Prof. Dr. Tobias Keber[1]

Secrecy and Publicness in Digital Democracies – The Netzpolitik.org Case from multiple legal perspectives

In July 2015, two reporters working for a German digital rights blog, came under suspicion for treason ("Landesverrat") after the publication of two leaked documents. The documents, internally classified as "confidential" revealed that Germany's domestic intelligence agency wanted additional funds and planned to expand internet surveillance. In Germany and Europe, the case sparked off a lively public debate over freedom of press and criminal liability of informants leaking secrets to media. The Netzpolitik.org case may also serve as a good starting point for a fundamental analysis concerning the concepts and the interaction between secrecy, privacy, publicity (publicness), and transparency in democratic states.

I. Introduction

According to common state practice, there is a form of legislation devoted to the protection of state secrets in roughly all national criminal code(s).[2] Hence, from the international law perspective, there is a "right to privacy for states". Arguably, the opposing concept (maximum transparency of state action) was advocated by Immanuel Kant. In the second appendix of his writing "Zum ewigen Frieden" (Perpetual Peace) Kant underlined the "transcendental principle of the publicity of public law".[3] Kant argued that "All actions relating to the right of other men are unjust if their maxim is not consistent with publicity." This indicates that Kant highlights the human rights dimension of publicity.[4]

A government's desire to keep information secret on national security grounds may conflict with the public's right to know. The latter may be interpreted as being complementary to the freedom of the press. Access to information for the public is certainly a key element of democratic participation. The right to know enables public scrutiny of state action. It is a human right which -in the sense of a liberal understanding of fundamental rights- obliges the

[1] Tobias Keber, Lawyer and since 2012 Professor at the Stuttgart Media University Chair for Media Law and Policy, Faculty Electronic Media. Lecturer (Internet- and Media-Law) at the Mainz Media Institute and the University of Koblenz-Landau. In honorary capacity, Tobias Keber is Co-Head of Institute for Digital Ethics and Head of the Scientific Advisory Board of the German Association for Data Protection and Data Security (GDD). For details and publications see: http://www.rechtsanwalt-keber.de.

[2] For an overview see Larsen/Atcherley, freedom of expression-based restrictions on the prosecution of journalists under state secrets laws: a comparative analysis, 50 J. Int'l Media & Entertainment Law 49-109.

[3] "Alle auf das Recht anderer Menschen bezogene Handlungen, deren Maxime sich nicht mit der Publicität verträgt, sind Unrecht. Dieses Princip ist nicht bloß als ethisch (zur Tugendlehre gehörig), sondern auch als juridisch (das Recht der Menschen angehend) zu betrachten." English text of the second appendix available at: http://www.constitution.org/kant/append2.htm. For an interpretation of Kant's concept of publicity, see Wegener, Der geheime Staat, p. 143.

[4] For a similar approach (no protection of state secrets), see the hacker ethics, providing inter alia: "Make public data available, protect private data." Ethics available via the Chaos Computer Club via: http://dasalte.ccc.de/hackerethics?language=en. See also Murray, Should states have a right to informational privacy? in: Klang / Murray (ed.) Human Rights in the Digital Age, pp. 191 ff.

state to do or to refrain from certain actions. The state has the duty to protect human rights. In certain circumstances, this includes keeping information secret in order to protect people, as a part of the national security interest.

The potential threat for state secrets was emphasized in discussions regarding the whistleblower platform Wikileaks. For example, in 2010, Amnesty International and three other prominent rights groups called on the whistleblower website to expunge the names of Afghans mentioned in the war logs because of the fear of being targeted by insurgents. In November 2009, WikiLeaks published the '9/11 messages', a massive archive including thousands of text messages sent on September 2001 in the wake of the terrorist attacks on New York and Washington.

Striking the right balance between transparency and secrecy is essential for modern (digital) Democracies. The Netzpolitik.org case perfectly exemplifies the problem.

II. The Netzpolitik.org Case

1. Facts of the case

Netzpolitik.org is a Berlin-based digital rights blog founded in 2002 covering topics like mass surveillance, open source software, data protection, privacy and net neutrality. On July, 30th 2015 the editors of the blog, Markus Beckedahl and Andre Meister received a letter from the Federal Public Prosecutor (German: Generalbundesanwalt). The Generalbundesanwalt is representing the federal government of Germany at the Bundesgerichtshof, the federal court of justice. The Generalbundesanwalt, at that time Harald Range, has primary jurisdiction in cases of crimes against the state and in his letter confirmed ongoing investigations against Netzpolitik.org. To be more precise, Beckedahl, Meister and their unknown sources were suspected of Treason. The letter from the Generalbundesanwalt [5] was based on complaints from the Federal Office for the Protection of the Constitution (Verfassungsschutz). The Verfassungsschutz argued that Netzpolitik.org had published two articles[6] disclosing classified documents from the Verfassungsschutz which is Germany's domestic intelligence agency.

