PROTECTING THE RIGHT TO FREEDOM OF EXPRESSION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS



A handbook for legal practitioners

Dominika Bychawska-Siniarska

COUNCIL OF EUROPE
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European Convention
on Human Rights

Article 10 – Freedom of expression

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

Introduction

The Convention for the Protection of Human Rights and Fundamental Freedoms– the European Convention on Human Rights – is the most important form of expression of the commitment of the member states of the Council of Europe to the values of democracy, peace and justice, and, through them, to respect for the fundamental rights and freedoms of the individuals living in these societies.[1]

The European Convention on Human Rights (the Convention) was signed on 4 November 1950, in Rome. Over the last 50 years, the Convention has evolved, both through the interpretation given to its texts by the European Court of Human Rights (the Court) and the European Commission of Human Rights (the Commission),[2] and through the work of the Council of Europe. The latter has adopted additional protocols that have broadened the scope of the Convention, as well as resolutions and recommendations directed at the member states that have developed and proposed standards of behaviour, and has imposed sanctions on those states failing to comply with the provisions of the Convention.

Almost all of the states parties to the Convention have integrated it into their national legislation. The Convention is thus part of the internal legal system and is binding on the domestic courts and all public authorities. It further follows that all individuals in the states concerned derive rights and duties from the Convention, so that in the national procedures states may directly invoke its text and case law, which must be applied by the national courts. Moreover, the national authorities, including the courts, must give priority to the Convention over any national law conflicting with the Convention and the Court's case law.

1. *Introduction to European Convention on Human Rights – Collected texts*, Council of Europe Publishing, Strasbourg, 1994.
2. In accordance with Protocol No. 11, which entered into force on 1 November 1998, the European Commission of Human Rights and the European Court of Human Rights joined together to form a single body, the European Court of Human Rights.

The text of the Convention may not be read outside the Court's case law. The Convention functions under the common law system. The judgments of the Court explain and interpret the text. They are binding precedents whose legal status is that of mandatory legal norms. Therefore, once the Convention has been ratified, the national authorities of all signatory states, including those who practice a civil (continental) law system, must consider the Court's judgments as binding law. This is why the text of this handbook will refer extensively to the Court's jurisprudence. In this respect, one must understand that, nowadays, even traditionally civil legal systems practise a mixed system of civil and common law whereby the jurisprudence is given equal value to that of the laws enacted by the parliament.

The interpretation of the Convention's text is dynamic and evolutive, making the Convention a living instrument, which must be interpreted in the light of the present day conditions. Accordingly, the Court is (and must be) influenced by the developments and commonly accepted standards in the member states of the Council of Europe.

The overall scheme of the Convention is that the initial and primary responsibility for the protection of the rights set forth in it lies with the contracting states. The Court is there to monitor states' actions by exercising the power of review. The domestic margin of appreciation thus goes hand in hand with European supervision. The doctrine of the margin of appreciation is applied differently and the degree of discretion allowed to the states varies according to the context. A state is allowed considerable discretion in cases of public emergency arising under Article 15, or where there is little common ground between the contracting parties, while the discretion is reduced almost to vanishing point in certain areas, such as the protection of freedom of expression.

This handbook is designed to assist judges, prosecutors, lawyers and human rights' defenders at all levels in ensuring that all cases involving freedom of expression are handled in conformity with states' obligations under Article 10 of the Convention, as developed by the Court in Strasbourg.

Chapter 1

General considerations on Article 10

In the context of an effective democracy and respect for human rights mentioned in the Preamble to the Convention, freedom of expression is not only important in its own right, but it also plays a central part in the protection of other rights under the Convention. Without a broad guarantee of the right to freedom of expression protected by independent and impartial courts, there is no free country, there is no democracy. This general proposition is undeniable.[3]

Freedom of expression is a right in itself as well as a component of other rights protected under the Convention, such as the freedom of assembly. At the same time, freedom of expression can conflict with other rights protected by the Convention, such as the right to a fair trial, to respect for private life, to conscience and religion. The conflict may arise when authorities need to protect the interests or values listed in Article 10, paragraph 2 of the Convention, such as national security or public health. When such conflict occurs, the Court strikes a balance in order to establish the pre-eminence of one right over the other. The balance of the conflicting interests, one of which is freedom of expression, takes into account the importance of the latter. The Court has repeatedly stated that freedom of expression "constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment".[4] Or, "the press plays a pre-eminent role in a State governed by the rule of law".[5]

3. Jochen Abr. Frowein, "Freedom of expression under the European Convention on Human Rights", in Monitor/Inf (97) 3, Council of Europe.
4. *Lingens v. Austria*, 8 July 1986; *Şener v. Turkey*, 18 July 2000; *Thoma v. Luxembourg*, 29 March 2001; *Marônek v. Slovakia*, 19 April 2001; *Dichand and Others v. Austria*, 26 February 2002.
5. *Castells v. Spain*, 23 April 1992; *Prager and Oberschlick v. Austria*, 26 April 1995.

The protection of freedom of expression is essential for the democratic political process and the development of every human being. As a matter of principle, the protection given by Article 10 extends to any expression, notwithstanding its content, disseminated by any individual, group or type of media. The only content-based restriction applied by the Court has dealt with the dissemination of ideas promoting racism and the Nazi ideology, denying the Holocaust, and incitement to hatred and racial discrimination. The Court relied on Article 17 of the Convention and held that freedom of expression may not be used to lead to the destruction of the rights and freedoms granted by the Convention.[6] Such decisions apply the theory of the paradox of tolerance: an absolute tolerance may lead to the tolerance of ideas promoting intolerance, and the latter could then destroy the tolerance.

States are compelled to justify any interference in any kind of expression. In order to decide the extent to which a particular form of expression should be protected, the Court examines the type of expression (political, commercial, artistic, etc.), the means by which the expression is disseminated (personal, written media, television, etc.), and its audience (adults, children, the general public, a particular group). Even the "truth" of the expression has a different significance according to these criteria.

In the process of taking its decisions, the Court in Strasbourg has paid attention to national constitutional practices, including that of the United States of America, which grants a high level of protection to freedom of expression. However, domestic decisions – even those with legal force – have a limited utility for an international body such as the Court, which applies and construes an international treaty. In some cases the Commission and the Court have referred to the International Covenant on Civil and Political Rights[7] or other international documents protecting freedom of expression.

Article 10 of the Convention is structured in two paragraphs:

- the first paragraph defines the freedoms protected;
- he second stipulates the circumstances in which a state may legitimately interfere with the exercise of the freedom of expression.

Article 10, paragraph 1:

> Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas

6. *Garaudy v. France*, 24 June 2003 (decision).
7. United Nations General Assembly, International Covenant on Civil and Political Rights, 16 December 1966 (entry into force, 23 March 1976).

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.

Paragraph 1 thus provides for three components of the right to freedom of expression:

- freedom to hold opinions;
- freedom to receive information and ideas; and
- freedom to impart information and ideas.

These freedoms must be exercised freely, without interference by public authorities[8] and regardless of frontiers.

1.1. Freedom to hold opinions

Freedom to hold opinions is a prior condition of the other freedoms guaranteed by Article 10, and it enjoys an almost absolute protection in the sense that the possible restrictions set forth in paragraph 2 are inapplicable. As stated by the Committee of Ministers, "any restrictions to this right will be inconsistent with the nature of a democratic society".[9]

States must not try to indoctrinate their citizens and should not be allowed to distinguish between individuals holding one opinion or another. Moreover, the promotion of one-sided information by the state may constitute a serious and unacceptable obstacle to the freedom to hold opinions.

Under the freedom to hold opinions, individuals are also protected against possible negative consequences in cases where particular opinions are attributed to them following previous public expressions. The freedom to hold opinions includes the "negative freedom" of not being compelled to communicate one's owns opinions.[10]

1.2. Freedom to impart information and ideas

Freedom to impart information and ideas is of the greatest importance for the political life and democratic structure of a country. Meaningful free elections are not possible in the absence of this freedom. Moreover, a full exercise of the freedom to impart information and ideas allows for free criticism

8. Except under the requirements of paragraph 2.
9. Report of the Committee of Ministers, in "Theory and Practice of the European Convention on Human Rights", P. Van Dijk and G. Van Hoof, Kluwer, 1990, p. 413.
10. *Vogt v. Germany*, 26 September 1995.

of the government, which is the main indicator of a free and democratic society. As the Court stated as early as 1976, its:

> supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man.[11]

The freedom to criticise the government was explicitly upheld by the Court in 1986: it is incumbent on the press "to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them".[12] Obviously, the freedom to impart information and ideas is complementary to the freedom to receive information and ideas. This is true with respect to printed media as well as to broadcasting media. With respect to the latter, the Court has stated that states may not intervene between the transmitter and the receiver, as they have the right to get into direct contact with each other according to their will.[13]

Freedom to impart information and ideas on economic matters (the so-called commercial speech) is also guaranteed under Article 10. However, the Court decided that in economic matters domestic authorities enjoy a broader margin of appreciation.[14]

Artistic creation and performance as well as its distribution is seen by the Court as a major contribution to the exchange of ideas and opinions, a crucial component of a democratic society. Stating that artistic freedom and the free circulation of art are restricted only in undemocratic societies, the Commission argued:

> [t]hrough his creative work, the artist expresses not only a personal vision of the world but also his view of the society in which he lives. To that extent art not only helps shape public opinion but is also an expression of it and can confront the public with the major issues of the day.[15]

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11. *Handyside v. the United Kingdom*, 7 December 1976, paragraph 49.
12. *Lingens v. Austria*, 8 July 1986, paragraph 41; *Şener v. Turkey*, 18 July 2000; *Thoma v. Luxembourg*, 29 March 2001; *Marônek v. Slovakia*, 19 April 2001; *Dichand and Others v. Austria*, 26 February 2002.
13. *Groppera Radio AG and Others v. Switzerland*, 28 March 1990 and *Casado Coca v. Spain*, 24 February 1994.
14. *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, 20 November 1989; *Krone Verlag GmbH & Co. KG v. Austria (No. 3)*, 11 December 2003, paragraph 31.
15. *Müller and Others v. Switzerland*, 24 May 1998, report of the Commission, paragraph 70.

1.3. Freedom to receive information and ideas

The freedom to receive information includes the right to gather information and to seek information through all possible lawful sources. The freedom to receive information also covers international television programmes.[16]

While the freedom to receive information and ideas relates to the media, so as to enable it to impart such information and ideas to the public, the Court also reads in this freedom the right of the public to be adequately informed, in particular on matters of public interest.

1.4. Access to information

Access to information was first developed in Article 8 cases relating to environmental problems.[17] The Court was not receptive to the idea of including access to information under Article 10's protection. In *Leander v. Sweden*, the applicant sought confidential information from official files belonging to the government. He believed that he was denied a job due to the information held in the respective files, and wanted to challenge that information. The Court decided that the applicant enjoyed no protection under Article 10.[18]

Only recently has the Court interpreted freedom to receive information more broadly.[19] In the case of *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*,[20] the Court moved towards a broader interpretation of the notion of "freedom to receive information", acknowledging a right of access to information. In contrast to its previous approach, it found that a refusal of access to documents held by the authorities (Constitutional Court) constituted an interference with the applicants' rights under Article 10.[21] Another significant case is *Youth Initiative for Human Rights v. Serbia*. In that judgment, the Court stressed once again that "freedom to receive information" includes the right of access to information.[22]

In *Kenedi v. Hungary,* the Court held unanimously that there had been a violation of the Convention, on account of the excessively long proceedings (over

16. *Autronic AG v. Switzerland*, 22 May 1990.
17. *Gaskin v. the United Kingdom*, 7 July 1989.
18. *Leander v. Sweden*, 26 March 1987.
19. *Társaság a Szabadságjogokért v. Hungary*, 14 April 2009, paragraph 35.
20. *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, 28 November 2013, paragraph 41.
21. *Társaság a Szabadságjogokért*, cited above.
22. *Youth Initiative for Human Rights v. Serbia*, 25 June 2013. Access to information was expanded to non-governmental organisations. The standard was confirmed in *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, 28 November 2013.

10 years) during which the applicant had sought to gain and enforce his access to documents concerning the Hungarian secret services. The Court also reiterated that "access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression".[23] The Court noted that the applicant had obtained a court judgment granting him access to the documents in question, following which the domestic courts had repeatedly found in his favour in the ensuing enforcement proceedings. However, the administrative authorities had persistently resisted their obligation to comply with the domestic judgment, thus hindering the applicant's access to the documents he needed in order to write his study. The Court concluded that the authorities had acted arbitrarily and in defiance of domestic law and it held, therefore, that the authorities had misused their powers by delaying the applicant's exercise of his right to freedom of expression, in violation of Article 10.

In the case of *Roşiianu v. Romania*, in which the applicant was a presenter of a regional television programme, the Court came to the conclusion that the Romanian authorities had violated Article 10 by refusing access to the documents of a public nature that the applicant had requested at Baia Mare, a city in the north of Romania.[24] The Court's judgment clarifies that efficient enforcement mechanisms are necessary in order to make the right of access to public documents practical and effective. The Court noted that Mr Roşiianu was involved in the legitimate gathering of information on a matter of public importance, namely the activities of the municipal administration. It reiterated that in view of the interest protected by Article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship, if the authorities create obstacles to the gathering of information. Gathering information is indeed an essential preparatory step in journalism and is an inherent, protected part of press freedom. Given that the journalist's intention was to communicate the information in question to the public and thereby to contribute to the public debate on good public governance, his right to impart information had clearly been impaired. The Court found that there had not been adequate execution of the judicial decisions in question enabling the journalist to have access to the requested documents. It also observed that the complexity of the requested information and the considerable work done in order to select or compile the requested documents had been referred to solely to explain the impossibility of providing that information rapidly, but could not be a sufficient or pertinent argument for refusing access to the requested documents.

23. *Kenedi v. Hungary*, 26 May 2009, paragraph 43.
24. *Roşiianu v. Romania,* 24 June 2014.

Although the public has a right to receive information of general interest, Article 10 does not guarantee an absolute right of access to all official documents.[25] However, once a national court has granted access to documents, the authorities cannot obstruct the execution of the court order. In the context of historical research, the Court has found that access to original documentary sources in state archives is an essential element of the exercise of rights under Article 10.[26] The Court also found in favour of a journalist who wanted to publish information on the use of public funds by the municipal authorities, pointing out that his intention was to make a legitimate contribution to the public debate on good governance.[27]

The Court has further emphasised the importance of the right to receive information from private individuals and legal entities. While political and social news might be the most important information protected by Article 10, freedom to receive information does not extend only to reports of events of public concern, but also covers cultural expressions and entertainment.[28] The Grand Chamber has emphasised the importance of the principle of the "free exchange of opinions and ideas".[29]

1.5. Types of protected speech

The "expression" protected under Article 10 is not limited to words, written or spoken, but extends to pictures,[30] images,[31] actions[32] and even cultural heritage[33] intended to express an idea or to present information. In some circumstances dress might also fall under Article 10.[34] The Court has never introduced into its case law the notion of "symbolic speech"; however, it protects, under Article 10, the display and use of different symbols, such as the red star in Hungary or the Easter lily in Northern Ireland.[35]

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25. *Sdružení Jihočeské Matky v. the Czech Republic*, 10 July 2006 (French and Czech only), where the refusal of access, requested by an environmental association, to technical details of construction of a nuclear power plant was found to be justified by the Court.
26. *Kenedi v. Hungary*, 26 May 2009.
27. *Roşiianu v. Romania*, 24 June 2014.
28. *Khurshid Mustafa and Tarzibachi v. Sweden*, 16 December 2008.
29. *Gillberg v. Sweden*, 3 April 2012, paragraph 95, (GC).
30. *Müller and Others v. Switzerland*, 24 May 1988.
31. *Chorherr v. Austria*, 25 August 1993.
32. *Steel and Others v. the United Kingdom*, 23 September 1998.
33. *Khurshid Mustafa and Tarzibachi v. Sweden*, 16 December 2008. The case concerned the evictions of tenants on account of their refusal to remove a satellite dish that enabled them to receive television programmes in Arabic and Farsi from their country of origin (Iraq).
34. *Stevens v. the United Kingdom*, 9 September 1989 (decision).
35. *Vajnai v. Hungary*, 8 July 2008 and *Donaldson v. the United Kingdom*, 25 January 2011 (decision).

Moreover, Article 10 protects not only the substance of the information and ideas but also the form in which they are expressed.[36] Therefore, printed documents,[37] radio broadcasts,[38] paintings,[39] films,[40] poetry,[41] novels[42] or electronic information systems are also protected under this article. Satirical expression has also been granted special protection by the Court.[43] Satire is a form of artistic expression and social commentary and, due to its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Any interference with an artist's right to such expression must be examined with particular care.[44] It follows that the means for the production and communication, transmission or distribution of information and ideas are also covered by Article 10, and the Court must be aware of the rapid developments in such means in many areas.

The Court also introduced under Article 10 the concept of a "European literary heritage" and set out in this regard various criteria for the granting of protection: the author's international reputation; the date of the first publication; a large number of countries and languages in which publication had taken place; publication in book form and on the internet; and publication in a prestigious collection in the author's home country.[45]

The freedom of expression includes the negative freedom of expression – the right not to speak. The Commission invoked this type of right in *K. v. Austria*,[46] protecting the applicant against self-incrimination in connection with criminal proceedings.

The right to vote is not protected under Article 10. It is considered to be a component of states' duty to hold "free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".[47]

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36. *Oberschlick v. Austria*, 23 May 1991; *Thoma v. Luxembourg*, 29 March 2001; *Dichand and Others v. Austria*, 26 February 2002; *Nikula v. Finland*, 21 March 2002.
37. *Handyside v. the United Kingdom*, 7 December 1976.
38. *Groppera Radio AG and Others v. Switzerland*, 28 March 1990.
39. *Müller and Others v. Switzerland*, 24 May 1988.
40. *Otto-Preminger-Institut v. Austria*, 20 September 1994.
41. *Karataş v. Turkey*, 8 July 1999.
42. *Akdaş v. Turkey*, 16 February 2010.
43. *Eon v. France*, 14 March 2013; *Kuliś and Różycki v. Poland*, 6 October 2009; *Alves da Silva v. Portugal, 20 October 2009*.
44. *Vereinigung Bildender Künstler v. Austria*, 25 January 2007.
45. *Akdaş v. Turkey*, 16 February 2010.
46. *K. v. Austria*, 13 October 1992 (report of the Commission).
47. Article 3 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952.

Chapter 2

Duties under Article 10

” The exercise of these freedoms, since it carries with it duties and responsibilities …

The idea that the exercise of the freedom of expression carries with it duties and responsibilities is unique in the Convention, and it cannot be found in any of the other provisions regulating rights and freedoms.

This text has not been interpreted as a separate circumstance automatically limiting the freedom of expression of individuals belonging to certain professional categories that may carry with them "duties and responsibilities".[48] The Court's judgments reflect various views on the "duties and responsibilities" of some civil servants when exercising their freedom of expression. In addition, the jurisprudence has developed from a rather conservative approach giving states stronger powers, to a more liberal approach where states enjoy less discretion.

For instance, in *Engel and Others v. the Netherlands*, a ban on soldiers' publication and distribution of a paper criticising some senior officers was found by the Court to be a justified interference with the freedom of expression. However, the Court also held that "there was no question of depriving them of their freedom of expression but only of punishing the abusive exercise of that freedom on their part."[49] In *Hadjianastassiou v. Greece*, an officer was convicted of having disclosed information that was classified as secret. He had disclosed information on a given weapon and the corresponding technical knowledge capable of causing considerable damage to national security. The Court decided that the conviction was an interference with the officer's freedom of expression which was, however, justified under paragraph 2:

48. Duties and responsibilities of journalists are discussed in Chapters 6 and 8.
49. *Engel and Others v. the Netherlands*, 8 June 1976, paragraph101.

> It is … necessary to take into account the special conditions attaching to military life and the specific "duties" and "responsibilities" incumbent on the members of the armed forces … The applicant as an officer at the K.E.T.A. in charge of an experimental missile programme, was bound by an obligation of discretion in relation to anything concerning the performance of his duties.[50]

Almost 20 years after the judgment in *Engel and Others*, in a similar case, the Court changed its view and issued an opposite ruling. In *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, the authorities prohibited the distribution to servicemen of a private periodical critical of the military administration. The Austrian Government argued that the applicants' periodical threatened the country's system of defence and the effectiveness of the army. The Court did not agree with the government's submissions and held that most of the items in the periodical:

> set out complaints, put forward proposals for reforms or encourage the readers to institute legal complaints or appeals proceedings. However, despite their often polemical tenor, it does not appear that they overstepped the bounds of what is permissible in the context of a mere discussion of ideas, which must be tolerated in the army of a democratic State just as it must be in the society that such an army serves.[51]

In *Rommelfanger v. the Federal Republic of Germany*,[52] the Commission said that states had the positive duty to ensure that the exercise of the freedom of expression by a civil servant is not subject to restrictions which would affect the substance of this right. Even where the existence of a category of civil servants with special "duties and responsibilities" is accepted, the restrictions applied on their right to freedom of expression must be examined upon the same criteria as the infringements to others' freedom of expression.

In *Vogt v. Germany*, the Court held that the way a duty of loyalty was imposed upon a civil servant was in breach of Article 10. In 1987, the applicant was dismissed from the school where she had been teaching for about 12 years because she was an activist in the German Communist Party, and she refused to dissociate herself from that party. The duty of loyalty had been introduced following the country's experience under the Weimar Republic, and it was justified by the need to prohibit public employees from taking part in political activities contrary to the constitutional provisions. The applicant's superiors decided that she had failed to comply with the duty owed by every civil servant to uphold the free democratic system within the meaning of

50. *Hadjianastassiou v. Greece*, 16 December 1992, paragraph 46.
51. *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, 19 December 1994, paragraph 38.
52. *Rommelfanger v. the Federal Republic of Germany*, 6 September 1989 (decision).

the constitution and thus dismissed her. The Court held that "[a]lthough it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 ... of the Convention".[53] Further on, the Court stated that it understood the arguments recalling the history of Germany; however, taking into account the absolute nature of the duty of loyalty, its general applicability to all civil servants and the absence of a distinction between the private and professional domains, the German authorities had violated both freedom of expression and freedom of association.

