

THE EUROPEAN COURT OF HUMAN RIGHTS AND FREEDOM OF EXPRESSION ON THE INTERNET

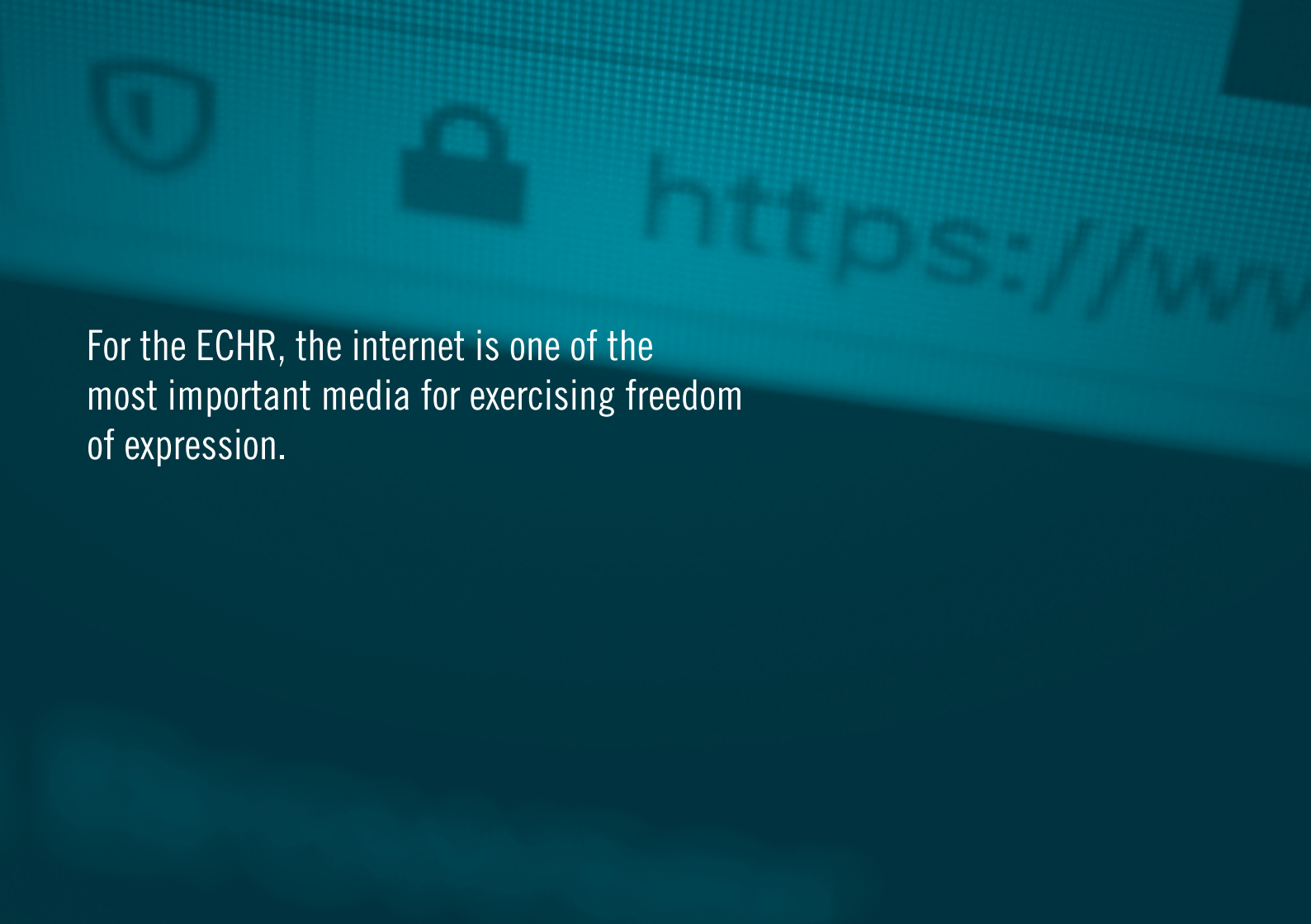


Schweizerisches Kompetenzzentrum für Menschenrechte (SKMR)
Centre suisse de compétence pour les droits humains (CSDH)
Centro svizzero di competenza per i diritti umani (CSDU)
Swiss Centre of Expertise in Human Rights (SCHR)