The first article (original title: "Secret Moneyrain: Federal Office for the Protection of the Constitution is working on mass analysis of internet content") had been published by netzpolitik.org in February 2015 and reported on the German government's plans to collect and monitor troves of Internet and social media data. The Article also indicated that there was a secret budget for the government´s programme. The article asserted that the government's plans mirrored the mass data acquisition by the NSA in the US. In order to substantiate netzpolitik.org´s critical viewpoint, the article included the link to a pdf-file containing the full text of a leaked secret surveillance budget from 2013.

[5] The original letter and also an English translation of the text is available at: https://netzpolitik.org/2015/suspicion-of-treason-federal-attorney-general-announces-investigation-against-us-in-addition-to-our-sources/.

[6] English Abstract of the articles available at: https://www.eff.org/deeplinks/2015/07/german-investigation-netzpolitik-coverage-leaked-surveillance-documents-confirmed.

The second article (original title: “Secret unit group: we are presenting the new Federal Office for the Protection of the Constitution-Unit concerning the extension of internet surveillance”) had been published by netzpolitik.org in April 2015 and reported on the German secret service’s plan to set up a new Internet surveillance department dedicated to improving and extending the government’s mass surveillance capabilities. The German version of the article included the full text of a leaked document describing the government’s plans for the new unit officially called “Extended Specialist Support Internet” department.

According to the Federal Public Prosecutor, the disclosure of those documents gave rise to the suspicion of treason appropriate to Section 94 Para 1 Number 2 of the German Penal Code. This provisions stipulates that “Whosoever […] allows a state secret to come to the attention of an unauthorised person or to become known to the public in order to prejudice the Federal Republic of Germany or benefit a foreign power and thereby creates a danger of serious prejudice to the external security of the Federal Republic of Germany, shall be liable to imprisonment of not less than one year.”[7]

Also on July, 30th Netzpolitik.org published an article under the headline „Suspicion of Treason: Federal Attorney General[8] Announces Investigation Against Us.” They informed their readers about the investigations and made the original letter of the Federal Public Prosecutor available online (full text).

Shortly after, 1500 journalists, citizens and civil society representatives signed a statement[9] declaring that the investigation for treason and their unknown sources is an attack against the free press, and demanding to put an end to it. A demonstration supporting Netzpolitik.org was organised on 1 August in Berlin. In Social Media, people posted under #landesverrat. The (traditional) Media covered the case. For example, the Frankfurter Allgemeine Zeitung asked why the grave charge of treason had been employed “to train the big guns of the judiciary on the poor bloggers of netzpolitik.org.”[10]

Following the protests, the Generalbundesanwalt decided to put the investigation on hold, and stated that he would “await the results of an internal investigation into whether the journalists had quoted from a classified intelligence report, before deciding how to proceed.” In his press-statement[11] he harshly criticised "political influence" on the suspected treason investigation and said that he had been pressured into putting the inquiry on hold by Justice Minister Heiko Maas.

On 5 August, after consultations with Chancellor Angela Merkel’s office, Justice Minister Heiko Maas dismissed Harald Range. Less than a week after Range’s dismissal, the now acting Federal Public Prosecutor announced that he had concluded, in agreement with the

[7] An English Version of the German Penal Code is available at: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0973.
[8] Netzpolitik.org translates “Generalbundesanwalt” as “Federal Attorney General”.
[9] The petition is avalable at https://netzpolitik.us/statement/.
[10] See also “German Journalists Celebrate as Treason Inquiry Is Dropped”, New York Times, Aug. 10th, http://www.nytimes.com/2015/08/11/world/europe/germany-treason-reporters.html?_r=0.
[11] In German available at http://www.generalbundesanwalt.de/de/showpress.php?themenid=17&newsid=560.

Ministry of Justice, that the leaked documents didn't constitute state secrets, and that the investigation will be dropped.[12]

2. Aftermath - Donations up, Press freedom down?

For Netzpolitik.org, the case meant a monetary blessing. Donations had poured in to help the bloggers' legal battle. In August, Netzpolitk.org had received 50.000 Euro in a few days. The year before it was 180.000 € in total. From the legal science perspective, one may regret that through the dropping of the accusations, possible proceedings in front of the Federal Constitutional Court in Germany became moot. Unfortunately, there is no second (third) Spiegel Case. Anyway, the case definitely left scars within Germany's public discourse. Against this background, it is not sure that Germany will rank 12th again in the forthcoming World Press Freedom Index.[13]

3. Treason, State Secrets and German (Case) Law

a. Provisions in the German Criminal Code

Section 93 GCC provides the legal definition of "state secret" stating:

(1) State secrets are facts, objects or knowledge which are only accessible to a limited category of persons and must be kept secret from foreign powers in order to avert a danger of serious prejudice to the external security of the Federal Republic of Germany.

The Provision relevant in the Netzpolitik.org-case is treason in Section 94 GCC which states:

(1) Whosoever

1. communicates a state secret to a foreign power or one of its intermediaries; or

2. otherwise allows a state secret to come to the attention of an unauthorised person or to become known to the public in order to prejudice the Federal Republic of Germany or benefit a foreign power

and thereby creates a danger of serious prejudice to the external security of the Federal Republic of Germany, shall be liable to imprisonment of not less than one year.

