

“Not only the offices of Autoweek magazine’s editors but those of other magazines published by the applicant company would have been exposed to a search which would have caused their offices to be closed down for a significant time; this might well have resulted in the magazines concerned being published correspondingly late, by which time news of current events (…) would have been stale. News is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest (…). This danger, it should be observed, is not limited to publications or periodicals that deal with issues of current affairs.”

It follows that searches and seizures do not actually need to be carried out in order to qualify as a restrictive measure. A threat can be enough if a chilling effect on the press, that depends on the trust of its sources, cannot be ruled out. In the eyes of the Court, this is usually the case. Threats of searches and seizures are, therefore, interferences like searches and seizures that have actually been executed. Case study: Searches and seizures under German criminal procedural law

The legal framework dealing with searches and seizures at journalists’ workplaces or homes can differ materially from country to country. Generally, all CoE member states recognize press freedom as a constitutional right. Its actual significance in the case of criminal investigations, however, also depends on the provisions of criminal procedural law and court jurisprudence. By way of example, the German provisions relating to searches and seizures and their application in cases when journalists are targeted shall be presented here.

According to Section 98 subsection (1), second sentence, of the German Code of Criminal Procedure (Strafprozessordnung, StPO, the Code), seizures in the premises of an editorial office, publishing house, printing works or broadcasting company may be ordered only by the court. The same requirement applies to searches. However, due to explicit privileges accorded to the press by the Code, an order of searches and seizures is usually unlawful: Seizures of documents, sound, image and data media, illustrations and other images in the custody of media professionals or of the editorial office, the publishing house, the printing works or the broadcasting company, shall be inadmissible insofar as they are covered by the right of such persons to refuse to testify (Section 97 subsection (5), first sentence, StPO).

Therefore, as long as members of the press are considered to be witnesses in a particular investigation, there is no legal possibility for searches and seizures at press premises or at the homes of journalists. According to the Code’s mechanism, the limits of searches and seizures concerning journalists as witnesses is determined by the scope of their right to refuse testimony. This scope is wide and covers any information concerning the author or contributor of comments and documents, or concerning any other informant or the information communicated to them in their professional capacity including its content, as well as concerning the content of materials which they have produced themselves and matters which have received their professional attention (Section 53 subsection (1), second sentence, StPO).

However, this carefully designed protection of media professionals collapses as soon as they themselves are considered to be suspects. An act of accusation changes a concerned person’s status from witness to suspect. Criminal suspects cannot claim witness privileges, but rather have the right to remain silent. The restrictions described above do not apply anymore, and the exclusive power of the judge to order searches and seizures is complemented by the prosecutor’s power in exigent circumstances. Furthermore, in case a witness (such as a media professional) is not accused, the restrictions on seizures also do not apply if, for example, certain facts substantiate the strong suspicion that the person entitled to refuse to testify participated in the criminal offence (Section 97 subsection (2), third sentence, StPO). It can therefore be seen that any act of incrimination has a significant impact on the position of a journalist with regard to his protection against measures of investigation.

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34 ECHR, Sanoma Uitgevers B.V. v. The Netherlands, supra note 8, paras. 90, 93.
35 ECHR, Nagla v. Latvia, supra note 11, paras. 98, 100.
36 ECHR, Sanoma Uitgevers B.V. v. The Netherlands, supra note 8, para. 18.
37 ECHR, Sanoma Uitgevers B.V. v. The Netherlands, supra note 8, paras 70-71; note 8, para. 18.
38 This provision does not apply to a journalist’s home.
40 Section 53 subsection (1), first sentence, number 5, StPO, defines media professionals as “individuals who are or have been professionally involved in the preparation, production or dissemination of periodically printed matter, radio broadcasts, film documentaries or in the information and communication services involved in instruction or in the formation of opinion”.
42 Federal Court of Justice, judgment of 03.12.1991, 1 StR 1200 (BGHSt 38, 144, pp. 146-147).
43 For the inconsistencies of this regulation, however regarding a previous version of the law, see L. Schuldt, supra note 41, p. 64.

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In the past, German public prosecutors frequently constructed a suspicion against journalists suspecting them of aiding and abetting to commit a breach of official secrets (Section 353b of the Criminal Code), based on the mere fact that confidential content appeared in a newspaper.44 This suspicion opened the possibility to search editorial offices. Their actual goal in most of the cases was to find the leak within the ranks of the state authority. In none of the cases has a journalist been actually accused in court.45

The above-mentioned practice of constructing a “fake” suspicion has been found unconstitutional by the Federal Constitutional Court in the famous “Spiegel”46 and “Cicero”47 judgments: “Searches and seizures as part of a criminal investigation against media professionals are unconstitutional if they exclusively or primarily serve the purpose of identifying the person of an informant.”48 Furthermore, the Constitutional Court clarified that the mere publication of an official secret can in itself never justify suspecting the involved journalists of aiding and abetting to a breach of official secrets. Rather, the prosecution needs to establish specific facts that the public official who leaked the information intended the subsequent publication. Only in that case could a predicate offence (breach of official secrets) be assumed. Moreover, in the meantime the German legislature has excluded any criminal liability of media professionals in case they limit themselves to the publication of official secrets that they received from a source.49

Overall, it can be seen that the German criminal procedural law in conjunction with the jurisprudence of the Federal Constitutional Court provides a high level of protection of the press against searches and seizures. As long as journalists are not themselves the suspects of a crime, it is virtually impossible for state authorities to access journalists’ materials or sources. Furthermore, a criminal suspicion against journalists needs to be based on something else than the mere publication of confidential information. If, however, journalists are actively involved in acquiring official secrets, for example by stealing documents or by bribing or instigating public officials to disclose confidential information, they cannot claim a privileged treatment anymore.