Judges' "duties and responsibilities" were considered by the Court in *Wille v. Liechtenstein*, where the applicant, a high-ranking judge, received a letter from the Prince of Liechtenstein criticising the applicant's statement during an academic lecture on a constitutional issue and announcing his intention not to appoint the applicant to a public post following that statement. At the beginning of its assessment, the Court held that it:

> must bear in mind that, whenever the right of freedom of expression of persons in such a position is at issue, the "duties and responsibilities" referred to in Article 10 § 2 assume a special significance since it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of judiciary are likely to be called in question.[54]

The Court further noted that although the constitutional issue raised by the applicant had had political implications, this element alone should not have prevented the applicant from discussing this matter. In finding a violation of Article 10, the Court observed that on a previous occasion, the Liechtenstein Government had held a similar view to that of the applicant, and that the opinion expressed by the applicant was shared by a considerable number of people in the country and therefore was not an untenable proposition.

It follows that any national laws or other regulations imposing absolute and unlimited loyalty or confidentiality restrictions on particular categories of civil servants, such as those employed by the intelligence services, army, etc. or the members of the judiciary, would violate Article 10. Such restrictions may be adopted by the member states only where they do not have an general character, but are limited to particular categories of information whose secrecy must be examined periodically, to specific categories of civil servants or only to some individuals belonging to such categories, and where they are temporary. When arguing that the duties of loyalty or confidentiality

53. *Vogt v. Germany*, 26 September 1995, paragraph 53.
54. *Wille v. Liechtenstein*, 28 October 1999, paragraph 64.

are in the interest of defending "national security", member states must define the latter concept in a strict and narrow way, avoiding the inclusion of areas which fall outside the real scope of national security. Equally, states must prove the existence of a real danger to the protected interest, such as national security, and must also take into account the interest of the public in having access to some information. If all these factors are ignored, such limitations on the freedom of expression have an absolute nature and are inconsistent with Article 10, paragraph 2.

Chapter 3

Unprotected speech – Hate speech, incitement to violence

3.1. Incitement to violence

Incitement to violence falls outside the protection conferred by Article 10 where there is an intentional and direct use of wording to incite violence and where there is a real possibility that the violence occurs. In *Sürek v. Turkey (No. 3)*, while describing the Kurds' national liberation struggle as a "war directed against the forces of the Republic of Turkey", the article asserted that "[w]e want to wage a total liberation struggle". In the Court's view, "the impugned article associated itself with the PKK and expressed a call for the use of armed force as a means to achieve national independence of Kurdistan".[55] The Court further noted that the article had been published in the context of serious disturbances between the security forces and the members of the PKK, involving heavy loss of life and the imposition of emergency rule in a large part of south-east Turkey. In such a context:

> the content of the article must be seen as capable of inciting to further violence in the region. Indeed the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor.[56]

Following this assessment, the Court found that the conviction of the applicant was not contrary to Article 10.

55. *Sürek v. Turkey (No. 3)*, 8 July 1999 (GC), paragraph 40.
56. *Sürek v. Turkey (No. 1)*, 8 July 1999, paragraph 62.

The Court reached similar conclusions in the case of *Leroy v. France*.[57] In 2002, the French cartoonist was convicted of complicity in condoning terrorism because of a cartoon published in a Basque weekly newspaper, *Ekaitza*. On 11 September 2001, the cartoonist submitted to the magazine's editorial team a drawing representing the attack on the twin towers of the World Trade Centre, with a caption which parodied the advertising slogan of a famous brand: "We have all dreamt of it... Hamas did it" (cf. "Sony did it"). The Court noted that the tragic events of 11 September 2001, which were at the origin of the impugned expression, had given rise to global chaos, and that the issues raised on that occasion were subject to discussion as a matter of public interest. However, the Court considered that the drawing was not limited to criticism of US imperialism, but supported and glorified the latter's violent destruction. It based its finding on the caption which accompanied the drawing and noted that the applicant had expressed his moral support for those whom he presumed to be the perpetrators of the attacks of 11 September 2001. Through his choice of language, the applicant commented approvingly on the violence perpetrated against thousands of civilians and diminished the dignity of the victims, as he had submitted his drawing on the day of the attacks and it was published on 13 September, with no precautions taken on his part as to the language used. In the Court's opinion, this factor – the date of publication – was such as to increase the cartoonist's responsibility in his account of, and even support for, a tragic event, whether considered from an artistic or a journalistic perspective. Also, the impact of such a message in a politically sensitive region, namely the Basque Country, was not to be overlooked. According to the Court, the cartoon had provoked a certain public reaction capable of stirring up violence and demonstrating a plausible impact on public order in the region. The grounds put forward by the domestic courts in convicting the applicant had been "relevant and sufficient". Having regard to the modest nature of the fine and the context in which the impugned drawing had been published, the Court found that the measure imposed on the cartoonist was not disproportionate to the legitimate aim pursued. Accordingly, there had not been a violation of Article 10 of the Convention.

By contrast, in *Sürek v. Turkey (No. 4)*, where the impugned articles described Turkey as "the real terrorist" and as "the enemy", the Court found that the:

> hard-hitting criticism of the Turkish authorities … is more a reflection of the hardened attitude of one side to the conflict, rather than a call to violence. …

57. *Leroy v. France*, 2 October 2008.

> On the whole, the content of the articles cannot be construed as being capable of inciting to further violence.

The Court also argued that the public has the right "to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them."[58] The Court concluded that the conviction and sentencing of the applicant were contrary to Article 10. Equally, in *Karataş v. Turkey*, the Court found that:

> even though some of the passages from the poems seem very aggressive in tone and to call for the use of violence … the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation.[59]

3.2. Hate speech and racism

Hate speech directed towards different minorities is not protected under Article 10. In the case of *Vejdeland and Others v. Sweden*,[60] the applicants were convicted of distributing in an upper secondary school approximately 100 leaflets considered by the courts to be offensive to homosexuals. The applicants had distributed leaflets by an organisation called National Youth, by leaving them in or on the pupils' lockers. The statements in the leaflets were, in particular, allegations that homosexuality was a "deviant sexual proclivity", had "a morally destructive effect on the substance of society" and was responsible for the development of HIV and Aids. The applicants claimed that they had not intended to express contempt for homosexuals as a group and stated that the purpose of their activity had been to start a debate about the lack of objectivity in the education in Swedish schools. The Court found that these statements constituted serious and prejudicial allegations, even if they had not been a direct call to hateful acts. The Court stressed that discrimination based on sexual orientation was as serious as discrimination based on race, origin or colour. It concluded that there had been no violation of Article 10 of the Convention, as the interference with the applicants' exercise of their right to freedom of expression had reasonably been regarded by the Swedish authorities as necessary in a democratic society for the protection of the reputation and rights of others.

In *Norwood v. the United Kingdom*,[61] the applicant had displayed in his window a poster supplied by the British National Party, of which he was a

58. *Sürek v. Turkey (No. 4)*, 8 July 1999 (GC), paragraph 58.
59. *Karataş v. Turkey*, 8 July 1999, paragraph 52.
60. *Vejdeland and Others v. Sweden*, 9 February 2012.
61. *Norwood v. the United Kingdom*, 16 November 2004 (decision).

member, representing the Twin Towers in flames. The picture was accompanied by the words "Islam out of Britain – Protect the British People". As a result, he was convicted of aggravated hostility towards a religious group. The Court declared the complaint to be inadmissible, referring to Article 17 of the Convention, which prohibits any activity "aimed at the destruction of any of the rights and freedoms set forth herein". The Court observed that the freedom of expression may not be used for the destruction of the rights and freedoms set forth in the Convention. It found that such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, was incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. Any expression containing elements of racial and religious discrimination will thus fall outside the scope of Article 10.[62]

The Court has also had the opportunity to examine racist statements broadcast on television, which were made in the context of informing the public about a group of young people expressing racist views. In *Jersild v. Denmark*,[63] the applicant was a television journalist who was convicted by the national courts of aiding and abetting the dissemination of racist statements. He had taken the initiative of preparing a programme in which three members of a youth group sharing racist views were interviewed. The journalist knew in advance that racist statements were likely to be made during the interviews and had encouraged such remarks. He included the offensive assertions when editing the interviews. The interviews were then presented during a serious television programme, intended for a well-informed audience, dealing with a wide range of social and political issues, including xenophobia and immigration. The audience was able to hear statements such as: "It's good being a racist. We believe Denmark is for the Danes"; "People should be allowed to keep slaves"; "Just take a picture of a gorilla … and then look at a nigger, it's the same body structure and everything … flat forehead"; "A nigger is not a human being, it's an animal, that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they are called", etc. The young men were also asked questions about their homes and places of work and their criminal records. The main reason why the national courts found the journalist guilty of aiding and abetting racist statements was the lack of a final statement by which, in the courts' opinion, he should have explicitly criticised the racist views expressed during the interviews.

62. *Kühnen v. the Federal Republic of Germany*, 12 May 1988 (decision).
63. *Jersild v. Denmark*, 23 September 1994 (GC).

Before the Strasbourg Court, the government justified the conviction by the need to protect the rights of those insulted by the racist statements. The Court emphasised the vital importance of combating racial discrimination, stressing that the matter broadcast by the applicant was of great public concern. In looking at how the programme had been prepared and presented, the Court found that it:

> could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought – by means of an interview – to expose, analyse and explain this particular group of youth, limited and frustrated by their social situation, with criminal records and violent attitudes.

Criticising the national courts' approach to how the journalist should have counterbalanced the racist statements, the Court held that:

> the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists.

Discussing the news reporting based on interviews, whether edited or not, the Court held that:

> [t]he punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.[64]

The Court therefore found a violation of Article 10.

3.3. Holocaust denial and references to Nazi ideology

Speech promoting the Nazi ideology and denying the Holocaust falls outside the protection of Article 10. Using imagery which refers to the Holocaust in social campaigns will also not be protected under Article 10. Such protection was denied in *PETA Deutschland v. Germany*,[65] in which a civil injunction by the Berlin Regional Court in 2004 prevented the animal rights' organisation PETA (People for the Ethical Treatment of Animals) from publishing an advertising campaign featuring posters bearing photos of emaciated, naked concentration camp victims or piled-up dead human bodies along with pictures of animals kept in mass stocks. The pictures were accompanied by short texts, such as "final humiliation", "if animals are concerned, everybody

64. *Jersild v. Denmark*, 23 September 1994, paragraphs 31-35.
65. *PETA Deutschland v. Germany*, 8 November 2012.

becomes a Nazi" and "[t]he Holocaust on your plate". The Court reached a different conclusion in a recent judgment concerning an anti-abortion campaign.[66]

The denial of the Holocaust,[67] as a subject of public discourse, was also denied the protection of Article 10. In *D.I. v. Germany*, the applicant, who was a historian, was fined for having made statements at a public meeting where he had denied the existence of the gas chambers in Auschwitz, stating that these gas chambers were fakes built in the first post-war days and that the German taxpayers had paid about 16 billion German marks for fakes. The Commission found the complaint to be inadmissible, noting that the applicant's statements were contrary to the principles of peace and justice expressed in the Preamble to the Convention, and that they advocated racial and religious discrimination. The Commission held:

> the public interests in the prevention of crime and disorder in the German population due to insulting behaviour against Jews, and similar offences, and the requirements of protecting their reputation and rights, outweigh, in a democratic society, the applicant's freedom to impart publications denying the existence of the gassing of Jews under the Nazi regime.[68]

The Commission reached similar conclusions in *Honsik v. Austria*[69] and *Ochensberger v. Austria*,[70] where the applicants had also denied the existence of the Holocaust and had incited to racial hatred.

Similarly, the Court did not grant protection to Dieudonné M'Bala M'Bala, a comedian who engaged in political activities, for public insults directed at a person or group of persons on account of their origin or of belonging to a given ethnic community, nation, race or religion, specifically in this case persons of Jewish origin or faith.[71] At the end of a show in December 2008 at the "Zénith" in Paris, the applicant invited Robert Faurisson, an academic who had received a number of convictions in France for his negationist and revisionist opinions, mainly his denial of the existence of gas chambers in

66. *Annen v. Germany*, 26 November 2015.
67. The Holocaust is defined as "the state-sponsored, systematic persecution and annihilation of European Jewry by Nazi Germany and its collaborators, between 1933 and 1945. Jews were the primary victims – six million were murdered. Roma (Gypsies), physically and mentally disabled people and Poles were also targeted for destruction or decimation for racial, ethnic, or national reasons. Millions more, including homosexuals, Jehovah's Witnesses, Soviet prisoners of war, and political dissidents also suffered grievous oppression and death under Nazi tyranny." www.ushmm.org/education/foreducators/guidelines.
68. *D.I. v. Germany*, 26 June 1996 (decision).
69. *Honsik v. Austria*, 18 October 1995 (decision).
70. *Ochensberger v. Austria*, 2 September 1994 (decision).
71. *M'Bala M'Bala v. France*, 20 October 2015 (decision).

concentration camps, to join him on stage to receive a "prize for unfrequentability and insolence". The prize, which took the form of a three-branched candlestick with an apple on each branch, was awarded to him by an actor wearing what was described as a "garment of light" – a pair of striped pyjamas with a stitched-on yellow star bearing the word "Jew" – who thus played the part of a Jewish deportee in a concentration camp. The Court declared the application inadmissible (incompatible *ratione materiae*), in accordance with Article 35 (admissibility criteria) of the Convention, finding that under Article 17 (prohibition of abuse of rights), the applicant was not entitled to the protection of Article 10 (freedom of expression). The Court considered in particular that during the offending scene, the performance could no longer be seen as entertainment but rather resembled a political meeting, which, under the pretext of comedy, promoted negationism through the key position given to Robert Faurisson's appearance and the degrading portrayal of Jewish deportation victims faced with a man who had denied their extermination. In the Court's view, this was not a performance which, even if satirical or provocative, fell within the protection of Article 10, but was in reality, in the circumstances of the case, a demonstration of hatred and anti-Semitism and support for Holocaust denial. Disguised as an artistic production, it was in fact as dangerous as a head-on and sudden attack, and provided a platform for an ideology which ran counter to the values of the Convention. The Court thus concluded that the applicant had sought to deflect Article 10 from its real purpose by using his right to freedom of expression for ends which were incompatible with the letter and spirit of the Convention and which, if admitted, would contribute to the destruction of Convention rights and freedoms.

In contrast to Holocaust denial, the denial of the Armenian genocide, as subject of historical and public discourse, was granted protection of Article 10. In *Perinçek v. Switzerland*, Mr Perinçek, a Turkish politician, publicly expressed the view in Switzerland that the mass deportations and massacres suffered by the Armenians in the Ottoman Empire in 1915 and the following years had not amounted to genocide.[72] The Swiss courts held in particular that his motives appeared to be racist and nationalistic and that his statements did not contribute to the historical debate. The applicant complained that his criminal conviction and punishment had been in breach of his right to freedom of expression. The Court held that there had been a violation of Article 10 of the Convention. Being aware of the great importance attributed by the Armenian community to the question whether those mass deportations and massacres were to be regarded as genocide, it found that the dignity

72. *Perinçek v. Switzerland*, 15 October 2015.

of the victims and the dignity and identity of modern-day Armenians were protected by Article 8. The Court therefore had to strike a balance between two Convention rights, the right to freedom of expression and the right to respect for private life, taking into account the specific circumstances of the case and the proportionality between the means used and the aim sought to be achieved. In this case, the Court concluded that it had not been necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the case. In particular, the Court took into account the following elements: the applicant's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance; the context in which they were made had not been marked by heightened tensions or special historical overtones in Switzerland; the statements could not be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland; there was no international law obligation for Switzerland to criminalise such statements; the Swiss courts appeared to have censured the applicant simply for voicing an opinion that diverged from the established ones in Switzerland; and the interference with his right to freedom of expression had taken the serious form of a criminal conviction.

Chapter 4

The system of restrictions within the exercise of the right to freedom of expression – Second paragraph

4.1. Permissible restrictions

Paragraph 2 of Article 10 reads:

> [t]he 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 disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

The primary aim of the Convention system is that the domestic courts enforce the text of the Convention as developed by the Court's jurisprudence. The Court must only be the last resort. This is why the national courts are the first and most important instances to ensure the free exercise of the freedom of expression and to make certain that eventual restrictions follow the requirements set up in paragraph 2 as explained and developed by the Court.

” The exercise of these freedoms … may be subject to…

Any restriction, condition, limitation or any form of interference with the freedom of expression may only be applied to a particular exercise of this freedom. The content of the right to freedom of expression may never be touched. In this respect, Article 17 reads that:

> [n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Obviously, a limitation on the content of a right is similar to denial of that right.

Equally, national authorities are not required to interfere with the exercise of freedom of expression whenever one of the grounds enumerated in paragraph 2 is at stake, as this would lead to a limitation of the content of that right. For instance, damaging someone's reputation or honour must not be seen as criminal and/or grounds for civil redress in all cases. Similarly, a public expression putting the authority of the judiciary at risk must not be punished whenever such a criticism occurs. In other words, public authorities have only the possibility and not the obligation to order and/or enforce a restrictive or punitive measure in respect of the exercise of the right to freedom of expression. A different approach would lead to a hierarchy of rights and values or interests, placing freedom of the expression at the bottom of the list, after, for instance, the right to dignity and honour, or the protection of morals or public order. Such a hierarchy would contravene all international treaties which provide for the equality of rights and do not allow permanent limitations on the exercise of a right, as this would be tantamount to denial of that right.

4.2. The three-part test

The Court, in assessing the interference with the freedom of expression, uses the three-part test, which is also used in cases concerning Articles 8, 9 and 11 of the Convention. According to Article 10, paragraph 2, domestic authorities in any of the contracting states may interfere with the exercise of freedom of expression where three cumulative conditions are fulfilled:

- the interference (meaning "formality", "condition", "restriction" or "penalty") is prescribed by law;[73]

73. *Gawęda v. Poland*, judgment of 14 March 2002 and *The Sunday Times v. the United Kingdom*, 26 April 1979.

- the interference is aimed at protecting one or more of the following interests or values: national security; territorial integrity; public safety; prevention of disorder or crime; protection of health; morals; reputation or rights of others; preventing the disclosure of information received in confidence; and maintaining the authority and impartiality of the judiciary;[74]
- the interference is necessary in a democratic society.[75]

The primary role of Article 10 is to protect everyone's freedom of expression. Therefore, the Court established rules for strict interpretation of the possible restrictions provided for in paragraph 2. In *The Sunday Times v. the United Kingdom*, the Commission held that:

> [s]trict interpretation means that no other criteria than those mentioned in the exception clause itself may be at the basis of any restrictions, and these criteria, in turn, must be understood in such a way that the language is not extended beyond its ordinary meaning ...
>
> In the case of exceptional clauses … the principle of strict interpretation meets certain difficulties because of the broad wording of the clause itself. It nevertheless imposes a number of clearly defined obligations on the authorities.[76]

Basically, it established the legal standard that, in any borderline case, the freedom of the individual must be favourably balanced against state's claim of overriding interest.[77]

Where the Court finds that all three requirements are fulfilled, the state's interference will be considered legitimate. The burden to prove that all three requirements are fulfilled stays with the state. The Court examines the three conditions in the order provided above. Once the Court finds that the state has failed to prove one of the three requirements, it will not examine the case further and will decide that the respective interference was unjustified, and therefore that freedom of expression was violated.

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74. *Observer and Guardian v. the United Kingdom*, 26 November 1991.
75. *Długołęcki v. Poland*, 24 February 2009 and *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995.
76. *The Sunday Times v. the United Kingdom*, 18 May 1977, report of the Commission, paragraph 194.
77. A. Rzeplinski, "Restrictions to the expression of opinions or disclosure of information on domestic or foreign policy of the State", Budapest 1997, in Monitor/Inf (97) 3, Council of Europe.

4.3. Interference with the exercise of the right to freedom of expression

Interference: "formalities, conditions, restrictions or penalties"

"State's interference" must be seen as any form of interference coming from any authority exercising public power and duties or being in the public service, such as courts, prosecutors' offices, police, any law enforcement body, intelligence services, central or local councils, governmental departments, army's decision-making bodies, or public professional structures. Far from being exhaustive, the above enumeration tries only to picture the possible national authorities whose actions would be capable of limiting the exercise of freedom of expression. It makes no difference for the Court which particular authority interferes with this right; the government shall be considered as respondent party in all cases brought before the Court in Strasbourg.

The range of possible interference (formalities, conditions, restrictions or penalties) with the exercise of the right to freedom of expression is very wide and there are no pre-established limits. The Court examines and decides in each particular case whether interference exists, looking at the restrictive impact on the exercise of the right to freedom of expression of the specific measure adopted by the national authorities. Such interference could be: criminal conviction[78] (a fine or imprisonment), an order to pay civil damages,[79] prohibition of publication[80] or of publication of one's picture in the newspaper,[81] confiscation of publications or of any other means through which an opinion is being expressed or information transmitted,[82] refusal to grant a broadcasting licence,[83] prohibition to exercise the journalistic profession, a disciplinary penalty,[84] a court's or other authority's order to reveal journalistic sources and/or sanctioning for not doing so,[85] the announcement by a head of state

78. *Barfod v. Denmark*, 22 February 1989; *Lingens v. Austria*, 8 July 1986; *Dalban v. Romania*, 28 September 1999.
79. *Muller and Others v. Switzerland*, 24 May 1988.
80. *The Sunday Times v. the United Kingdom (No. 2)*, 26 November 1991; *Observer and Guardian v. the United Kingdom*, 26 November 1991.
81. *News Verlags GmbH & Co.KG v. Austria*, 11 January 2000.
82. *Handyside v. the United Kingdom*, 7 December 1976; *Müller and Others v. Switzerland*, 24 May 1988.
83. *Autronic AG v. Switzerland*, 22 May 1990.
84. *Wojtas-Kaleta v. Poland*, 16 July 2009; *Frankowicz v. Poland*, 16 December 2008.
85. *Goodwin v. the United Kingdom*, 27 March 1996 (GC).

that a civil servant will not be appointed to a public post following a statement in public by the civil servant,[86] etc.