Section 353b GPC sanctions the "breach of official secrets and special duties of confidentiality" stating:

(1) Whosoever unlawfully discloses a secret which has been confided or become known to him in his capacity as

1. a public official;

[12] Järvinen, Netzpolitik.org case: Prosecutor dismissed, inquiry dropped available at https://edri.org/netzpolitik_case_prosecutor_dismissed_inquiry_dropped/.

[13] The Reporters Without Borders World Press Freedom Index ranks the performance of 180 countries according to seven criteria that include media pluralism, independence, respect for the safety and freedom of journalists as well as the the legislative, institutional and infrastructural environment in which the media operate. For the index see http://index.rsf.org/#!/. Details for Germany http://www.hlci.de/wp-content/uploads/2015/08/HLCI-Request_for_Inquiry.pdf.

2. a person entrusted with special public service functions; or

3. a person who exercises duties or powers under the laws on staff representation

and thereby causes a danger to important public interests, shall be liable to imprisonment not exceeding five years or a fine. If by the offence the offender has negligently caused a danger to important public interests he shall be liable to imprisonment not exceeding one year or a fine.

(…)

b. Secrets and FCJ/FCC-decisions

In the Netzpolitik.org case, one can safely argue that the information concerned "facts only accessible to a limited category of persons". But was it also facts that "must be kept secret from foreign powers in order to avert a danger of serious prejudice to the external security of the Federal Republic of Germany"? In order to answer this question, the relevant decisions of the German Federal Court of Justice FCJ and the Federal Constitutional Court FCC have to be taken into account.[14]

According to a decision of the Federal Court of Justice from 1965[15] , this disclosure of secrets may be legitimate under certain, very strict conditions. The accused (Mr. Werner Pätsch) had been an employee of the German Domestic Intelligence Agency. During his work, he discovered that the Agency practiced illegal wiretapping. He was reluctant to confide in his superiors as they, in his view, constituted a clique of individuals that had worked for the former Secret State Police (Gestapo). Pätsch therefore contacted a lawyer and later informed the press (the Spiegel) regarding the illegal wire tappings.[16] Against this background, he was accused of having disclosed secrets in the sense of Sections 93 ff and 353b of the Criminal Code. In the decision, the Federal Court of Justice made it clear that Article 5 of the German Constitution provides the right to reveal serious irregularities in agencies in order to remedy abuses. If this information concerns state or official secrets, the person disclosing it must limit the information to that which is strictly essential to end the abuse. Furthermore, prior to communicating with the public, superiors within the agency must be contacted. In exceptional cases where the constitutional order is seriously infringed, the public may be directly informed.[17] Against this background, Pätsch was convicted but the sentence was lenient (suspended sentence).

In the Wallraff/Bild Decision,[18] the Federal Constitutional Court made clear that the propagation of unlawfully acquired information falls within the protective scope of the

[14] In that regard see also Keber, Secrecy, Privacy, Publicity, Transparency in: Dörr, Dieter/Weaver, Russell L. (eds.): The Right to Privacy – Perspectives from Three Continents. Berlin, Boston: de Gruyter, S. 344-356.
[15] Federal Court of Justice, ruling of 8. 11. 1965 - 8 StE 1/65.
[16] See Spiegel Article 40/1963. Online available at: http://www.spiegel.de/spiegel/print/d-46172126.html.
[17] Federal Court of Justice, decision of 8. 11. 1965 - 8 StE 1/65.
[18] BVerfGE 66, 116, 1 BvR 272/81, English text available at http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=638.

freedom of the press.[19] The Court also turned to potential limits and the significance of the concerned knowledge in informing the public and for the formation of public opinion.

In its groundbreaking Spiegel decision,[20] the Federal Constitutional Court carefully balanced the necessity of military secrecy and State security as well as the freedom of the press. In an article published in 1962 called "Bedingt abwehrbereit" ("prepared for defense to limited extent") the sorry state of the German Army (Bundeswehr) had been uncovered on the basis of secret military information.[21] The publisher of the magazine, Rudolf Augstein was accused of treason (Landesverrat)[22] and the editorial offices of Spiegel were searched. The Constitutional Court, reviewing the constitutionality of these acts, stated in the Spiegel decision:

"the significance of the published facts, etc. are to be taken into consideration both for the potential opponent and for the formation of political opinion on a case-by-case basis; the threats to the security of the nation that might arise from publication are to be balanced against the need to be informed of important events, including in the area of defense policy"[23]

The eight judges[24] delivering the ruling each balanced the affected legal interests quite differently. Four judges ruled against a violation of press freedom, giving State security interests the right of way.[25] The other four judges (stalemate) argued inter alia:

"the uncovering of fundamental weaknesses in defense readiness may in the long term be more important than secrecy, despite the military detriment to the good of the Federal Republic that this might initially entail; the public's reaction normally will prompt the responsible State organs to initiate the required remedial measures."[26]

[19] The case related to the question of whether a civil-court decision is compatible with freedom of the press when the civil-court decision condones the publication of information stemming from the editorial area of an organ of the press (Bild newspaper) that was acquired by an individual (Günter Wallraff) through deception as to his identity and intentions. Journalist Wallraff had worked undercover as "Hans Esser" in the Editorial Office of the "Bild" Newspaper in Hannover. He later reported his impressions in a book in which he dealt critically with journalistic methods, editorial work and the contents of the "Bild" Newspaper.

