



**Advisory opinion on the applicability
of Dutch law, the ECHR and the ICCPR
on infringements on privacy
and honour and reputation**

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INTRODUCTION

This advisory opinion was written on request of mr. H. Langenberg and mr. D. Gürses, attorneys with Schoolplein Advocaten (hereinafter: 'Schoolplein') in Utrecht. Inducement for the request of this opinion is a lawsuit that is to be brought before, amongst others, a Dutch court and the Court of Justice of the European Communities on behalf of a client of Schoolplein, professor Sison. Prof. Sison has been put on a list with (alleged) terrorists: first on a list from the Dutch government, and at the end of last year on a European Union list.¹ After being put on these lists, prof. Sison has been cut off by the Dutch government from social security, has gotten eviction notices and has lost his insurance.

The question considered in this report is whether the inclusion of the name of an individual in a list of terrorists in Council Decision 2002/974 is compatible with Dutch law, with the European Convention on Human Rights and Fundamental Freedoms (hereinafter: 'ECHR') and with the International Covenant for the protection of Civil and Political Rights (hereinafter: 'ICCPR').

This advice is divided into three chapters.

Chapter one deals with the relevant Dutch law and jurisprudence, and with article 8 ECHR and Article 17 ICCPR concerning honour and reputation. Chapter two deals with cases concerning security measures that affect individuals. Chapter three contains the conclusions.

1 Relevant Dutch law and jurisprudence, art. 8 ECHR, art. 17 ICCPR

¹ For the EU list, see <http://www.statewatch.org/news/2003/jul/terrlist2jun03.pdf>, viewed on the 7th of July 2003. This list was first adopted by the Council of the European Union at the end of 2001, and has since expanded. The EU tries to use this list to fight (international) terrorism.

Dutch law distinguishes between two types of privacy: relational privacy and informational privacy. The right not to be disturbed in one's relational privacy includes protection for all aspects of private life, for example one's home, workplace, car or (e-) mail.² An infringement on one of these protected areas is regarded as an infringement on one's privacy.

Informational privacy is a sort of privacy that does not lie within one's immediate living environment. The protection of this type of privacy means that a person has the right to know about, and (to a certain level) determine what happens with, information and data concerning his person that is gathered, saved and (possibly) open to third persons.³

These privacy rights are protected by different articles in various laws. For the relational privacy, the most important ones are articles 10(1) (protection of privacy), 12 (protection against intrusion into one's house) and 13 (protection of mail, phone and telegraph correspondence) of the Dutch Grondwet (Constitution). As this chapter mainly focuses on informational privacy, no further attention will be paid to relational privacy.

The concept of privacy is not completely clear in Dutch law.⁴ This is because it protects many different aspects of a person's life, and is in fact slowly, but constantly changing.⁵ At present, the common understanding seems to be that an individual can base the protection of honour and reputation on the right to (informational) privacy. That way, one can act against publishing wrong and/or wrongful personal data.⁶

1.1 Dutch jurisprudence on honour and reputation⁷

Often in honour and reputation cases, there is a conflict between the right to freedom of speech and the right to protect one's honour and reputation. In the present case, that will

² See E. Dommering *et al.*, *Informatierecht: Fundamentele rechten voor de informatiesamenleving*, Amsterdam, Otto Cramwinckel Uitgever (2002), p. 49.

³ *Supra* note 2, p. 50.

⁴ *Supra* note 2, p. 89.

⁵ See A.J. Nieuwenhuis, *Het Onbestemde Grondrecht: Twintig Jaar Eerbiediging van de Persoonlijke Levenssfeer*, in NJCM-Bulletin, no. 3a (2003), p. 246.

⁶ See *Kamerstukken I*, 15463, no. 2, p. 350; Staatscommissie Bescherming Persoonlijke Levenssfeer 1976, p. 20 and on, as cited *supra* note 2, p. 88.

⁷ In Dutch: 'eer en goede naam'.

most likely not be a good lead, since it will be difficult to construe that freedom of speech is needed for a state (after all, a state has no fundamental or human rights), the EU or the UN, to put someone's name on a list of names with (alleged) terrorists. This might be worth looking into further concerning the EU listing, but that is not within the scope of this advisory opinion.

Dutch law regards, *i.e.* an attack on someone's self-esteem as an infringement upon one's honour and reputation.⁸ The article that is mostly used in lawsuits where someone feels his honour and reputation are infringed upon, is article 6:106 of the Burgerlijk Wetboek (Civil Code). This article can only be invoked indirectly, as it does not actually protect honour and reputation, but gives someone the possibility to get monetary compensation for a wrongful attack on these rights.

The applicable provisions of article 6:106 read:

(1) For injuries other than monetary losses, the injured has a right to monetary reparations, to be determined by reasonability:

a. [...]

b. if the injured has bodily injuries, is attacked in his honour and reputation or

is

attacked personally in any other way;

c. [...]⁹

In many cases (mostly regarding famous Dutch people or corporate bodies) where reparations were awarded, the contested allegations were either obviously untrue, or could not be sufficiently proven before a court.¹⁰

1.1.1 Two private persons

The few cases that could be useful are cases in which untrue, misleading or private information was brought into the public domain. The *Vondelpark*¹¹ case and the *Ferdi*

⁸ See for example the following case, found at www.rechtspraak.nl: LJN-number: AA8531, zaaknr. 96/1523 WAO, viewed on the 11th of June.