THE EUROPEAN COURT OF HUMAN RIGHTS AND FREEDOM OF EXPRESSION ON THE INTERNET

For the European Court of Human Rights (ECHR), the internet is one of the most important media for exercising freedom of expression, as well as the largest platform for citizen participation and political activity. But the court also recognises certain risks: misinformation or hate speech can be disseminated worldwide in a matter of seconds and may remain online indefinitely. Determining whether online communication takes place within or without a state's territory is difficult, since the data is generally transmitted via servers located in multiple territorial jurisdictions. It is therefore often unclear which state has jurisdiction for a given incident.

Where jurisdiction can be established, the ECHR requires national authorities and courts to take account of the special characteristics of the internet as a medium of communication. The court says that different assessments of some rights and obligations may apply for communication taking place on the internet as compared with physical space. ECHR judgments also provide guidance regarding the boundaries to freedom of expression on the internet, obligations to protect incumbent on national states, and to what extent these obligations can be placed on service providers of internet platforms.

The background of the slide is a close-up, slightly blurred image of a web browser's address bar. It features a teal-colored overlay. In the upper left, there is a shield icon with a checkmark inside. To its right is a padlock icon. Further right, the text "https://www" is visible, though partially cut off. The overall aesthetic is modern and digital.

For the ECHR, the internet is one of the most important media for exercising freedom of expression.

LEGAL BASES

THE SWISS FEDERAL CONSTITUTION

Freedom of expression is guaranteed in Article 16 of the Swiss Federal Constitution (FC). This comprises the right to form and hold an opinion, a right that may not be restricted. But Article 16 FC also includes the right to express and publicly disseminate an opinion without any intervention by the state. This aspect of freedom of expression may be restricted under certain conditions.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 10 of the European Convention on Human Rights ('the Convention') protects communications in general. This includes both freedom of expression and the right 'to receive and impart information and ideas without intervention by public authority and regardless of frontiers'.

THE SWISS FEDERAL CONSTITUTION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS – DIFFERENCES?

While Article 10 of the Convention makes an explicit distinction between freedom of opinion and freedom of expression, the protection provided by Article 10 of the Convention and Article 16 FC can substantially be regarded as comparable.

ECHR precedents are relevant for the interpretation of Article 16 FC, particularly in the case of content disseminated on the internet.

LAUSANNE OR STRASBOURG?

Before a matter can be taken to the European Court of Human Rights in Strasbourg, recourse before all competent national courts must be exhausted.

Before filing a complaint with the ECHR, the victim of a human rights violation must have brought claims in the competent Swiss courts at the various levels. The application must state in detail how the European Convention on Human Rights has been violated.

ECHR judgments often have wide-reaching impact and lead to changes in other member states. Public authorities adapt their practices and national courts refer to judgments of the court in Strasbourg.

Year	Case	ECHR judgments on freedom of expression on the internet	Page
2020	<u>Beizaras and Levickas versus Lithuania</u>	Complaint upheld: the national authorities should have initiated an investigation for hate speech and threats on Facebook.	17
2018	<u>Savva Terentyev versus Russia</u>	Complaint upheld: aggressive and shocking statements made against police officers in a blog do not constitute an incitement to violence and are protected by freedom of expression.	
2018	<u>Nix versus Germany</u>	Decision to dismiss the application without entering into the substance: art. 10 ECHR is applicable to the internet. However, the complaint appeared to be clearly without foundation.	8
2017	<u>Pihl versus Sweden</u>	Decision to dismiss the application without entering into the substance: posted comments are protected by freedom of expression. The complaint appeared to be clearly without foundation.	10
2016	<u>Cicad versus Switzerland</u>	Complaint rejected: the privacy of a book author is found to outweigh an association's freedom of expression.	
2015	<u>Delfi AS versus Estonia</u>	Complaint rejected: the service provider of an internet platform is liable for denigrating comments posted by users.	18
2012	<u>Mouvement Raëlien Suisse versus Switzerland</u>	Complaint rejected: restriction of the freedom of expression of an association in a poster campaign is justified.	14
2012	<u>Růžový panter o.s. versus Czech Republic</u>	Complaint rejected: restriction of the freedom of expression in the publication of whistleblower information on the internet may be justified.	
2009	<u>Willem versus France</u>	Complaint rejected: the banning of discriminatory incitements on the internet is a justified restriction of freedom of expression.	13

