



JOURNALISM AT RISK

Threats,
challenges and
perspectives

” Defending
a favourable
environment for
public debate

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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Note from the editor

There are concepts in the case law of the European Court of Human Rights which contain an entire universe; concepts that need to be explored, defined, understood, debated.

These concepts, bearers of universal values, find for many their origins in violations of human rights sometimes stemming from tragic events such as the murder of a journalist.

The authors of this book were invited to reflect on the concept of “favourable environment for the participation of all in public debate”,¹ in particular of journalists, and the “pre-eminent role in a State governed by the rule of law”² that the Court acknowledges as belonging to them.

Each author took a closer look at one of the aspects of such an environment and highlighted not only the pressing problems, but also the standards and principles prevailing in the European and even international landscape, as well as the gaps and the potential of the existing protection mechanisms.

They attempted to identify the meaning of “favourable environment” in terms of complex and constantly changing legal, political, economic and socio-cultural realities, especially in the context of technological advances. The diversity of their approaches blends the legal perspective with other approaches around a discussion of journalistic freedom, enriching thereby the exploration of the concept of “favourable environment”.

The said “favourable environment” for public debate is necessary fertile ground for democracy, human rights and the rule of law, the three pillars of the Council of Europe. The thread that connects independent journalism to these three pillars is present in all chapters, regardless of the distinctive approach brought to the debate by each author.

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1. “States are obliged to put in place an effective system of protection for authors and journalists as part of their broader obligation to create a favourable environment for participation in public debate by everyone and to enable the expression of opinions and ideas without fear, even when they are contrary to those held by the authorities or by a significant section of public opinion and even if they are annoying or shocking for the latter.” (*Dink v. Turkey*, Nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, § 137, 14 September 2010).
 2. The Court has repeatedly stressed the pre-eminent role of the press in a democratic state governed by the rule of law (among many others, *Castells v. Spain*, 23 April 1992, § 43, Series A no. 236; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239; *Goodwin v. the United Kingdom*, 27 March 1996, § 39, Reports 1996-I; *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298; *Fatullayev v. Azerbaijan*, no. 40984/07, § 88, 22 April 2010; *Financial Times Ltd and Others v. the United Kingdom*, No. 821/03, § 59, 15 December 2009; and *De Haes and Gijssels v. Belgium*, 24 February 1997, § 37, Reports 1997-I).

At the funeral of the journalist Hrant Dink, Rakel Dink, his wife, turned to thousands of people who were gathered outside the *Agos* newspaper building and said:

Whoever the assassin is ... I know he was once a little child. My brothers, my sisters, nothing will be possible as long as we do not question the darkness that has transformed a small child into a killer.³

This book hopes to shed some light, albeit small, on that threatening darkness.

Onur Andreotti
Co-ordinator

Council of Europe Task Force for Freedom of Expression and Media

3. "Yaşı kaç olursa olsun, 17 veya 27, katil kim olursa olsun, bir zamanlar bebek olduklarını biliyorum. Bir bebekten bir katil yaratan karanlığı sorgulamadan hiçbir şey yapılamaz kardeşlerim." <http://t24.com.tr/haber/aramizdan-ayrilali-8-yil-oldu-hrant-dinki-bu-kez-ailesi-anlatiyor,284263>

Foreword

Nils Muižnieks, Council of Europe Commissioner for Human Rights

In recent years I have observed a progressive deterioration of the conditions in which media professionals work, with a clear acceleration in 2014 when hundreds of journalists, photographers and camera operators were killed, injured, arrested, kidnapped, threatened or sued. The conflict in Ukraine stands out in this context, with six journalists killed while covering the events there. A report by the International Federation of Journalists identifies 2014 as the deadliest year for journalists in Europe in decades.

The rising death toll is the most extreme manifestation of an increasingly difficult working environment for journalists, which also features physical attacks, acts of intimidation, judicial harassment, imprisonment, muzzling legislation, smear campaigns and abuse of financial levers.

Investigations into crimes against journalists often drag on for years. At best they bring to justice the actual perpetrators, but rarely the masterminds. Media freedom is also a victim of political tensions and armed conflicts, with media outlets sometimes forced into becoming propaganda tools or simply shut down. New anti-terrorism legislation under discussion in several European countries risks increasing the vulnerability of the media to undue government control and to pressures on journalists over their sources.

One of the most widespread threats to media freedom that I have encountered is police violence against journalists who try to cover demonstrations. However, courtrooms are also all too often used to muzzle journalists. In the majority of European countries, defamation and libel are still part of criminal law and inadequate media legislation is used to stifle dissent. Throughout Europe, many journalists are still imprisoned because of their journalistic activity. According to the Committee to Protect Journalists, nine journalists were still behind bars in Azerbaijan, seven in Turkey, one in the Russian Federation and one in the “former Yugoslav Republic of Macedonia” as at 1 December 2014.

The trouble does not end here. A more subtle threat comes from powerful holdings or oligarchs that deal a great blow to media diversity and pluralism, as well as editorial independence, by concentrating media ownership. Inadequate legal frameworks and unfair taxes on advertising revenues can also harm media pluralism and be used in a selective way to silence dissenting voices.

In addition to these problems, public service media in Europe have suffered from both debilitating budget cuts and undue political pressure. This is particularly worrying because reduced state support and outright manipulation of public information have serious negative consequences in terms of diversity and quality of content provided to the public.

All evidence points to the urgency of taking action. Two fundamental steps that should be taken are the release of all journalists imprisoned because of views they have expressed and the eradication of impunity by effectively investigating all cases of violence against journalists, including those involving state actors such as law-enforcement officials. Such a move should be reinforced by specific instructions and training for the police on the protection of journalists. In addition, legislation must change: defamation and libel must be fully decriminalised and dealt with through proportionate civil sanctions only. Lastly, more efforts have to be made to preserve media diversity and pluralism. This includes providing adequate public resources to support media outlets, without compromising editorial independence, and enforcing laws and transparency regulations on media ownership.

By defending journalists' safety and preserving a free and diverse press we make democracy stronger.

Chapter 1

Positive obligations concerning freedom of expression: mere potential or real power?

Tarlach McGonagle¹

*Anything can happen. You know how Jupiter
Will mostly wait for clouds to gather head
Before he hurls the lightning? Well, just now
He galloped his thunder-cart and his horses
Across a clear blue sky. It shook the earth ...²*

(Seamus Heaney)

INTRODUCTION

There was no bolt of lightning, no thunder-clap, no King of the Gods present to herald the occasion. Instead, the European Court of Human Rights (the Court) announced in a very inauspicious manner its most far-reaching statement to date of the positive obligations of Council of Europe member states to secure the right to freedom of expression. The Court enunciated that member states are essentially under an obligation to facilitate inclusive and pluralistic public debate. The more detailed and nuanced formulation is tucked away in paragraph 137 of the Court's judgment in *Dink v. Turkey*:

States are obliged to put in place an effective system of protection for authors and journalists as part of their broader obligation to create a favourable environment for participation in

1. Senior Researcher, Institute for Information Law (IViR), Faculty of Law, University of Amsterdam, and Rapporteur, Council of Europe Committee of Experts on the Protection of Journalism and the Safety of Journalists (MSI-JO). While this article has been written in a personal capacity, the author would like to acknowledge with gratitude that the section "The outer ramparts of freedom of expression" has benefitted from exchanges on relevant issues within MSI-JO and on an ongoing basis with Onur Andreotti.
2. Seamus Heaney, "Anything can happen", after Horace, Odes I, 34, in Heaney S. (2004:11).

public debate by everyone and to enable the expression of opinions and ideas without fear, even when they are contrary to those held by the authorities or by a significant section of public opinion and even if they are annoying or shocking for the latter.³

Yet even if the announcement was without fanfare, there is a growing recognition that this statement has tremendous potential and may yet prove seminal.

This chapter will first briefly examine the theoretical and normative bases for the positive obligations doctrine and then trace its hesitant development in the case law of the Court. Next, it will show how the Court slowly became more comfortable with the doctrine and more confident when applying it to cases involving freedom of expression, culminating in its *Dink* judgment. The driving argument of the chapter is that the positive obligations doctrine has enormous potential for strengthening the right to freedom of expression and that the Court must now tease out its implications in concrete cases in a very scrupulous way, if the doctrine's full potential is to be realised.

This argument will be advanced by exploring the various positive obligations that are brought together in para. 137 of the *Dink* judgment. For organisational clarity and convenience, the chosen headings correspond to para. 137's main focuses: a favourable environment for participation in public debate by everyone; the expression of opinions and ideas without fear, and opinions and ideas that offend, shock or disturb.

THEORETICAL AND NORMATIVE BASES

All international human rights treaties share the primary objective of ensuring that the rights enshrined therein are rendered effective in practice. There is also a predominant tendency in international treaty law to guarantee effective remedies to individuals when their human rights have been violated. In order to achieve these objectives, separately and dually, it is not always enough for the state to simply refrain from interfering with individuals' human rights: positive or affirmative action will often be required as well. It is therefore important to acknowledge the concomitance of negative and positive state obligations to safeguard human rights. Although widely accepted nowadays, this viewpoint has encountered considerable resistance in the past. The European Convention on Human Rights (ECHR or the Convention) is a case in point.

It is clear from the drafting history of the ECHR that the priority or primary concern was to identify a list of rights and freedoms that would be protected by the Council of Europe's system of collective enforcement. In turn, the system of collective enforcement would "extend solely to rights and freedoms" which, *inter alia*, "imposed on the States only obligations 'not to do things,' which would thus be susceptible

3. Author's translation of *Dink v. Turkey*, para. 137: "... les Etats sont tenus de créer, tout en établissant un système efficace de protection des auteurs ou journalistes, un environnement favorable à la participation aux débats publics de toutes les personnes concernées, leur permettant d'exprimer sans crainte leurs opinions et idées, même si celles-ci vont à l'encontre de celles défendues par les autorités officielles ou par une partie importante de l'opinion publique, voire même sont irritantes ou choquantes pour ces dernières".

to immediate sanction by a court".⁴ Such obligations of abstention are commonly called negative obligations. Nevertheless, in the text of the Convention that was ultimately adopted, various articles expressly provide for positive state obligations. For instance, Article 6 (right to a fair trial) and Article 13 (right to an effective remedy), both clearly presuppose affirmative action on the part of states, if the rights they guarantee are to be realised in practice.

Besides these explicit positive obligations that are enshrined in the text of the ECHR, the Court has, over the years, identified various positive obligations that are implied by the text. Alastair Mowbray has identified a number of phases in the development of the positive obligations doctrine in the Court's case law.⁵ First, there was the Court's early case law that developed the Convention's explicit positive obligations, followed by a phase from the late 1970s to the early 1990s in which the Court developed various positive obligations under Article 8(1)'s requirement to "respect" family and private life. The 1990s were then characterised by the development of positive obligations under Article 2 (right to life), Article 3 (prohibition of torture) and Article 5 (right to liberty and security). Since then, the Court has been expanding these positive obligations and creating new ones.⁶ This chapter will ultimately posit that the *Dink* judgment could potentially mark the beginning of a new phase in the development of the positive obligations doctrine, at least in respect of the right to freedom of expression.

There are slightly divergent views about when and how the Court started to develop its doctrine of positive obligations. For instance, the current President of the Court, Dean Spielmann, points to the *Belgian Linguistic* case⁷ as the judgment in which the Court "inaugurated" the doctrine,⁸ whereas others tend to take the *Marckx* judgment⁹ as the relevant starting point.¹⁰ Both views are accurate in their own way and can be reconciled by noting that the reference to positive obligations in *Belgian Linguistic* is made in a roundabout way, whereas in *Marckx*, the reference is more direct. In *Belgian Linguistic*, the Court held that "it cannot be concluded that the State has no positive obligation to ensure respect for such a right as protected by" Article 2, Protocol 1, ECHR (right to education).¹¹ The judgment otherwise subscribes to the judicial thinking that typified the times, namely that most of the state obligations under the Convention are "essentially" negative in character.

In *Marckx*, however, referring specifically to the *Belgian Linguistic* case, the Court affirmed that while the object of Article 8 "is 'essentially' that of protecting the individual against arbitrary interference by the public authorities", "[n]evertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in

4. Teitgen P.-H. (1993:10).

5. Mowbray A. (2004:227).

6. Mowbray A. (2004:229).

7. *Belgian Linguistic* case.

8. Spielmann D. (2007:434).

9. *Marckx v. Belgium*.

10. E.g., Dijk P. (van) (1998:18).

11. *Belgian Linguistic* case, p. 27, § 3.

an effective 'respect' for family life".¹² The *Airey* judgment followed swiftly afterwards, providing the Court with the opportunity to further sharpen this formula and to broaden its object by mentioning private life as well as family life.¹³

Whatever the precise historical origins of the doctrine, its normative basis is clear. Article 1 ECHR, obliges States Parties to the Convention to "secure to everyone within their jurisdiction the rights and freedoms" set out in the Convention. The obligation to "secure" these rights is unequivocal and necessarily involves ensuring that the rights in question are not "theoretical or illusory", but "practical and effective".¹⁴ Against this backdrop and based on an analysis of the Court's relevant case law, it has been observed that "various forms of positive obligations have been imposed upon different governmental bodies in order to secure a realistic guarantee of Convention rights and freedoms".¹⁵ What exactly a "realistic guarantee" entails is best determined on a case-by-case basis, although certain trends can tentatively be identified per Convention article.¹⁶ The examples discussed below have been selected on the basis of their relevance for the positive state obligations set out in para. 137 of the *Dink* judgment.

