



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

**Video message for European Conference
on Democracy and Human Rights**

***Freedom of expression: A cornerstone for humanity
and democracy***

Message from Robert Spano

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Let me begin by thanking very warmly Mayor Jan Oddvar Skisland and the City of Kristiansand for inviting me to address this 2nd European conference on democracy and human rights co-organised with the Council of Europe and other local partners.

In 1964, the Committee of Ministers of the Council of Europe decided that 5 May, the anniversary of the founding of the Council of Europe, should be celebrated as Europe Day. You have chosen this auspicious date for your conference. This year you will address the conditions of freedom of speech and media freedom, and the situation of democracy in Europe in the wake of the pandemic.

I have been asked to speak about freedom of expression in the case-law of the European Court of Human Rights (“the Court”). After setting out the main principles of this freedom (I), I would like to look at the importance of preserving freedom of expression during times of crisis, such as the present global pandemic (II), before concluding with some general remarks (III).

But first a preliminary remark: the World Press Freedom Index for 2020¹ ranks Norway as first out of 180 countries on the basis of its media freedom, next come its neighbours, Finland, Denmark and Sweden. This annual index is a snapshot of the media freedom situation in the country based on an evaluation of pluralism, independence of the media, quality of legislative framework and safety of journalists. We measure media freedom, because freedom of expression, a broader concept, is indissociable from democracy, it is a measure of how far a country is deemed “free”. It has been said that freedom of expression is the condition *sine qua non* for a genuine pluralist democracy. Freedom of expression is not only a safeguard against interferences by the State, it is also an objective fundamental principle for life within a democracy.

Interestingly, those same four countries, including Norway, appear in the top four of the World Justice Project’s Rule of Law index for 2020² (albeit in a different order). As the Court has consistently held in its judgments there is a clear link between freedom of expression, democracy and the rule of law.

¹ <https://rsf.org/en/ranking>

² https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf

Despite the fact that the European Convention on Human Rights deals with many core rights such as the right to life and freedom from torture, Article 10 of the Convention, its free speech provision, is often regarded as one of the most central and fundamental provision of the Convention. One may ask: why is that?

Let us now turn to Article 10 of the Convention.

I. Article 10 of the European Convention on Human Rights (“the Convention”)

Article 10 of the Convention has its origins in Article 19 of the Universal Declaration of Human Rights (1948). Similar provisions can be found in Article 19 of the International Covenant on Civil and Political Rights (1966), Article 13 of the American Convention on Human Rights (1969), Article 9 of the African Charter on Human and Peoples' Rights (1981) and Article 11 of the Charter of Fundamental Rights of the European Union (2000). These examples demonstrate the universal importance of freedom of expression in human rights instruments. Article 10 covers not just the right to hold opinions, but also to receive and impart information.

In its interpretation of Article 10 of the Convention, the European Court of Human Rights has held, in a now rather well-known phrase dating back to 1976 that “*freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man*”³.

Why is freedom of expression so crucial for democracy?

The exercise of this freedom has been, and remains, one of the essential factors allowing transition from authoritarian rule to democratic government. Conversely, when an authoritarian regime takes power, its first measures are usually to abolish freedom of expression and silence the press, or more recently the internet.

I would like to make two points here. Firstly, that freedom of expression permits proper scrutiny of government and therefore contributes in an important way to making government accountable. Secondly, creating a favourable environment to freedom of speech has the consequential effect of creating a favourable environment for minority groups within society, although as always this will not be achieved without maintaining a proper balance between the right itself and commensurate duties and obligations. Freedom of expression should not be a vehicle for the destruction of other human rights

As the Court has repeatedly held freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.

³ Handyside v. the United Kingdom, § 49.

The Court has emphasised on several occasions the importance of Article 10, which is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”⁴. Freedom of political debate, which is at the very core of the concept of a democratic society, also includes the free expression by prohibited organisations of their views, provided that these do not contain public incitement to commit terrorist offences, or condone the use of violence.⁵

In addition to those general considerations, the Court has explored in its case-law the States’ positive obligations in protecting the exercise of this right. These positive obligations imply, among other things, that States are required to establish an effective mechanism for the protection of authors and journalists in order to create a favourable environment for participation in public debate. This enables them to express their opinions and ideas without fear or violence, even if they run counter to those defended by the official authorities or by a significant part of public opinion, or even if they are irritating or shocking to the latter.⁶ In consequence, Article 10 of the Convention enjoys a very wide scope, whether with regard to the substance of the ideas and information expressed, or to the form in which they are conveyed.

Indeed, there is little scope under Article 10 of the Convention for restrictions on political speech or on debate concerning questions of public interest.

Despite its importance, or perhaps because of it, Article 10 is not an absolute right. It operates on two levels: it first of all lays down a principle (the freedom guaranteed), then provides for exceptions (the limitations permitted).