⁹ Translation by authors.

¹⁰ *Supra* note 8; see also the case LJN-number: AF9801, zaaknr. 01/462, found at www.rechtspraak.nl, viewed on the 13th of June 2003.

*E.*¹² case are the most interesting ones here. None of these deal exclusively with infringements upon honour and reputation; that is always only a (small) part of the claims.¹³

In the *Vondelpark* case, a photograph of a boy and a girl walking arm in arm in the Vondelpark in Amsterdam was published, without them even knowing that the photograph was taken. The girl felt her privacy was infringed upon (after the photograph was published, her boyfriend broke up with her; she was constantly recognized when walking down the street and got remarks about the publication), and went to court. The court indeed found that she was wrongfully exposed in and by the media, and awarded damages to her.

In the *Ferdi E.* case, an article with close up photographs was published about Ferdi E., the kidnapper of a famous Dutch business man. Ferdi E. went to court, on the account that this publication infringed upon his right to privacy, and that it was detrimental to his resocialisation after his release from prison. The court held in this case that, since Ferdi E. was already a public figure and publications with his portrait had already been published before, this publication did not sufficiently infringe upon his privacy (and honour and good name), and therefore did not award him any damages.

¹¹ HR ('Hoge Raad', the Dutch Supreme Court) July 1 1988, *Vondelpark*, NJ 1988, 1000.

¹² HR 21 januari 1994, *Ferdi E.*, NJ 1994, 473.

¹³ Together with *e.g. the portretrecht* ('portrait right') as protected by article 21 Auteurswet (Law on Copyright).

1.1.2 A private person and the Dutch state

There are very few cases where someone's honour and reputation are attacked, in which the Dutch state or organs of the state are a party, and none of these are really comparable to prof. Sison's case, so we can only try to reason analogue to what courts have held in these cases. Two of these cases will be briefly explained hereafter.

In the case of *A. v. de Minister van Justitie*,¹⁴ A. brought a claim for compensation against the Dutch Minister of Justice on the ground that he was injured in his honour and reputation. In this case, the appellant was demoted to a lesser job within the Dutch judiciary. The court found that the demotion had taken place on a wrongful basis, and therefore awarded compensation for (amongst others) the fact that this demotion meant an infringement on A.'s honour and reputation.

In the case of *A., B. and C. v. The Netherlands*,¹⁵ three persons that were convicted in first instance brought a case against the Dutch state after their release on the ground that the evidence had not been substantial enough (determined in a case before the European Court of Human Rights). They submitted that the fact that they were held in prison for almost two years infringed (among other things) on their right for protection of honour and reputation, since they had been exposed to the public as convicted robbers. The court indeed awarded them compensation, but to what extent this was for the infringement on honour and reputation and not for the fact they had been detained unlawfully, did not become completely clear.

1.1.3 Concluding remarks

The conclusion for honour and reputation seems to be that there is very little jurisprudence about the protection of this subject; and the case law that does exist, does not have honour and reputation as a main subject. Also, not much is written on this

¹⁴ LJN-number: AD8016 zaaknr. 99/3752 AW, found at www.rechtspraak.nl, viewed on the 16th of June 2003.

¹⁵ LJN-number: AF9801 zaaknr. 01/462, found at www.rechtspraak.nl, viewed on the 17th of June 2003.

subject, even in specialized books about privacy.¹⁶ Obviously, this is an area of privacy law that still has to expand and develop, because with what is known about it at this moment; one cannot really come to an answer to questions concerning this right.

However, it is clear that Dutch law protects honour and reputation, also against infringements by the government. To find out exactly how far this protection goes, further research would be necessary. Due to the limited amount of time available for the creation of this advice, there was not enough time to do this research.

1.2 Honour and Reputation and article 8 ECHR

In this chapter we will assess whether the placing of prof. Sison on the European terrorist might lead to a violation of his right of protection of his 'honour and reputation'.

We will first give an overview of article 8 of the ECHR and article 17 of the ICCPR regarding the protection of the honour and reputation of the individual. We will also make a selection of relevant cases regarding these articles.

1.2.1 Reputation and article 8 ECHR

Article 8 states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

¹⁶ E.g. R. Nehmelman, *Het algemeen persoonlijkheidsrecht*, Kluwer (2002); A.J. Nieuwenhuis, *Tussen privacy en persoonlijkheidsrecht*, Ars Aequi Libri (2001).

Article 8 ECHR protects the privacy rights of the individual. The possible application of this article is broad, and jurisprudence ranges from abortion issues to family life and correspondence. As was clarified by the Council of Europe in Resolution 428 (1970) it also, analogue to article 17 ICCPR, concerns the honour and reputation of the individual:

"The right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, *honour and reputation* [*emphasis added*], avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially."¹⁷

1.2.2 *Relevant cases*

The next paragraphs will assess few relevant cases of the Court.

1.2.2.1 *Niemietz v. Germany*¹⁸

Niemietz was a lawyer whose office had been searched by the authorities in order to find documents revealing the whereabouts of a client.

The applicant filed a complaint stating that the search of his office violated the right for respect for home and correspondence as guaranteed by article 8 ECHR. Furthermore, he stated that the search of his office impaired the goodwill of his office and his reputation as a lawyer constituting a breach of his rights under art. 1 of Protocol 1.

The Court finds that the search of applicant's office constituted an interference with his right under article 8 (para. 33).