The Court's espousal of the doctrine was initially cautious. It has repeatedly declined to "develop a general theory of the positive obligations which may flow from the Convention",¹⁷ preferring instead to determine the existence and scope of positive obligations on a case-by-case basis.¹⁸ As the Court's judgments are "essentially declaratory", the Court "leaves to the State the choice of the means to be utilised in its domestic legal system for performance of its obligation under Article 53",¹⁹ assuming, of course, that the circumstances allow for such choice.²⁰ States are in any case obliged to take "reasonable and appropriate measures" to secure the Convention's rights and freedoms.²¹ This often involves "an obligation as to measures to be taken and not as to results to be achieved".²² States enjoy a certain margin of appreciation in this regard. The margin of appreciation can be wide, especially concerning positive obligations, for instance, in the context of Article 8, where "the notion of 'respect' [for family life] is not clear-cut" and "having regard to the diversity of the practices followed and the situations obtaining in the contracting states, the notion's requirements will vary considerably from case to case".²³

12. *Marckx v. Belgium*, § 31.

13. *Airey v. Ireland*. See, in particular, § 32.

14. *Ibid.*, § 24.

15. Mowbray A. (2005:78).

16. See generally: Mowbray A. (2004).

17. *Plattform "Ärzte für das Leben" v. Austria*.

18. *Rees v. the United Kingdom*.

19. *Marckx v. Belgium*, § 58.

20. C.f. (in respect of remedial measures to meet the State's obligations) *Youth Initiative for Human Rights v. Serbia*, § 31. The Court was of the opinion that "the violation found in this case, by its very nature, does not leave any real choice as to the measures required to remedy it".

21. *Plattform "Ärzte für das Leben" v. Austria*, §34.

22. *Ibid.*

23. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*. See also *Rees v. the United Kingdom*, §§ 35-37 and *Plattform "Ärzte für das Leben" v. Austria*, §34.

At present, the criteria applied by the Court in determining whether a state has failed to honour specific positive obligations remain somewhat unclear, although some guidance is given by the following passage:

the boundaries between the State's positive and negative obligations under the Convention do not lend themselves to precise definition. The applicable principles are nonetheless similar. Whether the case is analysed in terms of a positive duty on the State or in terms of interference by a public authority which needs to be justified, the criteria to be applied do not differ in substance. In both contexts regard must be had to the fair balance to be struck between the competing interests at stake.²⁴

The Court has held that the legitimate aims of restrictions on, for example, the rights to privacy and freedom of expression (as set out in Articles 8(2) and 10(2)) may be relevant for assessing whether or not states have failed to honour relevant positive obligations.²⁵ The Court has also found that the margin of appreciation is, in principle, the same for Articles 8 and 10, ECHR.²⁶ In all cases involving competing rights guaranteed by the Convention, a fair balance has to be struck between the rights involved, as relevant for the particular circumstances of the case.²⁷

Having set out some general considerations concerning the positive obligations doctrine, it is clear that the development of this doctrine is one of the main reasons why the ECHR can be seen as "part of a building project, not merely a fire-fighting operation".²⁸ Its aim is "the construction of a better rights framework, not just the prevention of the destruction of whatever framework already exists".²⁹ Attention will now turn from general considerations to a specific aspect of the doctrine that has proved contentious in the past: the extent to which states' positive obligations govern the private sphere and relations between private individuals.

Positive state obligations and private actors

The ECHR, like the whole international legal system for the protection of human rights, is built on the linear relationship between individuals (rights-holders) and states (duty-bearers). The recognition that different types of non-state/private actors should also be (explicitly) positioned within the system has come about in a gradual and frictional manner. And even that reluctant recognition has only been achieved through the dynamic interpretation of existing legal norms and the interplay between those norms and policy-making documents.

The questions of whether or how international human rights treaties protect individuals against other private persons do not invite straightforward answers. A leading

24. *VgT Verein gegen Tierfabriken v. Switzerland* (No. 2), §§ 82. See also *Von Hannover v. Germany* (No. 2), §99.

25. *Rees v. the United Kingdom*; *Von Hannover v. Germany* (No. 2).

26. *Von Hannover v. Germany* (No. 2), § 106.

27. For a detailed, critical analysis of the Court's current approach to the application of positive obligations, see: Lavrysen L. (2013).

28. Dickson B. (2010:204).

29. *Ibid.*

textbook on the ECHR captures the conceptual difficulties involved when it cautions against describing such protection (in the context of the ECHR) as *Drittwirkung*, a doctrine under which “an individual may rely upon a national bill of rights to bring a claim against a private person who has violated his rights under that instrument”.³⁰ Such a “horizontal application of law ... can have no application under the Convention at the international level, because the Convention is a treaty that imposes obligations only upon states”.³¹ It further clarifies that “insofar as the Convention touches the conduct of private persons, it does so only indirectly through such positive obligations as it imposes upon a state”.³²

The breakthrough for recognising the indirect horizontal applicability of certain provisions of the ECHR came in the *Young, James and Webster* judgment in 1981. In that case, the Court held that if a violation of one of the rights enshrined in the ECHR “is the result of non-observance of [the State’s] obligation [under Article 1, ECHR] in the enactment of domestic legislation, the responsibility of the State for that violation is engaged”.³³ This remark about the engagement of state responsibility was of general import, but in its subsequent jurisprudence, the Court progressively extended it to other articles of the Convention.

Thus, in its *Airey* judgment, the Court had stated that “although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life”.³⁴ Later, in *X. and Y. v. The Netherlands*, the Court supplemented that statement by admitting that such “obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves”.³⁵ This is an important extension of the principle as articulated in anterior case law; it confirms a degree of horizontal applicability of relevant rights. Yet, the Court “does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals *inter se*”.³⁶

Following this exposition of some of the more general features of the positive obligations doctrine, the next section will home in on the positive obligations that specifically relate to freedom of expression and are implicated in para. 137 of the *Dink* judgment.

30. Harris D. J. et al. (2014:23). For a detailed analysis of *Drittwirkung* in the context of the ECHR, see: Clapham A. (1993). For a comparative analysis of the scope of several national bills of rights for legal action against third parties for human rights violations, see: Oliver D. and Fedtke J. (2007).

31. *Ibid.*

32. *Ibid.*

33. *Young, James and Webster v. the United Kingdom*, § 49.

34. *Airey v. Ireland*, § 32.

35. *X and Y v. the Netherlands*, § 23.

36. *VgT Verein gegen Tierfabriken v. Switzerland (No. 1)*, § 46.

A FAVOURABLE ENVIRONMENT FOR PARTICIPATION IN PUBLIC DEBATE BY EVERYONE

At the very heart of the positive obligation set out in para. 137 of the *Dink* judgment is the obligation on states to create a favourable environment for public debate in which everyone can participate. In other words, states are obliged to create an environment that enables inclusive, pluralistic public debate. The concept of an “enabling environment” for freedom of expression and/or the media, developed in different guises in academic literature and policy-making studies,³⁷ can be very useful for exploring the range of (positive) state obligations envisaged by the Court. An enabling environment for freedom of expression typically involves a favourable legal and policy environment and a political, socio-economic and cultural climate that is also conducive to pluralist democracy and pluralist media. This is because, as Monroe Price and Peter Krug have noted, “there is a close interaction between what might be called the legal-institutional and the socio-cultural, the interaction between law and how it is interpreted and implemented, how it is respected and received”.³⁸

A favourable – or enabling – environment for freedom of expression is a prerequisite for a favourable environment for universal participation in public debate. In order to secure the right to freedom of expression, the safety and security of everyone wishing to exercise the right must first be guaranteed. The safety and security of actors in public debate should therefore be seen as prior (but of themselves insufficient) conditions for inclusive and pluralistic public debate. Numerous (positive) state obligations concern the safety and security of those wishing to participate in public debate. They will be considered now, before turning to the (positive) state obligations that concern public debate more specifically.

The outer ramparts of freedom of expression

As already mentioned, Mowbray’s third phase in the Court’s development of its positive obligations doctrine, in/from the 1990s, concerned the identification and elaboration of various positive obligations under Article 2 (right to life), Article 3 (prohibition of torture) and Article 5 (right to liberty and security).³⁹ These positive obligations comprise substantive and procedural dimensions, as will be seen below.

Under Article 2, the state must guarantee the safety and physical integrity of everyone within its jurisdiction and this entails not only the negative obligation to refrain from the intentional and unlawful taking of life, but also the positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction.⁴⁰ This necessarily includes safeguarding the lives of those wishing to participate in public debate. Although its titular focus is on torture, Article 3 obliges states to ensure that

37. For a comprehensive exploration of the concept, see Krug P. and Price M. E. (2002), and more recently and succinctly, Price M. and Krug P. (2007).

38. Price M. and Krug P. (2007:96).

39. For detailed analysis, see: Mowbray A. (2004), Chapters 2-4. See also in this connection, Leach P. (2013:8-11).

40. *Gongadze v. Ukraine*, § 164.

“no one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Under Article 5, the state has an obligation to guarantee the substantive liberty of everyone within its jurisdiction and to that end must ensure that everyone, including journalists and other participants in public debate, are not subjected to arbitrary arrest, unlawful detention or enforced disappearance. By fulfilling these obligations, the state protects the outer ramparts of freedom of expression and thereby creates and secures the necessary space for public debate.

In its judgment in *Gongadze v. Ukraine*, the Court essentialises the nature of the (positive) obligation on states as regards the protection of the right to life, insisting that:

This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends, in appropriate circumstances, to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose lives are at risk from the criminal acts of another individual.⁴¹

This, however, is subject to a number of qualifications, which the Court routinely repeats in relevant case law:

Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party, and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.⁴²

It is important to recall that states’ positive obligations govern all state authorities and are to be fulfilled by the executive, legislative and judicial branches of governments, as well as all other state authorities, including agencies concerned with maintaining public order and national security, and at all levels – federal, national, regional and local. They can have particular implications for different state bodies and officials when dealing with particular situations. Policing operations, including the policing of public demonstrations, are a useful and interesting example from the perspective of public debate. The Court has found in its *Makaratzis v. Greece* judgment that:

Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This means that, as well as being authorised under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force..., and even against avoidable accident.⁴³

41. Ibid.

42. Ibid., § 165; *Kılıç v. Turkey*, §§ 62-63; *Osman v. the United Kingdom*, § 116.

43. *Makaratzis v. Greece*.

This implies a need to take into consideration “not only the actions of the agents of the state who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination”.⁴⁴ Furthermore, “a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms”; in the light of the international standards which have been developed on this topic.⁴⁵ In this respect, a clear chain of command, coupled with clear guidelines and criteria are required;⁴⁶ specific (human rights) training can help to formulate such guidelines and criteria. In any case, the “undeniable difficulties inherent in the fight against crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals”⁴⁷ and Article 3 ECHR “does not allow for a balancing exercise to be performed between the physical integrity of an individual and the aim of maintaining public order”.⁴⁸

As mentioned above, states’ positive obligations under Articles 2, 3 and 5 also have a procedural dimension. In the first place, the procedural dimension involves a positive obligation on the state to carry out effective, independent and prompt investigations into alleged unlawful killings or ill-treatment, either by state or non-state actors, with a view to prosecuting the perpetrators of such crimes and bringing them to justice. The Court has given detailed guidance on what criteria must be met in order for such an investigation to be considered effective. An investigation must, for instance, be “capable of leading to the establishment of the relevant facts as well as the identification and, if appropriate, punishment of those responsible”.⁴⁹ In addition, the authorities “must have taken all the reasonable steps available to them to secure all the evidence concerning the incident” and the investigation’s conclusions “must be based on thorough, objective and impartial analysis of all the relevant elements”.⁵⁰

States have an obligation to take all necessary steps to bring the perpetrators of these kinds of crimes to justice. Investigations and prosecutions should consider all of the different (potential) roles in such crimes, such as authors, instigators, perpetrators and accomplices, and the criminal liability that arises from each of those roles.⁵¹ In the same vein, states’ authorities are obliged to investigate “the existence of a possible link between racist attitudes and an act of violence”.⁵² They should also pay attention to the vulnerable position in which a journalist who covers politically sensitive topics places himself/herself *vis-à-vis* those in power.⁵³ Prosecutions, however, do not necessarily have to lead to convictions and to hold

44. *Ibid.*, § 59.

45. *Ibid.*

46. *Ibid.*, § 70.

47. *İzci v. Turkey*, § 55.

48. *Ibid.*, § 56.

49. *Enukidze and Girvliani v. Georgia*, § 242.

50. *Ibid.*

51. See further in this regard, *ibid.*, §§ 254 and 255.

52. *Nachova and Others v. Bulgaria*, § 161. See also *Dink v. Turkey*, § 81.

53. *Gongadze v. Ukraine*, § 168.

otherwise would be to pre-determine the outcome before justice can take its course. On this point, the Court has stated that:

While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required measure of effectiveness. The national courts should not under any circumstances be prepared to allow life-threatening offences to go unpunished.⁵⁴

The Court has further clarified that, if an investigation is to be considered effective, “the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice”⁵⁵ This implies “not only a lack of hierarchical or institutional connection with those implicated in the events”, “but also a practical independence”⁵⁶ The Court has also explained why it attaches so much importance to the effectiveness of investigations, *viz.* because they must serve “to maintain public confidence in the authorities’ maintenance of the rule of law, to prevent any appearance of collusion in, or tolerance of, unlawful acts and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility”⁵⁷ For these reasons, investigations should be subject to public oversight and “[i]n all cases, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests”⁵⁸

Article 13 ECHR also requires states to ensure that an effective remedy is available whenever any of the Convention’s substantive rights are violated.⁵⁹ An effective remedy should be “before a national authority” and, importantly concerning the rights to life and liberty, “notwithstanding that the violation has been committed by persons acting in an official capacity”⁶⁰ The Court has explained that this requirement means that “where an individual has an arguable claim to be the victim of a violation of one of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress”⁶¹

Remedies should be effective and appropriate and they should be available to victims and, as relevant, their families. The absence of such effective measures gives rise to the existence of a culture of impunity, which leads to the toleration of abuses and crimes against journalists and other media actors. When there is little or no prospect of prosecution, perpetrators of such abuses and crimes do not fear punishment. This inflicts additional suffering on victims and can lead to the repetition of abuses and crimes.