[20] Federal Constitutional Court (BVerfG), Decision of 05.08.1966, Az. 1 BvR 586/62, 610/63 and 512/64 (BVerfGE 20, 162, Spiegel), English Text of the Spiegel decision available at: http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=651.

[21] A transcript of the original article is available at http://www.spiegel.de/spiegel/print/d-25673830.html.

[22] For the indictment, see Federal Court of Justice, Decision of 13.5.1965, 6 StE 4/64, NJW 1965, 1187.

[23] Federal Constitutional Court, FN. 35 (Spiegel).

[24] The Federal Constitutional Court consists of sixteen justices, half of them elected by the Bundestag and the other half elected by the Bundesrat. The Court decides through the Plenary, a Senate or a Chamber. The Plenary (all sixteen members of the Court) decides, should one Senate wish to depart from the legal opinion of the other. Usually, one of the two Senates (with eight members each) or a chamber (three members each and there are three chambers in each Senate) decides. The Chambers primarily determine whether a constitutional complaint is to be admitted for decision.

[25] Section 15(4), third sentence of the Law on the Federal Constitutional Court (BVerfGG) states: "If the votes are equal, the Basic Law or other Federal law cannot be declared to have been infringed."

[26] Federal Constitutional Court, FN. 35 (Spiegel).

The voting result was clearer in Cicero, a case with quite a similar factual background.[27] In 2005, seven judges voted in favor of a violation of press freedom.[28] The Federal Constitutional Court stated that, in the view of press freedom, the mere publication of an official secret by a journalist within the meaning of section 353b of the Criminal Code was not sufficient to justify the suspicion that the said journalist had aided and abetted a breach of official secrecy.[29]

As a result of the Cicero affair, Section 353b(3a) of the Criminal Code was introduced, stipulating that journalists are not guilty of complicity to commit treason if their action is restricted to the receipt, processing or publication of the secret even if they got it from a civil servant who has a special duty of secrecy.[30]

The considerations in the Spiegel-Case, especially taking into account its unique historical context (cold war, delicate situation i.e. cuba crisis) lead to the assumption that the information in the Netzpolitik.org case did not constitute a state secret. The information was not that sensitive (budget questions, surveillance capabilities) and it is hard to argue that the Bloggers had the intention to prejudice the Federal Republic of Germany. It would also be daring to argue that the publication created a danger of serious prejudice to the external security of the Federal Republic of Germany. Hence, the new federal prosecutor was surely right when he dropped investigations.

III. A hypothetical Case Study

Assumed, investigations in Germany would not have been dropped and the bloggers would have been found guilty of treason. Suppose (not very likely), even the FCC would have confirmed the conviction. The bloggers from netzpolitik.org could have filed an individual complaint before the European Court of Human Rights arguing that Germany infringed their freedom of expression guaranteed in the European Convention on Human Rights.

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[27] In April 2005, the monthly political magazine Cicero had published an article about Islamic terrorist Abu Musab al Zarqawi in which it cited a confidential leaked internal report of the Federal Criminal Police Office (Bundeskriminalamt). Shortly afterwards the editorial offices and the private home of Bruna Schirra (author of the article) were searched and material was confiscated. The searches had been based on the suspicion that the journalist would be an accessory to the breach of official secrecy committed by the journalist's unknown "source".

[28] Decision of the Federal Constitutional Court of 27.02.2007, Az.: 1 BvR 538/06, 1 BvR 2045/06 (Cicero).

[29] Rather, specific factual evidence was required to show that the person concerned (the informant) had disclosed the secret aiming it´s publication. Otherwise, as the judges further stated, there was a risk that public prosecutors could instigate preliminary proceedings against editors or journalists just in order to discover the identity of the source. Federal Constitutional Court, Cicero, FN. 41. For a discussion of the case see Schmidt-De Caluwe, Pressefreiheit und Beihilfe zum Geheimnisverrat i.S. des § 353b StGB - Der Fall „Cicero" und die Entscheidung des BVerfG, NVwZ 2007, p. 640.

[30] Section 353b GCC states:

Breach of official secrets and special duties of confidentiality

(…)

(3a) Acts of aiding by a person listed under section 53(1) 1st sentence No 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.