The Court in addition finds that the attendant publicity must have been capable of adversely affecting applicant's professional *reputation*, in the eyes of both his existing

¹⁷ Council of Europe in Resolution 428 (1970).

¹⁸ *Niemietz v. Germany*, appl. no. 13710/88 (1992).

clients and of the public at large (para. 37). Having thus already considered, in the context of article 8, the potential effects of the search on the applicants' professional reputation, the Court agrees with the Commission that no separate issue arises under article 1 of Protocol 1.

The Court then assessed whether the interference with article 8(1) was permissible under art. 8(2). Hence, the Court assessed all relevant criteria:

- Was the interference "in accordance with the law" (art. 8(2))?
- Did the interference have a legitimate aim or aims?
- Was the interference "necessary in a democratic society"?

The Court considered that the first two criteria were fulfilled. However, with regard to the criteria of necessity the Court decided that the measure complained about was not proportionate with regard to the aims (para. 37). Especially, the Court noted that the search warrant on the basis of which applicant's office was searched, was drawn in terms that were too broad, and that special caution must be taken where lawyers are targeted. An encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention.

*1.2.2.2 Leander v. Sweden*¹⁹

Applicant worked in a temporary position at the Naval Museum at Karlskrona. Applicant had left another permanent position for this job. Although he was promised permanent employment, he was dismissed from his job on account of certain information which allegedly made him a security risk. Applicant complained that this was an attack on his *reputation* and that he ought to have had an opportunity to defend himself in front a tribunal (para. 45). Therefore the applicant claimed that the personnel control procedure, as applied in his case, gave rise to a breach of article 8 (para. 47).

¹⁹ *Leander v. Sweden*, appl. no. 9248/81 (1987).

It was uncontested that the secret police register contained information on his private life. Both the storing and the release of such information, which were coupled with a refusal to allow Mister Leander a chance to refute it, amounted to an interference with article 8(1).

The Court then assessed whether this interference can be legitimate under article 8(2) of the Convention. It considered that there was a legitimate aim for the interference: national security. It also accepted its necessity in a democratic society. However, in assessing whether the interference of article 8(1) was done "in accordance with law", the Court ruled otherwise. The Court considered that compliance with domestic law does not suffice: the law in question must be accessible to the individual concerned and its consequences for him must also be foreseeable (see, *mutatis mutandis*, the *Malone* judgment of 2 August 1984, Series A no. 82, pp. 31-32, § 66).

The Court further stated:

"The requirement of foreseeability in the special context of secret security controls of staff in sectors affecting national security cannot be the same as in many other fields. Nevertheless, the law has to be sufficiently clear in its terms to give an adequate indication as to the conditions on which the authorities are empowered to resort to this kind of secret and potentially dangerous interference with private life."

[...]

"In assessing whether the criterion of foreseeability is satisfied, account may be taken also of instructions or administrative practices which do not have the status of substantive law, in so far as those concerned are made sufficiently aware of their contents (see the *Silver and Others* judgment of 25 March 1983, Series A no. 61, pp. 33-34, §§ 88-89).

In addition, where the implementation of the law consists of secret measures, not open to scrutiny by the individuals concerned or by the public at large, the law itself, as opposed to the accompanying administrative practice, must indicate the scope of any discretion conferred on the competent authority with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see the above-mentioned *Malone* judgment, Series A no. 82, pp. 32-33, § 68)." (par. 51).

The Court decided that Swedish law does give citizens an adequate indication as to the scope and the manner of exercise of the discretion conferred to the responsible authorities to collect, record and release information under the personnel control system (para. 56).

*1.2.2.3 Buscemi v. Italy*²⁰

The applicant is a father of a young daughter who is trying to get custody over her. First, custody was awarded to the mother, and later a court put the child in a children's home. During the procedures the president of the court made statements to the press. The applicant lodged a complaint; however the local court did not find an attack on the reputation or honour of applicant.

Applicant alleged an infringement of his right to respect for his family life on account of his daughter's having been placed in a children's home, bias on the part of the judge and injury to his reputation and to his family life as a result of the statements of the President to the press (para. 49). Applicant claimed an alleged violation of articles 6(1) and 8 of the ECHR arising from the statements made to the press by the president of the local court (paras. 64 and 70).

The Court considered that no injury to the applicant's right to respect for his private and family life can be found under this head, taking into account the fact that in his letter of 11 July 1994 the applicant had himself disclosed his identity (para. 72). Hence the Court found no violation of article 8.

*1.2.2.4 A. v. United Kingdom*²¹

The central issue in this case is the fact that a member of parliament (hereinafter: 'MP') had made public the name and address of the applicant and made comments about her person. He called her, among other things, "Neighbour from Hell". English courts

²⁰ *Buscemi v. Italy*, appl. no. 29569/95 (1999).

²¹ *A. v. United Kingdom*, appl. no. 35373/97 (2002).

decided that the applicant could not start judicial procedures against that MP since all MP's are protected by law against any action for libel.

Applicant complained that the absolute nature of the privilege which protected the MP's statements about her in Parliament violated her right of access to court as protected under article 6(1) ECHR and her right to respect for private life under Article 8 of the Convention.

In its decision the Court commented that the central issues of legitimate aim and proportionality that arise in relation to applicant's complaint regarding article 8 are the same as those that arise in relation to article 6(1) and are therefore 'already dealt with' (para. 102). The Court gave no further attention to issues relating to Article 8.