54. *Enukidze and Girgvliani v. Georgia*, § 242.

55. *Ibid.*, § 243.

56. *Ibid.*

57. *Ibid.*

58. *Ibid.*

59. For in-depth analysis of how the positive obligation under Article 13 has been developed by the Court, see Mowbray A. (2004), Chapter 8.

60. Article 13, ECHR.

61. *Silver and Others v. the United Kingdom*, § 113.

As already mentioned, securing the outer ramparts of freedom of expression is the first step towards creating an environment that is favourable to inclusive and pluralistic public debate. This section has shown that the Court has not only identified positive obligations under Articles 2, 3 and 5, but has given detailed guidance for their operationalisation or realisation. The next section deals with the notion of public debate, as understood by the Court. It will reveal that the detailed level of jurisprudential guidance concerning positive obligations and the outer ramparts of freedom of expression has not yet been replicated in respect of positive obligations and public debate.

Public debate

This section first explores the changing nature of public debate and the importance of robust public debate for democratic society. It then examines the various positive state obligations that have been recognised by the Court as being important for protecting and strengthening public debate.

The reconfiguration of public debate⁶²

The Court has repeatedly stressed the instrumental importance of journalists and the media for enhancing public debate in democratic society. The media can make important contributions to public debate by (widely) disseminating information and ideas, thereby contributing to opinion-forming processes within society. As the Court has consistently acknowledged, this is particularly true of the audiovisual media because of their wide reach and “immediate and powerful” impact.⁶³ The Court has traditionally regarded the audiovisual media as more pervasive than the print media and it now considers the Internet to be a medium with “no less powerful and effect than the print media”.⁶⁴

Journalists and the media also contribute to public debate through the role of “public watchdog” that is very often ascribed to them in democratic society.⁶⁵ In other words, they should monitor the activities of governmental authorities (and other powerful forces) vigilantly and expose any wrongdoing on their part. In respect of information about governmental activities, but also more broadly in respect of matters of public interest generally, the Court has held time and again that: “[n]ot only do the media have the task of imparting such information and ideas: the public also has a right to receive them”.⁶⁶

The media can also make important contributions to public debate by serving as forums for discussion and debate.⁶⁷ This is especially true of new media technologies

62. This sub-section is an adapted and updated version of McGonagle T. (2013).

63. *Animal Defenders International v. the United Kingdom*, § 119.

64. *Fatullayev v. Azerbaijan*, § 95.

65. *Barthold v. Germany*, § 58; *Goodwin v. the United Kingdom*, § 39.

66. *The Sunday Times v. the United Kingdom (No. 1)*, § 65.

67. *Társaság a Szabadságjogokért v. Hungary*, § 27.

which have considerable potential for high levels of individual and group participation in society. In its *Ahmet Yildirim v. Turkey* judgment, the Court recognised in a very forthright way the importance of the Internet in the contemporary communications landscape, because it offers “essential tools for participation in activities and debates relating to questions of politics or public interest”.⁶⁸ Thus seen, the increasingly interactive character of online media enables public debate and empowers a wider range of participants in public debate than just journalists and the media. The Court’s appreciation of the importance of individual contributions to public debate is clear from its judgment in *Steel and Morris v. the United Kingdom*, when it held that:

In a democratic society even small and informal campaign groups ... must be able to carry on their activities effectively and ... there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest⁶⁹

Figure 1: The reconfiguration of public debate

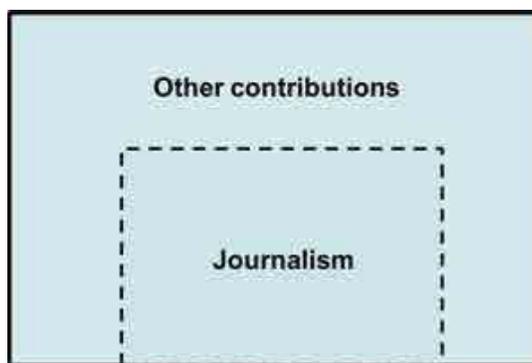


Figure 1 attempts to visualise the different ways in which public debate has been reconfigured by technology-driven developments. Once the preserve of professional journalists and institutional media, public debate is nowadays more accessible to wider sections of the public.⁷⁰ This has led to the participation of a greater diversity of actors in public debate and a greater diversity in the types of contributions to public debate. This growing diversity offers significant alternative sources of information and ideas to the institutionalised journalistic/media structures and processes that have traditionally been so determinative in shaping the contours and content of public debate. Professional journalists and institutional media are still dominant players in public debate, but they are no longer the *de facto* gatekeepers or moderators of public debate that they were in the past. Their relationship with other, new actors, is becoming more complex and porous.⁷¹ That relationship is alternatively characterised by competition, complementarity and collaboration. This is captured by the broken – as opposed to hermetic – lines that demarcate the relationship between both sets of actors/types of contributions to public debate in Figure 1.

68. *Ahmet Yildirim v. Turkey*, § 54.
69. *Steel and Morris v. the United Kingdom*.
70. See generally: Jakubowicz K. (2009).
71. Schudson M. (2013).

In the context of this reconfiguration of public debate, new types of actors have emerged and continue to grow in influence, including non-governmental organisations (NGOs), whistle-blowers and bloggers, to give a few topical examples.⁷²

The Court has in recent times repeatedly recognised that “when a non-governmental organisation is involved in matters of public interest ... it is exercising a role as a public watchdog of similar importance to that of the press”,⁷³ thereby entitling it to “similar Convention protection to that afforded to the press”.⁷⁴ The Court also introduced the term “social watchdog”,⁷⁵ it remains to be seen whether this terminological shift will also acquire substantive significance in future case law. The Court’s recognition of the value of NGOs’ contribution to public debate⁷⁶ and ability to play the role of public or social watchdog is not surprising. There are numerous similarities between NGOs and journalists or media, after all. NGOs, especially the better-resourced ones, invest in increasingly professional(ised) media and information strategies, often employing (former) journalists for that purpose. Human rights NGOs, in particular, often conduct, and publish the outcomes of, fact-finding missions in ways similar to investigative journalists.⁷⁷

Whistle-blowers – individuals who, acting in good faith and for reasons of principle and/or conscience, (illegally) disclose confidential information because of its overriding public-interest value - are quintessential public watchdogs. The importance of their contributions to public debate has been resoundingly demonstrated by Edward Snowden’s revelations of secret mass surveillance. The so-called “Snowden effect” has forced online privacy onto international and national political agendas and triggered unprecedented levels of public debate on relevant issues. Whistle-blowing websites – most famously *WikiLeaks*, but including other initiatives, facilitate the practice of secure, anonymous whistle-blowing. The importance of whistle-blowers’ contributions to public debate has already been recognised by the Court⁷⁸ and in other standard-setting work by the Council of Europe⁷⁹ and that recognition is likely to develop further in the future.⁸⁰

A burgeoning blogosphere is nowadays the source of myriad contributions to public debate. Of course, not all blogs have the ambition to contribute to public debate. Many blogs are personal in character and as such target personal networks and communities of interest. It is important, therefore, not to lump all blogs together without distinguishing between them. Even within the range of blogs that do contribute to public debate more specific typologies can be useful to further specify the nature of their contribution to news-making, for example, the distinction between

72. See further, Traimer M. (2012).

73. *Animal Defenders International v. the United Kingdom*, § 103; *Youth Initiative for Human Rights v. Serbia*, § 20.

74. *Társaság a Szabadságjogokért v. Hungary*, § 27; *Youth Initiative for Human Rights v. Serbia*, § 20.

75. *Társaság a Szabadságjogokért v. Hungary*, § 36.

76. *Vides Aizsardzības Klubs v. Latvia*; *Társaság a Szabadságjogokért v. Hungary*; *Kenedi v. Hungary*.

77. Fenton N. (2010).

78. See, for example: *Guja v. Moldova*; *Heinisch v. Germany*; *Matúz v. Hungary*.

79. Recommendation CM/Rec(2014)7 on the protection of whistleblowers; PACE Recommendation 1916 (2010) and Resolution 1729 (2010), Protection of “whistle-blowers”.

80. See further: Austin A. (2012) and more broadly, Benkler Y. (2011).

media blogs, journalist blogs, audience blogs and citizen blogs.⁸¹ The sub-category, “public watchblog”, has even been put forward to denote blogs that take on the public-watchdog role.⁸² Although the Court has not yet explicitly recognised the value of bloggers’ contributions to public debate (including those of micro-bloggers such as Twitter users), such a step would be very much in keeping with the Court’s earlier finding in its *Steel and Morris* judgment (cited above).

The upshot of these developments is, on the one hand, that the notion of public debate has been considerably widened. Moreover, the Court’s case law clearly recognises the crucial importance of inclusive and pluralistic public debate in democratic society. On the other hand, the parameters of public debate are increasingly being shaped by private parties, notably online intermediaries. The descriptor, “new gatekeepers”, which is sometimes used to refer to these actors, does not fully capture the complex range of ways in which they control access to information, data and communications in the contemporary online environment. Their operative control of private forums that serve quasi-public informational and communicative purposes means that their actions and omissions can affect individuals’ right to freedom of expression in different ways. The dominant positions enjoyed by several leading online intermediaries such as Google, Facebook, Microsoft, Twitter, etc., intensify the impact that their activities can have on their users’ freedom of expression – for better or for worse. As this chapter has already shown, relevant state obligations could, in certain circumstances, extend to cover the activities of the aforementioned private actors, notwithstanding their inter-/multinational character. A detailed explanation of such circumstances is, however, beyond the scope of this chapter.

Positive obligations of states and public debate

In its *Informationsverein Lentia* judgment, the Court affirmed that the state is the ultimate guarantor of pluralism, especially in the audiovisual media sector.⁸³ The Court re-emphasised its previous jurisprudence on “the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive”.⁸⁴ It then immediately added that:

Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.⁸⁵

It is important to note in this connection the Court’s express linking of freedom of expression, democratic society, pluralism and “especially” the audiovisual media, “whose programmes are often broadcast very widely”. If the reason for singling out

81. Domingo D. and Heinonen A. (2008:7). For further insightful commentary, see Jakubowicz K. (2009:21).

82. Oosterveld M. and Oostveen M. (2013).

83. *Informationsverein Lentia and Others v. Austria*, § 38.

84. *Ibid.*

85. *Ibid.*

the audiovisual media is the wide reach of their programmes, then these arguments clearly apply *mutatis mutandis* to the Internet. The Court, however, seems somewhat reluctant (for now) to embrace and develop this line of reasoning because:

notwithstanding the significant development of the Internet and social media in recent years, there is no evidence of a sufficiently serious shift in the respective influences of the new and of the broadcast media in the respondent state to undermine the need for special measures for the latter.⁸⁶

The *Informationsverein Lentia* case involved the threat to pluralism in the audiovisual sector posed by a state monopoly on broadcasting. In *Verein gegen Tierfabriken*, the Court focused on the dangers for freedom of expression and pluralism when:

powerful financial groups can obtain competitive advantages in the areas of commercial advertising and may thereby exercise pressure on, and eventually curtail the freedom of, the radio and television stations broadcasting the commercials.⁸⁷

In both cases, the position of the Court was clear: the role ascribed to the press in democratic society can only be effectively discharged in a climate of pluralism.

It was several years before the Court felt ready to start teasing out the implications of the positive obligation it had identified in *Informationsverein Lentia*, but it has by now begun to do so, most notably in *Manole and Others v. Moldova*⁸⁸ and *Centro Europa 7 S.r.l. and Di Stefano v. Italy*.⁸⁹ In *Manole*, the Court explicated the positive obligation of the state as the ultimate guarantor of pluralism, which requires it to:

ensure, through its law and practice, that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting inter alia the diversity of political outlook within the country and that journalists and other professionals working in the audio-visual media are not prevented from imparting this information and comment. Where the State decides to create a public broadcasting system, the domestic law and practice must guarantee that the system provides a pluralistic audiovisual service.⁹⁰

In *Centro Europa 7 S.r.l. and Di Stefano*, the Court observed that:

in such a sensitive sector as the audio-visual media, in addition to its negative duty of non-interference the state has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism.⁹¹

Furthermore, the Court took the view that in order to ensure “effective” or “true pluralism in the audiovisual sector in a democratic society”:

it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audio-visual market. It is necessary in

86. *Animal Defenders International v. the United Kingdom*, § 119.

87. *VgT Verein gegen Tierfabriken v. Switzerland*, § 73.

88. *Manole and Others v. Moldova*. See, in particular, §§ 98 and 107.

89. *Centro Europa 7 S.r.l. and Di Stefano v. Italy*.

90. *Manole and Others v. Moldova*, §107.

91. *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, § 134.

addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed.⁹²

In its other case law that does not deal with audiovisual media, the Court has also shown itself to be very sensitive to the need to be able to access information and very wary of “the censorial power of an information monopoly”.⁹³ This prompted the Court to find in *Társaság a Szabadságjogokért v. Hungary* that the state’s obligations in matters of freedom of the press include “the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities”.⁹⁴

Notwithstanding the potential of the state’s role as the ultimate guarantor of pluralism in democratic society, the positive obligations engendered by that role do not extend to guaranteeing a “freedom of forum”⁹⁵ or access to a particular medium/service.⁹⁶ In *Appleby and others v. the United Kingdom*, the applicants argued that the shopping centre to which they sought to gain access should be regarded as a “quasi-public” space because it was *de facto* a forum for communication. The Court held that:

[Article 10, ECHR], notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly-owned property (Government offices and ministries, for instance). Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights.⁹⁷

Instead, the Court tends to place store by the existence of viable expressive alternatives to the particular one denied. In determining whether alternative expressive opportunities are actually viable in the circumstances of a given case, it is important to be mindful of the Court’s *Khurshid Mustafa and Tarzibachi* judgment,⁹⁸ in which it correctly rejected the assumption that different media are functionally equivalent. Different media have different purposes and are used differently by different individuals and groups in society: they are not necessarily interchangeable.⁹⁹ This explains why different media are subject to different regulatory regimes.¹⁰⁰

92. *Ibid.*, § 130.