Necessary in a democratic society

The article now moves on to discuss the arguments of the Court regarding the question whether searches and seizures targeting the press could be justified before the Convention. The decision whether or not a particular measure that restricts the freedom guaranteed by Article 10 is “necessary in a democratic society” (Art. 10 para. 2) requires a comprehensive balancing of interests in the light of the case as a whole.50 Clearly, journalists are not above the law.51 Even when they report on matters of serious public concern, the Convention does not grant a whol...49 Since 2012, Section 353b subsection (3a) reads: Acts of aiding by a person listed under section 53(1) first sentence, number 5 of the Code of Criminal Procedure shall not be deemed unlawful if they are restricted to the receipt, processing or publication of the secret or of the object or the message in respect of which a special duty of secrecy exists.

50 ECHR, Telegraaf Media Nederland Landelijke Media B.V. and others v. The Netherlands, supra note 1, para. 124.
51 See the Court’s indignant response to journalists who destroyed the material they had received from a confidential source, though they had already been summoned by a tribunal to deliver the documents, thereby making any further judicial review of the affair impossible: ECHR, Keena and Kennedy v. Ireland, supra note 1, para. 48: “The Convention does not confer on individuals the right to take upon themselves a role properly reserved to the courts.”

ly unrestricted freedom of expression.52 Under the notion of “necessary in a democratic society”, the Court determines whether the respective restriction corresponded to a “pressing social need”, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient.53 In its assessment, the Court takes into account the interests involved in the respective case, the control exercised by domestic jurisdictions, the applicants’ conduct and the proportionality of the impugned measures.54 Regarding orders to disclose journalistic sources, the Court emphasizes the potentially chilling effect of such an order and demands proof of an “overriding requirement in the public interest”.55 Moreover, particularly relevant in the present context, the Court has held that press freedom assumes even greater importance in circumstances in which state activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature.56

Margin of appreciation

However, when the Court assesses the legality of measures that aim at the protection of confidential information against disclosure, it proclaims to leave the domestic courts a certain margin of appreciation.57

In the words of the Court, “this power of appreciation is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10.”58 The (in)famous margin of appreciation doctrine generally still lacks contours. It remains opaque under which exact circumstances the CoE member states are accorded which margin. Though this is not the place to critically assess the doctrine’s conceptual basis,59 the application of the doctrine to cases involving the disclosure of secret information by the press is particularly obscure.

Regarding these cases, the Court justifies applying the doctrine by referring to the lack of a common ground among the contracting states. It has held that the rules aimed at preserving the confidential or secret nature of certain sensitive items of information and at prosecuting acts which run 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”60. The Court therefore accords the domestic courts a margin of appreciation in assessing the necessity and scope of an interference because of their “direct, continuous contact with the realities of the country”61.

At the same time, however, the Court has repeatedly stated that in cases where freedom of the press is at stake, the authorities have only a limited margin of appreciation to decide whether a “pressing social need” exists.62 What is more, the Court emphasizes that “the most careful scrutiny on the part of the Court” is called for when the measures

44 For a critical discussion of journalists’ criminal liability of aiding and abetting in these cases, see L. Schuldt, supra note 41, pp. 208-236.
45 See the evidence in L. Schuldt, supra note 41, pp. 37-51.
46 Federal Constitutional Court, judgment of 05.08.1966, 1 BvR 586/62, 610/63, 512/64, BVerfGE 20, 162.
47 Idem, judgment of 27.02.2007, 1 BvR 538/06, 2045/06, BVerfGE 117, 244.
48 Ibid., first “Leitsatz” (guiding principle).
49 Since 2012, Section 353b subsection (3a) reads: Acts of aiding by a person listed under section 53(1) first sentence, number 5 of the Code of Criminal Procedure shall not be deemed unlawful if they are restricted to the receipt, processing or publication of the secret or of the object or the message in respect of which a special duty of secrecy exists.
50 ECHR, Telegraaf Media Nederland Landelijke Media B.V. and others v. The Netherlands, supra note 1, para. 124.
51 See the Court’s indignant response to journalists who destroyed the material they had received from a confidential source, though they had already been summoned by a tribunal to deliver the documents, thereby making any further judicial review of the affair impossible: ECHR, Keena and Kennedy v. Ireland, supra note 1, para. 48: “The Convention does not confer on individuals the right to take upon themselves a role properly reserved to the courts.”
52 ECHR, Stoll v. Switzerland, supra note 1, para. 102.
53 ECHR, Telegraph Media Nederland Landelijke Media B.V. and others v. The Netherlands, supra note 1, para. 123.
54 ECHR, Görmüs and others v. Turkey, supra note 13, para. 52.
55 ECHR, Goodwin v. United Kingdom, supra note 1, para. 39; Voskuil v. The Netherlands, supra note 1, para. 65.
56 ECHR, Stoll v. Switzerland, supra note 1, para. 110; Görmüs and others v. Turkey, supra note 13, para. 48.
57 ECHR, Telegraaf Media Nederland Landelijke Media B.V. and others v. The Netherlands, supra note 1, para. 123.
59 ECHR, Stoll v. Switzerland, supra note 1, para. 107.
60 ECHR, Bédar v. Switzerland, supra note 1, para. 54.
61 ECHR, Editions Plon v. France, supra note 1, para. 44; Stoll v. Switzerland, supra note 1, para. 105.
62 ECHR, Editions Plon v. France, supra note 1, para. 44; Stoll v. Switzerland, supra note 1, para. 105.
taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern.62

The concrete repercussions of invoking the margin of appreciation doctrine remain therefore unclear. On the other hand, the fact that the press publishes confidential information grants the domestic courts a wider margin of appreciation. Consequently, in cases concerning disclosures of confidential information by the press, references by the Court to the margin of appreciation doctrine do not seem to be actually operationalized. In practice, it can be observed that the Court might name the doctrine among the principles that need to be applied to the facts of the case. When it comes to the actual weighing of interests, however, the Court exercises its jurisdiction apparently without constraints. Neither does the Court clearly state which exact questions it leaves to the domestic authorities. It might be concluded that the doctrine has been operationalized in practice, as laid down in Articles 1, 13 and 35.