Among the different forms of interference, censorship prior to publishing is seen by the Court as the most dangerous, as it stops the transmission of information and ideas to those who want to receive them. This is why the measures undertaken prior to publication, such as the licensing of journalists, the examination of an article by an official before its publication, or the prohibition of publication, are subjected by the Court to very strict control.[87] Even if such limitations are temporary, they can reduce the value of the information. When faced with the prohibition to publish articles in a newspaper, the Court held that Article 10:

> does not in terms prohibit the imposition of prior restraints on publication, as such. … On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.[88]

Prior restraints may be imposed only for a limited time, after detailed scrutiny and justification, and based on clear and foreseeable national regulations.[89]

The requirement for prior authorisation before publication, typical in dictatorships, has never been accepted in democratic societies, and it is in general incompatible with Article 10.[90]

The refusal to register the title of a periodical is a distinct example of censorship prior to publication. As the Commission stated in *Gawęda v. Poland*, such a measure "is tantamount to a refusal to publish it".[91] The domestic courts had refused to register two of the applicant's publications on the ground that their titles "would be in conflict with reality". The Court found a violation of Article 10 on the basis that the law regulating the registration of periodicals was not sufficiently clear and foreseeable. In this context, the Court held:

> the relevant law must provide a clear indication of the circumstances when such restraints are permissible and, *a fortiori*, when the consequences of the

86. *Wille v. Liechtenstein*, 28 October 1999.
87. *RTBF v. Belgium,* 29 March 2011, paragraph 114.
88. *The Sunday Times v. the United Kingdom (No.2)*, 26 November 1991 paragraph 51; *Observer and Guardian v. the United Kingdom*, 26 November 1991.
89. *RTBF v. Belgium*, 29 March 2011.
90. The legal obligation for pre-publication review of interviews was criticised by the Court in the case of *Wizerkaniuk v. Poland*, 5 July 2011.
91. *Gawęda v. Poland*, report of the Commission, 4 December 1998, paragraph 39.

> restraint are to block publication of a periodical completely, as in the present case. This is so because of the potential threat that such prior restraints, by their very nature, pose to the freedom of expression guaranteed by Article 10.[92]

Among the variety of post-expression interferences with the freedom of expression, the criminal conviction and sentence are probably the most dangerous. In *Castells v. Spain*, the applicant, a member of the parliamentary opposition, was sentenced to a term in prison for offending the Spanish Government, which he had accused in a newspaper of being "criminal" and of hiding the perpetrators of crimes against people in the Basque Country. Against this factual background, the Court held that:

> the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.[93]

Civil damages granted for damage caused to others' dignity or honour may constitute a distinct interference with the exercise of the freedom of expression, regardless of a criminal conviction.

Disciplinary proceedings resulting in the ban on any critical expression in the medical profession is not consonant with the right to freedom of expression.[94] Disciplinary reprimand of a doctor, who raised public concerns about decisions made by his/her superior and the quality of medical care given to his/her patients, may also result in the violation of Article 10.[95]

Confiscation or seizure of the means through which information and ideas are disseminated is another possible interference. The moment at when such measures are ordered or enforced, whether prior to or following the moment of dissemination, is of no importance. Thus, the Court decided that the temporary confiscation of paintings considered as obscene by national courts constituted an interference with the painter's freedom of expression.[96] Equally, the seizure of a film seen by the domestic authorities as containing some obscene scenes was defined by the Court as an interference with the freedom of expression.[97] Seizure of books considered as including obscene fragments received a similar treatment by the Court.[98]

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92. *Gawęda v. Poland*, judgment of 14 March 2002, paragraph 40.
93. *Castells v. Spain*, 23 April 1992, paragraph 46.
94. *Frankowicz v. Poland*, 16 December 2008, paragraph 51.
95. *Sosinowska v. Poland*, 18 October 2011.
96. *Müller and Others v. Switzerland*, 24 May 1988.
97. *Otto-Preminger-Institut v. Austria*, 20 September 1994.
98. *Handyside v. the United Kingdom*, 7 December 1976.

Prohibition of advertising is considered by the Court, under particular circumstances, as an interference with the freedom of expression. In *Barthold v. Germany*, the applicant was the veterinary surgeon of last resort for the owners of a sick cat because he alone maintained an emergency service in Hamburg. He was interviewed by a journalist who then wrote an article about this lacuna affecting animal welfare in the region. Dr Barthold's fellow veterinarians initiated an action against him under the unfair competition law alleging that he had instigated or tolerated publicity on his own behalf. The Court held that this case was about public discussion of a matter of concern rather than commercial advertising, and found the applicant's conviction to be unjustified:

> [Dr Barthold's conviction] risks discouraging members of the liberal professions from contributing to public debate on topics affecting the life of the community if ever there is the slightest likelihood of their utterances being treated as entailing, to some degree, an advertising effect. By the same token, application of a criterion such as this is liable to hamper the press in the performance of its task[s] of purveyor of information and public watchdog.[99]

The Court has an extensive jurisprudence regarding paid political advertising. On several occasions, the Court ruled that a ban on paid political advertising constitutes a breach of freedom of expression under Article 10, and may violate freedom of expression of small political parties, since they receive minimal coverage in the edited media and thus paid advertising may be the only way for them to obtain coverage. However, in a recent ruling, the Court mitigated its position, deciding that a ban on political advertising constitutes a permissible attempt to *"protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media."*[100]

Certainly, a newspaper item could be tantamount to advertising. Items which are based on public relations profiles would be seen rather as commercial expression. For instance, in *Casado Coca v. Spain*, the distribution of advertising material by a barrister which had resulted in disciplinary proceedings against him was seen by the Court as commercial expression.[101] The notices published by the barrister merely gave the applicant's name, profession, address and telephone number. They were published with the aim of advertising and provided persons requiring legal assistance with information that was of use and likely to facilitate their access to justice. The disciplinary

99. *Barthold v. Germany*, 25 March 1985, paragraph 58.
100. *Animal Defenders International v. the United Kingdom*, 22 April 2013 and *TV Vest AS & Rogaland Pensjonistparti v. Norway*, 11 December 2008 (GC).
101. *Casado Coca v. Spain*, 24 February 1994.

measure was based on the ban against advertising imposed by the statute of the Spanish Bar, the Barcelona Bar, and its council's decisions. The Court found, however, that member states have a wide margin of appreciation in respect of banning certain types of advertisements.

Although protected by Article 10, commercial expression is subject to different standards of control than other types of expression. For instance, in *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, the Court upheld an injunction against a trade magazine prohibiting it from publishing information about an enterprise operating in its market. Arguing that this was an interference with the exercise of commercial expression, the Court allowed the national authorities a wider margin of appreciation and found the injunction to be compatible with the requirements of paragraph 2 of Article 10:

> even the publication of items which are true and describe real events may under certain circumstances be prohibited: the obligation to respect the privacy of others or the duty to respect the confidentiality of certain commercial information are examples.[102]

However, some dissenting opinions argued that there was no ground for extending the state's margin of appreciation:

> Only in rare cases can censorship or prohibition of publications be accepted
>
> This is particularly true in relation to commercial advertising or questions of commercial or economic policy … The protection of the interests of users and consumers in the face of dominant positions depends on the freedom to publish even the harshest criticism of products.[103]

Independent of the decision based on paragraph 2, commercial expression may be protected under Article 10, and therefore its prohibition or sanction constitutes an interference with the freedom of expression.

An order to reveal journalistic sources and documents, as well as the punishment imposed for having refused to do so, is seen by the Court as an interference with the exercise of the freedom of expression. In *Goodwin v. the United Kingdom*, the Court noticed that such measures were indisputably interfering with the freedom of the press, and decided in the favour of the journalist.[104]

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102. *Markt intern Verlag GmbH and Klaus Beerman v. Germany*, 20 November 1989, paragraph 35.
103. Judge Pettiti, dissenting opinion.
104. *Goodwin v. the United Kingdom*, 27 March 1996 (GC); further information about the case and protection of journalistic sources appears under the section on Protection of journalistic sources.

The search of newspapers' or broadcasters' premises is another form of interference with the freedom of the press. Whether or not based on a legal warrant, such a search would not only endanger the confidentiality of journalistic sources, but it would also place at risk the entire media and it would function as censorship for all journalists in the country.[105]

4.4. Prescribed by law

> **"The exercise of these freedoms may be subject to … restrictions or penalties as are prescribed by law**

According to this requirement, any interference with the exercise of the freedom of expression must have a basis in national law. As a rule, this would mean a written and public law adopted by parliament. A national parliament must decide whether or not such a restriction should be possible. For example, in a case regarding a journalist convicted of defamation, the crime of defamation must be provided for in the national law. Or, where prohibition of publication or seizure of the means by which an expression is disseminated – such as books, newspapers or cameras – are ordered or enforced, such measures have to rely on national legal provisions. Equally, where a newspaper's premises are searched or a broadcasting station is shut down and closed, legal provisions in the national law must ground such measures.

The Court has accepted in only very few cases that common law rules or principles of international law constituted a legal basis for interference with the freedom of expression. For instance, in *The Sunday Times v. the United Kingdom*, the Court found that the British common law rules on contempt of court were sufficiently precise as to fall under the requirement of "provided by law".[106] Also, in *Groppera Radio AG and Others v. Switzerland*[107] and *Autronic AG v. Switzerland*,[108] the Court allowed the state to rely on domestically applicable rules of public international law in order to satisfy this requirement. Although one should not exclude that rules of common law or customary law may restrict freedom of expression, this should rather be a rare exception. Freedom of expression is such an important value that its restriction should always receive the democratic legitimacy only derived from parliamentary debate and elections.

105. *Sanoma Uitgevers B.V. v. the Netherlands*, 14 September 2010 (GC).
106. However, following the Court's judgment, formal legislation was adopted in this area.
107. *Groppera Radio AG and Others v. Switzerland*, 28 March 1990.
108. *Autronic AG v. Switzerland*, 22 May 1990.

This requirement also refers to the quality of the law, even where adopted by parliament; the Court has consistently stated that a law has to be public, accessible, predictable and foreseeable. As stated in *The Sunday Times v. the United Kingdom*:

> [f]irstly, the law has to be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[109]

While in the Sunday Times case the Court found the common law rules as fulfilling the requirement of "law", having also in view the legal advice received by the applicant, in *Rotaru v. Romania* the Court found that the domestic law was not "law" because it was not "formulated with sufficient precision to enable any individual – if need with appropriate advice – to regulate his conduct."[110] In *Petra v. Romania*,[111] the Court decided that "the domestic provisions applicable to the monitoring of prisoners' correspondence … leave the national authorities too much latitude" and the confidential implementing regulations "did not satisfy the requirement of accessibility … and that Romanian law did not indicate with reasonable clarity the scope and manner of exercise of the discretion conferred on the public authorities." Although in the Rotaru and Petra judgments the Court examined and found violations of Article 8 of the Convention (the right to privacy), it used the same standards as when looking at national laws with respect to freedom of expression.

An important case under Article 10 on the quality of law is *Gawęda v. Poland*, where the courts refused to allow the applicant to register two periodicals, arguing that their titles were "in conflict with reality". The two titles were "The Social and Political Monthly – A European Moral Tribune" and "Germany – a thousand-year-old enemy of Poland". With respect to the first publication, the domestic courts refused registration based on the argument that the proposed title "would suggest a European institution had been established

109. *The Sunday Times v. the United Kingdom*, 26 April 1979, paragraph 49.
110. *Rotaru v. Romania*, 4 May 2000, paragraph 55.
111. *Petra v. Romania*, 23 September 1998, paragraphs 37-38.

in Kęty, which was clearly not true". The registration of the second publication was denied under the argument that the title "would be inconsistent with the real state of affairs in that it unduly concentrated on negative aspects of the Polish-German relations and thus gave an unbalanced picture of the facts". The Court noted that the domestic courts:

> inferred from the notion "inconsistent with the real state of affairs" … a power to refuse registration where they consider that a title did not satisfy the test of truth, i.e. that the proposed titles of the periodicals conveyed an essentially false picture.

The requirement that a title of a magazine embodies truthful information:

> is, firstly, inappropriate from the standpoint of freedom of the press. The title of a periodical is not a statement as such, since its function essentially is to identify the given periodical on the press market for its actual and prospective readers. Secondly, such interpretation would require a legislative provision which clearly authorised it. In short, the interpretation given by the courts induced new criteria, which could not be foreseen on the basis of the text specifying situations in which the registration of a title could be refused.

Further, the Court acknowledged that the judicial character of the registration was a valuable safeguard of freedom of the press, but it held that the decisions of the courts must also conform to the principles of Article 10. The Court found that the law, which gave the courts the power to deny registration if it would be "in conflict with reality", was "not formulated with sufficient precision to enable the applicant to regulate his conduct."[112]

The Court has also interpreted the features of the legal basis of a restriction where measures of secret surveillance were taken against individuals.[113] Thus, in *Roman Zakharov v. Russia*, the Court held that the phrase:

> [f]oreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. However, especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident. It is therefore essential to have clear, detailed rules on interception of telephone conversations, especially as the technology available for use is continually becoming more sophisticated. The domestic law must be sufficiently clear to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures.[114]

112. *Gawęda v. Poland*, judgment of 14 March 2002, paragraphs 43 and 48.
113. *Malone v. the United Kingdom*, 2 August 1984.
114. *Roman Zakharov v. Russia*, 4 December 2015 (GC), paragraph 229.

In the *Leander v. Sweden* judgment, the Court said that even in areas affecting national security or fighting organised crime, where the foreseeable character of the law can be weaker (for the effectiveness of investigations, for instance), the wording of the law must nevertheless be sufficiently clear as to give individuals an adequate indication of the legal conduct and the consequences of acting unlawfully. In addition, in the latter judgment, the Court said that "[i]n 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." The Court held further that:

> 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 to the legitimate aim of the measure in question, to give individual adequate protection against arbitrary interference.[115]

Therefore, national courts must examine the quality of laws, other norms, practices or jurisprudence providing grounds for a restriction on the exercise of freedom of expression. They must first look at the publicity and accessibility requirements, which would usually be fulfilled if the respective law is published. Unpublished internal regulations or other norms would definitely not fulfil these requirements if the individual concerned was not aware of their existence and/or content. Assessing the predictability and the foreseeable character of legal provisions or case law seems to be more sophisticated. Courts must examine whether the respective provision is drafted in sufficiently clear and precise terms, through well-defined notions, which allow correlation of the actions with the requirements of the law, and define clearly the area of the prohibited conduct and the consequences of breaking the respective provision. The legal norms empowering public authorities to order and adopt secret measures against individuals, such as secret surveillance, must be very strictly scrutinised by courts as they are the most dangerous interference with individual rights.

Where national courts face contradictory legislation, such as between laws or other regulations passed by local authorities and federal laws and/or the constitution, judges must apply the legal provisions which best ensure free

115. *Leander v. Sweden*, 26 March 1987, paragraph 51.

enjoyment of the freedom of expression. Moreover, all pieces of national law must be interpreted and applied in accordance with the Strasbourg Court's jurisprudence and principles and, where clear contradictions exist, the European law should prevail.

4.5. Legitimate aim

> **The exercise of these freedoms … may be subject to such … restrictions … as … are necessary … 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 disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary**

The list of the possible grounds for restricting freedom of expression is exhaustive. Domestic authorities may not legitimately rely on any other ground falling outside the list provided for in paragraph 2. Therefore, where called upon to enforce a legal provision which would in any way interfere with the freedom of expression, national courts must identify the value or interest protected by the respective provision and check if that interest or value is one of those enumerated in paragraph 2. Only if the answer is affirmative may the courts apply that provision to the individual concerned. For instance, a criminal action or a civil suit filed against a journalist accused of damaging one's reputation or honour will have the legitimate aim of protecting "the reputation or rights of others". Or, the seizure of an obscene book could have the legitimate aim of protecting "morals". An injunction against a newspaper publishing classified information could be justified in the interest of "national security". However, the courts must ensure that the interest to be protected is real, and not a mere and uncertain possibility.

Where the domestic courts are satisfied that a legitimate aim provides the ground for an interference with freedom of expression, they must then look into the third requirement of paragraph 2, as the Court does, and decide whether such interference is "necessary in a democratic society", following the Court's highly developed principles.

4.6. Necessary in a democratic society

” The exercise of these freedoms … may be subject to such … restrictions … as … are necessary in a democratic society

In order to take a decision under this third requirement, national courts must apply the principle of proportionality by answering the following question: “was the aim proportional to the means used to reach that aim?” In this equation, the “aim” is one or more of the values and interests provided by paragraph 2, for the protection of which states may interfere with the freedom of expression. The “means” is the interference itself. Therefore, the “aim” is that specific interest invoked by the state, such as “national security”, “order”, “morals”, “rights of others”, etc. The “means” is the particular measure adopted or enforced against an individual exercising his/her right of expression. For instance, a “means” could be: a criminal conviction for insult or defamation; an order to pay civil damages; an injunction against publication; prohibition of the journalistic profession; the search of a newspaper’s premises; the seizure of the means by which an opinion is expressed, etc.

The decision on proportionality is based on the principles governing a democratic society. In order to prove that interference was “necessary in a democratic society”, the domestic courts, as well as the Strasbourg Court, must be satisfied that a “pressing social need” existed, requiring that particular limitation on the exercise of freedom of expression. In *Observer and Guardian v. the United Kingdom*, the Court stated that “[t]he adjective ‘necessary’, within the meaning of Article 10 paragraph 2, implies the existence of a ‘pressing social need’”.[116]

The first to assess the existence of a pressing social need are the national authorities, which, when doing so, are called upon to follow the Court’s jurisprudence. However, in this respect, the Court held that:

> the Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts.[117]

The Court is therefore empowered to give the final ruling on whether a “restriction” is reconcilable with the freedom of expression as protected by

116. *Observer and Guardian v. the United Kingdom*, 26 November 1991, paragraph 59(c).
117. *Lingens v. Austria*, 8 July 1986; *Janowski v. Poland*, 21 January 1999; *Tammer v. Estonia*, 6 February 2001.

Article 10. The message to the national courts is that they should follow the Court's jurisprudence from the very first hearing in a case relating to the freedom of expression. As European standards such as the Court's jurisprudence offer freedom of expression a higher level of protection than national law and case law, all judges in good faith cannot do anything but apply the higher European standards.

The Court's reasoning in finding the answer to the questions "was the restriction necessary in a democratic society?" or "was the aim proportional to the means?" will be further examined taking into account each of the legitimate "aims" enumerated in paragraph 2. Obviously, the "means" will in all cases be the same: the interference with freedom of expression. In assessing the proportionality, the Court will particularly take into account the circumstances of the publication, the existence of public interest, and the severity of the sanction.

Chapter 5

Limitations due to "public" reasons

"National security", along with "public safety" and "rights of others", were seen as overriding the interest of protecting freedom of expression in cases where the expression sanctioned by the domestic authorities was aimed at the destruction of the rights set forth in the Convention.

5.1. Freedom of expression and national security

One of the major cases where the ground of "national security" was used to restrict freedom of expression is *Observer and Guardian v. the United Kingdom*.[118] In 1986, the two newspapers announced their intent to publish extracts from *Spycatcher*, a book by Peter Wright, a retired intelligence agent. At the time of the announcement, the book had not yet been published. Mr Wright's book included an account of alleged unlawful activities by the British intelligence service and its agents. He asserted that MI5 had bugged all diplomatic conferences in London throughout the 1950s and 1960s, as well as the Zimbabwe independence negotiations in 1979; that MI5 had bugged diplomats from France, Germany, Greece and Indonesia, as well as Mr Khrushchev's hotel suite during his visit to Britain in the 1950s; that MI5 had burgled and bugged the Soviet consulates abroad; that MI5 had plotted unsuccessfully to assassinate President Nasser of Egypt at the time of the Suez crisis; that MI5 had plotted against Harold Wilson during his premiership from 1974 to 1976; and that MI5 had diverted its resources to investigate left-wing political groups in Britain.

The attorney general asked the courts to issue a permanent injunction against the newspapers preventing them from publishing extracts from the book. In July 1986, the courts granted a temporary injunction to prevent the newspapers from publishing during the judicial proceedings regarding the permanent injunction.

118. *Observer and Guardian v. the United Kingdom*, 26 November 1991.

In July 1987, the book was printed in the United States and copies of the books were also circulating in the United Kingdom. Despite this, the temporary injunctions against the newspapers were maintained until October 1988, when the House of Lords refused to grant the permanent injunctions requested by the attorney general.

The Observer and *The Guardian* complained to the Strasbourg organs against the temporary injunctions. The British Government argued that at the time the temporary injunctions were ordered, the information to which Peter Wright had had access was confidential. Had this information been published, the British intelligence service, its agents and third parties would have suffered huge damage following the identification of agents; the relationships with allied countries, organisations and others would also have been damaged; and they would all have ceased to trust the British intelligence service. In addition, the government advanced the argument that there was a risk that other current or former agents would follow Mr Wright's action. For the post-publication period, the government relied on the need to assure allied states of the effective protection of information by the British intelligence service. In the government's opinion, the only way to give such assurance was to make it clear that officers who threatened to breach their lifelong duty of confidentiality could be effectively prevented from doing so by legal action, and that such action would be taken.

With regard to the prior restraints on publication, the Court stated that:

> the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.[119]

The Court further found that the temporary injunctions were justified prior to the publication of the book but not after this point. Following its publication in the United States, the information had lost its confidential character, and therefore the interest in maintaining the confidentiality of the information in *Spycatcher* and keeping it out of the public eye no longer existed. Under these circumstances, there was not "sufficient" need to maintain the injunctions.

In a partly dissenting opinion, Judge Pettiti stated that the temporary injunctions were not justified even before the publication of the book outside the United Kingdom: "where the press is concerned a delay in relation to items of

119. Paragraph 60.

current affairs deprives a journalist's article of a large part of its interest". The judge said further that:

> [o]ne gets the impression that the extreme severity of [the] injunction and of the course adopted by the Attorney General was less a question of the duty of confidentiality than the fear of disclosure of certain irregularities carried out by the security service in the pursuit of political rather than intelligence aims.

In Judge Pettiti's opinion, this constituted a violation of the freedom to receive information because "[t]o deprive the public of information on the functioning of State organs is to violate a fundamental democratic right". Judge De Meyer, also partly dissenting, expressed his agreement with Judge Pettiti and added:

> the press must be left free to publish news, whatever the source, without censorship, injunctions or prior restraint: in a free and democratic society there can be no room, in time of peace, for restrictions of that kind, and particularly not if these are resorted to, as they were in the present case, for "governmental suppression of embarrassing information" or ideas.

In *Vereniging Weekblad Bluf! v. the Netherlands*, the Court also examined, based on different facts, the conflict between "national security" and freedom of expression. The applicant, an association based in Amsterdam, published a weekly magazine called *Bluf!*, designed in principle for left-wing readers. In 1987, *Bluf!* obtained a quarterly report by the Dutch internal security service ("BVD"). The report, dated 1981, was marked "confidential", and contained information of interest for the Dutch secret service. The report referred to the Dutch Communist Party and anti-nuclear movements; it mentioned the Arab League plan to set up an office in The Hague; and it gave information on the activities of the Polish, Romanian and Czechoslovakian secret services in the Netherlands.