However, in the dissenting opinion of Judge Loucaides, a violation of the honour and reputation within the scope of Article 8 of the Convention was examined further:

"I entirely disagree with this approach. I believe that, as in the case of the freedom of the press, there should be a proper balance between freedom of speech in Parliament and protection of the reputation of individuals. The general absolute privilege of parliamentarians has an ancient history. It was established about 400 years ago when the legal protection of the personality of the individual was in its infancy and therefore extremely limited. In the meantime such protection has been greatly enhanced, especially through the case-law of this Court. This is exemplified by the expansion of the protection of privacy. The right to reputation is nowadays considered to be protected by the Convention as part of private life (see *N. v. Sweden*, no. 11366/85, Commission decision of 16 October 1986, DR 50, p. 173, and *Fayed v. the United Kingdom*, cited above, pp. 50-51, § 67). Therefore "the State must find a proper balance between the two Convention rights involved, namely the right to respect for private life guaranteed by Article 8 and the right to freedom of expression guaranteed by Article 10 of the Convention". (*N. v. Sweden*, *op. cit.*, p. 175). This balance can only be achieved through a system which takes account of the individual facts of particular cases on the basis of the relevant conditions and exceptions attached to both rights. Such balancing implies that neither of the two rights should be allowed to prevail absolutely over the other. There should be a harmonious

reconciliation, through appropriate qualification, so that the necessary protection is given to both rights. If freedom of speech were to be absolute under any circumstances it would not be difficult to imagine possible abuses which could in effect amount to a license to defame or, as the US Supreme Court Justice Stevens described, “an obvious blueprint for character assassination”.

[...]

"Furthermore the absolute privilege, which protected the MP's statements in Parliament about the applicant, in my opinion violated her right to respect for her private life under article 8 of the Convention because it amounted to a disproportionate restriction of that right. In this connection, I refer to the reasons given in relation to the applicant's Article 6 complaint”.

Judge Loucaides conclusion was, that there always should be a balance between what rightfully can and should be made public, and the right to respect for honour and reputation for a targeted individual, especially with regard to opportunities to refute allegations.

*1.2.2.5 Schönenberger and Durmaz v. Switzerland*²²

The two applicants in this case are a lawyer and his client. The authorities had stopped and disclosed a letter from Schönenberger to his client Durmaz. Hence the case in front of the Court was about the right for respect of correspondence as protected by article 8 of the Convention (para. 20), and the Court indeed found a breach of article 8.

*1.2.2.6 Dissenting opinion of Judge Bonello in Rotaru v. Romania*²³

Although this case will be dealt with in dept in the following chapter with regard to secret security files, it has some relevance for honour and reputation as well. An interesting addition was made by Judge Bonello in his dissenting opinion. He stated that he had no difficulty in acknowledging that the “false” data about the applicant, stored by the security services, were likely to injure his reputation. Furthermore he noted:

²² *Schönenberger and Durmaz v. Switzerland*, appl. no. 11368/85 (1988).

²³ *Rotaru v. Romania*, appl. no. 28341/95, report of 1 March 1999 (judgement of May 4 2000).

"Quite tentatively, the Court seems lately to be moving towards the notion that "reputation" could well be an issue under Article 8. Opening up Article 8 to these new perspectives would add an exciting extra dimension to human rights protection. But the Court, in my view, ought to handle this reform frontally, and not tuck it in, almost surreptitiously, as a penumbral fringe of the right to privacy."

The Court itself mentioned a violation of article 8(1) with regard to reputation only briefly in paragraph 44. It did not elaborate on this.

"44. In the instant case the Court notes that the RIS's letter of 19 December 1990 contained various pieces of information about the applicant's life, in particular his studies, his political activities and his criminal record, some of which had been gathered more than fifty years earlier. In the Court's opinion, such information, when systematically collected and stored in a file held by agents of the State, falls within the scope of "private life" for the purposes of Article 8 § 1 of the Convention. That is all the more so in the instant case as some of the information has been declared false and is likely to injure the applicant's reputation."²⁴

1.2.2.7 Conclusion

Considering the cases above, a violation of Article 8(1) with regard to reputation is mostly considered to be by the (possible) effects of publicity on an applicant's (professional) reputation. The Court applies the criteria of 'proportionality' in balancing the infringement on 8(1) against the legitimate aims of the governments.

1.3 Honour and Reputation and article 17 ICCPR

A study of case law shows of the Human Rights Committee shows that the right to privacy is dealt with as an additional argument for a violation of one of the other elements of article 17. A violation is never based merely on solely the privacy element of article 17. This report will leave the right to privacy aside, while noting that there might be additional arguments concerning the right to privacy that support the claim of violation of the right to honour and reputation.

²⁴ See para. 44 in the *Rotaru v. Romania* case.