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Concrete repercussions that could influence the outcome of the case are at least not visible in the Court’s judgments.

Assessing the case material

When it comes to systematizing the Court’s jurisprudence on searches and seizures in cases of disclosures of secret information, it needs to be observed that the Court usually discusses a number of arguments without clearly categorizing them. Rather, the Court takes into account various factors that together form the basis of its decision. However, having in mind the German Constitutional Court’s jurisprudence presented earlier, it shall be examined whether the Court recognizes at least one “red line”: that searches and seizures, which exclusively or primarily serve the purpose of identifying a source, constitute, in every case, a violation of press freedom. Subsequently, various other arguments employed by the Court will be discussed.

Targeting sources: A “red line” never to be crossed?

In seven of the ten cases analyzed for this article, the Court found that the state authorities executed searches and seizures in order to establish the identity of the source. In Roemen and Schmit where Mr. Roemen had published an article making public that a member of the government had been convicted of tax fraud, the Court noted that “the searches in the instant case were not carried out in order to seek evidence of an offence committed by the first applicant other than in his capacity as a journalist. On the contrary, the aim was to identify those responsible for an alleged breach of professional confidence and any subsequent wrongdoing by the first applicant in the course of his duties.”64 Similar accounts can be found in the cases of Earnst65, Tillack66, Martin67.

The Court further notes that “the extent to which the acts of compulsion resulted in the actual disclosure or prosecution of journalistic sources [is] irrelevant for the purposes of determining whether there has been an interference with the right of journalists to protect them.”68 In other words, it does not matter whether the identity of an informant has actually been unveiled. In cases of searches and seizures that aim at disclosing a source, this aim is enough to characterize the operation as an interference69, despite of a potentially contradictory opinion in Stichting.70

However, it would be erroneous to conclude that a search for the source is in any case in violation of the Convention. Rather, the conclusion that the Court draws from it is that “the measures thus undoubtedly came within the sphere of the protection of journalistic sources.”71 Consequently, the fact that state authorities aim at closing the internal leak by searching a newspaper’s office needs to be assessed in light of the strict standards that apply to the protection of journalistic sources. But it does not in itself constitute a violation. This becomes clear when the Court, in Tillack, held:

“It is clear that, at the time when the searches in question were carried out, their aim was to reveal the source of the information reported by the applicant in his articles. Since OLA’s internal investigation did not produce the desired result, and the suspicions of bribery on the applicant’s part were based on mere rumours, (…) there was no overriding requirement in the public interest to justify such measures.”72

Thus, it can be seen that an “overriding requirement” justifying the search for the source, is, at least in theory, still conceivable. Similar evidence can be taken from the Roemen case. There, the Court found that the Government had “entirely failed to show that the domestic authorities would not have been able to ascertain whether [there were crimes committed] without searching the applicant’s home

62 ECtHR, Stoll v. Switzerland, supra note 1, para. 106.
63 See, for instance, ECtHR, Stoll v. Switzerland, supra note 1, para. 162.
64 Additional Protocol No. 15 amending the Convention by, inter alia, introducing a reference to the principle of subsidiarity and the margin of appreciation doctrine has not yet entered into force. The text of Protocol No. 15 can be found here: http://www.echr.coe.int/Documents/Protocol_15.ENG.pdf.
65 ECtHR, Roemen and Schmit v. Luxembourg, supra note 5, para. 52.
66 ECtHR, Ernst and others v. Belgium, supra note 6, para. 100.
67 ECtHR, Tillack v. Belgium, supra note 7, para. 63.
68 ECtHR, Martin and others v. France, supra note 9, para. 85.
69 ECtHR, Ressiot and others v. France, supra note 10, para. 122.
70 ECtHR, Nagla v. Latvia, supra note 11, paras. 82, 95.
71 ECtHR, Görüm and others v. Turkey, supra note 13, para. 57.
72 ECtHR, Roemen and Schmit v. Luxembourg, supra note 5, para. 57; similarly, in Ernst and others v. Belgium, supra note 6, para. 103; Ressiot and others v. France, supra note 10, para. 125; Nagla v. Latvia, supra note 11, para. 95; Görüm and others v. Turkey, supra note 13, para. 57.
73 See, for instance, ECtHR, Sanoma Uitgevers B.V. v. The Netherlands, supra note 8, para. 67.
74 Note: Not necessarily as a violation; see the following paragraphs.
75 ECtHR, Stichting Ostade Blade v. The Netherlands, supra note 12, para. 72: When responding to the applicant’s complaint “that the search destroyed the confidentiality of information entrusted to the magazine’s editors”, the Court, in a quite lapidary fashion, held that “nothing is known about this information, nor has the applicant foundation suggested that it, its informants and contributors or its readership suffered as a result.” However, in that case, the persons who had sent the letter were not considered “sources” in the sense of Article 10, see below “Source or not?”
76 ECtHR, Roemen and Schmit v. Luxembourg, supra note 5, para. 52; Martin and others v. France, supra note 9, para. 85; Ressiot and others v. France, supra note 10, para. 123.
77 ECtHR, Tillack v. Belgium, supra note 7, para. 63.
and workplace.” This means that the search of Mr. Roemen’s home and workplace was not the least severe measure. The public authorities should have launched a thorough internal investigation first. However, in case these alternative measures had all failed, searches and seizures at a journalist’s home and workplace were not a total taboo.

Likewise, in Ernst, the Court stated 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 the leaks emanating from the office of the Public Prosecutor. Comparable reasoning can be found in Martin. In Ressiot, the Court accepted that the French authorities had, in vain, lead prior investigations to establish the identities of potential informants among the judicial personnel. It then continued by holding that France had nevertheless violated Article 10 due to the excessive and intimidating scale (“impressive and spectacular”) of the operation. In Nagla, the Court supported its finding that the search of Ms. Nagla’s home was designed to disclose her sources by holding that the search warrant was drafted in very vague terms and that there was no proper judicial oversight. In Görnüs, the Court held that the search was not necessary because the material sought by the military prosecutor had already been handed over. Moreover, the search and seizure were excessive in character.