93. *Társaság a Szabadságjogokért v. Hungary*, § 36.

94. *Ibid.*

95. *Appleby and Others v. the United Kingdom*, § 47.

96. *Haider v. Austria; United Christian Broadcasters Ltd. v. the United Kingdom, Demuth v. Switzerland; VgT Verein gegen Tierfabriken v. Switzerland*.

97. (emphasis added) *Appleby and Others v. the United Kingdom*, § 47.

98. *Khurshid Mustafa and Tarzibachi v. Sweden*, § 45.

99. For further analysis, see: McGonagle T. (2012:118-124).

100. See, as regards the Internet, *Węgrzynowski and Smolczewski v. Poland*.

In light of the *Khurshid Mustafa and Tarzibachi* judgment, the Court tends to consider whether the blocking of access to a particular medium or forum has the effect of depriving someone of a major source of communication and thereby the possibility of participating in public debate.¹⁰¹ The Court thus found no breach of the applicant's right to freedom of expression in *Akdeniz v. Turkey* after access to two music-streaming websites was blocked on the ground that they were in breach of copyright. The reasoning was that the applicant in the case could "without difficulty have had access to a range of musical works by numerous means without this entailing a breach of copyright rules".¹⁰² Again, the availability of viable expressive alternatives (or, *in casu* viable alternatives for receiving information) was a central consideration for the Court. The case was distinguished from *Ahmet Yildirim v. Turkey* as it involved copyright and commercial speech, as opposed to political speech (broadly defined) and the ability to participate in public debate. Member states have a wider margin of appreciation for commercial speech than for political speech.

In the previous section of this chapter, it was shown how the Court has developed influential jurisprudence under Article 8 on how positive obligations of states can extend to address violations of human rights by private actors, thereby ensuring a degree of indirect horizontal effect for the ECHR. Building on this jurisprudence, the Court has adopted similar reasoning regarding the right to freedom of assembly; it has held that "genuine, effective freedom of peaceful assembly" cannot:

be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8, Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be¹⁰³

The pattern of recognising that positive state obligations are sometimes necessary in order to render rights effective can also be detected in respect of the right to freedom of expression. Such positive state obligations apply to substantive and procedural matters alike.

The Court has accepted in principle that positive measures may be required of states in order to give effect to the right to freedom of expression (as with Articles 8 and 11, including the protection of the right in the sphere of relations between individuals¹⁰⁴), but it has yet to meaningfully explore the practical workings of the principle. For instance, in *Özgür Gündem v. Turkey*, taking as its starting point, "the key importance of freedom of expression as one of the preconditions for a functioning democracy", the Court recognised that:

Genuine, 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

101. *Akdeniz v. Turkey*.

102. *Ibid.*

103. *Plattform "Ärzte für das Leben" v. Austria*, §32.

104. See, among other authorities, *Fuentes Bobo v. Spain*, § 38.

interest of the community and the interests of the individual, the search for which is inherent throughout the Convention.¹⁰⁵

This recognition amounts to an important statement of principle, even if the Court does immediately go on to concede:

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 ...¹⁰⁶

Owing to the situational diversity across the Council of Europe, States Parties to the ECHR “enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention”, subject to the practical and effective doctrine.¹⁰⁷

Concerning procedural matters, the Court has found that when negligibly-funded informational campaigns aiming to influence debate on matters of public interest are pitted against the vastly superior financial resources of multinational corporations, fairness requires that some approximate equality of arms be strived for. It reasoned:

If, however, a State decides to provide such a remedy [against defamation] to a corporate body, it is essential, in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and equality of arms is provided for.¹⁰⁸

Although the Court does not spell out the implications of its pronouncement, it seems logical that it would be for the state to guarantee the requisite measure of procedural fairness and equality of arms.

Reviewing the foregoing, it can be observed that the Court’s recognition of positive state obligations in respect of public debate is nascent and piecemeal, but steady. The process of recognition will continue to be guided by the living instrument doctrine and the practical and effective doctrine. It will also be driven by the Court’s gradual but growing appreciation of the specificities of the online communications environment.

EXPRESSION OF OPINIONS AND IDEAS WITHOUT FEAR

Another key feature of a favourable environment for freedom of expression and participation in public debate is the possibility for everyone to express their opinions and ideas without fear. Franklin Delano Roosevelt showed an awareness of the relationship between freedom from fear and freedom of expression in his famous ‘Four Freedoms’ State of the Union address in 1941. In that historic address, he looked forward to “a world founded upon four essential human freedoms”: freedom of speech and expression, freedom of worship, freedom from want and freedom from

105. *Özgür Gündem v. Turkey*, § 43.

106. *Ibid.* See also *VgT Verein gegen Tierfabriken v. Switzerland (No. 2)*, §§ 81 and 82.

107. *Węgrzynowski and Smolczewski v. Poland*, § 55.

108. *Steel and Morris v. the United Kingdom*, § 95.

fear.¹⁰⁹ The Four Freedoms later had a palpable influence on the Preamble of the Universal Declaration of Human Rights, which in turn influenced the drafting of the ECHR.

It stands to reason that the effective exercise of the right to freedom of expression should imply the absence of fear. Where fear is present, it can have a chilling effect on individual behaviour or expression. The self-restraint or self-censorship it is likely to engender has a negative influence on the effectiveness with which the right to freedom of expression is exercised. In this sense, there is a logical connection between freedom from fear and freedom of expression. The Court has drawn attention to the threat to free expression that is posed by fear, stating that demonstrators fearing physical violence by their opponents “would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community”.¹¹⁰ Fear, then, can also lead to the impoverishment of public debate.

It should be noted that engrained prejudicial, discriminatory and hateful attitudes towards particular societal groups and the cumulation of institutional and societal practices reflecting those attitudes can lead to the erosion of self-esteem of members of affected groups, thereby ultimately resulting in a foreclosure of their speech.¹¹¹ In a social climate where discrimination prevails, viewpoints of members of certain minority groups are regarded as being of inferior value in deliberative processes. The “silencing” argument, as it is known, can affect, amongst others, women, members of (ethnic, religious, cultural or linguistic) minority groups, members of the LGBT community or persons with disabilities.

When used by state officials, public figures and members of dominant societal groups, different types of expression have the ability to silence members of minority groups with varying levels of intensity. Stereotypes, for instance, can “serve to maintain existing power relationships” and be used as “control mechanisms”.¹¹² (Negative) stereotypes can amount to “misrecognition” and lead to “social subordination”,¹¹³ in the sense that their targets are “denied the status of a full partner in social interaction, as a consequence of institutionalised patterns of cultural value that constitute one as comparatively unworthy of respect and esteem”.¹¹⁴ The Court has shown in its *Aksu v. Turkey* judgment that it shares this perspective.¹¹⁵ Attention has also been drawn to how (members of) minority or marginalised groups in society are:

subject to the physical dangers that accompany outcast status, including not only police brutality but also the lack of police protection against private attacks; and hand in hand with that they are subject to the ongoing stigmatization as enemies, aliens, or worse.¹¹⁶

109. Roosevelt F. D. (1941).

110. *Plattform “Ärzte für das Leben” v. Austria*, §32.

111. See generally: Matsuda M. J. et al. (1993); Delgado R. and Stefancic J. (eds) (2000); Delgado R. and Stefancic J. (2004).

112. Timmer A. (2011:715).

113. *Ibid.*

114. *Ibid.*, citing Fraser N. (2000), “Rethinking Recognition” (May-June 2000) *New Left Review* 107, at 113-114.

115. *Aksu v. Turkey*, § 58.

116. Levy J. T. (2000:45).

Hate speech, too, can become a tool of degradation and subordination – not simply resulting from a discriminatory climate, but actually contributing to its creation.

Besides being a subjective emotion, triggered to a greater or lesser extent by objective stimuli, fear can also be cultivated or manufactured, through what is sometimes referred to as the politics of fear. This strain of politics seeks to create and exploit fear in society in order to try to legitimise the pursuit of particular political agendas (e.g., national security), often posing a threat to human rights guarantees in the process. Conor Gearty makes the point both imaginatively and effectively when he describes a “super-virus” that has infected the international human rights movement.¹¹⁷ The virus works like a standard computer virus – it has entered the system and is wreaking havoc from within. Like many computer viruses, it is known by its acronym: GWOT. This virus “causes the human rights idea to manifest itself in gross human rights violations and egregious human rights abuses which it presents not as incompatible with but as necessitated by human rights.”¹¹⁸ GWOT stands for Global War on Terror: the emotive reason routinely given by many states’ authorities for their dismantling of much human rights architecture in recent times. Sweeping surveillance powers and practices, powers to detain and interrogate suspects of terrorist activities, etc., are examples of such dismantling.

OPINIONS AND IDEAS THAT OFFEND, SHOCK OR DISTURB

The final component of the envisaged favourable environment for freedom to participate in public debate provided for in para. 137 of the *Dink* judgment concerns protection for opinions and ideas that are contrary to official or mainstream opinion. This component is directly traceable to the Court’s seminal finding in the *Handyside* case, even though that case is not explicitly referenced in para. 137 of *Dink*.¹¹⁹ The case involved restrictions on the right to freedom of expression in order to protect public morals. The Court’s judgment affirmed that freedom of expression “is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there would be no democratic society.”¹²⁰

This far-reaching principle, however, does not mean that the ECHR creates a right to offend as such. In its *Otto-Preminger-Institut* judgment, the Court held that the duties and responsibilities that govern the exercise of the right to freedom of expression include (“in the context of religious opinions and beliefs”) a duty:

to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.¹²¹

117. Gearty C. (2004). For further insights into Gearty’s reflections on related themes, see: Gearty C. (2006).

118. *Ibid.*, at p. 7 of the transcript of the lecture.

119. *Handyside* is, however, referenced in § 123 of *Dink*, where the Court’s general principles on freedom of expression are recalled.

120. *Handyside v. the United Kingdom*, § 49.

121. *Otto-Preminger-Institut v. Austria*, § 49.

Nor does the Court's case law support a right not to be offended. The Court also clarified in its *Otto-Preminger-Institut* judgment that:

Those 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. ...¹²²

Rather, the *Handyside* judgment recognises that in democratic society, space has to be created and sustained for public discussion and debate. Democratic society is not without its rough edges and pluralistic public debate necessarily involves disagreement and confrontation between opposing viewpoints. Such disagreement and confrontation – even when expressed in strong terms – ordinarily come within the scope of the protection offered by Article 10. This is because Article 10 protects not only the substance of information and ideas, but also the form in which they are conveyed. The references to “the State or any sector of the population” in the *Handyside* judgment also make clear that the measure of legal protection for contentious speech should not therefore “be the dominant orthodoxy that it challenged, for that would trivialize the protection of free speech to whatever massaged the prejudices of dominant majorities”.¹²³

The concern here is for the need to safeguard democratic society from what has been termed the “tyranny of the majority”,¹²⁴ i.e. unchecked or insufficiently checked majoritarian tendencies and preferences which tend to ride roughshod over minority values and interests. Again, the Court has underscored the importance of such an approach, stressing in its *Young, James and Webster* judgment that:

Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.¹²⁵

Morally speaking, the legitimacy of majority rule is contingent on the existence of mechanisms allowing for the effective participation of minorities in deliberative political processes. Only such inclusive participatory practices can provide “the moral basis for binding everyone to the rule ultimately adopted”.¹²⁶ This point can easily be extended beyond decision-making and also applied to the legitimation of ideas generally through effective participation in public debate. The key consideration is that ideas be given the opportunity “to spread and become the possession of the multitude”.¹²⁷ This is of clear relevance for information about minority groups as well as their views and interests.

122. *Ibid.*, § 47.

123. Richards D. A. J. (1999:197).

124. Tocqueville A. (de), in his two-volume work, *Democracy in America* (1835, 1840).

125. *Young, James and Webster v. the United Kingdom*, § 63.

126. Schauer F. (1982:42).

127. Dewey J. (1954:208).

CONCLUSIONS

The development by the Court of the positive obligations doctrine in its case law has already gone through a number of phases. What the Court has achieved so far has aptly been described as “estimable”,¹²⁸ but if the post-*Dink* phase lives up to its potential, the best may be still to come.¹²⁹ In realising that potential, the Court will certainly have its work cut out. First, it will have to overcome any residual scepticism about the validity of its teleological (or some might say, activist) interpretation of the Convention – the reading into the Convention of implied positive obligations. Second, as the Court itself readily acknowledges, its judgments are essentially declaratory; states are left to choose the means to be utilised in their domestic legal systems for the performance of their obligations under the Convention. The third challenge facing the Court is directly related to the first two. It must fashion guidance for states by spelling out the implications of the positive obligations it has identified in a variety of situations. In doing so, it must be cautious to avoid a kind of mission-creep that would take it into the realms of policy-making.

Notwithstanding these challenges and the courage and circumspection that are required to overcome them, para. 137 of the *Dink* judgment hold great potential. With the Court’s bold pronouncements, its ‘positive obligations’ doctrine appears to have come of age, at least in respect of its application to the right to freedom of expression. The essential obligation for states to ensure a favourable environment for inclusive and pluralistic public debate gives a new sense of coherence to a disparate set of positive obligations that have been identified in piecemeal fashion by the Court in its case law. The focus on a favourable environment integrates the positive obligations governing the outer ramparts of freedom of expression and the robust public debate that is located at its core. In this way, it joins the dots and conveys a strong sense of a doctrine of positive obligations, rather than a diverse set of separate positive obligations.