Article 17 of the ICCPR states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

1.3.1 Honour and Reputation

Article 17 guarantees, in contrast to article 8 of the ECHR, the express protection of honour and reputation. However this protection is limited to the prohibition of ‘unlawful attacks’ and is thus not as strong as that for privacy, family, home and correspondence. The text of article 17(1) expresses that interference with these latter rights may be neither arbitrary nor unlawful, whereas only unlawful attacks are prohibited with respect to honour and reputation. The expression ‘arbitrary interference’ can also extend to interference provided for under the law and holds a test of reasonableness. The fact that an interference with one’s honour and privacy is not subjected to this test means that the protection of honour and reputation is less comprehensive than the protection given to other aspects of private and family life.²⁵

The word ‘attacks’ means interferences of certain intensity. During the drafting of this provision in the Committee, several delegates stressed that fair comments or truthful statements that might affect the honour or the reputation of the person affected are not to be considered attacks.²⁶ Moreover, the word ‘attacks’ refers only to the intentional impairment of the honour or the reputation of another.²⁷

The reason for the generally weaker protection given to honour and reputation is that the human rights conflict between freedom of expression and protection of personality. It is therefore not correct to state that the omission of arbitrary attacks is an editorial mistake

²⁵ M. Nowak, *UN Covenant on Civil and Political Rights: ICCPR Commentary* (Engel, Kehl, Strasbourg, and Arlington, 1993), p. 291.

²⁶ A/2929, 47 (§ 103), as cited in M. Nowak, *UN Covenant on Civil and Political Rights: ICCPR Commentary* (Engel, Kehl, Strasbourg, and Arlington, 1993), p. 305.

²⁷ F. Volio, *Legal Personality, Privacy, and the Family*, p. 199 in Henkin, *The Rights of Men Today*, 1978, p. 43 as cited in M. Nowak, *UN Covenant on Civil and Political Rights: ICCPR Commentary* (Engel, Kehl, Strasbourg, and Arlington, 1993), p. 306.

or is unjustified.²⁸ Also the *travaux préparatoires* show that the delegates in the Committee were aware of the differences in the formulation of art. 17(1).

In sum, it flows from the historical background that art. 17(1) only prohibits those impairments to a person's honour and reputation by state organs or private parties that were committed unlawfully and intentionally and are based on untrue allegations. All other insults, damages to one's reputation or affronts to one's honour that are unintentional or based on truth do not fall within the scope of protection of art. 17.²⁹

The Committee in its General Comment on article 17 states the following in general about honour and reputation: General Comment 6 point 11 reads:

"Article 17 affords protection to personal honour and reputation and States are under an obligation to provide adequate legislation to that end. Provision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible. States parties should indicate in their reports to what extent the honour or reputation of individuals is protected by law and how this protection is achieved according to their legal system."

Nowak states that 'honour' refers to one's subjective opinion of himself (one's self-esteem), whereas 'reputation' refers to one's appraisal by others.³⁰ An attack on one's honour can impair the self-esteem of a person and interferes therefore more severely with one's dignity, integrity and privacy than the mere injury to a person's reputation. It always implies a judgement on the person's moral character. The argument can be made that putting Sison's name on the list interferes with his honour as well as with his reputation.

In *Birindwa and Tshisekedi v. Zaire*,³¹ the Committee for the first time found unlawful attacks on one's honour and reputation:

²⁸ *Supra* note 27, Volio, p. 199.

²⁹ *Supra* note 25, p. 306.

³⁰ Joseph, Schulz, Castan, *The International Covenant on Civil and Political Rights*, Oxford University Press (2000), p. 364.

³¹ A/45/40 vol. II (2 November 1989) 77 at paras. 12.2, 12.7 and 13.

“12.2 The authors of the communication are two leading members of the *Union pour la Démocratie et le Progrès Social* (U.D.P.S), a political party in opposition to President Mobutu. From mid-June 1986 to the end of June 1987, they were subjected to administrative measures of internal banishment, as a result of the views adopted by the Human Rights Committee on 26 March 1986 in Communication No. 138/1983. On 27 June and 1 July 1987, respectively, they were released following a presidential amnesty, and decided to travel abroad. Upon his return to Zaire in mid-January 1988, Mr. Tshisekedi sought to organize a manifestation which met with the disapproval of State authorities. On 17 January 1988 he was arrested...Between 17 January and 11 March 1988, he was kept detained in a prison in Kinshasa; during this time he was neither informed of the charges against him nor brought before a judge, while the State party’s authorities ordered his psychiatric examination and consistently referred to him as being mentally disturbed.

[...]

12.7 [...] Finally, he [Mr. Tshisekedi] was subjected to unlawful attacks on his honour and his reputation, in that the authorities sought to have him declared insane, although medical reports contradicted such diagnosis.

[...]

13. The Human Rights Committee [...] is of the view that the facts of the communications disclose violations of the International Covenant on Civil and Political Rights:

[...]

(b) in respect of Etienne Tshisekedi wa Mulumba:

[...]

of article 17, paragraph 1, because he was subjected to unlawful attacks on his honour and reputation.”³²

Here the judicial authorities in Zaire (now the Democratic Republic of Congo) alleged that he displayed signs of mental disturbance and decided that applicant should undergo a psychiatric examination. The Government of Mobutu did not intern him in a psychiatric institution but continued to disseminate information about his allegedly disturbed mental state. This amounted to a violation of art. 17.³³

³² Found at http://www.bayefsky.com/themes/privacy_concluding-observations.php, viewed on the 13th of May 2003.

³³ *Supra* note 25, p. 307.

1.3.2 *Unlawful*

General Comment 16 paragraphs 3 and 8 read:

"The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant."

[...]

"Even with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis."

The work of the Human Rights Committee did not clarify the term 'law' when it elaborated on article 17 in General Comment No. 16. The Committee stated in this comment that the term 'unlawful' means that no interference can take place except in cases envisaged by the law.³⁴ This reasoning appears circular and does not explain what exactly should be understood by the term 'law' in this particular context.