From this material, it can be seen that searches and seizures which exclusively or primarily target a journalist’s source do not constitute a “red line” in the jurisprudence of the Court. Rather, the Court appreciates this fact in the context of asking whether a particular operation was actually “necessary”: State authorities must choose the least severe means (e.g. internal investigations) and may only resort to searches and seizures at press premises if all other measures have been conducted to no avail. The initial thesis drawn from the example of the German Constitutional Court holding that such operations inherently violate press freedom needs, therefore, to be qualified: Targeting sources by searching journalists’ workplaces or homes may be one argument in finding a violation of Article 10, but it is not, in itself, the decisive one. Rather, the Court assesses whether such operation was actually necessary.

Excessive and intimidating searches and seizures

In six of the ten cases analyzed for this article, the Court found that the particular searches and seizures were not only unnecessary but even excessive and intimidating. Systematically, these cases can be treated under the question whether an interference constituted the least severe means. However, as will be shown, the Court found them to have a particularly deep impact on the protection of journalistic sources.

In Ernst, where the prosecution launched investigations into information leaks emanating from its own office, the Court noted that it was “struck by the massive character of the operation” that took place at eight locations simultaneously and that employed 160 police officers. Numerous documents, discs and hard drives were seized from journalists. Similarly, in the case of Tillack, the Court took the amount of property seized by the authorities into consideration: “Sixteen crates of papers, two boxes of files, two computers, four mobile telephones and a metal cabinet. No inventory of the items seized was drawn up. The police even apparently lost a whole crate of papers, which were not found until more than seven months later.” Thus, the measures were disproportionate.

Though in Sanoma the public authorities merely threatened to conduct a large-scale search, the Court made clear that, had it been executed, "not only the offices of ‘Autoweek’ magazine’s editors but those of other magazines published by the applicant company would have been exposed to a search which would have caused their offices to be closed down for a significant time". In Ressiot, the case that involved revelations about doping at the Tour de France, the Court also highlighted the operation’s scale (searches at editorial offices, seizures of computers and messaging lists, surveillance of mobile and fixed telephones). It concluded that “the searches at the journals’ offices, impressive and spectacular, must have surely left a deep impression on the professionals who worked there, and they must have perceived them as a potential threat to their freedom to exercise their profession.”

In the case of Nagla, the Court marked the searches and seizures conducted by the Latvian authorities as excessive, primarily as a result of a wide-reaching search warrant. The Court held that “the search warrant was drafted in such vague terms as to allow the seizure of ‘any information’ pertaining to the crime under investigation allegedly committed by the journalist’s source, irrespective of whether or not his identity had already been known to the investigating authorities.” Furthermore, the data storage devices that were seized by the authorities contained not only information capable of identifying her source of information, but also information capable of identifying her other sources of information.

Finally, the Court denounced a particularly excessive behavior of the Turkish authorities in the case of Gönüüs. Here, the concerned journalists had already handed over the impugned material that they had received from a whistleblower. Nonetheless, the officers proceeded to copy the complete data of 46 computers — an operation that took about 65 hours. The Court held that such an intervention was “of a nature that discourages all possible sources from assisting the press in informing the public about questions regarding the armed forces, even if these questions are of public interest. (…) The indiscriminate extraction of all data located on the devices allowed the authorities to collect information that did not have any link to the investigated facts.”

As can be seen from the preceding accounts, the Court relates the excessive and intimidating character of an operation to the protection of journalistic sources. According to the Court’s jurisprudence, unnecessary searches and seizures are disproportionate and thereby violate Article 10. However, excessive, intimidating, or “spectacular and impressive” operations may have an even deeper impact on press freedom because potential sources are likely to be scared off. The Court therefore considers excessive searches as particularly harmful not only for the concerned journalists in a given case, but rather holds that such measures have “a dissuasive effect on other journalists or other whistleblowers by discouraging them from reporting irregular or debatable actions by public authorities.”

Source or not?

The answer on the question whether a person fur-
nishing confidential material to the press is considered a “source” has a substantial influence on the outcome of the “necessary in a democratic society” test. As has been shown in the preceding paragraphs, the Court considers the protection of journalistic sources one of the cornerstones of press freedom under Article 10 of the Convention. Principally, every informant of the press is considered a source. However, the case of Stichting provides an example of circumstances under which a person who has sent material to the press would not be considered a source. In Stichting, the Court eventually held that there was no violation of Article 10.93

According to the facts of the case, the Dutch police forces searched the editorial office of the bi-weekly magazine “Ravage”. The day before, the magazine’s editors had issued a press release in which they announced the upcoming issue of the magazine, to be released the following day, which would include the letter of the “Earth Liberation Front” (ELF) claiming responsibility for a bomb attack. The search was carried out in the context of criminal investigations against the perpetrators of three bomb attacks that had occurred in Arnhem.