It also gives a sense of purpose to the future development of the doctrine in respect of freedom of expression. If the ultimate objective is to secure a favourable environment for inclusive and pluralistic public debate, existing positive obligations can be consciously refined and new ones identified in light of this objective.

Finally, the focus on the favourable environment reinforces the process-orientation of many positive obligations: they are obligations to undertake action and not necessarily obligations of result. Securing a particular environment is by definition a work in progress, as is the protection of freedom of expression. These are gradual and patient processes. Perhaps that is why the Court chose not to bellow its ambitious announcement from a thunder-cart while galloping across a clear blue sky.

128. Mowbray A. (2004:231).

129. See also Dickson B. (2010:206, 208).

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Chapter 2

The international human rights protection of journalists

*Sejal Parmar*¹

1. INTRODUCTION

This chapter reviews international and regional human rights law, including soft law, on the protection of journalists.² Through an analysis of international and regional human rights law, including jurisprudence, this paper takes stock of states' obligations regarding the protection of journalists, a subject that has been gaining increasing attention from a spectrum of actors in recent years.³ The chapter focuses on the physical protection of journalists, with the term "journalists" being interpreted broadly to encompass media workers, while the term "protection" is interpreted narrowly to mean the protection of journalists from physical attack or assault, which may or may not result in death, rather than the legal protection of journalists in conducting their work more generally. Thus, while this chapter briefly addresses certain issues concerning the broader environment for media freedom, such as criminal defamation laws and the protection of journalistic sources, it refrains from deep scrutiny of the important challenges to the protection of journalists in the performance of their work, such as restrictions on access to information and national security policies, including surveillance measures, and will not address the obligations or ethical responsibilities of journalists.⁴ For reasons of space, it is also beyond the scope of this chapter to address relevant international humanitarian law, which has been examined elsewhere (Ben Saul 2008; Isabel Düsterhöft 2013).

1. Assistant Professor of Law, Central European University, Budapest.
2. This chapter is based on Sejal Parmar (2014), "The protection and safety of journalists: a review of international and regional human rights law", the invited background paper produced for the Seminar and Inter-regional Dialogue on the Protection of Journalists, on "Towards an effective framework of protection for the work of journalists and an end to impunity", European Court of Human Rights, Strasbourg, Monday 3 November 2014. See www.inter-justice.org for the background paper and presentations delivered at this seminar. The author is very grateful to Marina van Riel for her helpful comments and editorial assistance.
3. For a selection of relevant articles in academic journals, see Christof Heyns and Sharath Srinivasan (2013). See also the following research papers: Carmen Draghici and Lorna Woods (2011); Evie Browne et al. (2012).
4. These issues from the perspective of the jurisprudence of the European Court of Human Rights have been well covered in Philip Leach (2013). See also Tarlach McGonagle (2013).

By drawing on a range of international and regional human rights sources, this chapter thus seeks to identify the key components that should be behind the development of a comprehensive legal and policy framework to address the most pressing challenge facing journalists and media workers, namely actual violence or the threat of it.⁵ This chapter highlights the emergence of this issue as a matter of global concern amongst intergovernmental human rights bodies and non-governmental organisations (NGOs) in recent years (section 2) and some key preliminary issues in recognising the protection of journalists as a human rights issue (section 3). It then concentrates on setting out states' obligations that flow from the framework of international and regional human rights law on the protection of journalists and media workers (section 4).

2. A MATTER OF GLOBAL CONCERN

The year 2014 seemed like an especially bleak year for journalists and media workers, with the three years leading up to December 2014 being seen by the Committee to Protect Journalists as the “most deadly period” since its records began in 1992.⁶ The year 2014 saw, notably: the horrific, videoed beheadings by a so-called “Islamic State” (or ISIS) militant of James Foley and Steven Sotloff, American freelance journalists kidnapped in Syria in 2012 and 2013, not to mention the killing of at least 15 other journalists covering the Syrian civil war during 2014; the killing of at least 17 journalists and media workers as a result of the ongoing conflict in the Gaza Strip; the arrest, detention and assault of reporters covering protests in Ferguson, Missouri in the United States; and the beating unconscious of Ilgar Nasibov, as part of the crackdown on the media in Azerbaijan while it was the serving chair of the Council of Europe’s Committee of Ministers.⁷ Yet it was the shooting of eight journalists and satirists at the offices of the magazine *Charlie Hebdo* in Paris on 7 January 2015 that highlighted more than any other event that the issue of attacks on journalists is a global issue – a matter affecting not only countries in conflict or under repressive regimes, but states at the liberal heartland, the traditional bastions of free speech (Parmar 2015). The protection of journalists has thus become an issue of worldwide concern as it touches states on every continent, both democracies and less liberal states.

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5. As the OAS Special Rapporteur emphasised: “in order for free, robust and unrestricted democratic debate to exist, violence against journalists must be combated through a comprehensive policy of prevention, protection and procurement of justice” (Inter-American Commission on Human Rights 2013: 22).
 6. As of 2 April 2015, the organisation had identified 1121 journalists killed since 1992, with the following being the ten most dangerous countries: Iraq (166), Syria (80), the Philippines (77), Algeria (60), Somalia (56), Russia (56), Pakistan (56), Colombia (46), India (34) and Mexico (32). The organisation reported that the region of the Middle East and North Africa was the most dangerous for journalists and, while there was a marked increase in the number of international journalists killed on duty in 2014, most of those killed were local journalists (Committee to Protect Journalists 2014b). See the statistics collated by the Committee to Protect Journalists at www.cpj.org/killed/ and www.cpj.org/killed/impunity.php, accessed 13 July 2015.
 7. See Ravi Somaiya and Christine Haughney (2014). For press reports of these various incidents, see: Rukmini Callimachi (2014); Max Fisher (2014); Raziye Akkoc (2014); IMEMC News & Agencies (2014); Radio Free Europe/Radio Liberty Azerbaijani Service (2014).

Even before the dramatic instances of attacks on journalists through 2014 and at the beginning of 2015, there has, for a number of years, been an evolving global consciousness about the challenge posed by such attacks, thanks to more effective advocacy and concentrated research on the issue. As UNESCO's 2014 report, *World trends in freedom of expression and media development*, states: the "past six years have seen both a rise in the killings of journalists and a significant increase in international awareness of the issue" (UNESCO 2014: 11, 84-95). As part of their advocacy strategies, NGOs with mandates regarding the protection of journalists as such (for example, the Committee to Protect Journalists), freedom of expression more broadly (for example, ARTICLE 19) and human rights generally (for example, Human Rights Watch), have issued reports, monitoring and analysing trends and developing recommendations for a range of actors, including governments, as well as journalists themselves. The Committee to Protect Journalists' report, *The road to justice: breaking the cycle of impunity*, which was published in advance of the first International Day to End Impunity for Crimes Against Journalists on 2 November 2014, is one such report (Committee to Protect Journalists 2014a). Over the years, some organisations have also developed tools for empowering journalists and media workers to take action to protect themselves from attack, such as self-protection manuals.⁸ On 12 February 2015, in response to the spike in attacks on journalists, a global coalition of organisations adopted the "Global safety principles and practices" for international news organisations and freelance journalists (Dart Centre for Journalism and Trauma 2015). The International Committee for the Red Cross (ICRC) has also maintained a long-established hotline for journalists on dangerous assignments.⁹

The evolving global awareness is reflected and amplified by the growing engagement of international human rights bodies in the protection and safety of journalists and their calls upon states to respond to the challenge of attacks on journalists. Signalling a sense of heightened urgency, on 1 September 2014, the four inter-governmental experts with mandates on freedom of expression (namely, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye; the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Dunja Mijatović; the Organization of American States (OAS) Special Rapporteur for Freedom of Expression, Catalina Botero Marino; and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, Faith Pansy Tlakula) also issued a joint statement urging stronger protection of journalists covering conflicts, referring to the specific contexts of Syria, Ukraine, Iraq and Gaza (UN Office of the High Commissioner for Human Rights 2014).

Yet a range of global intergovernmental institutions and actors have been addressing the issue of the protection of journalists for a number of years since the adoption of the landmark UN Security Council Resolution 1738 in 2006 on attacks on journalists in conflict situations (UN Security Council 2006). The attention of international human

8. See the following examples of self-protection manuals: ARTICLE 19 (2013); Committee to Protect Journalists (2012); Reporters without Borders (2006); Reporters without Borders (2002).

9. The International Committee for the Red Cross established the hotline in 1985 at the request of 16 major media organisations. See International Committee for the Red Cross (2012).

rights bodies, which has been stepped up at the UN since 2012, encompasses: the adoption of Human Rights Council resolutions 21/12 of 27 September 2012 (UN Human Rights Council 2012a) and 27/5 of 25 September 2014 (UN Human Rights Council 2014a) on the safety of journalists, and Human Rights Council Decision 24/116 of 26 September 2013 on a panel discussion on the subject (UN Human Rights Council 2013a);¹⁰ the adoption of General Assembly Resolution 68/163 of 18 December 2013 on safety of journalists and the issue of impunity which declared 2 November the International Day to End Impunity for Crimes against Journalists (UN General Assembly 2013); the development and presentation of the reports of two UN mandate-holders, on the right to freedom of opinion and expression (UN Human Rights Council 2012b) and on extrajudicial, summary or arbitrary executions focusing on the protection of journalists (UN Human Rights Council 2012c) at the twentieth session of the Human Rights Council in June 2012; the May 2012 report of the Secretary-General on the protection of civilians in armed conflict which highlights attacks on journalists (UN Security Council 2012: paragraphs 5, 14 and 15); a series of informal discussions of the UN Security Council on the protection of journalists during 2013 (UN News Centre 2013a, 2013b); the endorsement of the United Nations Plan of Action on the safety of journalists and the issue of impunity, by the United Nations System Chief Executives Board for Coordination on 12 April 2012 and the development of security indicators to evaluate steps taken towards implementation of the UN Plan of Action on the safety of journalists and the issue of impunity (the “UN Plan of Action”) (UNESCO 2012, 2013a, 2013b, 2013c); and relevant UNESCO declarations and decisions in 2012 and 2013.¹¹ In June 2012, the four international mechanisms for promoting freedom of expression adopted a Joint Declaration on crimes against freedom of expression (the “2012 Joint Declaration”), which expressly identifies journalists and other media actors as the most likely victims of such crimes.¹² This relatively recent declaration by the four international intergovernmental experts on freedom of expression is drawn upon as a lodestar reference point for identifying the more specific standards applicable to states with respect to the protection and safety of journalists, even though it is not binding as such.

In the Americas, the UN Special Rapporteur on freedom of opinion and expression and the Special Rapporteur for Freedom of Expression of the OAS Inter-American

10. See also the summary of the Human Rights Council panel discussion on the safety of journalists (UN Human Rights Council 2014b); Human Rights Council Resolution 27/5, 2 October 2014 A/HRC/RES/27/5.

11. See World Press Freedom Day declarations, particularly Carthage Declaration, 3 May 2012 (supporting the UN Plan of Action on the safety of journalists and the issue of impunity) and San Jose Declaration, 4 May 2013. See also UNESCO General Conference Resolution 29 on condemnation of violence against journalists, 12 November 1997; Belgrade Declaration on support to media in violent conflict and in countries in transition, 3 May 2004; Medellin Declaration on securing the safety of journalists and combating impunity, 4 May 2007; and International Programme for the Development of Communication (IPDC) decisions on the safety of journalists and impunity of 27 March 2008, 10 March 2010 and 23 March 2012.

12. The Joint Declaration indicates that the crimes against freedom of expression include: “killings, death-threats, disappearances, abductions, hostage takings, arbitrary arrests, prosecutions and imprisonments, torture and inhuman and degrading treatment, harassment, intimidation, deportation, and confiscation of and damage to equipment and property”. See UN Office of the High Commissioner for Human Rights (2012).

Commission on Human Rights (IACHR) issued a joint statement on “violence against journalists and media workers in the context of protests” in September 2013 (UN and OAS 2013). The IACHR Office of the Special Rapporteur for Freedom of Expression also published a substantial analytical report, *Violence against journalists and media workers: Inter-American standards and national practices on prevention, protection and prosecution of perpetrators*, at the very end of 2013 (OAS Inter-American Commission on Human Rights 2013, 2014a), though the office regularly condemns attacks on journalists in the region.¹³ In March 2014, the IACHR held a hearing on “Impunity for violations of the right to freedom of expression in the Americas” (OAS Inter-American Commission on Human Rights 2014b).

At the European regional level, the bodies of the Council of Europe have demonstrated particular interest in the protection and safety of journalists over the years through a raft of relevant initiatives, declarations, resolutions, recommendations and other initiatives.¹⁴ In April 2015, the Council of Europe, in close co-operation with five partner organisations, launched the online “Platform to promote the protection of journalism and safety of journalists” which focused on bringing information about physical threats to journalists and media workers to the attention of the Council of Europe institutions.¹⁵ In April 2014, the Committee of Ministers of the Council of Europe adopted a declaration on “the protection of journalism and the safety of journalists and other media actors” (Council of Europe Committee of Ministers 2013a) towards the end of the committee chairmanship by Austria, for whom the safety of journalists was a strategic priority,¹⁶ and, in November 2013, the Council of Europe Conference of Ministers responsible for Media and Information Society (2013) adopted a resolution on the safety of journalists at a conference held in Belgrade. There have also been thematic debates of the Committee of Ministers on the safety of journalists since 2012 (Council of Europe Committee of Ministers 2012, 2013b, 2014a), the first meeting of the newly established Committee of Experts on protection of journalism and safety of journalists (MSJ-JO) in March 2014, as well as a roundtable to promote dialogue between international institutions held in Strasbourg in May 2014.¹⁷ Since 2011, the Parliamentary Assembly has adopted a resolution on the

13. For examples of statements of the Office of the Special Rapporteur for Freedom of Expression in August 2014, see OAS IACHR, Office of the Special Rapporteur for Freedom of Expression, press releases 89/14, 21 August 2014 (on the killing of a journalist in Honduras), 87/14, 16 August 2014 (on the killing of a journalist in Mexico); 85/14, 14 August 2014 (on the killing of a journalist in Colombia); and 83/14, 6 August 2014 (on the attack on a journalist and the killing of his son in Mexico).