1. ECHR and freedom of expression

The European Convention on Human Rights is an international Human Rights Treaty which entered into force in 1953.[31] The Treaty obliges the 47 Member States of the Council of Europe[32] to secure certain fundamental civil and political rights. In order to ensure the effective enforcement of those obligations, the convention also established the European Court of Human Rights (ECHR)[33] which is an international court based in Strasbourg, France. Individuals[34] may lodge a complaint arguing that a member State has breached the convention. The judgements of the ECHR are binding: the countries concerned have to comply. German administrative and judicial organs have a duty to take into account the European Convention on Human Rights and the relevant jurisprudence of the European Court for human rights.[35] The Court is not empowered to overrule national decisions or annul national laws, but if the Court finds that there has been a violation, it may award the individual a "just satisfaction". This is a sum of money in compensation for certain forms of damage. The execution of the Court's judgments is supervised by the Committee of Ministers of the Council of Europe.[36]

a. Article 10 ECHR and the doctrine of proportionality

Article 10 of the European Convention on Human Rights provides the right to freedom of expression and information. The provision states:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the

[31] Information documents concerning the ECHR and the ECtHR are available via http://echr.coe.int/Pages/home.aspx?p=court&c=#newComponent_1346149514608_pointer

[32] The Council of Europe must not be confused with the European Council and the Council of the European Union. The Council of the European Union (often referred to as the Council) represents the executive governments of the 28 EU's member states. Together with the Parliament, the Council forms the legislative body of the European Union. The European Council has no formal legislative power and sets the EU's policy agenda. The members of the European Council are the heads of state or government of the 28 EU member states, the European Council President and the President of the European Commission.

[33] The ECHR must not be confused with the European Court of Justice (the highest court of the European Union) which is based in Luxemburg.

[34] Inter-state cases are also possible, but they are rare. For a list of those cases see http://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf. For example, there are actually three inter-state applications lodged by Ukraine against Russia.

[35] For the legal significance of ECtR judgments within German national law, see the Görgülü Case, ECHR, No. 74969/01, Judgement of 26 February 2004. For a discussion of this case see Lübbe-Wolff ECHR and national jurisdiction - The Görgülü Case, HFR 2006, Beitrag 12, p.1.

[36] The Committee of Ministers is made up of the ministers of foreign affairs of each of the 47 member state or their permanent diplomatic representatives in Strasbourg. http://www.coe.int/T/CM/aboutCM_en.asp

disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

There is a substantial body of case-law regarding this article.[37] The Court has described freedom of expression as "one of the basic conditions for the progress of democratic societies and for the development of each individual".[38] But, as Article 10 para 2 makes clear, the freedom of expression and information is not absolute. The state may legitimately interfere with that freedom under three conditions:

1. restrictions must pursue one of the aims explicitly mentioned in article 10 para 2,
2. any restriction on freedom of expression must be prescribed by law and most important
3. any restriction must be "necessary in a democratic society".

The first condition means that the Member State must show that the national provision claimed to legitimise the interference pursued one of the aims listed exhaustively in Article 10 para 2. With respect to the second condition (prescribed by law/in accordance with the law) the Court made clear that this does not just mean some basis in the law of the country concerned. Generally, the law must be adequately accessible and sufficiently clear in its terms in order to enable the citizen to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[39] Also, national law has to provide a sufficient element of control over the relevant decision-maker in order to avoid the exercise of arbitrary action.[40]

The third condition incorporates the principle of proportionality. This principle requires that there is a reasonable relationship between a particular objective to be achieved and the means used to achieve that objective. In other words, the question is whether there is "a fair balance" between the general and individual interests. In its case law, the Court also asks whether a particular measure could be achieved by a less restrictive means. Regarding measures interfering with freedom of expression, the ECHR's proportionality test addresses, whether there is a pressing social need[41] for the relevant restriction and whether the particular restriction corresponds to that need.

The doctrine of proportionality marks the heart of the Court's investigation into the reasonableness of restrictions but there is a complex interaction with the principle of judicial restraint.

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[37] See Council of Europe Publishing, Human rights files, No. 18, http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18(2007).pdf; European Audiovisual Observatory (Ed) Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights, IRIS Themes, Vol. III (2015) http://www.obs.coe.int/en/iris-themes.

[38] Handyside v. the United Kingdom, judgment of 7 December 1976, Series A No. 24 para 49.

[39] Sunday Times, App No. 6538/74, judgment of 26 April 1979, para 49, Silver and Others judgment, App. Nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, judgment of 25 March 1983, paras. 87 and 88.

[40] Malone v. the United Kingdom, no.. 8691/79, judgment of 2 August 1984 para 67.

[41] Handyside v. UK, no. 5493/72, 7.12.1976.

b. Strict scrutiny vs margin of appreciation

In general, the Court does not deny that member states have some discretion in assessing what is necessary ("margin of appreciation"). On the other side, this cannot mean that there is no supranational review.[42] Hence, the exact scope (wide or narrow) of the margin of appreciation is subject to academic discussion and manifold case law.[43] It is undisputed that the scope varies according to the specific aim.