The editor of the magazine proposed that the report, together with a commentary, would be published as a supplement to the issue of 29 April 1987. On the same day, the chief of the Dutch internal security service sent a letter to the public prosecutor's office, stating that dissemination of the report would break the criminal law. With regard to the secret character of the information in the report, he observed that:

> [a]lthough ... the various contributions taken separately do not (or do not any longer) contain any State secrets, they do – taken together and read in conjunction – amount to information whose confidentiality is necessary in the interests of the State or its allies. This is because the juxtaposition of the facts gives an

> overview, in the various sectors of interest, of the information available to the security service and of the BVD's activities and method of operation.[120]

As a result, prior to the printing and distribution of the magazine, *Bluf!*'s premises were searched following an order of the investigating judge. The entire print run of *Bluf!*'s 29 April edition, including the supplement, was seized. During that night, unknown to the authorities, the staff of *Bluf!* had reprinted the issue, and about 2 500 copies were sold the next dayin the streets of Amsterdam. The authorities did not stop the distribution.

In May 1987, the investigating judge closed the investigation against the staff of *Bluf!* without bringing any criminal charges. In the meantime, the association asked for the return of the confiscated copies, but its application was denied. In March 1988, at the request of the public prosecutor, the Dutch courts decided that all copies of that *Bluf!* issue should be withdrawn from public circulation. The courts relied on the need to protect national security and argued that the unsupervised possession of the seized items was contrary to the law and to the public interest.

The association complained to the Court, claiming that the Dutch authorities had violated its right under Article 10. The government held that the interference with the applicant's freedom of expression was legitimately grounded by the need to protect "national security", basing this on the following arguments: individuals or groups posing a threat to national security could have discovered, by reading the report, whether and to what extent the Dutch secret service was aware of their subversive activities; the way in which the information had been presented could also have given them an insight into the secret services' methods and activities; these potential enemies thus had the possibility to use this information to the detriment of national security.

Examining whether the interference – the seizure and withdrawal from circulation – was "necessary in a democratic society" for the protection of the "national security", the Court held:

> it is open to question whether the information in the report was sufficiently sensitive to justify preventing its distribution. The document in question was six years old. ... the head of the security service [had] himself admitted that in 1987 the various items of information, taken separately, were no longer State secrets ... Lastly, the report was marked simply "Confidential", which represents a low degree of secrecy.
>
> ...

120. *Vereniging Weekblad Bluf! v. the Netherlands*, 9 February 1995, paragraph 9.

> The withdrawal from circulation ... must be considered in the light of the events as a whole. After the newspaper had been seized, the publishers reprinted a large number of copies and sold them in the streets of Amsterdam, which were very crowded ...
>
> Consequently, the information in question had already been widely distributed when the journal was withdrawn from circulation. ...
>
> In this latter connection, the Court points out that it has already held that it was unnecessary to prevent the disclosure of certain information seeing that it had already been made public ... or had ceased to be confidential. …
>
> the information in question was made accessible to a large number of people, who were able in their turn to communicate it to others. Furthermore, the events were commented on by the media. That being so, the protection of the information as a State secret was no longer justified and the withdrawal of [that] issue … of Bluf! no longer appeared necessary to achieve the legitimate aim pursued. ...
>
> In short, as the measure was not necessary in a democratic society, there has been a breach of Article 10.[121]

The judgments in the cases of *Observer and Guardian* and *Bluf!* provide for at least two important principles. The first principle states that once in the public arena, information on national security may not be prohibited, withdrawn, or the authors of the dissemination punished. The second principle institutes a prohibition on states to unconditionally define as classified all information in the area of national security and, consequently, to establish a prior limitation on access to such information. Some information on national security may indeed be classified where there are serious reasons to believe that national security would be threatened by allowing it into the public domain. Moreover, the classified status of information must be limited in time, and the need to maintain this status must be verified periodically. The interest of the public in knowing certain information should also be considered in the process of classifying or declassifying information related to national security.

The nature of the article should also be taken into account by national courts while assessing the proportionality of the interference in the case of revealing classified information. In the case *Stoll v. Switzerland*, the applicant, a journalist, was sentenced to the payment of a fine for having disclosed to the press a confidential report by the Swiss Ambassador to the United States, Carlo Jagmetti. The report related to the strategy to be adopted by the Swiss Government in the negotiations between, among others, the World

121. Paragraphs 41-46.

Jewish Congress and Swiss banks on the subject of compensation due to Holocaust victims for unclaimed deposited assets in Swiss bank accounts. A strategy paper on the subject, classified as "confidential", was drawn up by the ambassador and was then sent to the person in charge of the matter at the Swiss Federal Department of Foreign Affairs in Berne. Finding no violation of Article 10, the court emphasised that the content of the applicant's articles had been clearly reductive and truncated and hence the vocabulary used had tended to suggested that the ambassador's remarks had been anti-Semitic, causing a rumour which contributed to his resignation and which related to one of the very phenomena at the root of the unclaimed assets' issue, namely the atrocities against the Jewish community during the Second World War. Given that the inaccurate and sensationalist nature of the articles which detracted from their potential contribution to public debate, and bearing in mind one of them had been placed on the front cover of a weekly newspaper with a large circulation, the Court was of the view that the applicant's chief intention had not been to inform the public on a topic of general interest but to make the ambassador's report the subject of needless scandal.[122]

A legislation prohibiting in absolute and unconditioned terms the dissemination of all information in the area of national security, eliminating the public control over the intelligence services' activities, would constitute a breach of Article 10 as not being "necessary in a democratic society". Where faced with legislation providing for general and unconditioned prohibition of dissemination of all information in the area of national security, the national courts must reject such a claim, being it criminal or civil. Courts must allow the press, acting on the benefit of the public, to exercise its freedom as to identify the malfunctions, illegalities or other wrongs within the intelligence system. The rules developed by the Strasbourg Court in the instances where freedom of expression conflicted with the interest of defending the national security are the guidelines to be followed at national level. Even where a domestic legal system does not explicitly provide for the "necessity" test, the proportionality principle, and the public interest argument, the national courts must take them into their legal thinking and develop the balancing test which would answer at the "necessity" question.

Another guideline can be found in Principle 12 of the Johannesburg Principles[123] reading that "a state may not categorically deny access to all information related to national security, but must designate in law only those

122. *Stoll v. Switzerland*, 10 December 2007 (GC), paragraph151.

123. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted on 1 October 1995.

specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest".

In addition, Principle 15 prohibits the punishment of a person on grounds of "national security for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure."

The 1981 Recommendation of the Committee of Ministers of the Council of Europe on the right to access to information held by the public authorities, subjects the limitations on access to information to a three-part test: restrictions must be provided by law or practice, be necessary in a democratic society and be aimed at protecting a legitimate public interest. Any denial of information must be explained and subjected to revision. Information in the area of national security are not an exception to this rule.

"National security" versus freedom of expression was also examined by the Court in relation to military secrets. In *Hadjianastassiou v. Greece*, an officer was convicted to a 5-month suspended prison sentence for having disclosed classified military information to a private company in exchange of payment. The information concerned a given weapon and the corresponding technical knowledge, and in the government's view, the disclosure was capable of causing considerable damage to the national security. After holding that military information are not excluded from Article 10's protection, the Court found the conviction as "necessary in a democratic society" for protecting the "national security" and held:

> the disclosure of the State's interest in a given weapon and that of the corresponding technical knowledge, which may give some indication of the state of progress in its manufacture, are capable of causing considerable damage to national security.
>
> (…)
>
> Nor does the evidence disclose the lack of a reasonable relationship of proportionality between the means employed and the legitimate aim pursued.[124]

The Hadjianastassiou judgment gives two important trends to the national courts. Firstly, that not all the military information is swept away from the public arena. Secondly, the Court held once again that it is for the national courts to establish in each particular case whether the respective information did pose a real and serious danger to the national security. Such an assessment based on the proportionality principle is the answer to the question

124. *Hadjianastassiou v. Greece*, 16 December 1992, paragraphs 45 and 47.

whether or not an expression making public military information should or should not be prohibited or sanctioned.

5.2. Freedom of expression and territorial integrity

In *Sürek and Özdemir v. Turkey*, the applicants were convicted by the national courts to 6 months imprisonment and a fine each, under the charge of disseminating separatist propaganda. In addition, the printed issues were seized. The applicants published two interviews with a senior figure in the PKK, who condemned the policies of the Turkish authorities in the south-east, which he described as being aimed at driving the Kurds out of their territory and destroying their resistance. He also claimed that the war on behalf of the Kurdish people will continue "until there is only one single individual left on our side". The applicants also published a joint statement issued by four organisations which, like the PKK, were illegal under the Turkish law, which plead in favour of recognising the right of the Kurdish people to self-determination and the withdrawal of the Turkish army from Kurdistan.

The Court first referred to the criticism of the government – as practiced by the publication – and held that "the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician."[125] Further, the Court noted that the fact that the interviews were given by a leading member of a proscribed organisation and that they contained hard criticism of the official state policy and communicated a one-sided view of the situation and responsibility for disturbances in south-east Turkey cannot justify in itself an interference with the applicants' freedom of expression. In the Court's view,

> the interviews had a newsworthy content which allowed the public both to have an insight into the psychology of those who are the driving force behind the opposition to official policy in south-east Turkey and to assess the stakes involved in the conflict.

The Court further held that "domestic authorities failed to have sufficient regard to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them." Concluding, the Court found that the reasons given by the domestic courts to convict the applicants "although relevant, cannot be sufficient for justifying the interferences with their right to freedom of expression".[126]

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125. *Sürek and Özdemir v. Turkey*, 8 July 1999 (GC), paragraph 60.
126. Paragraph 61.

Equally, in *Özgür Gündem v. Turkey*, the Court found that convictions for separatist propaganda, which were justified by the Turkish government under the ground of protecting national security and preventing crime and disorder, were contrary to Article 10:

> the use of the term 'Kurdistan' in a context which implies that it should be, or is, separate from the territory of Turkey, and the claims by persons to exercise authority on behalf of that entity, may be highly provocative to the authorities.

After referring to the right of the public to be informed on other views than those of the state and the majority of the population, the Court stated that:

> [w]hile several of the articles were highly critical of the authorities and attributed unlawful conduct to the security forces, sometimes in colourful and derogatory terms, the Court nonetheless finds that they cannot be reasonably regarded as advocating or inciting the use of violence.[127]

By contrast, in *Sürek v. Turkey (No. 3)*, the Court found that the grounds of protecting national security and territorial integrity were proportional to the restriction upon freedom of expression, due to the capability of the article to incite to violence in south-east Turkey: "Indeed the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor."[128] The difference between this and the other cases lies in the capacity of the impugned article to incite violence and in the possibility that such violence will occur, both elements being determined by the Court on the basis of the concrete circumstances of each case.

In *Kühnen v. the Federal Republic of Germany*,[129] the applicant led an organisation whose aim was to bring the National Socialist Party (prohibited in Germany) back into the political scene. Mr Kühnen had disseminated publications encouraging the fight for a socialist and independent "Greater Germany". He wrote that his organisation was in favour of "German unity, social justice, racial pride, community of the people [and] camaraderie" and against "capitalism, communism, Zionism, estrangement by means of masses of foreign workers, destruction of the environment." He also wrote: "[w]hoever serves this aim can act, whoever obstructs will be fought against and eventually eliminated". Mr Kühnen was sentenced to prison by the

127. *Özgür Gündem v. Turkey*, 16 March 2000, paragraph 70.
128. *Sürek v. Turkey (No. 3)*, 8 July1999 (GC), paragraph 40.
129. *Kühnen v. the Federal Republic of Germany*, 12 May 1988 (decision).

German courts.[130] The European Commission noted that the applicant had advocated national socialism aimed at impairing the basic order of freedom and democracy, and that his speech ran counter to one of the basic values expressed in the Preamble to the Convention: the fundamental freedoms enshrined in the Convention "are best maintained ... by an effective political democracy." In addition, the Commission found that the applicant's speech contained elements of racial and religious discrimination. Consequently, the Commission held that the applicant had sought to use the freedom of expression to promote conduct contrary to the text and spirit of the Convention, as well as contrary to Article 17, which prohibits the abuse of rights. Concluding, the Commission found that the interference with the exercise of the applicant's freedom of expression was "necessary in a democratic society".

5.3. Freedom of expression and prevention of disorder or crime

The national authorities restricted the freedom of expression on the ground of "prevention of disorder" in the case of *Incal v. Turkey*.[131] Mr Incal, a Turkish national and member of the People's Labour Party (dissolved in 1993 by the Constitutional Court), had distributed leaflets containing virulent remarks about the Turkish Government's policy and called on the population of Kurdish origin to band together to raise certain political demands. The leaflets called people to fight against the campaign Driving the Kurds Out, which had been launched by the Turkish security police and local governments, and called this campaign a "part of the special war being conducted in the country at present against the Kurdish people". The leaflet also characterised the state's action as "state terror against Turkish and Kurdish proletarians". However, the leaflets did not call for violence or hatred. The Turkish security police considered that the leaflets could be regarded as separatist propaganda. Mr Incal was sentenced by the national courts to six months' imprisonment on the charge of incitement to commit an offence. He was also prohibited from entering the civil service and taking part in a number of activities within political organisations, associations and trade unions.

Before the Court, the Turkish Government argued that the applicant's conviction was necessary in order to prevent disorder, since the language in the leaflets was aggressive, provocative and likely to incite the people of Kurdish origin to believe that they were victims of a "special war" and therefore

130. The German Criminal Code prohibits the dissemination of propaganda by unconstitutional organisations where such propaganda is directed against the basic order of democracy, freedom and understanding of all people.

131. *Incal v. Turkey*, 9 June 1998 (GC).

justified in setting up self-defence committees. The government also argued that "it was apparent from the wording of the leaflets … that they were intended to foment an insurrection by one ethnic group against the State authorities" and that "the interest in combating and crushing terrorism takes precedence in a democratic society"[132].

The Court did not share the government's views, and referred to the need that "actions or omissions of the Government" be "subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion"[133]. In order to assess whether the conviction and sentence of the applicant were "necessary in a democratic society", the Court stressed that "[w]hile precious to all, freedom of expression is particularly important for political parties and their active members"[134]. The Court held that it could not identify:

> anything which would warrant the conclusion that Mr Incal was in any way responsible for the problems of terrorism in Turkey …
>
> In conclusion, Mr Incal's conviction was disproportionate to the aim pursued, and therefore unnecessary in a democratic society.[135]

In addition to the breach of Article 10, the Court also found a breach of the right to a fair trail (Article 6), as one of the judges on the bench was a military judge.

Prevention of disorder or crime, as well as the interest of protecting national security, was argued by the Austrian Government in the case of *Saszmann v. Austria*. The applicant was sentenced to three months' imprisonment, suspended for a probationary period of three years, for having incited the members of the army, through the press, to disobedience and violation of military laws. The Commission decided that the applicant's conviction was justified for the maintenance of order in the Austrian federal army and for protection of national security: "the incitement to disregard military laws constituted unconstitutional pressure aiming at the abolition of laws which had been passed in a constitutional manner. Such unconstitutional pressure could not be tolerated in a democratic society."[136]

The Court reached a different conclusion in the case of *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, where the Austrian courts prohibited the distribution of a monthly magazine among soldiers in

132. Paragraph 57.
133. Paragraph 54.
134. Paragraph 46.
135. Paragraphs 58 and 59.
136. *Saszmann v. Austria*, 27 February 1997 (decision).

military barracks; the periodical proposed reforms and encouraged the soldiers to take legal action against the authorities. The Austrian Government argued that the applicants' periodical threatened the country's system of defence, the effectiveness of the army and could lead to disorder and crime. The Court did not agree with the government's submissions and held that most of the items in the periodical:

> set out complaints, put forward proposals for reforms or encourage the readers to institute legal complaints or appeals proceedings. However, despite their often polemical tenor, it does not appear that they overstepped the bounds of what is permissible in the context of a mere discussion of ideas, which must be tolerated in the army of a democratic State just as it must be in the society that such an army serves.[137]

The Court therefore found a violation of Article 10.

5.4. Freedom of expression and morals

The conflict between "morals" and freedom of expression has brought new interpretations to the principle of proportionality and has mostly been examined in the context of artistic freedom. As a rule in such cases, the Court has left the national authorities a wider margin of appreciation, justified by the specificity of the "morals" in each member state or even in different regions within the same country.

In *Müller and Others v. Switzerland*,[138] the national authorities' interference with the freedom of expression was considered by the Court to be reasonable and "necessary in a democratic society" for the protection of "morals". In 1981, during an exhibition of contemporary art, Mr Müller painted and exhibited three large paintings showing acts of sodomy, zoophilia, masturbation and homosexuality. The exhibition was accessible to the public at large, without any age restriction, and was free of charge. The Swiss courts fined Mr Müller and the organisers of the exhibition and seized the paintings, which were handed over to an art museum for safekeeping. However, they were returned to Mr Müller in 1988. In Strasbourg, Mr Müller and the organisers of the exhibition claimed that both the conviction and the seizure had violated their right to freedom of expression.

The Court referred to the lack of a uniform concept of morals within the territory of the contracting parties to the Convention. The Court held that the national courts were in a better position than the international judge to

137. *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, 19 December 1994, paragraph 38.
138. *Müller and Others v. Switzerland*, 24 May 1988.

decide on issues of "morals", in view of the former's direct contact with the "vital forces" in their countries. The Court further stated that:

> the paintings in question depict in a crude manner sexual relations, particularly between men and animals ... the general public had free access to them, as the organisers had not imposed any admission charge or any age-limit. Indeed, the paintings were displayed in an exhibition which was unrestrictedly open to – and sought to attract – the public at large.[139]

The Court also held that the arguments of the national judges, who had found that the images were "liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity" by the "emphasis on sexuality in some of its crudest forms", were not unreasonable[140]. The findings of the Court were subsequently confirmed in a number of judgments concerning artistic freedom.[141] The unlimited access of children to the exhibition played an essential role in the Müller judgment, as was also the case in *Handyside v. the United Kingdom*,[142] where the applicant had published and distributed to pupils a book viewed as obscene by the British authorities.

In *Wingrove v. the United Kingdom*, the British Board of Film Classification refused to give a classification certificate to a video work entitled *Visions of Ecstasy*. The film depicted a youthful actress dressed as a nun – intended to represent St Teresa of Avila, the sixteenth century Carmelite nun and founder of many convents – who had experienced powerful ecstatic visions of Jesus Christ. The Commission concluded that the British Board of Film Classification's refusal of a classification certificate was unnecessary in a democratic society to protect against insult to religious feelings. In the Commission's view, the context of prior restraint meant that particularly compelling reasons were needed to justify restriction "based on speculation by the competent authorities that a section of the population might be outraged."[143] It was relevant that it was not a feature film and would not be on display to the general public; and that the board could have restricted circulation to those over 18.

The Court overturned the Commission's decision in this case. It felt itself unable to rule that the offence of blasphemy violated Article 10. It decided that:

> [w]hereas there is little scope under Article 10 para. 2 ... for restrictions on political speech or on debate of questions of public interest, ... a wider margin of

139. Paragraph 36.
140. Ibid.
141. *Vereinigung Bildender Künstler v. Austria*, 25 January 2007.
142. *Handyside v. the United Kingdom*, 7 December 1976.
143. *Wingrove v. the United Kingdom*, report of the Commission adopted on 10 January 1995.

> appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.[144]

Judge Löhmus rightly observed in a dissenting opinion that:

> [t]he Court makes distinctions within Article 10 … when applying its doctrine on the States' margin of appreciation. Whereas, in some cases, the margin of appreciation applied is wide, in other cases it is more limited. However, it is difficult to ascertain what principles determine the scope of that margin of appreciation.[145]

There have been signs of shift of attitude within the Court in respect of artistic freedom and the wide margin of apreciation left to states. In *I.A. v. Turkey*, the applicant published a novel in which the author addressed philosophical and theological issues, and two thousand copies of it were printed. The applicant was prosecuted for blaspheming against "God, the Religion, the Prophet and the Holy Book" and was convicted of blasphemy. In the Court's judgment, the majority followed the reasoning in the Wingrove case. It allowed Turkey a wide margin of appreciation because "believers may legitimately feel themselves to be the object of unwarranted and offensive attacks" and there was a pressing social need to provide "protection against offensive attacks on matters regarded as sacred by Muslims."[146] But the powerful joint dissenting opinion of Judges Costa, Cabral Barreto and Jungwiert referred to the passage in Handyside that recognised that Article 10 protects information and ideas that "shock, offend or disturb the State or any sector of the population". They stated that "these words should not become an incantatory or ritual phrase but should be taken seriously and should inspire the solutions reached by our Court."[147] It recognised that the novel contained insulting and regrettable statements, but considered that these statements should not be taken in isolation as a basis for condemning an entire book and imposing criminal sanctions on its publisher, and that "a democratic society is not a theocratic society". The dissenting judges were not persuaded by the precedent in the Wingrove case, concluding that "the time has perhaps come to 'revisit' this case-law, which in our view seems to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press"[148].

144. *Wingrove v. the United Kingdom*, judgment of 25 November 1996, paragraph 58.
145. Dissenting opinion of Judge Löhmus, paragraph 1.
146. *I.A. v. Turkey*, 13 September 2005, paragraph 30.
147. Joint dissenting opinion of Judges Costa, Cabral Barreto and Jungwiert, paragraph 1.
148. Paragraph 8.

Another type of conflict between "morals" and freedom of expression was examined by the Court in *Open Door and Dublin Well Woman v. Ireland*.[149] Open Door Counseling Ltd and Dublin Well Woman Centre Ltd ("Open Door" and "Dublin Well Woman") were non-profit organisations in Ireland, where abortion was prohibited. The two organisations offered advice to pregnant women, and Dublin Well Woman provided a large range of services in the area of family planning, pregnancy, health, sterility, etc. It also offered pregnant women information on the possibility of having an abortion outside of Ireland, such as the addresses of some clinics in the United Kingdom. Both organisations restricted themselves to providing advice, while the decision whether or not to have an abortion was left with the women. In 1983, Dublin Well Woman published a brochure criticising two recent constitutional amendments. The first amendment gave anyone the right to file an application with the courts to prohibit the imparting of information on abortions outside of Ireland. The second constitutional amendment gave anyone the right to request a court injunction to prevent a woman from travelling abroad if they believed she intended to have an abortion.