14. For lists of initiatives taken by Council of Europe bodies, see www.coe.int/t/dghl/standardsetting/media/roundtable-en.asp, accessed 14 July 2015.

15. See www.coe.int/en/web/media-freedom, accessed 14 July 2015. The five partner organisations are: ARTICLE 19, the Association of European Journalists, the European Federation of Journalists, the International Federation of Journalists and Reporters without Borders.

16. The Austrian chairmanship stated: “Freedom of expression and the safety of journalists will be the prime focus of Austria’s endeavours.” See Priorities of the Austrian Chairmanship of the Committee of Ministers of the Council of Europe (14 November 2013 – 14 May 2014), 5 November 2013 CM/Inf (2013) 32.

17. Council of Europe Committee of Experts on protection of journalism and safety of journalists (MSJ-JO), 1st meeting 3–4 March 2014, 10 March 2014, MSJ-JO(2014)03; Roundtable on safety of journalists: from commitment to action, 19 May 2014, Strasbourg www.coe.int/t/dghl/standardsetting/media/Round%20table%20outline_en.pdf, accessed 14 July 2015.

“state of media freedom in Europe” (Council of Europe Parliamentary Assembly 2013) highlighting the obligations of states “to protect journalists against attacks on their lives and freedom of expression, and prevent impunity of the perpetrators”, as well as a recommendation on the protection of journalists’ sources (Council of Europe Parliamentary Assembly 2011). The “protection of journalists from violence” was the subject of an issue discussion paper produced by the Commissioner for Human Rights in 2011 (Council of Europe Commissioner for Human Rights 2011), as well as public statements.¹⁸ Interestingly, “combating violence, persecution, harassment and intimidation of individuals, including journalists and other media actors ... and ... impunity for such crimes” has been identified as a priority area of action by the Council of the European Union in the “EU human rights guidelines on freedom of expression online and offline” (Council of the European Union 2014).

Across the broader region of the OSCE, the Representative on Freedom of the Media, acting together with the Lithuanian Chairmanship of the organisation in June 2011, adopted the “Vilnius recommendations on safety of journalists” (OSCE 2011), a set of guidelines for national governments, legislatures, law-enforcement agencies and the media to ensure safe working conditions for journalists. In 2013, the Office of the Representative on Freedom of the Media launched the “End Impunity” campaign to underscore the threats to journalists in the region (OSCE 2013) and in 2014 published the second edition of the *Safety of journalists guidebook* (OSCE 2014a). The Office of the Representative on Freedom of the Media appears to be a particularly prolific international mechanism for promoting freedom of expression in terms of highlighting individual instances of attacks on journalists and media workers as the biggest threats to media freedom in the region (OSCE 2014b).¹⁹ The Representative Dunja Mijatović has recently condemned attacks on journalists in states ranging from Russia and Ukraine to the United States.²⁰ She has also been a pioneering voice amongst intergovernmental mechanisms on the particular yet growing problem of online threats to female journalists (OSCE 2015).

3. HUMAN RIGHTS AND THE PROTECTION OF JOURNALISTS: PRELIMINARY ISSUES

3.1. Engagement of rights

Journalists and media workers may be subjected to a diversity of attacks, from physical violence and assaults, abductions and disappearances, to threats, intimidations and harassment. Female journalists are especially vulnerable to sexual abuse, assault and violence, as well as online attacks.²¹ Journalists generally may feel threatened or

18. See also Council of Europe Commissioner for Human Rights (2012, 2014).

19. See also Dunja Mijatović (2011).

20. See, for example, OSCE (2014c, 2014d, 2014e, 2014f).

21. For a useful survey of the range of attacks women journalists and media workers face, see Alana Barton and Hannah Storm (2014). See also UN Human Rights Council (2012b: paragraphs 52, 94); UN Human Rights Council (2012c: paragraph 107); and Jennifer R Henrichsen, Michelle Betz and Joanne M. Lisosky (2015: 43-62).

coerced by measures taken against them as journalists by state authorities, such as restrictions on their movement, the seizure and confiscation of their property (e.g. notes, memory cards, cameras, hard drives) and sanctions for their refusal to reveal their sources, or by a hostile climate for the media more generally, through outright censorship (e.g. banning or blocking of websites), the criminalisation of defamation, licensing conditions, national security legislation and surveillance programmes.²² This range of attacks on journalists in the performance of their work has real and multiple consequences: the dead are silenced forever; survivors of attacks and those threatened are less likely to continue their work and more likely to engage in self-censorship; other media professionals, who are intimidated by what they observe, do the same; the public is prevented from seeking and receiving information freely as a result of the “chilling effect” that creeps in, particularly amongst journalists themselves; the ensuing impunity that almost always follows a killing or an attack simply makes further killings and attacks more likely; and opportunities for democratic debate, and the oversight and accountability of state institutions and private actors wielding power are diminished.

Cases of attacks on, and threats to, journalists relate to a number of rights protected by the core international and regional human rights instruments, notably:

- a. the right to life under Article 3 of the Universal Declaration of Human Rights (UDHR), Article 6 of the International Covenant on Civil and Political Rights (ICCPR), Article 2 of the European Convention on Human Rights (ECHR), Article 4 of the American Convention on Human Rights (ACHR) and Article 4 of the African Charter on Human and Peoples’ Rights (ACHPR);
- b. the right to freedom of opinion and expression under Article 19 of the UDHR, Article 19 of the ICCPR, Article 10 of the ECHR, Article 13 of the ACHR and Article 9 of the ACHPR.

While the right to life and freedom of expression have been the key rights in the leading judgments and authoritative considerations on attacks on journalists, other human rights may also be implicated, notably (Leach 2013):

- a. the prohibition of torture and cruel, inhuman or degrading treatment or punishment under Article 5 of the UDHR, Article 7 of the ICCPR, Article 3 of the ECHR, Article 5 of the ACHR and Article 5 of the ACHPR;
- b. the right to liberty and security under Article 3 of the UDHR, Article 9 of the ICCPR, Article 5 of the ECHR, Article 7 of the ACHR and Article 6 of the ACHPR;
- c. the right to a fair hearing under Article 10 of the UDHR, Article 14 of the ICCPR, Article 6 of the ECHR, Article 8 of the ACHR and Article 7 of the ACHPR;
- d. the right to freedom of thought, conscience and religion under Article 18 of the UDHR, Article 18 of the ICCPR, Article 9 of the ECHR, Article 12 of the ACHR and Article 8 of the ACHPR;
- e. the right to privacy, family, home or correspondence under Article 12 of the UDHR, Article 17 of the ICCPR, Article 8 of the ECHR, Article 11 of the ACHR;

22. See United Nations Office of the High Commissioner for Human Rights (2012).

- f. the rights to freedom of assembly and association under Article 20 of the UDHR, Articles 21 and 22 of the ICCPR, Article 11 of the ECHR, Articles 15 and 16 of the ACHR and Articles 10 and 11 of the ACHPR;
- g. the right to an effective remedy or judicial protection under Article 8 of the UDHR, Article 2 of the ICCPR, Article 13 of the ECHR and Article 25 of the ACHR;
- h. the right to property under Article 17 of the UDHR, Article 1 of Protocol No. 1 of the ECHR, Article 21 of the ACHR and Article 14 of the ACHPR.

The subsequent sections focus on the interpretation of key international and regional provisions on the right to life and on freedom of expression. The key provisions on the right to life are the following:²³

Article 3 of the UDHR

Everyone has the right to life, liberty and security of person.

Article 6 of the ICCPR

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 2 of the ECHR

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 4 of the ACHR

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

Article 4 of the ACHPR

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

The right to freedom of expression – an “indispensable condition for the full development of the person”, “essential for any society” and “the foundation stone for every free and democratic society”, according to the UN Human Rights Committee (2011: paragraph 2) – is protected under the following provisions in international and regional law:

Article 19 of the UDHR

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

23. Provisions on the death penalty have been excluded.

Article 19 of the ICCPR

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20 of the ICCPR

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 10 of the ECHR

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.

Article 13 of the ACHR

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - (a) Respect for the rights or reputations of others; or
 - (b) The protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Article 9 of the ACHPR

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

Restrictions on the freedom of expression, including the freedom of journalists and media workers to expression, may be imposed in specific circumstances. Any restrictions on freedom of expression should: first, be prescribed or provided by law; second, pursue a legitimate aim, namely the respect of the rights or reputations of others, protection of national security, public order, public health or morals; and third, be necessary to secure the legitimate aim and meet the test of proportionality. This same test is incorporated in all regional human rights treaties (as indicated above) and applied by international and regional human rights bodies.

3.2. Definition of “journalist”

Although the core international and regional human rights treaties do not distinguish journalists as a category of protected persons (unlike the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the protection of victims of international armed conflicts), international and regional human rights authorities do regularly take account of the status of an individual as a journalist in determining the scope and nature of states’ obligations in relation to such a person under international and regional human rights law. The question of “who can be classified as a journalist?” is significant not only because certain rights and privileges flow from the title of “journalist”, but also certain individuals may be targeted by virtue of playing or being identified with that role (Heyns and Srinivasan 2013: 307). Yet giving a response to this question today may seem a challenge because of the changing media landscape. The rise of the Internet over the past two decades has radically transformed the media and the practice of journalism, with news media concentrating more on promoting their online presence than their hard copy distribution, and featuring users’ comments to articles and own contributions alongside those of professional journalists. News sites, online news aggregators, blogs and social networks have come to dominate the dissemination of information. In this climate, an ever increasing community of bloggers and so-called “citizen journalists” are able to generate content.²⁴

In the absence of any treaty law directly defining who is a journalist, international and regional human rights bodies have adopted a broadly functional, albeit not identical, approach to the notion. In his report of June 2012, the Special Rapporteur on freedom of opinion and expression, Frank La Rue, defined journalists broadly, according to “their function and service” and to encompass “all media workers and support staff, as well as community media workers and so-called ‘citizen journalists’ when they momentarily play that role”(UN Human Rights Council 2012b). The UN Human Rights Committee has preferred to focus on the practice of journalism rather than the role of journalist. In General Comment 34 interpreting states obligation under

24. On the key global trends and challenges concerning the Internet and freedom of expression, see: UN Human Rights Council (2011); UN General Assembly (2011).

Article 19 of the ICCPR, the committee asserted that journalism is: “a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the Internet or elsewhere ...” (UN Human Rights Committee 2011: paragraph 44).²⁵ The committee’s approach to journalism is notably broader than the influential definition of “journalist” provided by a recommendation of the Council of Europe’s Committee of Ministers in 2000, which defines a journalist as “any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication” (Council of Europe Committee of Ministers 2000). It is interesting to note, however, that in 2011 the Committee of Ministers issued a recommendation urging member states to “adopt a new, broad notion of the media” to recognise that “the scope of media actors has enlarged as a result of new forms of media in the digital age” and may include bloggers if they fulfil certain criteria.²⁶

Notwithstanding the differences and overlap between the various meanings given for terms from “journalist” and “journalism” to “the media”, there is a strong case that the protection afforded by international and regional human rights law to journalists who are attacked or threatened should also be applied to media workers more generally, particularly those who perform the function of a “public watchdog” and contribute to or inform public debate. In this regard, the 2014 “Declaration on the protection of journalism and safety of journalists and other media actors” by the Committee of Ministers of the Council of Europe deals with journalists and other media actors concurrently (Council of Europe Committee of Ministers 2014b: paragraph 2).

In this aspect, this declaration clearly draws on the position of the European Court of Human Rights in *Társaság a Szabadságjogokért v. Hungary* in which the Court recognised that the “public-watchdog” role is performed by others in society, besides the media.²⁷ In this case, the Court recognised that it was necessary to apply “the most careful scrutiny [of] measures taken by the national authority capable of discouraging the participation in the public debate on matters of legitimate public concern”.²⁸ In recognition of “civil society’s important contribution to the discussion of public affairs”, a non-governmental organisation involved in, for instance, human rights litigation may also serve to inform public debate and may constitute a “social watchdog”.²⁹ The Court held that any barriers to accessing public-interest information might dissuade journalists and media workers, but also those “working in related fields” from continuing their investigations and, consequently, negate “their vital

25. For commentary on the general comment, see Michael O’Flaherty (2012).

26. See Council of Europe Committee of Ministers (2011), especially paragraph 7. See also Council of Europe Committee of Ministers (2014b).

27. European Court of Human Rights, *Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05, Judgment of 14 April 2009.

28. *Ibid.*, paragraphs 26 and 27. See also European Court of Human Rights, *Bladet Tromsø and Stensaas v. Norway*, Application No. 21980/83, Judgment of 20 May 1999 (Grand Chamber), paragraph 64; and European Court of Human Rights, *Jersild v. Denmark*, Application No. 15890/89, 23 September 1994, paragraph 35.