In response to the applicants’ claim that the case concerned the protection of journalistic sources and that the Court’s relevant case law should apply, the Court held that “it does not follow [from its case law] that every individual who is used by a journalist for information is a “source” in the sense of the case-law mentioned.”94 The Court continued:

“It is undeniable that, even though the protection of a journalistic “source” properly so-called is not in issue, an order directed to a journalist to hand over original materials may have a chilling effect on the exercise of journalistic freedom of expression. That said, the degree of protection under Article 10 of the Convention to be applied in a situation like the present one does not necessarily reach the same level as that afforded to journalists when it comes to their right to keep their “sources” confidential. The distinction lies in that the latter protection is twofold, relating not only to the journalist, but also and in particular to the “source” who volunteers to assist the press in informing the public about matters of public interest.”95

Before this background, the Court held that the magazine’s informant was “not motivated by the desire to provide information which the public were entitled to know.” Rather, he “was claiming responsibility for crimes which he had himself committed; his purpose in seeking publicity through the magazine “Ravage” was to don the veil of anonymity with a view to evading his own criminal accountability. For this reason, the Court takes the view that he was not, in principle, entitled to the same protection as the “sources” in [other cases].”96 The outcome of the case was thereby substantially predetermined because the Court accorded the magazine a significantly lower level of protection. One might even argue that the Court restricted its control to an unnecessarily narrow scope. This becomes clear when the Court brushed off claims that other investigatory leads were available. In this regard, the Court responded:

“Even assuming such to be the case, the Court cannot find that the original document, whether on its own or in conjunction with other evidence, was incapable of yielding useful information. Indeed, if that is so then it cannot be seen what prevented the editors of the magazine from handing it over of their own accord.”97

In this passage, it appears that the Court had made up his mind already and that it was not willing to depart from that route. As the sender of the letter was not considered a source, the argument that the searches might possibly not have been the least severe means is declared irrelevant. In other words, just because the protection of journalistic sources was of reduced importance in the given case, the Court did not apply a full-scale proportionality test anymore. It did not determine whether the searches and seizures were actually necessary. This is questionable from a methodological point of view and should be criticized. In any event, the case of Stichting demonstrates how the outcome of a case may depend on the question whether a provider of material is considered a source or not. This needs to be born in mind when assessing claims under Article 10.

Reporting questions of public interest

When dealing with press reports disclosing secret information, the Court normally assesses whether the respective article has contributed to the discussion of a topic of public interest. If this is the case, an interference “cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.”98 Hence, the threshold for justification is lifted to a higher level: Searches and seizures must not only be the least severe means, rather, the underlying public interest in the protection of confidential information must also clearly outweigh the public’s right to know. In this regard, the Court apparently employs a balancing test in order to assess a given measure’s proportionality in the narrow sense. In this balancing exercise, the Court also takes into account whether the impugned information can (still) legitimately be considered confidential and whether the journalists acted in good faith.

In the case of Bluf!, the Court had little difficulty in weighing the concerned interests as it held that

the impugned security service’s quarterly report was not confidential anymore. The document in question was six years old at the time of the seizure. Further, the Court noted, “it was of a fairly general nature, the head of the security service having himself admitted that in 1987 the various items of information, taken separately, were no longer State secrets (…). Moreover, the report was marked simply “Confidential”, which represents a low degree of secrecy.” Finally, the publishers reprinted a large number of copies and sold them in the crowded streets of Amsterdam.

“That being so, the protection of the information as a State secret was no longer justified and the withdrawal of issue no. 267 of Bluf! no longer appeared necessary to achieve the legitimate aim pursued.”99 Accordingly, the Court found the searches and seizures at the editorial offices in violation of Article 10.

In Roemen, the Court noted that Mr. Roemen had published an established fact concerning a fiscal fine that had been imposed on a minister by decision of the director of a public authority. There was, therefore, “no doubt that he was commenting on a subject of general interest.”100 Similarly, in the case of Martin, the articles written by Mr. Martin and his colleagues quoted from a provisional auditing report alleging that the region of Languedoc-Roussillon had been mismanaged under the presidency of a certain politician. The Court held that information relating to the management of public funds by local elected officials and civil servants was “a topic of general interest for the local community; the applicants had the right to make this information known to the public.”101 Furthermore, the Court noted that the journalists had marked the auditing report as provisional and subject to possible changes. They had their
the impression of the disproportionate seizures, the state authority’s operation was not justified by an “overriding requirement”.

Finally, in the case of Görmüş, the Court had the opportunity to address the notion of “national security” invoked by Turkey. Mr. Görmüş and his colleagues had revealed that the General Staff of the Turkish armed forces had created lists of journalists and non-governmental organizations considered to be either pro or against the armed forces. The Court held that the disclosure of this information was not able to threaten national security, clarifying that this notion needs to be interpreted in a restrictive manner. On the contrary, the articles contributed to a public debate about the role of the Turkish military in the country’s politics. “Excluding questions relating to the armed forces completely from the public debate is not acceptable.” Rather, having regard to the freedom of access to information in a democratic society, the Court held that the public interest in the disclosure of information evidencing debatable practices of the armed forces is of such an importance that a possible loss of the public’s confidence in the military, in the wake of the disclosure, must be accepted. The Court reiterated that “a free discussion of problems of public interest is essential in a democratic state; one should beware of discouraging the citizens of expressing themselves about these problems.”

The Court also held that the journalists had reported about probable security flaws in a database maintained by the Latvian state revenue service. The Court noted that the subject-matter on which she had reported “made a twofold contribution to a public debate. It was primarily aimed at keeping the public informed about the salaries paid in the public sector at a time of economic crisis, when a variety of austerity measures had been introduced. It is not insignificant that, around the same time, legislative amendments were being drafted to make information concerning salaries in public institutions available to the general public (…). In addition, the applicant’s broadcast also exposed security flaws in the database of the State Revenue Service, which had been discovered by her source.”

Before this background and under the impression of the disproportionate seizures, the state authority’s operation was not justified by an “overriding requirement”.

From these accounts, it can be deduced that reports on topics of public interest enjoy a high level of protection. Though the public’s right to know still needs to be balanced with possible grounds for secrecy, only overriding requirements on the side of the state or an individual may justify an interference with press freedom. An existing public interest therefore reinforces the arguments for holding particular searches and seizures in violation of the Convention.