One may safely argue that national security interests require a wide margin because they are highly sensitive objectives and are closely related to State sovereignty, one of the basic principles of international law. This is the reasoning in some ECHR Cases. For example, the Court stated in the Klass v. Germany Case:[44] „it is not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field."[45] In another decision, the Court noted that the margin available to the State „in assessing the pressing social need [...] and in particular in choosing the means for achieving the legitimate aim of protecting national security, [is] a wide one."[46]

On the other hand, the Court has also stated: "Where there has been an interference in the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict, because of the importance of the rights in question; the importance of these rights has been stressed by the Court many times. The necessity for restricting them must be convincingly established".[47]

2. State Secrets and ECHR Case Law

If assumed the netzpolitik.org case would have been an individual complaint before the ECHR, what would have happened? There are some ECHR Decisions which are illustrative for balancing the interest in publishing certain information through the press versus the interest of the State in secrecy.

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[42] For further discussion, see Shany, „Toward a General Margin of Appreciation Doctrine in International Law?" (2005) European Journal of International Law 16 (No. 5), p. 907.

[43] Brems, „The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights" (1996) Heidelberg Journal of International Law 56, p. 240. See also Smith, The Margin of Appreciation and Human Rights Protection in the 'War on Terror': Have the Rules Changed before the European Court of Human Rights, Essex Human Rights Review Volume 8 Number 1, October 2011, p. 130.

[44] In Klass v Germany, the applicants challenged German legislation as it permitted surveillance measures without obliging the authorities in every case to notify the persons concerned after the event, and in that it excluded any remedy before the courts against the ordering and execution of such measures. The Court, aware of the increasing threat of terrorism, accepted that the existence of some legislation granting powers of secret surveillance was, under exceptional conditions, necessary in the interests of national security and/or for the prevention of disorder or crime. On the other hand, it held that States may not, in the name of the struggle against terrorism adopt whatever measures they consider appropriate. Adequate and effective guarantees against abuse of surveillance measures were essential.

[45] Klass v. Germany, App. No. 5029/71, (1978) para. 49.

[46] Leander v. Sweden, App. no. 9248/81 (1987) para. 59.

[47] Autronic AG v. Switzerland, judgment of 22 May 1990, Series A No. 178, para 61. See also Worm v. Austria, judgment of 29 August 1997, Reports 1997-V, para 47.

a. The spycatcher case: relevant information is already available

In Observer and Guardian v UK and Sunday Times v UK 1992 ("Spycatcher-Cases"), the ECHR found that the prohibition of newspaper publications detailing the contents of a book featuring inside information on the British special services was not in conformity with the freedom of expression. In line with the established body of case law,[48] the Court once more stressed the presses' role as a "public watchdog of democracy". Addressing the question as to whether the prohibition was "necessary in a democratic society", the court denied that due to the fact that the information (the book) was freely available elsewhere, namely in Australia where the book had been published without any restrictions.[49] Also in the Vereniging Weekblad Bluf! Case[50], the Court held that it was unnecessary to prevent the disclosure of certain information seeing that it had already been made public.[51]

b. The Stoll Case: timing and presentation

In the Stoll vs Switzerland case, a Swiss journalist filed his sentencing through national courts to pay a fine for having disclosed a confidential report by the Swiss ambassador to the United States in the press. The report was about the strategy to be adopted by the Swiss Government in the negotiations between the World Jewish Congress and Swiss banks. Key element of these negotiations was the subject of compensation due to Holocaust victims for unclaimed assets deposited in Swiss bank accounts.

In Stoll vs. Switzerland, the Court held that there had been no violation of Article 10.[52] The Court considered it vital to diplomatic services and the smooth functioning of international relations for diplomats to be able to exchange confidential or secret information. However, the confidentiality of diplomatic reports could not be protected at any price. Referring to the Goodwin-case[53], the Court also noted that the conviction of a journalist for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest. The Court speaks about to potential "chilling effect". As a result, the press may no longer be able to play its vital role as a "public watchdog" and the ability of the press to provide accurate and reliable information may be adversely affected.

[48] See for example ECHR, Goodwin vs. UK, Decision of 27 March 1996, no. 17488/90; ECHR, v. Hannover vs. Germany, Decision of 24 June 2004, no. 59320/00.
[49] ECHR, Observer and Guardian v. the United Kingdom, Decision of 26 November 1991, no. 13585/88.
[50] In the spring of 1987 the editorial staff of the left-wing Bluf! came into possession of a quarterly report by the internal security service. Dated 1981 and marked "Confidential", it was designed mainly to inform staff and other officials. It showed that at that time the internal security service was interested in, among other groups, the Communist Party of the Netherlands and the anti-nuclear movement. The editor of Bluf! proposed to publish the report with a commentary as a supplement to issue no. 267 of the journal on 29 April 1987. Later and due to proceedings brought against Bluf! by the internal security service, Bluf's premises were searched and the entire print run of issue no. 267 was seized. The police apparently did not take away the offset plates remaining on the printing presses. Hence, Bluf´s staff managed to reprint the issue and some 2,500 copies were sold in the streets of Amsterdam the next day.
[51] Vereniging Weekblad Bluf! v. the Netherlands - 16616/90, Judgment 9.2.1995, para 45
[52] Eurp. Conv. Prot. Hum Rights. ECHR, Stoll vs. Switzerland, Decision of 10 December 2007, no. 69698/01.
[53] Goodwin v. the United Kingdom, 27 March 1996, § 39, Reports 1996-II.