29. *Ibid.*, paragraph 27. See also European Court of Human Rights, *Steel and Morris v. the United Kingdom*, Application No. 68416/01, Judgment of 15 February 2005 at paragraph 89.

role as ‘public watchdogs’.³⁰ The principle that a “non-governmental organisation involved in matters of public interest is exercising a role as a public watchdog of similar importance to that of the press” has been reiterated in the subsequent cases of *Animal Defenders International v. the United Kingdom* and *Youth Initiative for Human Rights v. Serbia*.³¹ Beyond NGOs, the Human Rights Committee has identified other individuals who face similar risks to journalists, specifically those “who engage in the gathering and analysis of information on the human rights situation and who publish human rights-related reports, including judges and lawyers” (UN Human Rights Committee 2011: paragraph 23).

3.3. The importance of journalists for a democratic society

The fundamental connection between the freedom of expression, on the one hand, and democratic values, on the other, has been underscored on many occasions by international and regional human rights authorities. The Human Rights Committee in General Comment No. 34 stated its view that the freedoms of opinion and expression are not only “indispensable conditions for the full development of the person”, but “they are essential for any society” and “constitute the foundation stone for every free and democratic society”.³² Moreover, according to the committee, freedom of expression “is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights”.³³ As the European Court of Human Rights stated in the seminal case of *Handyside v. the United Kingdom* in 1976, “[f]reedom of expression constitutes one of the essential foundations of ... a society, one of the basic conditions for its progress and for the development of every man”.³⁴ For its part, the Inter-American Court of Human Rights in its Advisory Opinion echoed this position in 1985 regarding “Compulsory membership in an association prescribed by law for the practice of journalism”, stating that freedom of expression is the “cornerstone upon which the very existence of a democratic society rests” and that it “is indispensable for the formation of public opinion” (Inter-American Court of Human Rights 1985: paragraph 70). As a result, “it can be said that a society that is not well informed is not a society that is truly free” (ibid: paragraph 70).³⁵

International and regional human rights authorities have also emphasised the importance of freedom of expression for the media on numerous occasions. The UN Human Rights Committee’s General Comment 34 distinguishes the importance

30. Ibid. paragraph 38.

31. European Court of Human Rights, *Animal Defenders International v. the United Kingdom*, Application No. 48876/06, Judgment of 25 June 2013 at paragraph 103; European Court of Human Rights, *Youth Initiative for Human Rights v. Serbia*, Application No. 48105/08, Judgment of the Grand Chamber of 22 April 2013 at paragraph 20.

32. Ibid., paragraph 2.

33. Ibid., paragraph 3.

34. European Court of Human Rights, *Handyside v. the United Kingdom*, Application No. 5493/72, Judgment of 7 December 1976 at paragraph 49.

35. See also Inter-American Court of Human Rights, *Case of “The Last Temptation of Christ” (Olmedo Bustos et al) v. Chile*, Judgment of 5 February 2001, paragraph 68.

of the media, especially in relation to political reporting. The committee stated that a “free press [must be] able to comment on public issues without censorship or restraint and to inform public opinion” connecting it with the public’s “corresponding right to receive media output” (UN Human Rights Committee 2011: paragraph 13). The Inter-American Court of Human Rights has further emphasised this position by asserting that “journalists who work in the media should enjoy the necessary protection and independence to exercise their functions to the fullest, because it is they who keep society informed, an indispensable requirement to enable society to enjoy full freedom and for public discourse to become stronger”.³⁶

Attacks on individual journalists and media workers therefore constitute attacks on the function of journalism and hence undermine the possibilities for public debate in a democracy. As the Inter-American Court of Human Rights has stated in the case of *Vélez Restrepo and Family v. Colombia*, “journalism can only be exercised freely when those who carry out this work are not victims of threats or physical, mental or moral attacks or other acts of harassment”.³⁷ While such attacks also constitute violations of their individual rights to freedom of expression, they also interfere with the rights of other individuals in societies to seek and receive all types of information and ideas (OAS Inter-American Commission on Human Rights 2008a: paragraph 9). Given the important “social role” of journalists and media workers, any attacks on them may be deemed as attacks “on the foundations of the human rights project and on informed society as a whole”, as indicated by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns (UN Human Rights Council 2012c: paragraph 24; Heyns and Srinivasan 2013: 306).

Unsurprisingly perhaps, the jurisprudence of the regional human rights courts has hitherto focused upon the particular importance of the print media, online media being a relatively recent phenomenon. The European Court of Human Rights has referred on numerous occasions to “the pre-eminent role of the press in a State governed by the rule of law” or in a democratic society specifically.³⁸ In *Jersild v. Denmark*, the Court has also indicated that audiovisual media play a “vital ‘public watchdog’ role” and have “much more immediate and powerful effect than the print media”.³⁹ Yet the Court has for several years recognised that the Internet provides a forum

36. Inter-American Court of Human Rights *Case of Ivcher Bronstein v. Peru*, Judgment of 6 February 2001, Series C No. 74, paragraph 150; Inter-American Court of Human Rights *Case of Herrera, Ulloa v. Costa Rica*, Judgment of 2 July 2004, Series C No. 107, paragraph 119.

37. Inter-American Court of Human Rights, *Vélez Restrepo and Family v. Colombia*, Judgment of 3 September 2012, paragraph 209.

38. See, for example, European Court of Human Rights, *MGN v. the United Kingdom*, Application No. 39401/04, Judgment of 18 January 2001 at paragraph 141; European Court of Human Rights, *Flux v. Moldova*, Application No. 28702/03, Judgment of 12 November 2007 at paragraph 43; European Court of Human Rights, *Castells v. Spain*, Application No. 11798/85, Judgment of 23 April 1992 at paragraph 43; European Court of Human Rights, *Thorgeir Thorgeirson v. Iceland*, Application No. 13778/88, Judgment of 25 June 1992 at paragraph 63.

39. European Court of Human Rights, *Jersild v. Denmark*, Application No. 15890/8, Judgment of 23 September 1994, paragraph 31; European Court of Human Rights, *Observer and Guardian v. the United Kingdom*, Application No. 13585/88, Judgment of 26 November 1991, paragraph 59; European Court of Human Rights, *The Sunday Times v. the United Kingdom (No. 2)*, Application No. 13166/87, Judgment of 26 November 1991, at paragraph 50.

for debate for ordinary citizens as well as journalists, and “which in modern times has no less powerful an effect than the print media”.⁴⁰ Moreover, in *Yildirim v. Turkey*, the European Court of Human Rights asserted that “the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information”.⁴¹

3.4. Positive obligations to protect journalists

All branches of the state – the executive, the legislative and the judiciary – and at all levels – national, regional or local – owe obligations to secure human rights within the jurisdiction of the state.⁴² State authorities are required to protect individuals’ rights against arbitrary interference by public authorities: a state is responsible for all the acts and omissions of its agents in the exercise of their duties, notwithstanding the intention of those relevant state agents.⁴³ Put differently, a state is responsible for active and intentional violations of rights by public authorities, as well as the “support or tolerance by public authorities” of violations.⁴⁴ In relation to the right to life, this means that the law must, at minimum, “strictly control and limit the circumstances in which a person may be deprived of his life by such authorities” (UN Human Rights Committee 2003: paragraph 3).

Crucially, however, states are also required to take the necessary steps to ensure effective protection of human rights amongst individuals, including by preventing the interference in individuals’ rights by private or non-state actors (UN Human Rights Committee 2011: paragraph 7; OAS Inter-American Commission on Human Rights 2013: 22). Accordingly, states may “be found responsible for acts of private individuals” in fulfilment of their international human rights obligations.⁴⁵ The European Court of Human Rights has recognised that a state may have positive obligations under Article 2 of the ECHR to protect the right to life. In *McCann and others v. the United Kingdom*, the Court held that a general prohibition on arbitrary killing by state agents was insufficient to secure protection of the right to life; the obligations under the ECHR also required “some form of effective official investigation

40. European Court of Human Rights, *Fatullayev v. Azerbaijan*, Application No. 40984/05, Judgment of 22 April 2010 at paragraph 95.

41. European Court of Human Rights, *Yildirim v. Turkey*, Application No. 3111/10, Judgment of 18 December 2012 at paragraph 54.

42. In connection with freedom of expression, see UN Human Rights Committee (2011), paragraph 7.

43. See generally, in the context of the European Convention on Human Rights, European Court of Human Rights Research Division (2011).

44. Inter-American Court of Human Rights, *Case of the “Mapiripán Massacre” v. Colombia*, Judgment of 15 September 2005, Series C No. 134, paragraph 108-111; Inter-American Court of Human Rights, *Case of the “Pueblo Bello Massacre” v. Colombia*, Judgment of 31 January 2006, Series C No. 140, paragraph 111.

45. Inter-American Court of Human Rights, *Case of the “Mapiripán Massacre” v. Colombia*, Judgment of 15 September 2005, Series C No. 134, paragraph 111-112; Inter-American Court of Human Rights, *Case of the “Pueblo Bello Massacre” v. Colombia*, Judgment of 31 January 2006, Series C No. 140, paragraph 111. See also Inter-American Court of Human Rights (2003: paragraph 140).

when individuals have been killed as a result of the use of force by, *inter alia* agents of the State”.⁴⁶ In *Osman v. the United Kingdom*, the Court also held that a state is, as a result of Article 2 of the ECHR, bound to “take appropriate steps to safeguard the lives of those within its jurisdiction” by putting in place an appropriate framework of criminal justice, including legal provisions and “law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions”.⁴⁷ Thus, the right to life may imply “a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual”.⁴⁸

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 European Court of Human Rights highlighted the importance of positive measures for the “genuine” and “effective” exercise of freedom of expression, as well as considerations which inform the scope of such positive obligations on the state.⁴⁹ The state’s positive obligations will be discussed further below, especially with respect to the duties to protect and prevent.

3.5. Recognition of the effects of impunity

The Special Rapporteurs on extrajudicial, summary and arbitrary executions and on freedom of opinion and expression have highlighted the damaging effects of allowing attacks on journalists and media workers to continue with impunity, without any accountability. The Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, stated that impunity is “widely recognised as one of the main causes of the continued killing of journalists” (UN Human Rights Council 2012c: paragraph 43). The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, has recognised that impunity “emboldens perpetrators as well as would-be perpetrators to attack journalists with no legal consequences”, and that it stands as “one, if not the main cause of the unacceptably high number of journalists who are attacked or killed every year” and, in so doing, “generates more violence in a vicious cycle” (UN Human Rights Council 2012b: paragraph 65).

Impunity has been defined by the Inter-American Court of Human Rights as “the overall lack of investigation, tracking down, capture, prosecution and conviction of those responsible for violating the rights protected by the American Convention”.⁵⁰

46. European Court of Human Rights, *McCann and others v. the United Kingdom*, Application No. 18984/91, Judgment of 27 September 1995 (Grand Chamber) at paragraph 161.

47. European Court of Human Rights, *Osman v. the United Kingdom*, Application No. 23452/94, Judgment of 28 October 1998 (Grand Chamber) at paragraph 115.

48. *Ibid.*, paragraph 115.

49. European Court of Human Rights, *Özgür Gündem v. Turkey*, Application No. 23144/93, Judgment of 16 March 2000 at paragraph 43.

50. Inter-American Court of Human Rights, *Constitutional Court v. Peru*, 31 January 2001, Series C No. 71, paragraph 123; Inter-American Court of Human Rights, *Case of Bámaca Velásquez v. Guatemala*, 25 November 2000, Series C No. 70, paragraph 211.

Impunity as the consequence of “the absence of a complete investigation, leading to the criminal punishment of all those responsible for the murder of a journalist” may also be viewed as, in and of itself, a violation of the right to freedom of expression “for the intimidating effect it has on the impunity of citizens”.⁵¹ In the case of *Vélez Restrepo and Family v. Colombia*, following the Inter-American Commission’s decision, the Inter-American Court of Human Rights emphasised that the attack against Mr Restrepo “by soldiers while he was covering a demonstration, and its widespread dissemination in the Colombian media, had a negative impact on other journalists who had to cover events of this type, who could fear similar acts of violence”.⁵² Besides having a “chilling effect” on other journalists, it also intimidated other individuals dissuading them from speaking out and prevented the free flow of information about the armed forces controlling the demonstration from reaching possible recipients, namely the public. The Inter-American Court of Human Rights therefore found a violation of Article 13 of the ACHR on freedom of expression partly because of the failure by the Colombian state authorities to effectively investigate earlier violence against the journalist, which resulted in subsequent threats and harassment against him.⁵³

By taking steps to “prevent, investigate, identify and punish” the perpetrators of human rights violations, states should ensure that there are adequate and effective mechanisms of accountability to break such a “vicious circle” of violence and combat the culture of impunity surrounding violence against journalists.⁵⁴ According to the Inter-American Court of Human Rights, speedy action to punish all perpetrators is the way in which a state can send “a strong message to society that there will be no tolerance for those who engage in such a grave violation of the right to freedom of expression”.⁵⁵

The remainder of this chapter distinguishes the nature of states’ human rights obligations to respond to attacks on journalists and media workers.

4. A FRAMEWORK OF STATE OBLIGATIONS

States have a series of obligations to investigate, prosecute and punish, to protect and to prevent attacks on journalists and media workers.

51. Inter-American Commission on Human Rights, *Luis Gonzalo “Richard” Vélez Restrepo and Family v. Colombia*, 23 October 2010, paragraph 136.
52. Inter-American Court of Human Rights, *Vélez Restrepo and Family v. Colombia*, Judgment of 3 September 2012, paragraph 148. See also Inter-American Commission on Human Rights, *Luis Gonzalo “Richard” Vélez Restrepo and Family v. Colombia*, paragraph 136.
53. Inter-American Court of Human Rights, *Vélez Restrepo and Family v. Colombia*, paragraph 215.
54. Inter-American Court of Human Rights, *Ivcher-Bronstein v. Perú*, Judgment of 6 February 2001, Series C No. 74, paragraph 186.
55. Inter-American Commission on Human Rights, *Luis Gonzalo “Richard” Vélez Restrepo and Family v. Colombia*, 23 October 2010, paragraph 136. See also Inter-American Commission on Human Rights, Report No. 50/99, Case 11.739, *Héctor Félix Miranda v. Mexico*, 13 April 1999, paragraph 52; Inter-American Commission on Human Rights, Report No. 130/99, Case No. 11.740, *Víctor Manuel Oropeza v. Mexico*, 19 November 1999, paragraph 58.