Conclusion

The analysis of the Court’s jurisprudence relating to searches and seizures in cases where journalists had published confidential material enables the formulation of rough guidelines for the assessment of future cases. First of all, when it comes to searches and seizures that have an impact on the protection of journalistic sources, the Court demands mechanisms for review by a judge or other independent and impartial decision-making body. Second, searches that primarily or exclusively aim at disclosing the identity of the source are not by itself prohibited. However, this fact may serve as a strong argument that there was a violation of Article 10. Third, any intimidation of journalists by excessive interferences will very likely result in a violation. Fourth, if a provider of information is not considered a “source”, the level of protection as regards press freedom is significantly lowered. And fifth, reports on matters of public interests enjoy a high level of protection. A matter is of particular public interest if it reveals mismanagement or other debatable behavior on the part of the state.

With regard to ongoing criminal investigations, the presumption of innocence can be a strong argument against disclosures; see, for instance, ECtHR, Bedat v. Switzerland, supra note 1; further, Tourancheau and July v. France, supra note 1; Campos Damaso v. Portugal, supra note 1; Laranjeira Marques da Silva v. Portugal, supra note 1; Pinto Coelho v. Portugal, supra note 1; Ressiot and others v. France, supra note 10.

105 ECtHR, Görmüş and others v. Turkey, supra note 13, para. 37.
106 Ibid., paras. 54-55.
107 Ibid., para. 62 (author’s translation from the French original).
108 Ibid., para. 63 (author’s translation from the French original).
109 Ibid., para. 69.
Interview with Ajarn Wiriya, founder of Yim Soo Café

In December 2016, “Yimsoo Café” opened on Arun Amarin Road and it is run by the Universal Foundation for People with Disabilities. The Café employs mainly handicapped people, and became very popular among students, both Thai and foreign. The media reported about this café as a model of “hip” and successful business for the disabled. We had the great opportunity to talk with Arjan Wiriya Namsiripongpun, a chairman of the foundation, former senator, and law professor at the Faculty of Law, Thammasat University. We were talking about the origin of his idea, his vision for people with disabilities and rights for handicapped people. Yimsoo Café’s facebook page is: https://www.facebook.com/YimsooCafe/

Q: Why did you name the Café “Yim Soo”? (Smile Fight Café)

It comes from the song “Yim Soo” or “Smiles”, which was produced by His Majesty, King Bhumibol Adulyadej. It was composed in order to encourage handicapped people to achieve what they want to, even if they have more difficulties than ordinary people. It’s such an important, and inspiring massage I think. That’s why we decided to use the name of the song for our café. It is sad, but some people have a bad attitude towards people with disabilities. They believe that handicapped people are a burden, and cannot contribute anything to society. But in my point of view, one should change the status of being a burden, and empower them instead to believe that they can achieve everything.

Q: What inspired you to open the café?

When I went to United States, I discovered that many people with disabilities there lead restaurants and coffee shops successfully. I was eager to try this model in Thailand. In my view, Thai people with disabilities should also have the possibility to lead a business and become successful and independent. A café could be a good business for a disabled person. It offers the opportunity for other things, like decorating the café. This is at the same time a good way to make the customer feel comfortable. They might like the atmosphere in the café, and take some photos to share them on social media. This is a good way to get other people’s attention to go to the coffee shop.

Q: Who did you employ and how do the employees communicate with each other?

We employ deaf people, and persons with down-syndrome, but also ordinary people. They communicate with each other using sign language. In case of any communication problems between the customer and the barista, our ordinary staff can help. Furthermore, there is the TTRS machine which provides real-time sign language translation services in the café, connecting to TTRS Center in the foundation. Customers and employees can use the machine to connect with a translator.
Q: How did the barista learn the work?

We hired an expert to teach us how to make coffee, and how to check its quality. We’re planning a free program to train disabled people in the coffee business, too. My vision is to make people confident to open own restaurants or cafés in the future. Moreover, there will be a program for teaching handicapped people for example how to plant mushrooms, and breed insect as a food. It’s not hard to learn, and could be a first step to make disabled people more independent. The most important thing is to raise awareness that they understand about their own potential, give them challenging work and empower them not to give up easily.

Q: How did your baristas like the job?

Normally, the world of deaf people is rather limited. They have their own language, and usually have difficulties to communicate with ordinary people. Therefore, deaf people tend to be around others with the same symptoms. The deaf persons we employ say that working here offers the opportunity to communicate with ordinary customers. They developed a new perspective, and become more confident to believe that they could be an entrepreneur in the future. We also plan to let customer order coffee with sign language. That could be a very interesting experience for the customer.

Q: What is in your view the challenge in this project?

Luckily, we have been supported financially by the government fund for disabled people. According to the law, any organization who does not hire disabled people, has to pay a fee to the fund. The fund is used to finance and support projects for handicapped people. Many people with disability live in Thailand, almost one million. There are also specific laws and rights to protect and support disabled people. I think the real challenge is about management and how to run the project successfully. We needed to think about a good strategy. We should not think too bureaucratic, but more creative and modern with our project. For example, we wanted our coffee shop to be decorated nicely, and create a warm atmosphere to make the customer feel comfortable.

Q: Do you have any plans of expanding your business?

Actually, businesses by disabled people enjoy certain benefits according to the law. These businesses for instance don’t need to pay rent if the business is run in governmental area. Therefore, it would be great, if we could open a café in a governmental area like at the Faculty of Law of Thammasat University. The foundation also wants to do some projects together with bigger professional businesses like C.P. or Thai Bev, because they have expertise with business management and they want to do more charity projects. But we are still considering different business models.

Q: What do you think about the situation of the disabled living in Thailand?

The situation develops continuously, but it could be better. In the past, people thought that the disabled were unable to work or even to live like ordinary people. But obviously, they are able to work, and to live and act like normal people. We have laws and rights which support the disabled. Many firms produce devices and technologies to simplify the everyday life of handicapped people. This gives us the chance to access more and more aspects of life. My smartphone offers many applications for disabled. I use them a lot to read and to connect with other people. It is very important to give this opportunity to everyone who is handicapped, in whatever way.

Q: What do you think about rights for the disabled in Thailand?