Balancing the conflicting interests, the Court analysed the exact content of the report and the potential threat posed by its publication. In doing so, the Court made clear that in this case the public's interest in being informed had to be weighed not against a private interest but against another public interest: the interest of the authorities in ensuring a positive and satisfactory outcome to the diplomatic negotiations.[54] Finding that the articles were published in the context of a public debate, the Court also noted that it was vital to diplomatic services and the smooth functioning of international relations for diplomats to be able to exchange confidential or secret information.

The Court noted that it was important to ascertain whether the disclosure of the report and/or the impugned articles were, at the time of publication, capable of causing "considerable damage" to the country's interests.[55] In that context the Court attached some importance whether the documents were classified as "confidential" or "secret". According to the Court's reasoning, the time of the publication may also heighten the risk of a potential threat. In the Stoll case, the publication fell in a time where negotiations on the issue of unclaimed assets were in a very sensitive phase. Finally, the Court also examined the way in which the articles had been edited. The Court argued that the vocabulary used was clearly liable to provoke a negative reaction from the other parties to the negotiations, namely the World Jewish Congress, and, in consequence, to compromise the successful outcome of negotiations. For example, the article discovered that the ambassador expressed the view that Switzerland's partners in the negotiations were "not to be trusted" but that it was just possible that "an actual deal might be struck" with them. Furthermore, he described them as "adversaries".[56]

3. Relevant Article 10 ECHR Case Law

a. Freedom of Expression and the internet

As the Grand Chamber of the ECHR in 2015 in the Delfi Case[57] noted, Article 10 of the Convention also applies to the Internet as a means of communication. The Court argued that "In light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information generally." But, the Court also made clear that the risk of harm posed by content and communications on the Internet is potentially higher than that posed by the press.[58]

The unique nature of the Internet has led the Court to establish specific criteria for balancing freedom of expression and respect for other rights or requirements. This is not just because of the fast and ubiquitous nature of the internet. Media convergence also plays an important

[54] Stoll vs. Switzerland, 115.
[55] In the same line of reasoning, the Court in the Vereinigung Demokratischer Soldaten Österreichs und Gubi case argued that prohibiting the distribution of a journal critical of military life to soldiers was disproportionate because the contents of the articles were not a serious threat to military discipline. Vereinigung Demokratischer Soldaten Osterreichs und Gubi v. Austria, no. 15153/89 judgment of 19.12.1994.
[56] Eurp. Conv. Prot. Hum Rights. ECHR, Stoll vs. Switzerland, Decision of 10 December 2007, Application No. 69698/01.Para 135.
[57] Delfi AS v. Estonia, no. 64569/09, 16 June 2015.
[58] Delfi AS v. Estonia, para 133.

role as the internet is also a distribution channel for audiovisual content. In that context and considering the "duties and responsibilities" of a journalist, the Court reiterated that it is commonly acknowledged that the audiovisual media often have a much more immediate and powerful effect than the print media.[59]

Internet specific "duties and responsibilities" of journalists may also be deduced from the already mentioned Stoll case. The Court argued: "(…) in a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance."[60]

b. Political and commercial speech

Political speech and comments on matters of general interest generally enjoy a high level of protection and generally imply a narrow margin of appreciation.[61] In contrast, the margin of appreciation is broader, where commercial speech is concerned.[62]

c. Article 10, amateur journalists and NGOs

In Steel & Morris v United Kingdom, the Government had pointed out that the applicants were not journalists, and should therefore not attract the high level of protection granted to the press under Article 10. The applicants had been involved in an anti-McDonald's campaign. Entitled "What's wrong with McDonald's?" they had produced and distributed a six-page leaflet harshly criticising the company. The Court rejected the argument of the government noting that in a democratic society even small and informal campaign groups, must be able to carry on their activities effectively and that a strong public interest in enabling such groups exists. It explains, that Individuals outside the mainstream contribute to the public debate.[63] In later decisions, the Court confirmed this approach arguing that Civil society organisations monitoring government performance, may have a similar role to the press acting as some kind of social watchdog.[64]

d. Case law regarding the protection of journalist's sources

According to established case law, another key element of press freedom is the protection of journalist's sources. That means that journalists have a right to refuse to reveal their sources, unless there is an overriding requirement in the public interest. The reason behind that principle is that "Without such protection sources may be deterred from assisting the press in informing the public on matters of public interest."[65] In Tillack vs Belgium,[66] the Court emphasised that the right of journalists not to disclose their sources cannot be considered a mere privilege to be granted or taken away depending on the lawfulness or