In 1986, following an application filed by the Society for the Protection of Unborn Children (Ireland) Ltd, the Irish courts decided that imparting information on abortion violated the constitution and other statutory provisions. The courts issued a permanent injunction against Dublin Well Woman and Open Door to prevent them giving advice or help to pregnant women on having an abortion outside of Ireland. The two organisations complained to the Strasbourg Court, claiming that their right to impart and receive information had been violated. They were joined by four individual women: two as direct victims of the prohibition and two as virtual victims.

Discussing protection of "morals" as a legitimate aim, the Court argued that the protection of unborn children relies on the profound moral values of the Irish people, and held that although the margin of appreciation of the national authorities is wider with respect to "morals", it is not unlimited: national authorities do not have "an unfettered and an unreviewable" discretion[150]. Further on, the Court examined whether the interference answered a "pressing social need" and whether it was proportionate with the legitimate aim pursued. The Court was struck by the absolute nature of the injunctions issued by the Irish courts, which imposed a perpetual and general prohibition "regardless of age or state of health or their reasons for seeking counselling on the termination of pregnancy" (paragraph 73). The Court held that

149. *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992.
150. Paragraph 68.

such a restriction was too broad and disproportionate. Arguing the disproportionate nature of the interference, the Court noted the existence of other available sources of information (magazines, telephone books, people living abroad), all proving that the need for the restriction imposed on the applicants was not a pressing one.

Here again, the national courts were shown that general and/or perpetual prohibitions on freedom of expression are unacceptable, even in an area as sensitive as morals. National courts have thus been given guidelines for applying the proportionality principle: the target group of the expression is important and especially relevant if children and youth are also being addressed; measures limiting the access to the respective form of expression are relevant, as proving the care taken to reduce the "immoral" impact; and real damage to "morals" should be identified, so as to avoid arbitrariness.

Chapter 6

Freedom of expression and reputation

The "legitimate aim" of protecting the "reputation and rights of others" is by far the "legitimate aim" most frequently used by national authorities to restrict freedom of expression. It has often been invoked to protect politicians and civil servants against criticism. The Court has thus developed a large jurisprudence in this area, proving the high level of protection afforded to the freedom of expression, in particular towards the press. The media's privileged position derives from the Court's view of the central role played by political expression in a democratic society, both with respect to the electoral process and to daily matters of public interest. With regard to the language, the Court has accepted severe and harsh criticism, as well as colourful expressions, as the latter have the advantage of drawing attention to the issues under debate.

In order to balance the right to freedom of expression against the right to private life, the Court uses six criteria established in the case of *Axel Springer AG v. Germany*:[151] the contribution to a debate of general interest; how well known the person being reported on is and the subject of the report; the person's prior conduct; the method used to obtain the information; the veracity, content, form and repercussions of the report; and the penalty imposed. The above notions are analysed in more detail below.

6.1. Reputation of public figures

A gradation of protection for different groups can be seen from the Court's case law. For expression directed against judges, the Court has favoured less protection and leaves a large margin of appreciation for the state. Speech directed at ordinary people and public figures (apart from politicians) also benefits from less protection. The highest level of protection is granted to speech concerning politicians and high-ranking officials, whereas criticism may be directed against a state, government and other state institutions.[152]

151. *Axel Springer AG v. Germany*, 7 February 2012.
152. Human rights files No. 18, *Freedom of expression in Europe, Case-law concerning Article 10 of the European Convention on Human Rights*, Council of Europe, March 2007.

The press freedom to interfere in the private life of public figures is not absolute, however. In *Von Hannover v. Germany*, the Court decided in favour of the right to respect for private life. The Court reiterated that the concept of private life extends to aspects relating to personal identity, such as a person's name or a person's picture. Furthermore, private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his or her relations with other human beings. The protection against publication of pictures and articles about the sphere of private and family life was granted to the applicant.[153]

6.2. Criticism of politicians

Much less protection would be granted to the privacy and reputation of politicians, particularly if information about a person's private life has an impact on his or her duties and public functions. The Court found that by being willing to work in the public sphere, politicians put themselves voluntarily into the spotlight and thus need to tolerate more criticism, have a "thicker skin".

In *Lingens v. Austria*,[154] the Court balanced freedom of the press against the right to reputation of a high-level public official. In October 1975, following general elections in Austria, Mr Lingens published two articles criticising the Austrian Federal Chancellor, Mr Bruno Kreiski, who had won the elections. The criticism focused on a political move of the chancellor, who had announced a coalition with a party led by a person with a Nazi background, and on the chancellor's systematic efforts to sustain former Nazis politically. The chancellor's behaviour was characterised as "immoral", "undignified", and proving "the basest opportunism". Following a private prosecution brought by the chancellor, the Austrian courts found these statements to be insulting and sentenced the journalist to a fine. The national courts also found that the journalist could not prove the truth of his allegation of "basest opportunism". Before the Strasbourg Court, the Austrian Government claimed that the applicant's conviction was aimed at protecting the chancellor's reputation.

Looking into the requirement of the necessity of the interference "in a democratic society", the Court developed some very important principles. Politicians must show greater tolerance of criticism by the media:

> [f]reedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political

153. *Von Hannover v. Germany*, 24 June 2004.
154. *Lingens v. Austria*, 8 July 1986.

> leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.
>
> The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. [155]

The Court did not exclude the protection of politicians' reputation, but held that "in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues".[156]

The political context of the contested articles was also of relevance: "t]he impugned expressions are therefore to be seen against the background of a post-election political controversy; ... in this struggle each used the weapons at his disposal; and these were in no way unusual in the hard-fought tussles of politics".[157]

The impact of the applicant's conviction upon the freedom of the press in general was another element which the Court found relevant:

> [a]s the Government pointed out, the disputed articles had at the time already been widely disseminated, so that although the penalty imposed on the author did not strictly speaking prevent him from expressing himself, it nonetheless amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future ... In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.[158]

Following the Court's principles, any internal law protecting by special or higher penalties politicians and all high-ranking officials in general (such as the president, the prime minister, ministers, members of parliament, etc.) against insult or defamation, in particular by the press, would be incompatible with Article 10.[159] Where such provisions exist and are invoked by politicians, national courts must abstain from enforcing them. In exchange, the general legal provisions on insult and defamation could be relied on. Moreover, where the honour and reputation of politicians conflict with the freedom of the press, national courts must carefully apply the proportionality

155. Paragraph 42.
156. Paragraph 42.
157. Paragraph 43.
158. Paragraph 44.
159. *Otegi Mondragon v. Spain*, 15 March 2011.

principle and decide whether the conviction of a journalist is a necessary measure in a democratic society, looking at the guidelines provided by the Court in cases such as Lingens.

The Court stressed in *Sanocki v. Poland*, that although politicians need to accept wider criticism, they have to be able to defend themselves when they consider that a publication casting doubt on their person was untrue and might mislead the public as to their manner of exercising power.[160]

6.3. High-ranking officials and civil servants

A lesser level of protection (in comparison to criticism directed at politicians) is granted towards insult or defamation of high-ranking officials (including the president of a country,[161] ministers,[162] members of parliament, etc.) or civil servants[163] (including police officers, prosecutors and law enforcement officers, and all public employees). It seems that the Court is broadening the "breathing space" for borderline critical/insulting expressions directed towards public officials or public entities, which discuss or comment on matters of public interest or are part of political debate.[164]

In *Colombani and Others v. France*, the Court analysed the French law on protection of the head of state in the context of defamation of the King of Morocco. The Court noted that the law tended to confer on heads of state an extraordinary privilege:

> [S]hielding them from criticism solely on account of their function or status, irrespective of whether the criticism is warranted … amounts to conferring on foreign heads of State a special privilege that cannot be reconciled with modern practice and political conceptions. Whatever the obvious interest which every State has in maintaining friendly relations based on trust with the leaders of other States, such a privilege exceeds what is necessary for that objective to be attained.[165]

In *Thorgeir Thorgeirson v. Iceland*,[166] the Court upheld the freedom of the press in the context of criticism of civil servants. The applicant (a writer) published in a daily newspaper two articles on police brutality. The first article

160. *Sanocki v. Poland*, 17 July 2007, paragraph 61.
161. Protection of a foreign head of state was analysed in the case of *Eon v. France*, 14 March 2013. The Court found that there was no reason to grant special protection for a head of state through insult or defamation laws.
162. *Tuşalp v. Turkey*, 21 February 2012.
163. *Sokołowski v. Poland*, 29 March 2005.
164. *Uj v. Hungary*, 19 July 2011.
165. *Colombani and Others v. France*, 25 June 2002, paragraph 68.
166. *Thorgeir Thorgeirson v. Iceland*, 25 June 1992.

took the form of a letter addressed to the minister of justice, who was called on to institute a commission "to investigate the rumours, gradually becoming public opinion, that there is more and more brutality within the Reykjavik police force and being hushed up in an unnatural manner". Apart from a journalist who had been the victim of police brutality, the applicant did not indicate the names of other victims. Describing the police officers and their behaviour, Mr Thorgeirson used, among others, the following expressions: "wild beasts in uniform that creep around, silently or not, in the jungle of our town's night-life"; "individuals reduced to a mental age of a new-born child as a result of strangle-holds that policemen and bouncers learn and use with brutal spontaneity instead of handling people with prudence and care", or "allowing brutes and sadists to act out their perversions". Following a television programme in which the police denied the allegations of brutality, the applicant published a second article, stating that "[police] behaviour was so typical of what is gradually becoming the public image of our police force defending itself: bullying, forgery, unlawful actions, superstitions, rashness and ineptitude". The applicant was sentenced to a fine for defamation of unspecified members of the police force.

Before the Court, the government argued that the conviction was aimed at protecting the "reputation ... of others", namely that of the police officers, and, in addition, that the limits of acceptable criticism were wider only with regard to political speech. The Court however, observed "that there is no warrant in its case-law for distinguishing, in the manner suggested by the Government, between political discussion and discussion of other matters of public concern". With regard to the language, the Court stated that "both articles were framed in particularly strong terms. However, having regard to their purpose and the impact which they were designed to have, the Court is of the opinion that the language used cannot be regarded as excessive." The Court concluded that "the conviction and sentence were capable of discouraging open discussion of matters of public concern" and that the reasons advanced by the government did not prove the proportionality of the interference to the legitimate aim pursued. The applicant's conviction was therefore not "necessary in a democratic society"[167].

In *Thoma v. Luxembourg*, a journalist was ordered to pay civil damages for having stated that all but one of the officials of the Water and Forestry Commission were corruptible. The Court found a violation of Article 10,

167. Paragraphs 64-69.

taking into account the wide debate on this topic and the general interest raised by it. Referring to the criticism of civil servants, the Court held:

> Civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent politicians do and should therefore be treated on equal footing with the latter when it comes to criticism of their conduct.[168]

Criticism of individual judges and prosecutors is not granted the same protection – members of the judiciary are granted special protection by the Court.[169]

In *Castells v. Spain*,[170] the Court argued for better protection of the freedom of expression on behalf of the political opposition. Mr Castells was a senator in the Spanish Parliament and represented a political organisation favourable to the independence of the Basque Country. In 1979, he wrote an article called "Outrageous impunity", which was published in a national daily newspaper. Mr Castells accused the government of failing to investigate murders and attacks in the Basque Country and stated: "[t]he perpetrators of these crimes act, continue to work and remain in posts of responsibility, with total impunity. No warrant has been issued for their arrest". He also accused the government of complicity in those crimes:

> [t]he right-wing, who are in power, have all the means at their disposal (police, courts and prisons) to seek out and punish the perpetrators of so many crimes. But don't worry, the right will not seek itself out.
>
> ...
>
> Those responsible for public order and criminal prosecutions are the same today as they were before.

Referring to the extreme groups guilty of these crimes, he wrote:

> [t]hey have substantial files which are kept up to date. They have a considerable supply of weapons and of money. They have unlimited material and resources and operate with complete impunity ... it can be said they are guaranteed legal immunity in advance.

Mr Castells further stated:

> [b]ehind these acts there can only be the Government, the party of Government and their personnel. We know that they are increasingly going to use as a

168. *Thoma v. Luxembourg*, 29 March 2001.
169. *Błaja News Sp. z o.o. v. Poland*, 26 November 2013; *Łozowska v. Poland*, 13 January 2015.
170. *Castells v. Spain*, 23 April 1992.

> political instrument the ruthless hunting down of Basque dissidents and their physical elimination ... But for the sake of the next victim from our people, those responsible must be identified right away with maximum publicity.

Mr Castells was charged for offending the government and sentenced to one year in prison, which he never served.

Before the Court, the Spanish authorities argued that Mr Castells's conviction served to prevent "disorder and crime". Examining whether the interference was "necessary in a democratic society", the Court held:

> [w]hile freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interference with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court.[171]

The Court then observed that "Mr Castells did not express his opinion from the senate floor, as he might have done without fear of sanctions, but chose to do so in a periodical. That does not mean, however, that he lost his right to criticise the Government".

Further, the Court referred to the criticism of the government:

> [t]he limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly when other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.[172]

The Court found a violation of Article 10. In addition, the concurring opinion of Judge De Meyer held that "there are no grounds for affording better protection to the institutions than to individuals, or to the Government than the opposition".

In a similar way to the lessons derived from previous judgments, national courts must understand that even if in principle incitement to legal disobedience is punishable, judges must not automatically apply a prohibition provided by law, but must weigh the conflicting interests and apply the proportionality principle when deciding whether punishing a particular exercise of the freedom of expression "is necessary in a democratic society". Moreover,

171. Paragraph 42.
172. Paragraph 46.

as proved by the Castells judgment, national courts must refrain from punishing criticism of the state authorities. Such criticism, even if harsh, is part of political pluralism and the pluralism of opinions.

While the aim to convict a person who has insulted or defamed a person belonging to any of the two aforementioned categories might be justified by the need to protect "the reputation or rights of others", a higher penalty – provided by law – than the one provided for insulting or defaming an ordinary person, would not be justified. Higher penalties for defaming high-ranking officials and civil servants go contrary to the principle of equality before the law. Moreover, such higher penalties would implicitly protect more than the rights of the individuals performing such functions. They would protect abstract notions, such as "state authority" or "state prestige", which do not appear in the list in Article 10, paragraph 2.

Furthermore, values such as "image/honour of the country or government", "image/honour of the nation", "state or other official symbols", "image/authority of public authorities" (other than courts) are not provided for in paragraph 2, and therefore they are not legitimate aims for restricting the freedom of expression. This is why national courts must not sanction any criticism – expressed through words, gestures, images or in any other way – against such abstract notions, as they fall outside the scope of the area protected under paragraph 2. The explanation of this can be found in the functioning rules of a democratic society, where the criticism of those (individuals and institutions) exercising power is a fundamental right and duty of media, ordinary individuals and society at large. For instance, the destruction of or an "insulting" act against a state symbol would express one's disagreement and criticism with some political decisions, activity of public authorities, public policies in particular areas, or anything else in connection with the exercise of power. Such disagreement and criticism must be free as it is the only way to debate in public the possible wrongs and to find possible redress. In addition, such general and abstract notions such as "state authority" usually cover and hide the private and possibly unlawful interests of those in power, or at least their interest in staying in power at all costs.

Some European jurisdictions have eliminated from their legal systems the possibility for protection of reputation by state institutions. The Court acknowledged "that there may be sound policy reasons to decide that public bodies [such as the courts' management department], should not have standing to sue in defamation in their own capacity".[173] However, the Court found that it was not "its task to examine the domestic legislation in

173. *Romanenko and Others v. Russia*, 8 October 2009, paragraph 39.

the abstract but rather consider the manner in which that legislation was applied to, or affected, the applicant in a particular case".[174]

6.4. Criticism of commercial entities

The criticism of commercial entities was analysed by the Court in the case of *Kuliś and Różycki v. Poland*. The owner and the chief editor of a Polish magazine called Angora and its supplement for children, Angorka, published an article in *Angorka* that referred to an advertising campaign for potato crisps made by the company Star Foods. The first page of the magazine presented a cartoon of a boy holding a packet of Star Foods' potato crisps and saying to the dog Reksio, a popular cartoon character for children, "Don't worry! I would be a murderer too if I ate this muck!". The drawing in question was headed: "Polish children shocked by crisps advertisement, Reksio is a murderer". On the next page there was an article reporting that parents and children were disgusted and even terrified because of the little pieces of paper showing a slogan stating that the dog Reksio was a murderer, which at the time could be found in packets of the above-mentioned crisps. Star Foods consequently brought a claim for protection of personal rights against both applicants, requiring them to publish an apology for discrediting its products without any justification, and to make a payment of PLN 10 000 to a charity. The Polish court decided in favour of the plaintiff. The Strasbourg Court emphasised that the cartoon in question contained not a defamatory statement of fact but a value judgment presented in a satirical way. Moreover, the large heading referring to "a shocking advertising campaign", the use of the contentious slogan which was to be found in the packets of crisps, as well as the article on the second page clearly showed that the cartoon had in fact been inspired by the company's advertising campaign. Given all this, the Court found that the applicants' aim was not to make the product look worse in the eyes of the readers, but to raise awareness of the type of advertisement the plaintiff had been conducting in order to increase sales, and to its unacceptability when it comes to advertising aimed at children.[175]

6.5. Protection of minors

A special protection is also granted to information concerning minors. In a case concerning a press article dealing with a custody dispute between parents, the Court found that a child who had been the subject of the articles in question was not a public figure, nor had he entered the public sphere by becoming the victim of a custody dispute between his parents, which had

174. Ibid.
175. *Kuliś and Różycki v. Poland*, 6 October 2009.

attracted considerable public attention. The articles had dealt with a matter of public concern giving rise to a public debate, namely the appropriate enforcement of custody decisions and whether and to what extent force might or should be used in this context. However, given that neither the child nor his parents were public figures or had previously entered the public sphere, the Court did not find that it had been essential for understanding the case to disclose his identity, reveal most intimate details of his life, or to publish a picture from which he could be recognised.[176]

6.6. Authority and impartiality of the judiciary

The Court's jurisprudence concerning the authority and impartiality of the judiciary proves that although the latter enjoys special protection, it does not function in a vacuum, and questions about the administration of justice may be part of public debate.

In *The Sunday Times v. the United Kingdom*,[177] the government justified injunctions against publication of a newspaper article by citing the interest of protecting the impartiality of the judiciary and preserving the trust of the public in the judicial authorities. Following the use of the sedative called "thalidomide", between 1959 and 1962 many children were born with severe deformities. The drug was produced and sold by Distillers Company Ltd, which withdrew it from the market in 1961. Parents sued the company, asking for civil damages, and negotiations between the parties continued for many years. The parties' transactions had to be approved by the courts. All newspapers, including *The Sunday Times*, covered the issue extensively. In 1971, the parties started negotiations for setting up a charity fund for the children with deformities. In September 1972, *The Sunday Times* published an article called "Our thalidomide children: a cause for national shame", criticising the company for the reduced amount of money paid to the victims and for the small amount which the company intended to put into the charity fund. *The Sunday Times* announced that it would describe, in a future article, the circumstances of the tragedy.

At the request of the company, the attorney general asked the court to issue an injunction against the newspaper, arguing that the publication of the announced article would obstruct justice. The injunction was granted and *The Sunday Times* refrained from publication.

176. *Kurier Zeitungsverlag und Druckerei GmbH v. Austria (No. 2)*, 19 June 2012 and *Krone Verlag GmbH v. Austria*, judgment of 19 June 2012.
177. *The Sunday Times v. the United Kingdom*, 26 April 1979.

Before the Strasbourg Court, *The Sunday Times* claimed a violation of Article 10. The government justified the injunction by the need to maintain the "authority and impartiality of the judiciary", since thalidomide cases were still pending before the courts. The Court stated that:

> [t]here is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialized journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.[178]

In the particular circumstances of the case, the Court observed that the "thalidomide disaster" was a matter of undisputed public concern. In addition, the families involved in the tragedy, as well as the public at large had the right to be informed on all the facts of this matter. The Court concluded that the injunction ordered against the newspaper "did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention"[179].

The existing rules regarding the restriction of defamatory speech on the grounds of maintaining the authority and impartiality of the judiciary are derived from two cases: *Nikula v. Finland*[180] and *Morice v. France*.[181] In a memorial which Ms Nikula read out before the city court, the public prosecutor, Mr T., was criticised for "role manipulation and unlawful presentation of evidence". Following a private prosecution initiated by Mr T., Ms Nikula was convicted in 1994 of public defamation committed without better knowledge. The Supreme Court upheld the criminal conviction in 1996, but restricted the sanction to the payment of damages and costs only. The precedent in the Nikula case establishes a lawyer's freedom to criticise the conduct of a public prosecutor in court, in the course of defending his or her client. The special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. The applicant's submissions were confined to the courtroom, as opposed to criticism of a judge or prosecutor voiced in the media. The threat of an *ex post facto*

178. Paragraph 65.
179. Paragraph 67.
180. *Nikula v. Finland,* 21 March 2002.
181. *Morice v. France*, 23 April 2015.

review of a counsel's criticism of the public prosecutor is difficult to reconcile with a defence counsel's duty to zealously defend his or her clients' interests. The assessment of a defence argument should not be influenced by the potential "chilling effect" of a criminal sanction or an obligation to pay compensation for harm suffered or costs incurred.

The Morice case concerned statements made by a lawyer in the French daily newspaper *Le Monde*; the statements contained the text of a letter sent by the applicant to the minister of justice seeking an administrative investigation of two judges. The criminal sanction – a fine of EUR 4 000 – was found to be a justifiable restriction by a chamber of the Court, but this was subsequently overturned as disproportionate by the Grand Chamber. As found in another case, lawyers will not be granted protection for criticism directed against specific judges. Writing in a circular letter addressed to several judges, that one of them is "biased" and had commited errors "willfully ... with malice or gross negligence or through lack of commitment", without providing sufficient evidence demonstrative of such malice, is not protected by Article 10.[182]

In *De Haes and Gijsels v. Belgium*,[183] the applicants, both journalists, covered in the newspaper a case pending before the courts. In five articles, they criticised in virulent terms the judges of a court of appeal who had decided, in a divorce case, that the two children of a divorced family would live with their father. The father, a well-known notary, had previously been accused by his former wife and her parents of sexual abuse of the two children. At the time of the divorce, the investigation against the notary had been closed without indictment.

Three judges and a prosecutor sued the two journalists and the newspaper, seeking civil damages for defamatory statements. The civil courts found that the two journalists had strongly doubted the impartiality of the judges by writing that they had intentionally ruled wrongly due to their close political relationship with the notary. The journalists were obliged to pay civil damages (a symbolic amount) and to publish the judgment in six newspapers at their own expense.