Even tough the constitution did not specify the right for disabled yet, our national laws are quite sufficient. How to realize these rights is, in my opinion, one key problem. We have enough funds from the government. But not many people support projects for handicapped people. We should arrange more projects to improve the right of the disabled. We have many unemployed disabled, and we should support and train them instead of leaving them behind. Moreover, there are some important bills that we support. For example the bill about education of disabled people. We should let disabled children study with normal children. It is important to think about how school could take care of disabled children. We also want experts to take care of handicapped children in school so we can live together in harmony.

After the interview, Prof. Wiriya kindly showed us the Kindergarten for disabled children, and the “Yimsoo-Gallery” which is also run by the foundation. The Gallery exhibits many artworks of disabled people, especially Mr. Tanong Kot-Chompu, a famous disabled artist who once exhibited his works in Switzerland. The Gallery aims to show the potential of the disabled people to the society. The interview was conducted by Shavaorn Wongcom, Researcher at CPG.
ANNOUNCEMENTS

People

On the occasion of CPG’s 8th Annual Conference “The Global Commons and the Governance of Unappropriated Spaces”, held from 20-22 October 2017 at Royal Orchid Sheraton Hotel Bangkok, His Excellency Kasit Piromya, former Minister of Foreign Affairs of Thailand, was presented the CPG Friendship Award for his outstanding contributions to the works of CPG. His vast experience and expertise as diplomat and politician was invaluable at numerous events and activities in which he participated as speaker or commentator. CPG is grateful for his constant support throughout the years since the Center has been established in 2009.

On 18 October 2017, H.E. Mr. Emilio De Miguel Calabia was appointed as Ambassador Extraordinary and Plenipotentiary of Spain. He had joined the Ministry of Foreign Affairs and Cooperation of Spain in 1990. He has served in various capacities at the Ministry of Foreign Affairs and Cooperation of Spain in Cameroon, Bolivia, Thailand and Singapore as well as at Spanish Consulate General in the Philippines.

On 18 October 2017, Mr. Nguyen Hai Bang was appointed as Ambassador Extraordinary and Plenipotentiary of Vietnam. Before his appointment, he has been the Director General of the Department of Africa & the Middle East (MOFA) from 2003 until 2017.

Past Events September and October 2017

From 31 August to 2 September 2017, the Konrad Adenauer Foundation in cooperation with the National Legislative Assembly hosted a seminar to Strengthen the Network under the Project on “Strengthening Local Communities and Local Leaders – the Course of Strengthening Participatory Democracy Leadership Process” at Krungthon Ballroom, 3rd Floor, the Royal River Hotel and the Parliament Building, Bangkok. More information can be found at http://www.kas.de/wf/doc/kas_23371-1442-1-30.pdf?

On 5 September 2017, the ISEAS Yusof Ishak Institute organized a seminar on “Malaysia in a Constitutional Democracy” at the ISEAS Seminar Room 2, Singapore. More details are found at https://www.iseas.edu.sg/events/upcoming-events/item/6007-seminar-malaysia-in-a-constitutional-democracy.

From 6 to 7 September 2017, the European Centre of Sustainable Development in collaboration with the CIT University hosted the 5th International Conference on Sustainable Development on the topic “Creating a unified foundation for the Sustainable Development: research, practice and education” at
On 8 September 2017, the German-Southeast Asian Center of Excellence for Public Policy and Good Governance (CPG) organized a lecture which will be held by Jennifer Prestholdt (Deputy Director and Director of International Justice Program of The Advocate for Human Rights) on “International Refugee Law: US Practice and Current Challenges to Refugee Protection” at Faculty of Law, Thammasat University, Bangkok. For more information please go to http://www.cpg-online.de/cpg-event.

From 18 to 20 September 2017, the “International Conference on Sustainable Development” was held at the Columbia University, New York. This year’s theme was “The World in 2050: Looking Ahead for Sustainable Development”. For more information please go to: http://ic-sd.org/.

From 20 to 21 September 2017, the Asia Europe Foundation organized the “14th Asia Europe Economic Forum” that emphasized on the most urgent economic challenges facing both Asia and Europe. The forum will take place in Seoul, Korea. For more information, please go to: http://asecf.org/projects/themes/economy.

From 21 to 22 September 2017, the 50th International Conference on “Business, Economics, Social Science & Humanities” was held at the Novotel Hotel Bangkok Ploenchit Sukhumvit, Thailand. More details can be found at: http://academicfora.com/bessh-bangkok-thailand-september-21-22-2017/.

From 21 to 22 September 2017, the Centre of Excellence for Operations in Confined and Shallow Waters (COE CSW) hosted the “5th Conference on Operational Maritime Law” in cooperation with the Austrian Armed Forces at Vienna, Austria. Details can be found at http://www.coecsw.org/our-events/5thcom17/.

In September 2017, the Asia Europe Foundation hosted a workshop on climate change for government officials from ASEAN Member States. The workshop provided an opportunity to present the updated “Handbook for ASEAN Government Officials on Climate Change and SDGs”. More information can be found at: http://asef.org/projects/themes/sustainable-development.

From 10 to 11 October 2017, the Bangkok 51st International Conference on “Business, Economics, Social Science & Humanities” was held at the Holiday Inn Bangkok Silom Bangkok, Thailand. For more information, please got to: http://academicfora.com/bessh-bangkok-thailand-october-10-11-2017/.

From 14 to 16 October 2017, the Faculty of Economics and Muamalat of the Universiti Sains Islam Malaysia organized the “International Future Global Economic Development (IFOGED) Conference” at the University Chiang Mai, Thailand. For more information please go to http://ifoged.com/.

From 15 to 20 October 2017, the German-South-east Asian Center of Excellence for Public Policy and Good Governance (CPG) hosted the 6th Academy on “Human Rights” at the Faculty of Law, Thammasat University, Bangkok. Further information can be found at http://www.cpg-online.de/cpg-event/cpg-6th-annual-international-conference/.