[59] Delfi AS v. Estonia, para 134.
[60] Stoll vs. Switzerland, para 104.
[61] Axel Springer AG v. Germany, no. 39954/08, para 90 and Morice v. France, no. 29369/10, para 125.
[62] Mouvement raëlien Suisse v. Switzerland, no. 16354/06, para 62.
[63] Steel & Morris v United Kingdom, Application no. 68416/01, 15 Feb. 2005 para 89.
[64] Társaság a Szabadságjogkért v. Hungary, App. 37374/05, 14 April 2009, para. 27. Riolo v. Italy, App. 42211/07 17 July 2008, para. 63. Vides Aizsardzības Klubs v. Latvia, App 57829/00, 27 May 2004, para. 42.
[65] Goodwin v. UK 27 March 1996.
[66] Tillack v. Belgium, no. 20477/05, 27 November 2007, para 65.

unlawfulness of their sources. It is part of the right to information, to be treated with the utmost caution. In the similar case Voskuil v. The Netherlands the ECHR added that in a democratic state the use of improper methods by public authority brought to light by the journalist and his source is precisely the kind of issue which the public have the right to be informed about.[67] In De Telegraaf v. The Netherlands,[68] again reiterating protection of journalist's sources-principle the court also noted the potentially chilling effect an order of source disclosure could have on press freedom. The Court stated that such a measure was not compatible with Article 10 unless it was justified by an overriding requirement in the public interest.[69]

e. Whistleblowing

A series of ECHR-Decisions addresses Whistleblowing. This means the exposure of certain information e.g. misconduct, corruption, mismanagement or illegal activity within an organization by a person, usually an internal employee, to the authorities in charge or to the general public. The ECHR stated: "In a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence."[70] Case by case, the ECHR decided whether the exposure of certain information by a doctor, teacher, geriatric nurse or through Intelligence Service personnel was justified by overriding public interests.[71]

The protection of whistleblowers is also enshrined in the Global Principles on National Security and the Right to Information, the so called Tshwane Principles (Principle 37). Even if these principles which were drafted right here in 2013 are non-binding, the principles reflect a broad consensus as well as internationally agreed standards and good practices. According to these principles information generally should be kept secret only if its disclosure poses a real and identifiable risk of significant harm to a legitimate national security interest (Principle 3). Principle 10 contains a list of categories of Information with a high presumption or overriding interest in favor of disclosure due to their special significance to the process of democratic oversight and the rule of law. This explicitly covers information concerning expenditures for governmental structures and information regarding the legal framework concerning surveillance of all kinds (Principle 10E)

[67] Voskuil v. the Netherlands, no. 64752/01, November 2007 para 70.

[68] In De Telegraaf v. The Netherlands a newspaper had published articles alleging that sensitive information on pending investigations by the Netherlands secret services (AIVD) into drugs and arms dealings had fallen into criminal hands. The journalists, in possession of the leaked files, working for were ordered to surrender the documents, but objected on the grounds that its source might be identifiable from fingerprints thereon.

[69] De Telegraaf v. The Netherlands, Application no. 39315/06, 22 November 2012, para 131.

[70] ECHR Grand Chamber 12 February 2008, Case No. 14277/04, Guja v. Moldova and ECtHR 8 January 2013, Case No. 40238/02, Bucur and Toma v. Romania.

[71] See Frankowicz v. Poland 16 December 2008, Marchenko v. Ukraine, 19 February 2009, Kudeshkina v. Russia 26 February 2011, Heinisch v. Germany, 21 July 2011, Sosinowska v. Poland, 18 October 2011, Bucur and Toma v. Romania, 8 January 2013.

IV. Conclusion

The Netzpolitik.org case lucidly illustrates the conflict between the government's desire to keep information secret and the public's right to know. After carefully balancing the rights concerned and taking into account the decisions of the FCC in the Spiegel Case, the case law of the ECHR as well as the Tshwane principles, the arguments of the former Federal Public Prosecutor appear to be ill founded.

The articles contained strong protected political speech. After the Snowden disclosures, surveillance issues trigger the highest public interest. Netzpolitik.org functioned as public (social) watchdog and the potential threat for the Federal Republic of Germany was minimal. No other result may be found looking at the circumstances of the disclosure. Neither was the time of the disclosure extraordinary sensitive, nor was the form of the presentation of the article some kind of immoderately sensational.

V. Links

For facts and opinions concerning the Netzpolitk Case see information via EDRI, BBC: German spy leaks website being investigated, eff.org: German Investigation of Netzpolitik For Coverage of Leaked Surveillance Documents Confirmed and Deutsche Welle: German press, politicians criticize 'absurd' Netzpolitik inquiry.

For related legal questions concerning WikiLeaks see Keber, in: Dörr, Dieter/Weaver, Russell L. (eds.): The Right to Privacy – Perspectives from Three Continents. Berlin, Boston: de Gruyter, S. 344-356.

Article 10 Case Law is available via HUDOC. For Article 10 ECHR case law see: Voorhoof, Freedom of Expression, the Media and Journalists. Case law of the European Court of Human Rights, Strasbourg, European Audiovisual Observatory, Iris, 2013, with T. Mc Gonagle (ed.), 404 p., E-Book.

For information concerning the right to know visit right2info.org.