SCOPE OF PROTECTION

Restrictions to the freedom of expression are admissible if a legitimate goal is being pursued and the intervention is reasonable.

On his blog, Mr Nix had posted photos of Heinrich Himmler in SS uniform with a swastika armband. His intention had not been to disseminate Nazi propaganda, but to compare what he saw as the discriminatory practices of job centres and schools with those of the Nazi regime.

The court of final instance in Germany found Mr Nix guilty of slandering third parties and using the emblems of anti-constitutional organisations. Moreover, it was unable to establish any specific

link between the blog text and the policies that the Nazi symbols stood for.

In its decision on Mr Nix's complaint, the ECHR ruled in 2018 that Article 10 of the Convention was applicable to the internet as a medium of communication and the publication of photographs on a website did fall within the scope of freedom of expression. States did however have a margin of appreciation devolving from their historical experience: national courts could decide on the acceptability of posts with National Socialist content. Restriction of the freedom of expression of Mr Nix was reasonable and 'necessary in a democratic state'.



Article 10 of the European Convention on Human Rights is applicable to the internet as a medium of communication and the publication of photographs on an internet site falls within the scope of freedom of expression.

CASE EXAMPLE

FREEDOM OF EXPRESSION VS. THE RIGHT TO PRIVACY

Service providers and comments posted on the internet are protected by freedom of expression. The privacy of third parties is also to be protected. To resolve conflicts between these imperatives, the ECHR balances the legal interests of the parties against each other.

Defamatory content about Mr Pihl was posted on the blog of a small non-profit organisation by an anonymous user. Mr Pihl brought an action asking that the service provider be held liable for the

third party's comment. The court of final instance in Sweden dismissed the claim. Mr Pihl then took the matter to the ECHR, on the basis that failure by the courts to provide appropriate protection was a violation of his right to privacy – including his individual rights and, as part of these, his human dignity.

The ECHR found in 2017 that the claim was inadmissible, since it was clearly without foundation. The national authorities had balanced the respective interests fairly, the court said. While the comment was indeed defamatory, it was not hate speech or an incitement to violence. Furthermore, the comment had been posted on a small platform and was online for only nine days, as it was deleted following the objection by Mr Pihl.

Online comments are not protected
by freedom of expression if they
constitute hate speech or an
incitement to violence.

In the view of the ECHR, the risk of a breach of privacy is greater on the internet than in speech or in the print media.



CASE EXAMPLE

SPECIAL CHARACTERISTICS OF THE INTERNET

The application of Article 10 of the Convention may be restricted to a greater extent in case of statements made on the internet than of statements made at physical meetings or in the print media.

Mr Willem, as mayor of a French municipality, made a speech at a meeting calling for a boycott of products from Israel. This call was also taken up by the press. In addition, Mr Willem published his call for a boycott on the municipality's website. Members of the Jewish community took legal action against this, claiming the call was discriminatory and antisemitic and thus violated their privacy.

The court of final instance in France found that the call for a boycott on the internet was indeed discriminatory and sentenced Mr Willem to payment of a fine.

In 2009, the ECHR ruled that the verbal call for a boycott during the political debate at the meeting and reporting in the press was protected by freedom of expression and that Mr Willem had rightly not been fined. However, publication of the call on the internet had changed the situation, the court found: dissemination on the internet had aggravated the discrimination, because potential reproduction and reach on the internet were significantly greater than in the print media. In addition, the court said, in contrast with the political debate during the meeting, the posting of such a call on the internet did not provide any opportunities for debate or voting.