The Court recognised that members of the judiciary must enjoy public trust and therefore they must be protected against destructive attacks lacking any factual basis. Moreover, since they are subject to a duty of discretion, judges cannot publicly respond to various attacks, as, for instance, politicians are

182. *Peruzzi v. Italy*, 30 June 2015, paragraph 59.
183. *De Haes and Gijsels v. Belgium*, 24 February 1997.

able to do. In looking at the articles in question, the Court noted that they contained a mass of detailed information, including experts' opinions, proving that the journalists had undertaken serious research before informing the public about this case. The articles were part of a large public debate on incest and on how the judiciary had dealt with the issue. Giving due importance to the right of the public to be informed on an issue of public interest, the Court decided that the national courts' decision was not "necessary in a democratic society", and there had therefore been a violation of Article 10.

In principle, the defamation of a judge by the press takes place as part of a debate on the malfunction of the judicial system or in the context of doubting the independence or impartiality of judges. Such issues are always important for the public and must not be kept outside of the public debate, in particular in a country experiencing the transition to an independent and effective judiciary.[184] This is why the national courts must weigh the values and interests involved in cases where judges or other judicial actors are criticised. Courts must balance the honour of the respective judge against the freedom of the press to report on matters of public interest, and decide on the priority in a democratic society. Certainly, where the criticism is primarily aimed at insulting or defaming members of the judiciary, without contributing to the public debate on the administration of justice, then the protection afforded to the freedom of expression may be narrower. Another relevant issue under this heading is the possibility to publicly contest a final judicial decision.

6.7. Nature of expression

It is characteristic for Article 10 to protect expression which carries a risk of damaging or actually damages the interests of others. Usually, the opinions shared by the majority or by large groups of individuals do not run the risk of interference by states. Thus, the protection afforded by Article 10 also covers information and opinions expressed by small groups or one individual, even where such expressions shock the majority. The toleration of individual points of view is an important component of the democratic political system. Denouncing the tyranny of the majority, John Stuart Mill stated: "if all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind".[185]

184. *Maciejewski v. Poland*, 13 January 2015.
185. "On Liberty" (1859), Penguin Classics, 1985, p. 76.

In this respect, the Court has stated that Article 10 protects not only:

> the "information" or "ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb […] such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society".[186]

The use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well serve merely stylistic purposes. For the Court, style constitutes part of the communication as the form of expression and is as such protected together with the content of the expression.[187]

Opinions expressed in strong or exaggerated language are also protected; the extent of protection depends on the context and the aim of the criticism. In matters of public controversy or public interest, during political debate, in electoral campaigns or where the criticism is levelled at government, politicians or public authorities, strong words and harsh criticism may be expected and will be tolerated to a greater degree by the Court.[188] In *Thorgeirson v. Iceland*,[189] for instance, the Court found that although the articles contained very strong terms -the police officers were characterised as "beasts in uniform", "individuals reduced to a mental age of a new-born child as a result of strangle-holds that policemen and bouncers learn and use with brutal spontaneity" and the references to the police force were "bullying, forgery, unlawful actions, superstitions, rashness and ineptitude"- the language could not be viewed as excessive having in view their aim of urging reform of police. Equally, in *Jersild v. Denmark*,[190] the fact that an interview containing racist statements was carried in a serious news programme was significant since the programme was designed to inform a serious auditory about events in the community or from abroad. In *Dalban v. Romania*, where a journalist accused a politician of corruption and of mismanagement of state's assets, the Court held that "journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation".[191] In *Arslan v. Turkey*, the applicant criticised the action of the Turkish authorities in the south-east of the country using a wording described by the Court as of an

186. *Handyside v. the United Kingdom*, 7 December 1976, paragraph 49; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992; *Jersild v. Denmark*, 23 September 1994 (GC); *Goodwin v. the United Kingdom*, 27 March1996; *De Haes and Gijels v. Belgium*, 24 February 1997.
187. *Uj v. Hungary*, 19 July 2011, paragraph 20.
188. Freedom of expression should be particularly granted during a pre-election period when voters should be informed about the candidates. *Kwiecień v. Poland*, 9 January 2007.
189. *Thorgeir Thorgeirson v. Iceland*, 25 June 1992.
190. *Jersild v. Denmark*, 23 September 1994.
191. *Dalban v. Romania*, 28 September 1999 (GC), paragraph 49. Similar in *Prager and Oberschlick v. Austria*, 26 April 1995 and *Dichand and Others v. Austria*, 26 February 2002.

"undeniable virulence" which "confers a certain amount of vehemence to this criticism". The Court decided however that the applicant's conviction for criticising the government was disproportionate and not necessary in a democratic society.[192]

The use of violent terms is given more protection when it comes as a reply to provocation. In *Lopes Gomes da Silva v. Portugal*, the journalist criticised the political beliefs of Mr Resende, a candidate for the municipality, and called him "grotesque", "buffonish" and "coarse". The criticism followed statements of Mr Resende where he had referred to a number of public figures in a very incisive manner, including by attacking their physical features (for instance, he called a former prime minister of France a "bald-headed Jew"). The Court held that the journalist's conviction infringed article 10, and found that

> the opinions expressed by Mr Resende and reproduced alongside the impugned editorial are themselves worded incisively, provocatively and at the very least polemically. It is not unreasonable to conclude that the style of the applicant's article was influenced by that of Mr Resende.[193]

Or, in Oberschlick (2), the journalist called Mr Haider (leader of the Austrian Freedom Party and Governor) "an idiot" ("…he is not a Nazi … he is however an idiot") following Haider's statement that in the Second World War the German soldiers fought for peace and freedom. The Court found that Mr Haider' speech was itself provocative, and therefore the word "idiot" did not seem disproportionate to the indignation knowlingly aroused by Mr Haider.[194]

However, the Court sets the limits of exaggeration in cases concerning tabloids. Articles of written in a sensational manner, would not be protected by the Court.[195] In *Couderc and Hachette Filipacchi Associés v. France*,[196] the Court found that articles describing an extra-marital child of Prince Albert Grimaldi, due to their tone appeared to be measured and non-sensationalist and therefore were granted protection under Article 10.

6.8. Distinction between facts and opinions

One of the most important distinctions that should be made by national courts while adjudicating in defamation cases is the distinction between

192. *Arslan v. Turkey*, 8 July 1999.
193. *Lopes Gomes da Silva v. Portugal*, 28 September 2000, paragraph 35.
194. *Oberschlick v. Austria (No. 2)*, 1 July 1997.
195. *Société Prisma Press v. France*, 1 July 2003 (decision).
196. *Couderc and Hachette Filipacchi Associés v. France*, 10 November 2015.

information (facts) and opinions (value judgments). The Court has stated that

> [t]he existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. … [As regards value judgments this] requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10.[197]

While opinions are viewpoints or personal assessments of an event or situation and are not susceptible of being proven to be true or false, the underlying facts on which the opinion is based may be capable of being proven to be true or false. Equally, in the Dalban case, the Court held: "it would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth".[198]

Consequently, along with information or data that could be verified, opinions, criticism or speculation, which cannot be subjected to the "truth proof" are also protected under Article 10. Moreover, value judgments, in particular those expressed in the political field, enjoy a special protection as a requirement of the pluralism of opinions, crucial for a democratic society.

The distinction between facts and opinions, and the prohibition of the truth proof with regard to the latter, has become very important in the domestic legal systems that still require the truth proof for the crime of "insult", which concerns the expression of ideas and opinions. Moreover, even with regards to facts, the Court has recognised the defence of good faith for leaving the media "a breathing space for error". For instance, in Dalban,[199] the Court observed "that there is no proof that the description of events given in the articles was totally untrue and was designed to fuel a defamation campaign against G.S.". Basically, the good faith defence comes at the expense of the truth proof. Where a journalist or a publication has a legitimate purpose, the matter is of public concern, and reasonable efforts were made to verify the facts, the press shall not be liable even if the respective facts prove to be untrue.

However, a sufficient factual basis must support value judgments. As the Court pointed out even:

> [w]here a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for

197. *Jerusalem v. Austria*, 27 February 2001; *Dichand and Others v. Austria*, 26 February 2002.
198. *Dalban v. Romania*, 28 September 1999 (GC).
199. Ibid.

the impugned statement, since even a value judgment without any factual basis to support it may be excessive.[200]

In the Lingens case, cited above, the Austrian courts' approach with regard to the truth proof defence was found by the Court to be wrong. The Court emphasised the distinction between "facts" and "value judgments", holding that proving the truth of "value judgments" is an impossible task. The applicant's opinions about the chancellor's political conduct were a mere expression of the right to hold and impart opinions, rather than the right to impart information. The requirement of proving the truth of value judgments runs counter to the spirit of the freedom of opinion. The Court also observed that the facts on which Mr Lingens had founded his value judgments were undisputed, and he was in good faith.

The principles developed by the Court in the area of political criticism and the distinction between facts and opinions have been reaffirmed in many other judgments. Thus, in *Dalban v. Romania*, the Court held that "it would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth".[201] In *Oberschlick v. Austria (No. 2)*, the use of the word "idiot" to characterise the behaviour of a politician was found to be admissible.[202] Again, in *Lopes Gomes da Silva v. Portugal*, where a candidate in the local elections was called "grotesque", "buffoonish" and "coarse", the Court found that although incisive, the wording was not exaggerated and it came in response to a provocative speech by the candidate. The Court also stated that "political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society".[203]

Similarly, where the national law provides for the truth proof defence in cases of insulting expressions, the domestic courts must abstain from requesting such evidence, following the Court's distinction between facts and opinions.

6.9. Good faith and due diligence

The defence of good faith must be accepted by courts in cases of defamation, which essentially concern facts. If, at the time of publication, a journalist had sufficient reasons to believe that a particular piece of information was true, he/she should not be sanctioned. The news is a "perishable commodity and to delay its publication, even for a short period, may well deprive it

200. *Feldek v. Slovakia*, 12 July 2001, paragraph 76; *Kuliś and Różycki v. Poland*, 6 October 2009.
201. *Dalban v. Romania*, 28 September 1999 (GC), paragraph 49.
202. *Oberschlick v. Austria (No. 2)*, 1 July 1997.
203. *Lopes Gomes da Silva v. Portugal*, 28 September 2000, paragraph 34.

of all its value and interest."[204] A journalist should therefore only be required to make a reasonable check and to assume in good faith the accuracy of the news. Another argument in this respect concerns the lack of intent, on the part of the journalist, to defame the alleged victim. As long as the journalist believed the information to be true, such intent is lacking and therefore the journalist's conduct may not be sanctioned under provisions prohibiting intentional defamation; it is intentional defamation that is provided for in criminal law.

Additionally, journalists should not only act in good faith, but they should also demonstrate diligence and professionalism in the collection of information, and facts, in particular, should be verified by reliable sources. When "the circumstances indicated a higher probability of inaccuracy in the submissions of persons who were the source of information for the journalist, a particularly meticulous verification of the truthfulness of the allegations was necessary".[205] National courts should always verify the diligence with which the journalistic material was collected. The same standard would be applicable to other professional groups enjoying freedom of expression, for example film makers.[206]

6.10. Sanctions

The national courts must also refrain from applying criminal penalties, in particular imprisonment. Such sentences endanger the very core of the freedom of expression and function as censorship for the entire media, hampering the press in its role as public watchdog.

The Court reiterated that the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10.[207] In *Mahmudov and Agazade v. Azerbaijan*, in which the applicants were sentenced to five months' imprisonment, the Court held that:

> although sentencing is in principle a matter for the national courts, the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been

204. *The Sunday Times v. the United Kingdom (No. 2)*, 26 November 1991, paragraph 51.
205. *Stankiewicz and Others v. Poland*, 14 October 2014, paragraph 58.
206. *Braun v. Poland*, 4 November 2014.
207. *Ceylan v. Turkey*, 8 July 1999 (GC), paragraph 37 and *Skalka v. Poland*, 27 May 2003, paragraphs 41-42.

> seriously impaired, as, for example, in cases of hate speech or incitement to violence.[208]

A conditional discontinuation of the proceedings for a probationary period was also considered as a disproportionate interference with the freedom of expression.[209]

Even where the criminal penalties consisted of relatively small fines, the Court argued against such penalties, as they could play the role of an implicit censorship. In further cases where journalists were fined, the Court held that:

> although the penalty imposed on the author did not strictly speaking prevent him from expressing himself, it nonetheless amounted to a kind of censure, which would be likely to discourage him from making criticism of that kind again in future … In the context of the political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.[210]

The chilling effect of the criminal sanction is particularly dangerous in cases of political speech and public interest debate.[211]

In addition, fines and trial expenses may constitute an interference with the right to freedom of expression where their amount raises doubts as to the financial survival of the person who is ordered to pay them.[212]

There is a general consensus among the different specialised bodies of international and regional organisations that not only the application of criminal sanctions, but also the mere fact that such sanctions could be applied, has substantial undesirable effects on freedom of expression and information. The Parliamentary Assembly of the Council of Europe has called for the decriminalisation of defamation.[213] A similar enhancement has been addressed by the Committee of Ministers.[214]

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208. *Mahmudov and Agazade v. Azerbaijan*, 18 December 2008, paragraph 50.
209. *Długołęcki v. Poland*, 24 February 2009.
210. *Lingens v. Austria*, 8 July 1986, paragraph 44; *Barthold v. Germany*, 25 March 1985.
211. *Lewandowska-Malec v. Poland*, 18 September 2012, paragraph 70.
212. *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992.
213. Parliamentary Assembly of the Council of Europe Resolution 1577 (2007) Towards decriminalisation of defamation, adopted on 4 October 2007, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en.
214. Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, "Libel Tourism", to Ensure Freedom of Expression, adopted on 4 July 2012 at the 1147th meeting of the Ministers' Deputies.

Important civil compensation may constitute a disproportional interference with the freedom of expression. In the case of *Tolstoy Miloslavsky v. the United Kingdom*, the applicant was found by the national courts (based on the jury system) to have written a defamatory article, and was asked (together with the distributor of the article) to pay to the victim civil damages amounting to GBP 1 500 000.[215] Finding that the amount of the civil damages was in itself an infringement of Article 10, the European Court held:

> … it does not mean that the jury was free to make any award it saw fit since, under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.
>
> The jury had been directed not to punish the applicant but only to award an amount that would compensate the non-pecuniary damage to Lord Aldington [the victim].

In addition, the Court found that "the scope of the judicial control … at the time of the applicant's case did not offer adequate and effective safeguards against a disproportionately large award." Consequently,

> having regard to the size of the award in the applicant's case in conjunction with the lack of adequate and effective safeguards at the relevant time against a disproportionately large award, the Court finds that there has been a violation of the applicant's rights under Article 10 ... of the Convention.

In a recent judgment, *Kurski v. Poland*,[216] the Court found that the obligation to cover the costs of printing or broadcasting public apologies can be excessive and disproportionate. In that case, the costs of publication of apologies constituted the equivalent of an 18-month salary for the applicant. The Court found a violation of Article 10.

All the above guidelines concerning the distinction between value judgments and facts and sanctions provided by the Court to the national courts apply equally to criticism of civil servants or to any other criticism intended to bring into the public debate matters of interest for communities or the public at large.

215. *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995.
216. *Kurski v. Poland*, 5 July 2016.

Chapter 7

Rights of others

Freedom of expression may clash with other rights enshrined in the Convention, particularly the freedom of religion. "Rights of others", namely religious freedom versus freedom of expression, were examined by the Court in, for example, *Otto-Preminger-Institut v. Austria*.[217] In that case, the applicant, an association ("OPI") based in Innsbruck, announced a series of six showings, accessible to the general public, of the film *Council in Heaven* by Werner Schroeter. The announcement carried a statement to the effect that, in accordance with the law, persons under the age of 17 were prohibited from seeing the film. The film portrayed the God of the Jewish, Christian and Islamic religions as an apparently senile old man prostrating himself before the Devil, with whom he exchanged a deep kiss, and calling the Devil his friend. Other scenes showed the Virgin Mary listening to an obscene story and a degree of erotic tension was depicted between the Virgin Mary and the Devil. The adult Jesus Christ was portrayed as a low grade mental defective, and in one scene he was shown lasciviously attempting to fondle and kiss his mother's breasts, which she was shown as permitting. God, the Virgin Mary and Jesus Christ were shown in the film applauding the Devil.

Prior to the first showing, at the request of the Innsbruck diocese of the Roman Catholic Church, the public prosecutor instituted criminal proceedings against the director of OPI under the charge of "disparaging religious doctrines". After seeing the film, a domestic court granted its seizure. Consequently, the public showings did not take place. The criminal proceedings were discontinued and the case was pursued only to the effect of the seizure. OPI complained to the European Commission, arguing that its right under Article 10 had been violated by the seizure of the film. The Commission shared this view.

217. *Otto-Preminger-Institut v. Austria*, 20 September 1994.

Before the Court, the government argued that the seizure of the film was aimed at "protection of rights of others", in particular the right to respect for religious feelings, and at the "prevention of disorder". The right to respect for religious feelings is part of the right to freedom of thought, conscience and religion provided in Article 9 of the Convention. Looking at the legitimacy of this aim, the Court held:

> [t]hose who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 ... to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them
>
> The respect for the religious feelings of believers as guaranteed in Article 9 ... can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society. The Convention is to be read as a whole and therefore the interpretation and application of Article 10 ... in the present case must be in harmony with the logic of the Convention.[218]

Further, the Court referred to the duty to avoid "expressions that are gratuitously offensive to others ... which ... do not contribute to any form of public debate capable of furthering progress in human affairs"[219].

Defending its position, the government stressed the role of religion in the everyday life of the people of Tyrol, where the proportion of Roman Catholic believers was 87%. Balancing the two conflicting values, the Court held:

> the Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the objects of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time. In all the circumstances of the present case, the Court does not consider

218. Paragraph 47.
219. Paragraph 49.

> that the Austrian authorities can be regarded as having overstepped their margin of appreciation in this respect.[220]

Consequently, the seizure of the film did not violate Article 10.

It is interesting to note that three dissenting judges argued in favour of a violation of Article 10:

> it should not be open to the authorities of the State to decide whether a particular statement is capable of "contributing to any form of public debate capable of furthering progress in human affairs"; such a decision cannot but be tainted by the authorities' idea of "progress".
>
> ...
>
> The need for repressive action amounting to complete prevention of the exercise of freedom of expression can only be accepted if the behavior concerned reaches so high a level of abuse, and come so close to a denial of the freedom of religion of others, as to forfeit for itself the right to be tolerated by society.
>
> ...
>
> ... the film was to have been shown to a paying audience in an "art cinema" which catered for a relatively small public with a taste for experimental films. It is therefore unlikely that the audience would have included persons not specifically interested in the film.
>
> This audience, moreover, had sufficient opportunity of being warned beforehand about the nature of the film.
>
> ...
>
> It thus appears that there was little likelihood in the instant case of anyone being confronted with objectionable material unwittingly.
>
> We therefore conclude that the applicant association acted responsibly in such a way as to limit, as far as it could reasonably have been expected to, the possible harmful effects of showing the film.

220. Paragraph 56.

Chapter 8

Freedom of expression and the media

8.1. Freedom of the press

Although Article 10 does not explicitly mention the freedom of the press, the Court has, in its case law, developed a body of principles and rules granting the press a special status in the enjoyment of the freedoms contained in Article 10. Freedom of the press therefore deserves further consideration under the scope of Article 10. Another argument in favour of special consideration for the freedom of the press is shown in national practices: to a large extent, the victims of the infringement of the right to freedom of expression by public authorities are journalists rather than other individuals.

The role of the press as "public watchdog" was first emphasised by the Court in *Lingens v. Austria*.[221] In several articles, the journalist had criticised the then Austrian Federal Chancellor for a particular political move consisting in announcing a coalition with a party led by a person with a Nazi background. The journalist (Mr Lingens) had called the chancellor's behaviour "immoral", "undignified", and proof of "the basest opportunism". Following a private prosecution brought by the chancellor, the Austrian courts found these statements to be defamatory and sentenced the journalist to a fine. While arguing his guilt, the courts also found that the journalist could not prove the truth of his allegations. With regard to the latter issue, the Court found the national courts' approach to be wrong, as opinions (value judgments) cannot be demonstrated and are not susceptible of being proved[222]. Looking at the grounds for the journalist's conviction, the Court underlined the importance of the freedom of the press in political debate:

221. *Lingens v. Austria*, 8 July 1986.
222. Paragraph 12.

> These principles are of particular importance as far as the press is concerned. Whilst the press must not overstep the bounds set, *inter alia*, for the "protection of the reputation of others", it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them … In this connection, the Court cannot accept the opinion, expressed in the judgment of the Vienna Court of Appeal, to the effect that the task of the press was to impart information, the interpretation of which had to be left primarily to the reader.[223]

In the same judgment, the Court argued that the freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders, and, consequently, the freedom of political debate is at the very core of the concept of a democratic society. As a result, the Court affords the political debate by the press a very strong protection under Article 10.