From 20 to 22 October 2017, the CPG’s 8th Annual International Conference on the topic “The Global Commons and the Governance of Unappropriated Spaces” was held at Royal Orchid Sheraton Hotel, Bangkok. Details can be found at http://www.cpg-online.de/cpg-event/cpgs-8th-annual-international-conference/.

From 21 to 22 October 2017, the Bangkok 52nd International Conference on “Business, Economics, Social Science & Humanities” took place at the Holiday Inn Bangkok Silom Bangkok, Thailand. For more information, please go to: http://academicfora.com/bessh-bangkok-thailand-october-21-22-2017/.

From 23 to 24 October 2017, the Bali 27th International Conference on “Business, Economics, Social Science & Humanities” was held at Street of sunset road no 88 Seminyak Bali. Further information can be found at: http://academicfora.com/bessh-bali-indonesia-october-23-24-2017/.

From 24 to 26 October 2017, the 46th Annual Conference on South Asia took place at The Madison Concource Hotel and Governor’s Club, I West Dayton Street, Madison, WI 53703, USA. Further information can be found at http://southasiaconference.wisc.edu.

From 24 to 26 October 2017, the Asia Europe Foundation organizes the “Bali 28th International Conference” emphasizing on Business, Economics, Social Science and Humanities. The conference will take place at Novotel Hotel Bangkok Ploenchit Sukhumvit, Thailand. For more information, please go to: http://academicfora.com/bessh-bangkok-thailand-november-09-10-2017/.

From 21 to 22 November 2017, the Asia Europe Foundation will organize the “Bangkok 54th International Conference” emphasizing on Business, Economics, Social Science and Humanities. The conference will take place at Novotel Hotel Bangkok Ploenchit Sukhumvit, Thailand. For more information, please go to http://academicfora.com/bessh-bangkok-thailand-november-21-22-2017/.

From 23 to 24 November 2017, the Asia Europe Foundation organizes the “Bali 29th International Conference” on Business, Economics, Social Science and Humanities. The conference will take place at Street of sunset road no 88 Seminyak Bali. Further information is available at http://academicfora.com/bessh-bali-indonesia-november-23-24-2017/.

From 24 to 26 November 2017, the Berlin International Human Rights Congress will take place on the topic “Human Rights and Democracy in Times of Greater Global Insecurity”. The conference will take place at the ICD House of Arts & Culture, the German Parliament and several hotels in Berlin. Further information can be found at http://www.

**From 5 to 6 December 2017**, the International Institute of Knowledge Management organizes the “4th International Conference on Poverty and Sustainable Development.” The conference will take place in Colombo, Sri Lanka. Further information is available at http://povertyconferences.com/.

**From 7 to 8 December 2017**, the Asia Europe Foundation organized the “Singapore 39th International Conference” on Business, Economics, Social Science and Humanities. The conference will take place at The Aqueen Hotel Paya Lebar 33 Jalan Afifi, Singapore 409180. Details can be found at http://academicfora.com/bessh-singapore-december-7-8-2017/.

**From 11 to 12 December 2017**, the Asia Europe Foundation organized the “Bangkok 55th International Conference” on Business, Economics, Social Science and Humanities. The conference will take place at Holliday Inn Bangkok Silom Bangkok, Thailand. Further information can be found at http://academicfora.com/bessh-bangkok-thailand-december-11-12-2017/.

**From 19 to 22 December 2017**, the “4th International Academic Conference on Social Sciences” will be held as an international platform for scholars, researchers and practitioners to discuss current research in the field of Social Sciences. The conference will take place in Singapore. Further information is available at http://iaccs-conf.org/site/page.aspx?pid=901&sid=6045&lang=en.

**From 21 to 22 December 2017**, the Asia Europe Foundation organized the “Bangkok 56th International Conference” on Business, Economics, Social Science and Humanities. The conference will take place at Holliday Inn Bangkok Silom Bangkok, Thailand. Details are available at http://academicfora.com/bessh-bangkok-thailand-december-21-22-2017/.

**From 21 to 22 December 2017**, the “Bali 29th International Conference” on Business, Economics, Social Science and Humanities. The conference will take place at Street of sunset road no 88 Seminyak Bali. Further information is available at http://academicfora.com/bessh-bali-indonesia-december-21-22-2017/.

**Scholarships opportunities**

The **Friedrich Ebert Foundation Scholarship** is aimed at supporting students from Africa, Asia, Latin America or Eastern Europe that intend to study in Germany in any subject area. The students must demonstrate excellent school or academic merit and must be committed to the values of social democracy. More information can be found at https://www.daad.de/deutschland or http://www.fes.de/studienfoerderun (in German). **Deadline depends on the type of application (http://www.fes.de/).**

The **Netherlands Fellowship Programmes** provides fellowships for qualified Master studies, PhD studies, or short courses offered at participating Dutch Universities. You need to contact the Dutch higher education institution where you wish to go in order to find out whether it is NFP-qualified. People from the 51 NFP countries can apply. For more information: https://www.studyinholland.nl/scholarships/highlighted-scholarships/netherlands-fellowship-programmes. **Deadline varies.**
**CPG Job-Market**

As a service, CPG provides a regularly updated overview of currently open job offers in fields and from institutions related to CPG’s focal areas of work.

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<th>Organization</th>
<th>Vacant position</th>
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German-Southeast Asian Center of Excellence
for Public Policy and Good Governance (CPG)
Faculty of Law, Thammasat University
2 Prachan Road
Bangkok 10200, Thailand
Phone: +66 2 613 2971
Fax: +66 2 224 8100
Website: www.cpg-online.de
E-mail: contact@cpg-online.de
Facebook: facebook/CPGTU

Responsible for content: Henning Glaser, Duc Quang Ly, Jan Kliem

Outline and artwork: Thansuda Pantusa

Picture: Venus Phuangkom, Pixarbay