CASE EXAMPLE

POLITICALLY SENSITIVE CONTENT

The scope for restricting freedom of expression in the context of political debate is very limited.

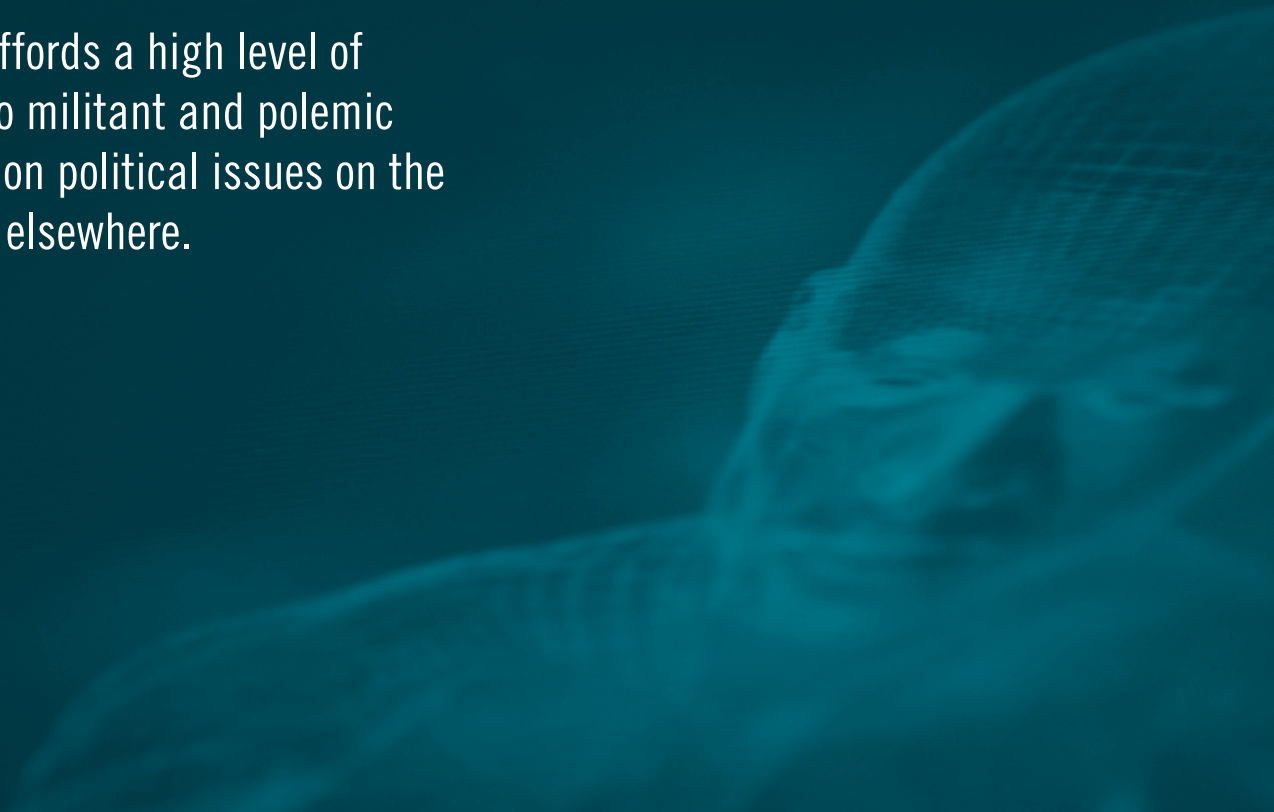
The Federal Supreme Court of Switzerland prohibited the Mouvement Raëlien Suisse association from conducting a poster campaign on public land. As well as on posters, the campaign was conducted on the association's website. The campaign included content supporting human cloning and offering services for this purpose and expressed views in favour of pedophilia and incest.

In 2012, the ECHR endorsed the Supreme Court's decision that it was necessary to ban the poster

campaign in order to safeguard health and morality and to prevent breaches of the law in Switzerland. Since the posters had been put up on public land, the court said, they would have created the impression that the Swiss state supported the views of the complainants.