The Court reiterated in robust terms that a non-governmental organisation can play a role as important as that of the press in a democratic society: "when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press".[224]

The Court has underlined the special role of the press in political debate. In *Castells v. Spain*, discussed extensively in Chapter VI, the applicant, a Basque militant and member of the Spanish Parliament, had been convicted of insulting the government by publishing an article accusing the government of supporting or tolerating attacks on Basques by armed groups. In this connection, the Court made the following observations:

> The pre-eminent role of the press in a State governed by the rule of law must not be forgotten … Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[225]

Freedom of the press also enjoys a special status where other matters of public concern are at stake. In *Thorgeir Thorgeirson v. Iceland*, the applicant (Mr Thorgeirson) had made allegations in the press concerning widespread police brutality in Iceland, and called police officers "beasts in uniform", "individuals reduced to a mental age of a new-born child as a result of

223. Paragraph 41.
224. *Animal Defenders International v. the United Kingdom*, 22 April 2013 (G C), paragraph 103.
225. *Castells v. Spain*, 23 April 1992, paragraph 43.

strangle-holds that policemen and bouncers learn and use with brutal spontaneity", and characterised the police force as using "bullying, forgery, unlawful actions, superstitions, rashness and ineptitude" when defending itself. At the domestic level, Mr Thorgeirson was prosecuted and fined for defaming unspecified members of the police force. The Court found that the applicant had raised the issue of police brutality in his country and that "it is incumbent on [the press] to impart information and ideas on matters of public interest". The Court further stated that "there is no warrant in its case-law for distinguishing … between political discussion and discussion of other matters of public concern". Finally, the Court characterised the conviction as "capable of discouraging open discussion of matters of public concern".[226] Or, in *Marônek v. Slovakia*, the Court viewed the Slovakian housing policy at a period when State-owned apartments were about to be denationalised to be a matter of general interest, and afforded the applicant's freedom of expression a stronger protection.[227] Other examples can be found in many of the cases against Turkey, where the conflict in the south-east of the country and related issues, including "separatist propaganda" or the question of federalisation, raised orally or in writing, have been matters of public interest.[228]

Undoubtedly, the Court affords the freedom of the press strong protection where matters of public interest, other than political issues, are publicly debated. Matters of public interest may concern a number of different issues, for example, problems in local communities,[229] the functioning of an elementary school[230] or environmental pollution.[231]

Another important issue in the context of the freedom of the press is the publication of rumours and allegations which journalists are not able to prove. As mentioned above,[232] the Court has stated that value judgments must not be subject to any proof requirement. In *Thorgeir Thorgeirson v. Iceland*,[233] the allegations against police were collected from various sources, but the article had mentioned rumours coming from the general public. While the respondent state argued that the applicant's articles lacked an objective and factual basis as he could not prove the truth of the allegations, the Court found the truth requirement to be an unreasonable, if not impossible task, and stated

226. *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, paragraphs 64-6.
227. *Marônek v. Slovakia*, 19 April 2001.
228. *Sürek and Özdemir v. Turkey*, 8 July 1999; *Şener v. Turkey*, 18 July 2000; *Özgür Gündem v. Turkey*, 16 March 2000.
229. *Kurłowicz v. Poland*, 22 June 2010.
230. *Gałus v. Poland*, 15 November 2011 (decision).
231. *Dubowska and Skup v. Poland*, 18 April 1997 (decision).
232. Chapter 6.8.
233. Thorgeirson v. Iceland, 25 June 1992, paragraph 65.

that the press would hardly be able to publish anything if it were required to publish only fully probed facts. Obviously, the Court's considerations have to be placed in the context of public debates on matters of general concern.

Dissemination in the media of statements made by other persons was considered by the Court in the cases of *Jersild v. Denmark*[234] and *Thoma v. Luxembourg*[235], where the Court stated that:

> punishment of a journalist for assisting in the dissemination of statements made by another person … would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.[236]

Further, in the Thoma case, where the government had reproached the applicant journalist for not distancing himself from the statements in the quotation, the Court held:

> [a] general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation was not reconcilable with the press's role of providing information on current events, opinions and ideas.[237]

8.2. Positive obligations of the state and protection of journalists

States are required not to interfere with the exercise of rights. However, they are also required to act positively in taking the necessary steps to ensure effective protection of human rights among individuals, including by preventing the interference in individuals' rights by private or non-state actors.[238] States may "be found responsible for acts by private individuals" in fulfilment of their international human rights obligations.

In the context of media activity, the Court has found that such obligations may arise under Article 2[239] and Article 3.[240] A positive obligation may also

234. Paragraph 35.
235. Paragraph 62.
236. *Jersild v. Denmark*, 23 September 1994; *Thoma v. Luxembourg*, 29 March 2001.
237. Paragraph 64.
238. Human Rights Committee, General comment No 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, paragraph 7; Organization of American States, Inter-American Commission on Human Rights, Violence against Journalists and Media Workers: Inter-American Standards and National Practices on Prevention, Protection and Prosecution of Perpetrators, OEA/Ser.L/V/II, CIDH/RELE/INF.12/13, 31 December 2013, p. 22.
239. *Huseynov v. Azerbaijan*, 7 May 2015.
240. *Najafli v. Azerbaijan*, 2 October 2012.

arise under Article 10. This is because the Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy and that states must ensure that private individuals can effectively exercise the right of communication between themselves.[241]

In *Özgür Gündem v. Turkey*, a case concerning pro-PKK newspaper journalists and media workers who had been subjected to a campaign of violence and intimidation, the Court highlighted the importance of taking positive measures for the exercise of freedom of expression, as well as considerations which inform the scope of such positive obligations on the state. The Court stated:

> [g]enuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals ... In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.[242]

A violation of Article 2 was found in the case of *Dink v. Turkey*, which concerned the murder of the journalist Hrant Dink, who had been the subject of intense hostility from extreme nationalists as a result of his newspaper articles on Turkish-Armenian relations. The Court found that the security forces could reasonably be considered to have been informed of the hostility towards Mr Dink, given that the law enforcement bodies had been informed of a real and imminent threat of assassination, and yet they had failed to take reasonable measures to protect his life. Article 10 of the Convention was also found to have been breached, not only because of the failure to protect Hrant Dink against attack, but also because, as a result of his newspaper articles, he had been found guilty of the crime of denigrating "Turkishness", which was considered by the Court to have no pressing social need.[243]

Article 2 requires that there is also an effective investigation conducted into alleged unlawful killing. If the state is aware of threats or intimidation perpetrated against journalists or media organisations, the state may be under a duty to take protective measures and to carry out an effective investigation

241. *Özgür Gündem v. Turkey*, 16 March 2000.
242. Ibid., paragraph 43.
243. *Dink v. Turkey*, 14 September 2010.

into such allegations.[244] If there is a reasonable suspicion that a killing was related to journalistic activities, Article 2 may require the authorities to take adequate steps to investigate such a possibility.[245] Article 2 may be breached where investigators fail to allow for the possibility that state officials (such as members of the security forces) might have been implicated in attacks.[246]

Moreover, Article 2 combined with Article 13 of the Convention also requires the provision of a domestic remedy to deal with the substance of a complaint under the Convention and to grant effective relief for the siblings of a journalist. Article 13 requires, therefore, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure.[247]

The use of force towards journalists by state agents may violate Article 3 of the Convention, which prohibits torture and inhuman or degrading treatment or punishment. Article 3 was found to have been breached in the case of *Tekin v. Turkey* because a journalist had been held blindfolded in a cold, dark cell and was forcibly interrogated in a way which left wounds and bruises on his body.[248] There was also a violation of Article 3 in *Najafli v. Azerbaijan*, where a journalist was found to have been beaten by the police during the dispersal of a political demonstration, which he had attended in order to report on it: in that case the use of force was held to be unnecessary, "excessive and unacceptable".[249] Furthermore, the Court held that any measures which prevent journalists from doing their work may raise issues under Article 10 of the Convention. The applicant journalist had been wearing a journalist's badge on his chest and had told the police officers that he was a journalist. The use of excessive force while he was performing his professional duties was therefore also held to violate Article 10 (irrespective of whether there had been any intention on the part of the police to interfere with journalistic activity).

In the case of *Fuentes Bobo v. Spain*, the applicant was dismissed by the Spanish national television company ("TVE") because of his criticism of its management, which was made during a radio programme. In response to a government argument that TVE was a legal person, the Court found that by virtue of its positive obligation, it was incumbent on the Spanish Government

244. *Özgür Gündem v. Turkey*, 16 March 2000, paragraph 41.
245. *Adali v. Turkey*, 31 March 2005, paragraph 232.
246. *D.D. v. Turkey*, 2 September 1998, paragraph 100.
247. For example, *Tepe v. Turkey*, 9 June 2003.
248. *Tekin v. Turkey*, 9 June 1998, paragraphs 48-54.
249. *Najafli v. Azerbaijan*, 2 October 2012, paragraph 39.

to safeguard freedom of expression from threats stemming from private persons, so that the applicant's lawful dismissal constituted an interference with his freedom of expression.[250]

In another case concerning dismissal for distributing a newsletter about trade-union activities, the applicants complained about a violation of Article 10, and that the real reason for their dismissal had been their trade-union activities, in violation of their right to freedom of assembly and association under Article 11.[251] The principal question was whether Spain was required to guarantee respect for the applicants' freedom of expression by annulling their dismissal. The measure complained of by the applicants, namely their dismissal, was not taken by a state authority but by a private company. Following the publication of the trade-union newsletter of March 2002 and the expressions contained therein, the applicants' employer opened disciplinary procedings against them for serious misconduct and this was followed by their dismissal. The measures were confirmed by the domestic courts. Thus, the applicants' dismissal was not the result of direct intervention by the national authorities. The responsibility of the authorities would nevertheless have been engaged had the facts complained of stemmed from a failure on their part to secure the applicants' enjoyment of the right enshrined in Article 10 of the Convention. The Grand Chamber found no violation of Article 10, as in the particular circumstances of the case, the measure of dismissal taken against the applicants was not a manifestly disproportionate or excessive sanction capable of requiring the state to afford redress by annulling it or by replacing it with a more lenient measure.

The Declaration of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors, imposes on states the positive obligation to protect journalists and other media actors from any form of attack (also from private individuals) and to end impunity.[252]

8.3. Freedom of radio and television broadcasting

In accordance with the last sentence of paragraph 1, the right to receive and impart information and ideas "shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises." This provision was included at an advanced atage of the preparatory work on the Convention and was included for technical reasons: the limited number of

250. *Fuentes Bobo v. Spain*, 29 February 2000, paragraph 38.
251. *Palomo Sánchez and Others v. Spain*, 12 September 2011 (GC), paragraph 60.
252. Adopted by the Committee of Ministers on 30 April 2014 at the 1198th meeting of the Ministers' Deputies.

available frequencies and the fact that, at that time, most European states had a monopoly on broadcasting and television. However, progress in the area of broadcasting techniques has led to these reasons becoming irrelevant. In *Informationsverein Lentia and Others v. Austria*,[253] the Court held that following "the technical progress made over the decades, justification of these restrictions can no longer today be found in considerations relating to the number of frequencies and channels available." Satellite transmissions and cable television have resulted in an unlimited number of available frequencies. In this context, the state's right to license media companies received a new sense and purpose, namely the guarantee of liberty and pluralism of information in order to fulfil the needs of the public.[254]

The Court held that the power of the domestic authorities to regulate the licensing system may not be exercised for other than technical purposes and not in a way which interferes with freedom of expression contrary to the requirements of the second paragraph of Article 10. In *Groppera Radio AG and Others v. Switzerland*,[255] the Court held:

> the purpose of the third sentence of Article 10 § 1 ... of the Convention is to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2 ... for that would lead to a result contrary to the object and purpose of Article 10 ... taken as a whole.

In *Autronic AG v. Switzerland*,[256] the Court held that devices for receiving broadcasting information, such as satellite dishes, do not fall under the restriction provided in the last sentence of the first paragraph. In *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, the Court found Austria to be in violation of Article 10 following the lack of any legal basis for granting licences to set up and operate a television transmitter to any station other than the Austrian Broadcasting Corporation.[257]

The refusal by authorities to grant broadcasting licenses to a television company may amount to a violation of Article 10. The Court reached this conclusion in the case of an Armenian television company, Meltex, which had applied several times for for a broadcasting licence.[258] The Court firstly recognised that the applicant's independent broadcasting company, Meltex,

253. *Informationsverein Lentia and Others v. Austria*, 24 November 1993, paragraph 39.
254. *Observer and Guardian v. the United Kingdom*, 26 November 1991.
255. *Groppera Radio AG and Others v. Switzerland*, 28 March 1990, paragraph 61.
256. *Autronic AG v. Switzerland*, 22 May 1990.
257. *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, 21 September 2000.
258. *Meltex Ltd. and Mesrop Movsesyan v. Armenia*, 17 June 2008.

was to be considered as a "victim" of interference with its freedom of expression by the Armenian public authorities, due to it not being recognised as the winner in the calls for tenders in which it had competed. The National Radio and Television Commission (NTRC) had effectively refused the applicant company's bids for a broadcasting licence and such refusals constituted interferences with the applicant company's freedom to impart information and ideas. The Court also underlined that states are permitted to regulate by means of a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects, and that the granting of a licence may also be made conditional on matters such as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments. The manner in which the licensing criteria are applied in the licensing process must provide sufficient guarantees against arbitrariness, including the proper reasoning by the licensing authority of its decisions denying a broadcasting licence.[259] The NTRC's decisions had been based on the Broadcasting Act (2000) and other regulations defining criteria on which the NTRC was to make its choice, such as the financial and technical resources of the applicant company, its staff's experience and whether it produced predominately in-house Armenian programmes. However, the Broadcasting Act had not explicitly required at that time that the licensing body give reasons when applying those criteria. Therefore, the NTRC had simply announced the winning company without providing any explanation as to why that company, and not Meltex, had met the requisite criteria. There was thus no way of knowing on what basis the NTRC had exercised its discretion to refuse a licence.[260] The Court further took note that "the vagueness of the law in force ha[d] resulted in the [NTRC] being given outright discretionary powers".[261] The Court considered that a licensing procedure whereby the licensing authority gives no reasons for its decisions does not provide adequate protection against arbitrary interferences by a public authority with the fundamental right to freedom of expression. The Court therefore concluded that the interference with Meltex's freedom to impart information and ideas, namely the seven denials of a broadcasting licence, had not met the requirement of lawfulness.

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259. See *Glas Nadezhda EOOD and Elenkov v. Bulgaria*, 11 October 2007.
260. See also the Declaration of the Committee of Ministers of 26 March 2008 on the independence and functions of regulatory authorities for the broadcasting sector.
261. *Meltex Ltd. and Mesrop Movsesyan v. Armenia*, 17 June 2008, paragraph 65 (Resolution 1361 (2004) of the Parliamentary Assembly of the Council of Europe (PACE): Honouring of obligations and commitments by Armenia, 27 January 2004).

The public monopolies within the audiovisual media were seen by the Court as contrary to Article 10, primarily because they cannot provide a plurality of sources of information. Such a monopoly is not necessary in a democratic society, and it could only be justified by a pressing social need. However, in modern societies, the multiplication of methods of broadcasting communication and the increase of transfrontier television make it impossible to justify the existence of monopolies. On the contrary, the diversity of the public's requirements cannot be covered by only one broadcasting company.[262]

Commercial advertising by the audiovisual media is also protected by Article 10, even though the domestic authorities enjoy a wide margin of appreciation as regards the necessity of restraining it.[263] In principle, advertising should be prepared with a sense of responsibility towards society, and particular attention should be paid to the moral values forming the basis of any democracy. Any advertising addressed to children should avoid information which could harm their interests, and should respect their physical, mental and moral development. The Court has also developed a remarkable approach with regard to the right of access to broadcast "non-commercial" television commercials of a political nature, which had raised public concern.[264] In 1994, the Commercial Television Company in Switzerland (AG für das Werbefernsehen), had refused to broadcast a commercial concerning animal welfare at the request of an association against industrial animal production (Verein gegen Tierfabriken, "VGT"). The television commercial was to be considered as a response to advertisements by the meat industry, and ended with the words "eat less meat, for the sake of your health, the animals and the environment". The Commercial Television Company refused to broadcast the commercial, however, because it considered it to be a message with a clear political character, and Swiss broadcasting law prohibits political advertisements on radio and television. The applicant's administrative law appeal was dismissed by the federal court (Bundesgericht) on 20 August 1997, relying, *inter alia* on the legitimate aim of the prohibition of political advertising stated in section 18, paragraph 5 of the Federal Radio and Television Act. The Court, finding a violation of Article 10, took into consideration that the Commercial Television Company was the sole entity responsible for the broadcasting of commercials during programmes broadcast nationally, which meant that there were few other possibilities for reaching the entire Swiss public with the proposed advertisement. Moreover, the Court observed that powerful financial groups obtain competitive

262. *Informationaverein Lentia v. Austria*, 24 November 1993.
263. *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, 20 November 1989.
264. *VgT Verein gegen Tierfabriken v. Switzerland, 28 June 2001.*

advantages through commercial advertising and might therefore exercise pressure on, and eventually curtail, the freedom of the radio and television stations broadcasting commercials. Such situations undermine the fundamental role of freedom of expression in a democratic society. As a result of the lack of implementation of the judgment at national level, the case gave rise to a second complaint.[265]

In its case law the Court has developed special rules concerning public broadcasters, particularly their independence from political influence. In *Manole and Others v. Moldova*, the public broadcasting company, Teleradio-Moldova (TRM), was subjected to political control by the government and the ruling political party. No guarantee of pluralism was present in its editorial policy and news and information programmes.[266] Journalists at TRM complained that they had been subjected to a censorship regime and that their dismissal from the company had been based on political motives. The Court confirmed that the state must be the ultimate guarantor of pluralism and that this places a duty on the state to ensure that the public has access through television and radio to impartial and accurate information and a range of opinions and comments, reflecting the diversity of political outlook within the country. Journalists and other professionals working in the audiovisual media should not be prevented from imparting this information and commentary. Furthermore, it is indispensable for the proper functioning of democracy that the public broadcaster transmits impartial, independent and balanced news, information and comment and, in addition, provides a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed.

The Committee of Ministers has issued a number of recommendations concerning public media pluralism and independence, particularly as concerns the way in which members of the boards of those media are selected.[267]

8.4. Duties and responsibilities of journalists

Under the "duties and responsibilities" approach, the Court has also argued that the fact that a person belongs to a particular category provides grounds for the limitation, as opposed to increase, of public authorities' powers to restrict the exercise of that person's rights. Editors and journalists would

265. *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)*, 30 June 2009.
266. *Manole and Others. v. Moldova*, 17 September 2009.
267. For example, Recommendation No. R (1996) 10 of the Committee of Ministers to member States on the guarantee of the independence of public service broadcasting, 11 September 1996 and Recommendation (2007) 2 of the Committee of Ministers to member states on media pluralism and diversity of media content, 31 January 2007.

fall into this category. In the case of *Observer and Guardian v. the United Kingdom*[268] already discussed above, the national courts issued an injunction prohibiting the publication of specific articles on the ground that they would endanger national safety. The Court referred to the duty of the press "to impart information and ideas on matters of public interest", adding that the right of the public to receive such information corresponds to the duty of the press to impart it. Consequently, by having been granted the right and the duty to impart information and ideas, the press gained a greater freedom, thus reducing the possibilities for states to limit its interferences. However, the Court stated that by reason of the "duties and responsibilities" inherent in the exercise of freedom of expression, the protection of journalists under Article 10 is subject to the proviso that they "are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism".[269]

In addition, the Court also stressed that the "duties and responsibilities" of media professionals "assume special significance in situations of conflict and tension".[270] In *Şener v. Turkey*, the Court held:

> Particular caution is called for when consideration is being given to the publication of views which contain incitement to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence.

Nevertheless, the Court also stressed that:

> [a]t the same time, where such views cannot be so categorised, Contracting States cannot, with reference to the protection of territorial integrity or national security or the prevention of crime or disorder, restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.[271]

In the instant case, the Court noted that the review published by the applicant – the owner and the editor of a weekly review – contained a sharp criticism of the government's policy and of the action of their security forces with regard to the Kurds in south-east Turkey, and that certain phrases seemed aggressive in tone. However, the Court found that the article did not glorify violence and did not incite to revenge or armed resistance, and therefore the criminal conviction of the applicant infringed Article 10. The applicant

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268. *Observer and Guardian v. the United Kingdom*, 26 November 1991.
269. *Fressoz and Roire v. France*, 21 January 1999; *Bergens Tidende and Others v. Norway*, 2 May 2000.
270. *Şener v. Turkey*, 18 July 2000.
271. Ibid., paragraph 42.

did not overstep the limits of his duties and responsibilities in conflict and tensions, but he offered the public a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective might have been for the public.

The Grand Chamber, in deciding whether a journalist should have been detained while covering demonstrations, stated that journalists "*cannot claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions*".[272] The Court noted that the case did not concern the prohibition of a publication or any sanctions imposed in respect of a publication. The interference to the journalistic freedom of expression was the consequence of the journalist failing to comply with police orders while taking photos in order to report on a demonstration that had turned violent.[273] The fact that the applicant was a journalist did not entitle him to preferential or different treatment in comparison to the other people taking part in the reported demonstration.

Journalists have the obligation to collect materials in accordance with professional standards. The method of obtaining information should be adequate for the substance of the material produced. In the case of *Haldimann v. Switzerland*,[274] which concerned the conviction of four journalists for having recorded and broadcast an interview using hidden cameras, the Court found such a method acceptable. It found that Article 10 protects journalists in relation to such reporting on the provision that they are acting in good faith and on an accurate factual basis, while providing "reliable and precise" information in accordance with the ethics of journalism. The recording, on the other hand, had been broadcast in the form of a report using audiovisual media, which was particularly negative insofar as the person recorded (an insurance broker) was concerned, as audiovisual media are often considered to have a more immediate and powerful effect than the written press. However, a decisive factor was that the journalists had disguised the insurance broker's face and voice, and that the interview had not taken place on his usual business premises.

In a recent case, *Brambilla and Others v. Italy*, concerning illegal interception of police discussions by journalists, the Court reiterated that the notion of responsible journalism required that where journalists acted to

272. *Pentikäinen v. Finland*, 20 October 2015 (GC), paragraph 91.
273. Ibid., paragraph 93.
274. *Haldimann and Others v. Switzerland*, 24 February 2015.

the detriment of the duty to abide by ordinary criminal law, they had to be aware that they risked being subjected to legal sanctions, including those of a criminal character.[275]

8.5. Protection of journalistic sources

Journalistic sources are particularly protected under Article 10. The Court explained that the protection of journalistic sources is one of the basic conditions of freedom of the press. The Goodwin judgment[276] is significant for the balance between the interests of justice and rights of others on the one hand, and the interest to protect sources on the other. The Court argued that:

> [w]ithout such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.[277]

Mr Goodwin, a journalist with the monthly magazine *The Engineer*, had received from a "source", by telephone, information on the company Tetra Ltd. The source had stated that the company was in the process of raising a large loan while it had major financial problems. The information had not been asked for and was not given in exchange for any payment. In the course of preparing an article on this subject, the journalist had telephoned Tetra Ltd and asked for its comments on the information. Following this telephone call, the company asked for a court injunction against the publication of Mr Goodwin's article, arguing that its economic and financial interests would be seriously hampered if the information became public. The injunction was granted, and the company sent a copy to all major newspapers.

Further, the company asked the court to request the journalist to reveal the name of his source. It was argued that this would help the company to identify the dishonest employee and initiate proceedings against him or her. The journalist repeatedly refused the court's request and did not reveal the source. He was subsequently fined under the charge of "obstruction of justice".