Fact is that the Committee does make demands with regard to the interferences of privacy, as is also shown by the comments made by the Committee against the Russian Federation in 1995:³⁵

"[...] The committee is concerned that the mechanisms to intrude into private telephone communication continue to exist, without clear legislation setting out the conditions of legitimate interferences with privacy and providing for safeguards against unlawful interferences."³⁶

However, prohibition of 'unlawful' interferences with privacy offers only limited protection of human rights, as state parties potentially can authorise highly oppressive

³⁴ GOAR, 43rd Session (1988), Supplement no. 40, (A/43/40), Report of the Human Rights Committee, p. 181, para. 3.

³⁵ (1995) UN doc. CCPR/C/79/Add.54.

³⁶ Found at http://www.bayefsky.com/themes/privacy_concluding-observations.php, viewed on the 13th of May 2003.

invasions of privacy in municipal law, as long as the laws are expressed with the requisite precision.³⁷

It is not clear whether the term 'unlawful' in article 17(1) was to refer to legal norms other than those of national law. The position was, for example, taken in the Committee during the drafting of the General Comment that interference with privacy would be unlawful within the meaning of art. 17 when it violated a provision of the Covenant. In the *Mauritian Women* case (35/1978),³⁸ the Committee noted that since interferences resulted from national legislation itself, "[...] there can be no question of regarding this interference as 'unlawful' within the meaning of article 17(1)."³⁹

If 'unlawful' in article 17 means 'unlawful' in domestic law, the protection offered to honour and reputation is potentially very weak. However, the Committee has more recently interpreted the word 'lawful' in the context of article 9(4) to mean more than simple compliance with domestic law. This may lead to broader interpretations of the word 'unlawful' in the context of article 17: protection of honour and reputation in the future.⁴⁰

The text of article 9(4) requires that one must have an opportunity to challenge the 'lawfulness' of one's detention before a court. The author in the case *A. v Australia* (560/93) did have such an opportunity. However, the relevant Australian legislation did not leave any chance of success: A.'s detention was automatically lawful in municipal law. The fact that the Committee found a violation of article 9(4) confirms that 'lawfulness' in this article means 'lawfulness' under the Covenant rather than under domestic law. In this sense, 'lawful' seems to equate with 'not arbitrary'. This conclusion is supported by the Committee's reference in paragraph 9.5 article 9(1), and by Mr. Bhagwati's separate concurring opinion.

³⁷ However, in § 3 of General Comment 16, the HRC does add that the law itself should comply with the Covenant. This may simply be referring to the fact that the law must not be arbitrary. Alternatively, it may mean that 'lawful' means 'lawful' in domestic and in international human rights law, as cited in Joseph, Schulz, Castan, *The International Covenant on Civil and Political Rights*, Oxford University Press (2000), p. 354.

³⁸ No. 35/1987, para. 9.2 (b)2(i)4, found at http://www.bayefsky.com/themes/privacy_concluding-observations.php, viewed on the 13th of May 2003.

³⁹ *Supra* note 25, p. 292.

⁴⁰ *Supra* note 30, p. 365.

The relevant part of paragraph 9.5 of the mentioned judgement reads:

“[...] In the Committee’s opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects real and not merely formal. By stipulating that the court must have the power to order release ‘if the detention is not lawful’, article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant [...]”

Mr. Bhagwati submitted a concurring individual opinion on this point:

“[...] it was argued on behalf of the State that all article 9, paragraph 4, of the Covenant requires is that the person detained must have the right and opportunity to take proceedings before a court for review of lawfulness of his/her detention and lawfulness must be limited merely to compliance of the detention with domestic law. The only inquiry which the detained person should be entitled to ask the court to make under article 9, paragraph 4, is whether the detention is in accordance with domestic law, whatever the domestic law may be. But this would be placing too narrow an interpretation on the language of article 9, paragraph 4, which embodies a human right. It must be interpreted broadly and expansively. The interpretation contended for by the State will make it possible for the State to pass a domestic law virtually negating the right under article 9, paragraph 4, and making nonsense of it. The State could, in that event, pass a domestic law validating a particular category of detentions a detained person failing within that category would be effectively deprived of his/ her right under article 9, paragraph 4. I would therefore place a broad interpretation on the word ‘lawful’ which would carry out the object and purpose of the Covenant in my view, article 9, paragraph 4, requires that the court be empowered to order release ‘if the detention is not lawful’, that is, the detention is arbitrary or incompatible with the requirement of article 9, paragraph 1, or with other provisions of the Covenant. It is no doubt true that the drafters of the Covenant have used ‘arbitrary’ along with ‘unlawful’ in article 17 while the word ‘arbitrary’ is absent in article 9, paragraph 4. But it is elementary that detention which is arbitrary

is unlawful or in other words, unjustified by law. Moreover the word ‘lawfulness’ which calls for interpretation in article 9, paragraph 4, occurs in the Covenant and must therefore be interpreted in the context of the provisions of the Covenant and having regard to the object and purpose of the Covenant. [...]”

Following this concurring individual opinion one could in the Sison case establish a violation of the right to no unlawful interference with the right of the preservation of honour and reputation. However such a line of argument was never followed by the Committee regarding article 17.

The mere fact that measures are taken on the basis of a regulation is not enough to consider the measures as ‘lawful’. However, there is no case law regarding article 17 that shows that the Committee does interpret ‘lawful’ in a broad sense; taking into account the whole Convention.