It may happen that the exercise of the right to freedom of expression interferes with other rights safeguarded by the Convention and its Protocols. In such cases, the Court examines whether the national authorities have struck a proper balance between protection of the right to freedom of expression and other rights or values guaranteed by the Convention⁷. The search for a fair balance may entail a weighing up of two rights of equal status. These cases typically involve the rights protected by Article 6 § 2 (presumption of innocence)⁸ and by Article 8 of the Convention (private life including the right to protection of one’s reputation)⁹.

Before I move on to discussing freedom of expression during times of crisis, I would like to mention here the impact of the technological revolution we have lived through during the last decade in particular. The Internet has provided an unprecedented platform for the exercise of freedom of expression. The benefits to democracy are evident. However, alongside these benefits, certain dangers also arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds,

⁴ *Handyside v. the United Kingdom*, § 49; *Observer and Guardian v. the United Kingdom*, § 59.

⁵ See for example *Gözel and Özer v. Turkey*, nos. 43453/04 and 31098/05, § 56, 6 July 2010

⁶ *Dink v. Turkey*, § 137; *Khadija Ismayilova v. Azerbaijan*, § 158.

⁷ *Perinçek v. Switzerland* [GC], § 274.

⁸ *Bladet Tromsø and Stensaas v. Norway* [GC], § 65; *Axel Springer SE and RTL Television GmbH v. Germany*, §§ 40-42; *Eerikäinen and Others v. Finland*, § 60

⁹ *Axel Springer AG v. Germany* [GC], §§ 83-84; *Von Hannover v. Germany* (no. 2) [GC], §§ 104-107.

and sometimes remain persistently available online.¹⁰ I know that your conference will look at how societies must respond to hate speech, and particularly online hate speech. This is a crucial topic which has to be addressed.

II. Freedom of expression in times of crisis

Freedom of expression and information and freedom of the media continue to play an important role in our societies in times of crisis, such as wars, terrorist attacks and also natural disasters such as global pandemics. This role is also coupled with increased responsibility, in providing accurate, reliable information to the public (countering misinformation and so-called fake news) but also in preventing panic and fostering people's understanding for and cooperation with necessary restrictions. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them.

As reaffirmed in the Council of Europe Guidelines on protecting freedom of expression and information in times of crisis, Article 10 of the European Convention on Human Rights and the relevant case law of the European Court of Human Rights remain the fundamental standards to be applied in the exercise of those rights.

As I have had the opportunity of saying previously, the pandemic is not only a crisis in the sanitary sense. It is a crisis for the further development of European democracy, the rule of law and for the protection of human rights. Crisis situations, such as the current pandemic, should not be used as a pretext for restricting the public's access to information or clamping down on certain journalists whose views are critical of the governing powers. On the contrary, in times of crisis we need more access to reliable information. However, media organisations and journalists must adhere to the highest professional and ethical standards - what we call responsible journalism.

I would like to share with you four principles which I have drawn together and which I consider essential in preserving human rights, including freedom of expression, in the current pandemic.

Firstly - The public interest, whilst undoubtedly important, cannot be an absolute trump card for national authorities in the fight against the pandemic. The Convention requires proportionality, a balance to be struck between the public interest and the autonomy of the person. The responsibility for striking that balance is at the outset for the national authorities, but is subject to European supervision by the Court within the Council of Europe. In short, the Convention requires all national authorities, the legislative, executive and judicial branches, to engage with the principle of proportionality in good faith.

Secondly - The principle of legality, based on the primordial principle of the rule of law that permeates the Convention as its lodestar¹¹ will become ever more salient when lockdowns, restrictions on freedom of movement and other such measures are imposed. The principle of legality requires that

¹⁰ *Delfi AS v. Estonia* [GC], no. 64569/09, § 110, ECHR 2015

¹¹ R. Spano, The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary, *Eur Law J.* 2021;1–17.

measures taken at national level are accessible and foreseeable. This precludes vague and overbroad rules that run the risk of unpredictability and arbitrariness in their enforcement.

Thirdly - Rules adopted at national level as a basis for pandemic-related measures restricting individual rights must not afford excessive discretion to the executive. In a true democracy, the executive must not be the sole arbiter of what rules are applicable. The democratically-elected legislator must be reactive and up to the task of engaging with the difficult balancing of interests required in this field.

Fourthly - The adoption of emergency laws or declarations deviating in general from Convention guarantees must be strictly tailored to meet the exigencies of the situation. Emergency laws should not become the new normal. The pandemic may well alter our way of life, but the Council of Europe should be at the forefront in making clear that it must not eradicate the system of fundamental values which forms the cornerstone of the Council of Europe and the European Convention on Human Rights.

III. Concluding remarks

Freedom of expression and freedom of the press are primordial for the establishment of a democratic society. This is why they must be protected at all costs, by sustaining a favourable environment for debate and a free exchange of ideas. This is even more important in times of crisis, such as the present global health crisis.

While the European Convention system and the European Court of Human Rights may not be on the frontline in the sanitary sense, we are certainly on the frontline in safeguarding and promoting the rights and values embedded within the Council of Europe structure and the European Convention on Human Rights and Article 10 in particular.

Thank you for your attention and I wish you a very fruitful day of discussions.