Accordingly the ECHR found that the restriction on freedom of expression was justified with regard to the posters. It emphasised, however, that the association was permitted to conduct its campaign and the related debate on its website without restriction, even though the site was only marginally concerned with social or political ideas.

The ECHR affords a high level of protection to militant and polemic statements on political issues on the internet, as elsewhere.



The background of the slide is a close-up, slightly blurred photograph of a computer keyboard. The keys are visible, but the focus is soft. A solid teal color is overlaid on the entire image, creating a monochromatic effect. The text is positioned in the lower right quadrant of the slide.

The ECHR sees states as obliged to take
appropriate measures against hate
speech and incitements to violence on
the internet.

CASE EXAMPLE

THE STATE'S OBLIGATIONS WITH REGARD TO HATE SPEECH AND INCITEMENTS TO VIOLENCE

The state has a duty to protect and to provide with regard to hate speech and incitements to violence.

A homosexual couple in Lithuania posted a photo on Facebook in which they could be seen kissing. This attracted a flood of hate comments, including statements such as 'these individuals and all homo-

sexuals should be burned, exterminated, hanged, gassed and killed'. The Lithuanian authorities categorised the comments as merely 'immoral' and declined to initiate a criminal investigation.

In 2020, the ECHR classified the comments as hate speech and an incitement to violence. It found that the dignity and therefore the privacy of the complainants had been violated: the national authorities had failed to perform their obligation to protect, by failing to protect the complainants from offences against their dignity by third parties and by failing to provide redress. The authorities had further failed to perform their duty to provide. They had obstructed any effective complaint by the couple, even though the prohibition on discrimination had been violated. The authorities were obliged to provide the victims with appropriate opportunities to lodge a complaint against the violation of their privacy.

CASE EXAMPLE

LIABILITY OF SERVICE PROVIDERS

The ECHR has formulated a set of criteria as to when service providers may be held liable for user generated comments on their platform.

Delfi AS is the service provider of an internet news platform based in Estonia. It was held liable by the court of final instance for hate comments by third parties on its platform and fined 320 €. Delfi AS appealed the judgment before the ECHR.

In 2015, the ECHR ruled on when a service provider is to be held liable for online comment. The specific criteria were as follows:

- how extreme the statements are;
- whether the provider allows the anonymous posting of comments;
- whether the provider did enough to remove the comments in question;
- how long the comments remained online;
- and the extent to which the penalties imposed on the provider by the national authorities were reasonable.

After reviewing the case in the light of the above criteria, the ECHR came to the conclusion that Delfi AS was liable for the comments of its users. The fine was therefore a reasonable restriction of Delfi AS's freedom of expression.

For the first time, the ECHR has confirmed the liability of a service provider for illegal online comments of third parties.

News

DELFI

THE ECHR HAS FOUND IN MY FAVOUR – WHAT HAPPENS NOW?

The judgments of the ECHR have to be implemented by the national authorities.

The decisions of the ECHR in Strasbourg are legally binding. But all the ECHR can do is determine that there has been a violation of the Convention and award indemnification to the victim. It is not able to revoke any national laws that are contrary to human rights or to release individuals from prison. Implementation of its judgments is instead in the hands of the authorities of the member state in question.

DOCUMENTATION

This brochure is part of our series on the importance of human rights for specific occupational groups and sectors of society.

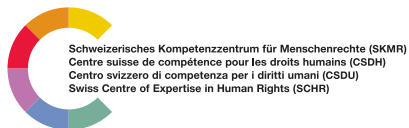
Previous brochures:

- The European Court of Human Rights and the Right to a Fair Trial
(2018; German, French, Italian)
- The European Court of Human Rights – Protecting Businesses
(2017; English, German, French, Italian)
- The European Court of Human Rights and Freedom of the Media in Switzerland
(2016; German, French, Italian)

The brochures are available at

www.csdh.ch > publications

Layout: **do2** Dominik Hunziker
Cover photo: © ECHR-CEDH Council of Europe



July 2020

Swiss Centre of Expertise in Human Rights
Schanzeneckstrasse 1, case postale, 3001 Berne