1.3.3 Concluding remarks

It seems to be clear that listing an individual as a terrorist can result in an interference with the right to preservation of honour and reputation. Less clear is whether this interference is ‘unlawful’. This depends on the way this notion is interpreted. The Committee tends to see the meaning in the light of the Covenant and does not only include domestic law as has been very clearly argued by Bhagwati in his concurring individual opinion. However, there is little case law supporting the Committee to actually go into the law to see how and whether it conflicts with the Covenant.

The conclusion might be that the mere fact that measures are taken on the basis of a Regulation is not enough to consider the measures as ‘lawful’, but that there is only little case law regarding article 17 of the Covenant to support this.

2 Security measures and article 8 ECHR

Another possibility to apply Article 8 ECHR to the placing of prof. Sison on the European terrorist list can be derived from several *lustration*⁴¹ cases the Court dealt with.⁴² A good approach seems to be to reason according to the ex-communist and ex-fascist cases against Slovakia and Rumania regarding *lustration* after the end of the Cold War. In these cases the court looked with scrutiny at decision taken on the basis of secret security files, especially where there was little or no possibility to challenge the content of the closed security files on the basis of which measures were taken against the applicants.

Lustration is a term that needs some explanation. Lustration is the vetting⁴³ of public officials (and others) in Eastern Europe for links to the Communist-era security services. It has been performed most systematically in the Czechoslovak Republic, Hungary and Poland. Prior attempts to explain the pursuit or avoidance of lustration focused on the differing experiences of Communist rule or transition to democracy. A closer examination shows that although the three countries in question had very different histories, there were identical demands for lustration in the early 1990s. These demands were translated into legislation at different times, and varied considerably in the range of offices affected and the sanctions imposed.⁴⁴

In the cases before the Court regarding lustration, the governments had deprived the applicants of social benefits, pensions and such on the basis of closed security files, against the content of which the applicants had no ability to challenge. The measures against applicants in these cases were taken without any criminal offences being charged, which is clearly also the case for the measures that have been imposed upon

⁴¹ See Iain Cameron, *National Security And the European Convention on Human Rights*, (2000) ISBN 90-411-1411-4, p. 188.

⁴² Lustration. Not to be found in any English dictionary, the term describes the practice in post-Communist countries of exposing those who collaborated with the former regime and barring them from public office.

⁴³ 'Vetting' is security screening.

⁴⁴ See K. Williams and B. Fowler, *Explaining Lustration in Eastern Europe*, (March 2003), ISSN 1350-4649.

prof. Sison. In general, measures taken on the basis of a state file (dismissed, transferred, etc. from public employment) can be complained about for a violation of article 8.⁴⁵

2.1 *Withdrawing benefits on the basis of security information*

There have been some cases concerning the overt use of security information to deny employment or to withdraw benefits.⁴⁶ Certain Central and Eastern European states have withdrawn benefits from, or introduced employment bans on former communists and former fascists ('lustration'), basing these measures on information from security police and security informers of the former Communist regimes. Two of these cases will be analysed, the *Matejka v. Slovak Republic* case and the *Rotaru v. Romania* case.

2.1.1 *Matejka v. Slovak Republic*⁴⁷

In the Slovak Republic, political prisoners from the communist era were released and compensated for the years spent imprisoned. They were granted a pension as if they had held a regular job during their imprisonment. However, former fascists have been excluded from the benefits of this scheme.

In casu a ministerial certificate has been issued indicating that the applicant belonged to a category that was banned from the benefits. (No. 24157/94, decision inadmissible of 28 June 1995). The contents of the certificate were confidential, although these were later leaked to the press. The applicant argued that his inability to challenge the certificate, and its disclosure were violations of Article 8. The Commission considered that these acts could raise issues under art. 8, but dismissed this part of the complaint for non-exhaustion of local remedies.

2.1.2 *Rotaru v. Romania*⁴⁸

⁴⁵ See *Amann v. Switzerland* para. 70. See also *Hilton v. UK*.

⁴⁶ *Supra* note 41, p. 190.

⁴⁷ *Matejka v. Slovak Republic*, appl. no. 24157/94 (1995).

⁴⁸ *Rotaru v. Romania*, appl. no. 28341/95, report of 1 March 1999, (judgement of May 4 2000).

This is another case that has its origin in the fall of the communist regime, this time in Romania. Also this case was dismissed for lack of exhaustion of local remedies. Still there are some interesting positions for the case at hand to be found. The democratic government had created legislation that granted certain rights to those who had been persecuted by the communists, however also excluding fascists (as in the Slovak Republic as mentioned above). A Romanian court indeed granted the applicant the rights, in this case his right to pensions, derived from the legislation. Then the government took away his granted rights on the basis that the applicant had a fascist past. The government based its decision on material from the Romanian secret service (hereinafter: 'RIS'). The Romanian court allowed this. Applicant then brought procedures against RIS to try and alter his records or to have them removed. The Romanian court decided that the judicial authorities had no jurisdiction to destroy or amend secret service files.

In appeal in a Romanian court, a key letter from the RIS, the letter on basis of which his right to pension was denied, was declared null and void. However, the files containing the wrong information on the basis of which this letter was written remained unchanged and could not be challenged.

For this reason applicant brought a claim based on article 8 ECHR. The Court considered that applicant may on account of these presented facts claim to be a victim under the ECHR, even though in appeal the above mentioned letter was annulled. The Court took the view that declaring the RIS letter null and void is only partial redress and that at all events it is insufficient under the case law to deprive him from his status as a victim. With this reasoning the Court dismissed the governments claim that applicant was no longer a 'victim'.