Before the Court, the applicant claimed that the court order requesting him to reveal the source, as well as the fine for not doing so, had both infringed his right to freedom of expression. Recalling that "freedom of expression constitutes one of the essential foundations of a democratic society and that

275. *Brambilla and Others v. Italy*, 23 June 2016.
276. *Goodwin v. the United Kingdom*, 27 March 1996 (GC).
277. Paragraph 39.

the safeguards to be afforded to the press are of particular importance", the Court further held that the:

> [p]rotection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms … Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.[278]

Having in view the importance of journalistic sources for press freedom in a democratic society and the potentially chilling effect of a disclosure order, the Court found "that both the order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so gave rise to a violation of his right to freedom of expression".

The Goodwin standard was confirmed in *Nagla v. Latvia*.[279] This case concerned the search by the police of a well-known broadcast journalist's home, and their seizure of data storage devices. The applicant's home was searched following a broadcast she had aired in February 2010 in which she had informed the public about an information leak from database of the State Revenue Service. The applicant complained that the search of her home meant that she had been compelled to disclose information that had enabled a journalistic source to be identified, thus violating her right to receive and impart information.

Following the Goodwin judgment, on 8 March 2000, the Committee of Ministers of the Council of Europe adopted Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information.

In *Sanoma Uitgevers B.V. v. the Netherlands*, the Grand Chamber emphasised that orders requiring journalists to disclose their sources must be subject to the guarantee of judicial review or review by another independent and impartial review body.[280] The criteria for such a review are:

- it should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not;

278. Paragraph 39.
279. *Nagla v. Latvia*, 16 July 2013.
280. *Sanoma Uitgevers B.V. v. the Netherlands*, 14 September 2010 (GC), paragraphs 90-92.

- the exercise of a review that only takes place subsequently to the handing over of material capable of revealing such sources would undermine the very essence of the right to confidentiality;
- there must be a weighing of the potential risks and respective interests prior to any disclosure and with reference to the material that it is sought to have disclosed so that the arguments of the authorities seeking the disclosure can be properly assessed;
- the review should be governed by clear criteria, including whether a less intrusive measure may be sufficient;
- it should be possible for the judge or other authority to refuse to make a disclosure order or to make a limited or qualified order so as to protect sources from being revealed, whether or not they are specifically named in the withheld material, on the grounds that the communication of such material creates a serious risk of compromising the identity of journalists' sources; and
- in urgent situations, there should be a procedure to identify and isolate, prior to the exploitation of the material by the authorities, information that could lead to the identification of sources from information that carries no such risk.[281]

The Court has also recognised that secret surveillance by the state may interfere with an individual's freedom of expression if there is a risk that journalistic communications may be monitored – since this could mean that sources might be either disclosed or dissuaded from providing information by telephone. The transmission of data to other authorities, their destruction or the failure to notify the journalist of surveillance measures could also undermine the confidentiality of sources.[282]

8.6. Protection for whistle-blowers

The Court grants special protection to whistle-blowers due to their important role in democratic societies. Individuals who report or disclose information on threats or harm to the public interest can contribute to strengthening transparency and democratic accountability.

281. Philip Leach, "The principles which can be drawn from the case-law of the European Court of Human Rights relating to the protection and safety of journalists and journalism", Report prepared for the Council of Europe Conference of Ministers responsible for Media and Information Society, Freedom of Expression and Democracy in the Digital Age: Opportunities, Rights, Responsibilities, Belgrade 7-8 November 2013, paragraph 54.
282. *Weber and Saravia v. Germany*, 29 June 2006 (decision), paragraph 145 and *Bucur and Toma v. Romania*, 8 January 2013.

In *Guja v. Moldova,* the Court recognised the need for protection of whistle-blowers by Article 10 of the Convention. The Court noted:

> that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgation or publication corresponds to a strong public interest. The Court thus considers that the signaling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large.[283]

Although disclosure should be made in the first place to the person's superior or other competent authority or body, the Court accepted that when such a practice is clearly impractical, the information could, as a last resort, be disclosed to the public. The Court held that the dismissal of a civil servant for leaking two confidential letters from the public prosecutor's office to the press was in breach of Article 10, also referring to the serious chilling effect of the applicant's dismissal for other civil servants or employees, discouraging them from reporting any misconduct.[284]

The criteria for establishing a breach of the right to freedom of expression in relation to whistle-blowing was applied by the Court in *Heinisch v. Germany*.[285] In this case, a geriatric nurse in a nursing home, together with colleagues, had repeatedly indicated to management that staff shortages were impacting on their ability to perform their duties and causing serious shortcomings in the daily care of patients. The applicant complained that she had been dismissed without notice on the ground that she had lodged a criminal complaint against her employer in respect of these concerns, and that this had infringed her right to freedom of expression. The Court observed that the parties agreed that the lodging of the criminal complaint was whistle-blowing on the alleged unlawful conduct of the employer in the running of its nursing home, and that the resulting dismissal was an interference with the applicant's right to freedom of expression. The Court confirmed the standard that workers, in certain circumstances, should enjoy protection in respect of the disclosure of illegality or wrongdoing in the workplace, particularly if the employee is the one person, or part of only a small group, aware of what is happening and so "best placed to act in the public interest" by alerting the employer or the public. In coming to its judgment the Court noted

283. *Guja v. Moldova*, 12 February 2008 (GC), paragraph 72.
284. Ibid.
285. *Heinisch v. Germany*, 21 July 2011.

that the information disclosed by the applicant was in the public interest and of "vital importance" to preventing abuse, taking into account the particular vulnerability of the patients in the employer's nursing home, who are often unable to draw attention themselves to shortcomings in the provision of their care. Moreover, the applicant had raised her concerns on numerous occasions with her employer to no avail. The Court reiterated that a person who chooses to disclose information must carefully verify, as far as permitted by circumstances, its accuracy and reliability. The Court also found that the applicant was acting in good faith. Although she allowed herself a degree of exaggeration and generalisation, the applicant's disclosures were held to be a description of the serious shortcomings in the functioning of the nursing home. Finally the Court held that the public interest in receiving information about the care in the nursing home outweighed the rights of the employer and that the dismissal of the applicant was "disproportionately severe".

In *Matúz v. Hungary*, a journalist and presenter working for the state television company Magyar Televízió Zrt., was dismissed after having revealed that one of his superiors was censoring parts of the cultural programme of which he was editor and presenter.[286] At the material time, Mr Matúz was also the chairman of the trade union of public service broadcasters, active within the television company. On several occasions, Mr Matúz had openly invited the board of the television company to end censorship in news and television programmes. He subsequently published a book containing documentary evidence of the censorship exercised in the state television company, which led to his dismissal with immediate effect for having breached the confidentiality clause contained in his labour contract. Mr Matúz challenged his dismissal in court, but he was unsuccessful in his legal actions in Hungary. Finally, he lodged a complaint with the Court, arguing a violation of his rights under Article 10 of the Convention. Mr Matúz submitted that as a journalist and chairman of the trade union at the public television broadcaster, he had had the right and obligation to inform the public about alleged censorship at the national television company.

The Court recognised that the issue of censorship within a public service broadcaster concerns an issue of major interest for society. The Court also established that the publication of the book took place only after Mr Matúz had felt prevented from remedying the perceived interference with his journalistic work within the television company itself, that is, for want of any effective alternative channel. The domestic courts had found that the mere fact that the applicant had published the book was sufficient to conclude

286. *Matúz v. Hungary*, 21 October 2014.

that he had acted to his employer's detriment, limiting their analysis to the finding that Mr Matúz had breached his contractual obligations. As a result, the Hungarian courts did not examine whether and how the subject matter of the book at issue could have affected the permissible scope of restriction on his freedom of expression. Being mindful of the importance of the right to freedom of expression on matters of general interest, of Mr Matúz's professional obligations and responsibilities as a journalist on the one hand, and of the duties and responsibilities of employees towards their employers on the other, and having weighed the different interests involved in the case, the Court concluded that the interference with the applicant's right to freedom of expression had not been "necessary in a democratic society." The Court therefore considered the termination of the journalist's employment with immediate effect to be a violation of Article 10 of the Convention, once more recognising the importance of whistle-blowing in a democratic society.

The importance of whistle-blowers was also stressed in the Committee of Ministers' recommendation on the protection of whistle-blowers.[287] In that recommendation, it was stressed that member states should foster an environment that encourages reporting or disclosure in an open manner and that individuals should feel safe to freely raise public interest concerns. It was also recommended that "clear channels should be put in place for public interest reporting and disclosures and recourse to them should be facilitated through appropriate measures".

287. Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers, adopted on 30 April 2014.

Chapter 9

Freedom of expression and new technologies

9.1. Electronic surveillance

The case of *Youth Initiative for Human Rights v. Serbia*[288] concerned access to information obtained via electronic surveillance by the Serbian Intelligence Agency. The applicant, a non-governmental organisation (NGO), had complained that the intelligence agency's refusal to provide it with the information it had requested – it had asked to be provided with information on how many people the agency had subjected to electronic surveillance in 2005 – prevented it from exercising its role as "public watchdog".

The Court held that there had been a violation of Article 10 of the Convention. It found that the agency's obstinate reluctance to comply with a final and binding order to provide information it had obtained was in defiance of domestic law and was tantamount to being arbitrary. Relying on Article 46 (binding force and implementation) of the Convention, the Court further held that the most natural way to implement its judgment in this case would be to ensure that the agency provided the applicant NGO with the information it had requested on how many people had been subjected to electronic surveillance in 2005.

In the future, the Court will need to respond to the question to what extent the use of new technologies, mainly interception of communications, including the internet, affects journalists and their work. In the case of *Bureau of Investigative Journalism and Alice Ross v. the United Kingdom*,[289] the Court will look into how the statutory regime in relation to the interception of external communications has affected the ability of journalists to undertake investigative journalism without fear for the security of their communications, and whether it poses a risk to the public watchdog role of the press.

288. *Youth Initiative for Human Rights v. Serbia*, 25 June 2013.
289. Currently under examination, communicated to the respondent government on 5 January 2015.

9.2. General remarks on freedom of expression and the internet

The internet remains a new field of communication in which a limited number of regulations have been adopted at the national or international level. Therefore, national and international judges play a major role in establishing standards on the protection of freedom of expression in the internet. A number of standards have been established by the Court.

In the case of *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*,[290] the Court acknowledged for the first time that Article 10 of the Convention had to be interpreted as imposing on states a positive obligation to create an appropriate regulatory framework to ensure effective protection of journalists' freedom of expression on the internet. Ukrainian law, specifically the Press Act, granted journalists immunity from civil liability for verbatim reproduction of material published in the press. The Court noted that:

> this provision generally conforms to its approach to journalists' freedom to disseminate statements made by others.
>
> However, according to the domestic courts, no such immunity existed for journalists reproducing material from internet sources not registered pursuant to the Press Act. In this connection, the Court observes that there existed no domestic regulations on State registration of internet media and that, according to the Government, the Press Act and other normative acts regulating media relations in Ukraine did not contain any provisions on the status of internet-based media or the use of information obtained from the Internet.

The Court considered:

> that the absence of a sufficient legal framework at the domestic level allowing journalists to use information obtained from the Internet without fear of incurring sanctions seriously hinders the exercise of the vital function of the press as a "public watchdog" ... In the Court's view, the complete exclusion of such information from the field of application of the legislative guarantees of journalists' freedom may itself give rise to an unjustified interference with press freedom under Article 10 of the Convention.

Since then, the Court has applied the general principles resulting from the case law on Article 10 to online publications.[291]

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290. *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, 5 May 2011, paragraphs 61-64.
291. In, for example, *Renaud v. France*, 25 February 2010 (decision).

9.3. Blocking access

Access to the internet has become acceptes as one of the individual rights under Article 10. The Court's first decision concerned the blocking of access to two websites on the ground that they had streamed music without respecting copyright legislation. The applicant, Mr Yaman Akdeniz, had applied to the Court as a user of the websites in question, complaining in particular of a violation of his freedom of expression.[292] The Court declared the application to be inadmissible (incompatible *ratione personae*), finding that the applicant could not claim to be a "victim" in the sense of Article 34 (right of individual application) of the Convention. While stressing that the rights of internet users are of paramount importance, the Court nevertheless noted that the two music-streaming websites had been blocked because they operated in breach of copyright law. As a user of these websites, the applicant had benefited from their services and he had only been deprived of only one method of listening to music among many others. The Court further observed that the applicant had had at his disposal many means to access a range of musical works, without thereby contravening the rules governing copyright.

The Court adopted another approach in *Yıldırım v. Turkey*, where the entire domain of Google Sites had been blocked in Turkey due to a single website that contained content deemed offensive to the memory of Atatürk.[293] The blanket blocking order of Google Sites directly affected Mr Yıldırım's access to his own website. The Court accepted that this was not a blanket ban but rather a restriction on internet access. However, the limited effect of the restriction did not lessen its significance, particularly as the internet had become one of the principal means of exercising the right to freedom of expression and information. The measure in question therefore amounted to interference by the public authorities with the applicant's right to freedom of expression. The Court reiterated that a restriction on access to a source of information was only compatible with the Convention if a strict legal framework was in place regulating the scope of a ban and affording the guarantee of judicial review to prevent possible abuses. The Turkish law was found not to be "foreseeable" in its application, as it was not formulated with sufficient precision to enable individuals to regulate their conduct. By virtue of the law, a Turkish court could order the blocking of access to content published on the internet if there were sufficient reasons to suspect that the content gave rise to a criminal offence. However, neither Google Sites nor Mr Yıldırım's site

292. *Akdeniz v. Turkey*, 11 March 2014 (decision).
293. *Ahmet Yıldırım v. Turkey*, 18 December 2012.

were the subject of court proceedings in this case. Although the decision of 24 June 2009 had found Google Sites to be responsible for the site it hosted, no provision was made in the law for the wholesale blocking of access as had been ordered by the court. The effects of the measure in question had therefore been arbitrary and the judicial review of the blocking of access had been insufficient to prevent abuses.

The Court adopted a different approach in the case brought by Messrs Serkan Cengiz, Yaman Akdeniz and Kerem Altıparmak, professors of law at universities throughout Turkey.[294] In May 2008, the Turkish Government had blocked all access to the popular video-sharing website YouTube. The ban was justified under a law that prohibited "insulting the memory of Atatürk". YouTube contained about ten videos that were deemed to be insulting to Atatürk by the domestic court that had issued the blocking order. The ban remained in effect from 5 May 2008 to 30 October 2010, when the order was lifted by the public prosecutor's office. The applicants had sought unsuccessfully to get the ban lifted through the domestic court system, citing the freedom to receive and impart information, as well as the public interest in accessing an information-sharing website such as YouTube. The Court took the view that this case differed from *Akdeniz v. Turkey* because in this case the YouTube ban made inaccessible a popular platform for political discourse, which displayed specific information that could not easily be accessed by other means, whereas in Akdeniz the Court had pointed to alternative means available for accessing music in the face of the relevant ban[295]. Although the blocking of YouTube had not directly targeted the applicants, the ban had affected their right to receive and impart information and ideas. Therefore, the Court found that the ban presented an interference with the applicants' right to freedom of expression. This interference was unjustified because the law under which it was authorised allowed only for the banning of the specific publications in the event that an offence was suspected. A blanket ban of an entire website, such as in the present case, was not prescribed by law and therefore not lawful.

9.4. Right to internet access

The Court, in particular circumstances, has granted prisoners access to the internet. In *Kalda v. Estonia* a prisoner complained about the authorities' refusal to grant him access to three internet websites, containing legal information, run by the state and by the Council of Europe.[296] The applicant

294. *Cengiz and Others v. Turkey*, 1 December 2015.
295. Paragraph 51.
296. *Kalda v. Estonia*, 19 January 2016.

complained in particular that the ban under Estonian law on his accessing these specific websites had breached his right to receive information via the internet and thus prevented him from carrying out legal research for court proceedings in which he was engaged. The Court held that there had been a violation of Article 10 of the Convention. It found in particular that contracting states are not obliged to grant prisoners access to internet. However, if a state is willing to allow prisoners access, as is the case in Estonia, it has to give reasons for refusing access to specific sites. In the specific circumstances of the applicant's case, the reasons, namely the security and cost implications, for not allowing him access to the internet sites in question, had not been sufficient to justify the interference with his right to receive information. Notably, the authorities had already made security arrangements for prisoners' use of internet via computers especially adapted for that purpose and under the supervision of the prison authorities, and had borne the related costs. The domestic courts had undertaken no detailed analysis as to the possible security risks of access to the three additional websites in question, bearing in mind that they were run by an international organisation and by the state itself.

9.5. Internet archives

The internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general. Content available in the internet remains there and it is very difficult for it to be erased. The Court has had to decide on the publishers' responsibility for internet archives, particularly if they contain materials which lead to a violation of the right to reputation. In *Times Newspapers Ltd v. the United Kingdom (Nos. 1 and 2)*,[297] the Court ruled that once a newspaper has lost a defamation case concerning an article which remains in its archives, it has to add an appropriate note to the internet version that the article has been subject to defamation proceedings. The press provide a valuable role by maintaining archives, and the limitation period in libel actions is intended to ensure that claimants act quickly. However, in this case the domestic court had not suggested that the articles be removed altogether, and the obligation to attach a notice to archive material when the newspaper is on notice that a libel action has been initiated in respect of that same article, is not a disproportionate interference with Article 10. On the facts, the ceaseless liability issue did not arise, but libel proceedings brought against a newspaper after a significant lapse of time may, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom under Article 10.

297. *Times Newspapers Ltd v. the United Kingdom (Nos. 1 and 2)*, 10 March 2009.

Another case relating to internet archives was analysed by the Court from the perspective of Article 8 of the Convention, and provides guidelines for the responsibility of publishers. Two lawyers, Mr Węgrzynowski and Mr Smolczewski, demanded from national courts the deletion of articles which they found to be defamatory. The Court emphasised that neither the national court nor the media has, nor could have, the task of rewriting history by deleting articles or their published content from the internet, even if that content violates someone's rights. The Court found that internet archives are protected by freedom of expression within the meaning of Article 10.[298] Internet archives make a significant contribution to preserving and making available news and information. Such archives are an important source for education and research, especially considering that they are easily available to the public and generally free of charge. Although the media's primary task in a democracy is to act as a "public watchdog", it also has a secondary function – storing news articles that have previously been published and making those news articles available to the public. The maintenance of internet archives is a critically important aspect of that function. It is therefore not disproportional in and of itself to order a media outlet, simultaneously administrating an internet archive, to publish a suitable reference or correction with its internet issue if such reference or correction was relevant to the article in its printed issue. As a result, the Court also noted in connection with this dispute that it would have been relevant to supplement the article with a reference to the court judgment.

The Court has left a wide margin of appreciation to authorities in case of copyright infringement in the internet. In the case of *Ashby Donald and Others v. France*, two fashion photographers were convicted of copyright infringement following the publication on the internet site of a fashion company run by two of the applicants, without the authorisation of the fashion houses concerned, of photos taken by the other applicant at fashion shows in 2003. The Court held that there had been no violation of Article 10.[299] In the circumstances of the case and regard being had to the particularly wide margin of appreciation open to the domestic authorities, the nature and gravity of the penalties imposed on the applicants were not such that the Court could find that the interference in issue was disproportionate to the aim pursued.

298. *Węgrzynowski and Smolczewski v. Poland*, 16 August 2013.
299. *Ashby Donald and Others v. France*, 10 January 2013.

9.6. Liability for user-generated content

The Court has had also to deal with the problem of liability for user-generated comments on an internet news portal. In *Delfi AS v. Estonia*,[300] Delfi AS, a company which runs an internet news portal on a commercial basis, complained that it had been held liable by the national courts for the offensive comments posted by its readers below one of its online news articles about a ferry company. At the request of the lawyers of the owner of the ferry company, the applicant company removed the offensive comments about six weeks after their publication. The Court held that there had been no violation of Article 10, finding that the Estonian courts' finding of liability against the applicant company had been a justified and proportionate restriction on the portal's freedom of expression, in particular because: the comments in question had been extreme (anti-Semitic) and had been posted in reaction to an article published by the applicant on its professionally managed news portal run on a commercial basis; the steps taken by the applicant to remove the offensive comments without delay after their publication had been insufficient; and the 320 euro fine had by no means been excessive for the applicant, one of the largest internet portals in Estonia. An important argument of the Court related to the fact that the applicant company was earning revenue from its internet activity.

The Court reached a different conclusion in a case concerning the liability of a self-regulatory body of internet content providers and an internet news portal for vulgar and offensive online comments posted on their websites following the publication of an opinion criticising the misleading business practices of two real estate websites.[301] The applicants complained about the Hungarian courts' rulings against them, which had effectively obliged them to moderate the contents of comments made by readers on their websites, arguing that the rulings had gone against the essence of free expression on the internet. In this case, the Court held that there had been a violation of Article 10. It reiterated in particular that, although not publishers of comments in the traditional sense, internet news portals had nevertheless, in principle, to assume duties and responsibilities. However, the Court considered that the Hungarian courts, when deciding on the notion of liability in the applicants' case, had not carried out a proper balancing exercise between the competing rights involved, namely between the applicants' right to freedom of expression and the real estate websites' right to respect for their commercial reputation. Notably, the Hungarian authorities had accepted at

300. *Delfi v. Estonia*, 16 June 2015 (GC).

301. *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, 2 February 2016.

face value that the comments had been unlawful as being injurious to the reputation of the real estate websites. In contrast to the Delfi case, the Court found that the comments did not contain hate speech and that the internet service providers did not operate for profit.

The need to ensure internet freedom has also been underlined in the Committee of Ministers' recommendation on internet freedom.[302] The Committee of Ministers has also adopted a number of documents relating to network neutrality,[303] transboundary flow of information,[304] human rights guidelines for search engines,[305] internet users[306] and user-generated content.[307]

302. Recommendation CM/Rec(2016)5 of the Committee of Ministers to member States on Internet freedom, adopted on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies.
303. Recommendation CM/Rec(2016)1 of the Committee of Ministers to member States on protecting and promoting the right to freedom of expression and the right to private life with regard to network neutrality, adopted on 13 January 2016 at the 1244th meeting of the Ministers' Deputies.
304. Recommendation CM/Rec(2015)6 of the Committee of Ministers to member States on the free, transboundary flow of information on the Internet, adopted on 1 April 2015 at the 1224th meeting of the Ministers' Deputies.
305. Recommendation CM/Rec(2012)3 of the Committee of Ministers to member States on the protection of human rights with regard to search engines, adopted on 4 April 2012 at the 1139th meeting of the Ministers' Deputies.
306. Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users, adopted on 16 April 2014 at the 1197th meeting of the Ministers' Deputies.
307. Swiss Institute of Comparative Law, Comparative study on blocking, filtering and take-down of illegal internet content: Comparative considerations, Lausanne, 20 December 2015.

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