As the Court had also expressed in other cases,⁴⁹ both the storing by a public authority of information relating to a person's private life, and the use of it and the refusal to allow an opportunity for it to be refuted amount to an interference with the right to respect for private life, as protected by article 8(1) of the Convention.

⁴⁹ See the cases *Leander* para. 48, *Kopp v. Switzerland* para. 53, *Amann* para. 69.

2.1.3 Application of 8(2) ECHR

After having concluded that in the *Rotaru v. Romania* case article 8(1) of the Convention was interfered with, the Court considered article 8(2). Measures interfering with the right for respect of private life are only allowed when justifiable under article 8(2). If an interference is not to contravene with Article 8, such must have been in accordance with the law, pursue a legitimate aim and, furthermore, must be necessary in a democratic society in order to achieve that aim.

2.1.4 In accordance with the law

The Court allows only a narrow use of the exemption provided for in paragraph 2.⁵⁰ The court therefore states in this case that "in accordance with law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question. The Court requires that the law/rule in question should be accessible by the person concerned and that it should be foreseeable as to its effects.⁵¹ Therefore, the Court in this case determined whether the law on organisation and operation of the Romanian secret service could provide legal basis for these measures. *In casu*, formally this was in accordance with the law. Also the requirement of accessibility was met by publication in the Romanian Official Gazette.

However, a more difficult issue was the demand of 'foreseeability'. The Court reiterates that a rule is to be considered foreseeable if it is formulated with sufficient precision to enable any individual - if need be with appropriate advice - to regulate his conduct. The Court has stressed the importance of this concept with regard to secret surveillance the following terms:

"The Court would reiterate its opinion that the phrase 'in accordance with the law' does not merely refer back to domestic law but also relates to the quality of the 'law', which is expressly mentioned in the preamble to the Convention...The phrase thus implies - and it follows from the object and purpose of Article 8 - that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph

⁵⁰ See also the *Klass* case.

⁵¹ See most recently the *Amann* case.

1...Especially where a power of the executive is exercised in secret, the risk of arbitrariness are evident.

[...]

Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."⁵²

The Court must be satisfied that there exist adequate and effective safeguards against abuse, since a system of secret surveillance designed to protect national security entails the risk of undermining or even destroying democracy on the ground of defending it.⁵³ The Court indicates that effective supervision should normally be carried out by the judiciary, at least in last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure.

In the *Rotaru* case the Court decides that domestic law does not provide such safeguards whereas no supervision is provided by law, whether while the measure is in force, or afterwards.

2.1.5 Concluding remarks regarding the lustration cases

What has happened in the former communist countries after the Iron Curtain had fallen was by no means unique. Most regime changes are accompanied with some form of (institutionalized) counter measures against the former oppressors. Very often, in the tense situation and in the light of the high emotions of everyone involved, judicial safeguards for those under scrutiny are easily overlooked. Other examples could be the post WOII processes against suspected NSB-ers or Nazis. Also a comparison could be made to McCarthyism in the US in the 1950s.

⁵² See the *Malone v. the UK* judgement of 2 August 1984, Series A no. 82, p. 32.

⁵³ See (among others) the *Klass* case, pp. 23-24.

What makes the 'lustration' practices in Eastern Europe important is that an objective, external judicial instrument existed as a last resort for the persons under attack. The ECHR has in several cases dealt with governments that crossed the line with regard to the right of the individual in respect to safeguards for personal information, judicial safeguards and such in their fight for a 'good' cause. In these cases the Court has balanced issues of national safety against the rights of the individual.

Although the situation relating to the terrorist lists could be considered of a different order, and although the balance between national security and individual rights thus may be different, such balance should be indicated in any event. It seems that a judicial process is the only way to achieve this.

3 Conclusion

Further information about the kind of information and the way in which the information regarding prof. Sison was collected and used by the Dutch government is needed to make a complete analysis of the applicability of the Dutch law. Regarding the Dutch jurisprudence it must be noted that there no cases in which untrue, misleading or private information was brought into the public domain by the state were found during our research.

It is not obvious that Dutch law and jurisprudence could be invoked as an argument to strengthen prof. Sison's claim that the inclusion of his name on the list infringes upon his right to privacy and to non interference with his honour and reputation, though further research, as pointed out in paragraph 1.1.3, is essential to ascertain this claim.

With regard to article 8 ECHR there seem to be to possible lines of argument. It seems to be fair to conclude that there is an infringement of the right of respect for prof. Sison's honour and reputation, especially with regard to his status as a senior advisor in the Philippines peace process.

Furthermore, jurisprudence with regard to article 8 shows that the Court is reluctant to accept measures taken against applicants on the basis of secret security files. Hence this also seems a valid argument for the case of prof. Sison.

With regard to the ICCPR, it seems fair to conclude that there is an infringement of the right to no interference with prof. Sison's honour and privacy. However, difficulties lie in the fact that the interference is based on a Common Position and underlying EU rules and will therefore, regarding most case law, be considered 'lawful'. On the other hand, by analogously applying case law regarding article 9 of the ICCPR, there are arguments supporting that the only fact that interference is based on a Common Position does not necessarily make it 'lawful'. It seems that an argument for prof. Sison's claim can be made, but will have very little case law directly supporting this claim.

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