4.1. Duty to investigate, prosecute and punish

4.1.1. Duty to investigate

General considerations

From the perspective of Article 19 of the ICCPR on freedom of expression, no attack on a person – including arbitrary arrest, torture, threats to life and killing – may be justified on the basis of that person’s exercise of his or her freedom of expression (UN Human Rights Committee 2011: paragraph 23). When attacks do occur, states have duties to “vigorously investigate in a timely fashion” all such attacks on journalists and media workers and ensure that “the perpetrators [are] prosecuted, and the victims, or, in the case of killings, their representatives, [are] in receipt of appropriate forms of redress”; according to the UN Human Rights Committee in General Comment No. 34 (ibid.).⁵⁶ The UN Human Rights Council has also called upon “states to ensure accountability through the conduct of impartial, speedy and effective investigations into all alleged violence against journalists and media workers falling within their jurisdiction, to bring perpetrators including, inter alia, those who command, conspire to commit, aid and abet or cover up such crimes, to justice, and to ensure that victims and their families have access to appropriate remedies” (UN Human Rights Council 2012a: paragraph 3; 2014a: paragraph 7).

These statements, capturing the fundamental tenets concerning states’ duties to investigate attacks on journalists and media workers, derive from international and regional law, including jurisprudence, concerning the so-called “procedural aspect” of the right to life as well as the prohibition of torture, degrading or inhuman treatment.⁵⁷ Many of these principles are crystallised in the “Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions” recommended by the Economic and Social Council of the UN in 1989 (UN Economic and Social Council 1989). These principles provide that investigations into extrajudicial killings should be “thorough, prompt and impartial” and conducted by independent bodies (ibid., at principles 7 and 9), prosecutors should act independently, impartially and expeditiously (ibid., at principle 5), and other state authorities should enable prosecutors to act independently and without interference, including, where necessary, by ensuring their safety (ibid., at principles 12 and 13).

State authorities should not wait for the family of a murdered journalist to file a complaint before initiating an investigation. They should initiate an investigation of their own accord as soon as they have been informed of the killing as a matter of their obligations under the right to life.⁵⁸ In addition, the responsibilities of state institutions to fully and properly investigate every attack against a journalist and

56. See also UN Human Rights Committee (2003); UN Office of the High Commissioner for Human Rights (1989).

57. States should also investigate cases of missing and disappeared journalists and media workers which may involve a violation of their right to life (UN Human Rights Committee 1982: paragraph 4).

58. European Court of Human Rights, *Yaşa v. Turkey*, Application No. 22395/93, Judgment of 2 September 1998 at paragraph 100.

prosecute those responsible should not be negated by the fact that in many, if not most, cases the “origin of the acts of violence may not be known”, and may well involve a private actor, as highlighted by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in 2012 (UN Human Rights Council 2012b: paragraph 56). The Inter-American Court of Human Rights has similarly noted that this obligation remains whomsoever the alleged perpetrator “because, if their acts are not investigated genuinely, they would be, to some extent, assisted by the public authorities, which would entail the State’s international responsibility”.⁵⁹

The following sections indicate some of the key principles concerning the duty to investigate with specific reference to cases concerning attacks on journalists and other media workers. These apply in cases where the journalist or media worker has either been killed or has suffered ill-treatment as a result of an attack in violation of provisions on the right to life, under Article 2 of the ECHR or Article 4 of the ACHR, or the prohibition on torture and inhuman or degrading treatment or punishment, under Article 3 of the ECHR or Article 5 of the ACHR, in the context of the European and Inter-American human rights systems.⁶⁰ In this regard, the Court considered that the prohibition on inhuman and degrading treatment was breached in *Tekin v. Turkey*, the case of a journalist who was held blind-folded in a cold, dark cell and forcibly interrogated in a way that left wounds and bruises on his body.⁶¹

Independence

State authorities involved in the investigation of attacks on journalists and the prosecution of perpetrators should be autonomous and independent. In circumstances where there is the risk of “undue influence” by other state authorities, including the government, investigations should be “moved to a different authority outside of their jurisdiction or sphere of influence (for example, in appropriate cases, to the federal as opposed to the state level)” (UN Human Rights Council 2012c: paragraph 113). The 2012 Joint Declaration emphasised that independence meant “both formal hierarchical and institutional independence, and practical arrangements to secure independence”, a statement which clearly draws from the jurisprudence of the European Court of Human Rights (UN Office of the High Commissioner for Human Rights 2012).⁶²

National security or military prosecutors and courts do not meet the criterion of independence where they include the “presence of a military judge whose participation

59. Inter-American Court of Human Rights, *González et al. ('Cotton Field') v. México*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 16 November 2009, Series C No. 205, paragraph 291.

60. European Court of Human Rights, *Najafli v. Azerbaijan*, Application No. 2594/07, Judgment of 2 October 2012 at paragraph 35.

61. European Court of Human Rights, *Tekin v. Turkey*, Application No. 22496/93, Judgment of 9 June 1998 at paragraphs 49-54.

62. See European Court of Human Rights, *Adalı v. Turkey*, Application No. 38187/97, Judgment of 31 March 2005, paragraph 222; European Court of Human Rights, *Ergi v. Turkey*, Application No. 23818/94, Judgment of 28 July 1998, paragraphs 83-84.

gives rise to legitimate fears that the court may be unduly influenced by considerations which had nothing to do with the nature of the case”, as the European Court of Human Rights held in the already mentioned case of *Kılıç v. Turkey*.⁶³ In that case the Court considered that these were “defects [which] undermined the effectiveness of the protection afforded [to the journalist] by the criminal law” and “fostered a lack of accountability of members of the security forces for their actions which ... was incompatible with the rule of law in a democratic society respecting the rights and freedoms guaranteed under the Convention”.⁶⁴ Similarly, the Inter-American Court of Human Rights in *Vélez Restrepo and Family v. Colombia* reiterated its previous jurisprudence in deciding that the military justice system was “not the competent system to investigate and, as appropriate, prosecute and punish the authors of human rights violations, and that, only soldiers on active duty who have committed crimes or misdemeanors that, owing to their nature, harm juridical rights of a military nature, can be tried by the military justice system”.⁶⁵

Investigations into attacks on journalists by state agents (such as the police or other state security forces) must be conducted by state agents who operate under a different public authority. In the case of *Najafli v. Azerbaijan*, the European Court of Human Rights found violations of Article 3 on the right not to be subjected to inhuman or degrading treatment and Article 10 on freedom of expression in a case of a journalist who was covering an unauthorised demonstration by the opposition held in Baku. Although the journalist was not wearing the blue vest identifying him as a member of the press, he nonetheless was wearing a badge identifying himself as a journalist and he also repeatedly told his police assailants that he was a journalist.⁶⁶ Reaffirming the role of the media, the Court also held that “reporting on opposition gatherings and demonstrations” is “essential for the development of any democratic society”.⁶⁷ Without the possibility to report on such events, “the press would be unable to play its vital role of ‘public watchdog’”.⁶⁸ In relation to the state’s procedural obligations under Article 3 of the ECHR, the Court expressly stated that “an investigation by the police force of an allegation of misconduct by its own officers could not be independent in the present case”.⁶⁹

Speed

As stated in the 2012 Joint Declaration, state authorities should “make all reasonable efforts to expedite investigations, including by acting as soon as an official complaint

63. European Court of Human Rights, *Kılıç v. Turkey*, Application No. 22492/93, Judgment of 28 March 2000, paragraph 74.

64. *Ibid.*, at paragraph 75.

65. Inter-American Court of Human Rights, *Vélez Restrepo and Family v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 3 September 2012, Series C No. 248, paragraph 240.

66. European Court of Human Rights, *Najafli v. Azerbaijan*, Application No. 2594/07, Judgment of 2 October 2012, at paragraphs 64-65.

67. *Ibid.*, at paragraph 66.

68. *Ibid.*, at paragraph 66.

69. *Ibid.*, at paragraph 52.

or reliable evidence of an attack against freedom of expression becomes available” (UN Office of the High Commissioner for Human Rights 2012). The Special Rapporteur on extrajudicial, summary or arbitrary executions endorsed “The principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions” in his 2012 report and has urged states to meet their “obligation to conduct prompt and exhaustive investigations into all suspected cases of violations of the right to life of journalists and to identify and bring to justice those responsible” (UN Human Rights Council 2012c: paragraphs 44, 111).

A period of three months between the incidents of violation and the launch of the initial relevant procedural steps contributed to the finding by the European Court of Human Rights that the state had violated its obligation to carry out an effective investigation under the procedural aspect of Article 3 of the ECHR in *Najafli v. Azerbaijan*.⁷⁰ In *Héctor Félix Miranda v. Mexico*, the Inter-American Commission on Human Rights decided that a state had violated its obligation to conduct an effective investigation since more than a decade had passed without the mastermind of the crime being identified and prosecuted.⁷¹ Moreover, there were no excuses for this “unreasonably prolonged duration of the investigation”: the commission emphasised that the murder of journalist Héctor Félix Miranda was “not an extremely complex case”, given that the direct perpetrators were quickly tried and convicted, and that there was clear evidence linking them to a potential mastermind.⁷² In *Vélez Restrepo and Family v. Colombia*, the Inter-American Commission observed that 13 years had passed without the Colombian state identifying, trying or punishing any of those responsible for a series of threats and acts of harassment against journalist Richard Velez and members of his family, actions which eventually forced them to flee the country. The commission decided that the investigation was not conducted in a reasonable manner and found a violation of Colombia’s obligations under Article 8, paragraph 1, of the ACHR on the right to a fair trial.⁷³ Authorities should conduct the investigations quickly, avoiding delays that could result in impunity and infringe judicial protections under the law.⁷⁴

Effectiveness

The obligation to conduct an investigation that is effective means that such investigations exhibit a number of features, as indicated by the 2012 Joint Declaration (UN Office of the High Commissioner for Human Rights 2012). The key features of an effective investigation are discussed below.

70. European Court of Human Rights, *Najafli v. Azerbaijan*, Application No. 2594/07, Judgment of 2 October 2013, at paragraphs 49-50.

71. Inter-American Commission on Human Rights, *Héctor Félix Miranda v. México*, 13 April 1999, paragraphs 11, 30, 32.

72. *Ibid.*, at paragraphs 31 and 32.

73. Inter-American Court on Human Rights, *Gómez Palomino v. Peru*, Judgment of 22 November 2005, Series C No. 136, paragraph 85; Inter-American Court of Human Rights, *Moivana Community v. Suriname*, Judgment of 15 June 2005, Series C No. 124, paragraph 160.

74. Inter-American Court on Human Rights, *Case of Gómez Palomino v. Peru Case. Merits, Reparations and Costs*, Judgment of 22 November 2005. Series C No. 136, paragraph 85.

First, effective investigations and prosecutions in response to attacks on journalists and media workers require states to be politically committed to combating impunity in relation to such attacks. States should therefore set aside sufficient human and financial resources for gathering and analysing information in order to establish liability and ensure accountability for such actions. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has recommended that “necessary resources must be dedicated to preventing and investigating attacks or bringing those responsible to justice” (UN Human Rights Council 2012b: paragraph 102; 2012a: paragraph 8(e)). The Special Rapporteur on extrajudicial, summary or arbitrary executions was more specific, recommending that “[i]n countries where high incidences of attacks against journalists are reported, the investigations should be carried out by special investigative units with sufficient resources and appropriate training to operate efficiently and effectively” (UN Human Rights Council 2012c). The 2012 Joint Declaration emphasises that “[s]ufficient resources and training should be allocated to ensure that investigations into crimes against freedom of expression are thorough, rigorous and effective and that all aspects of such crimes are explored properly” (UN Office of the High Commissioner for Human Rights 2012). It also calls on states to consider “establishing specialised and dedicated investigative units – with sufficient resources and appropriate training to operate efficiently and effectively – to investigate crimes against freedom of expression” (ibid.).

Second, any investigation into an attack on a journalist which is limited may be deemed to have been ineffective and therefore in violation of human rights. In *Kılıç v. Turkey*, the European Court of Human Rights held that the limited scope and short duration of the investigation into the killing of a journalist pointed to a failure to conduct an effective investigation leading to a violation of the procedural aspect of Article 2 of the ECHR.⁷⁵ The Court indicated that there were a series of inadequacies in the investigation, including the failure to make inquiries into the possible targeting of the journalist due to his job as journalist for *Özgür Gündem* or into the possibility of “any collusion by security forces in the incident”.⁷⁶

Third, any investigation into an attack on a journalist should be conducted diligently and thoroughly, and should examine at least the motives of the perpetrators and pursue logical lines of inquiry. State authorities should inquire into the motive behind the attack to determine whether it was related to the journalist’s professional activities. In *Adalı v. Turkey*, the European Court of Human Rights did not find it “implausible” that the killing of the journalist critical of the government “was related to his activities as a journalist”.⁷⁷ The Court found, however, that the “authorities failed to inquire sufficiently into the motives” behind his killing, including by failing to “investigate the possibility that the murder was politically motivated or had any link with his work as a journalist”.⁷⁸ Instead, it seemed that the “responsible authorities

75. European Court of Human Rights, *Kılıç v. Turkey*, Application No. 22492/93, Judgment of 28 March 2000, paragraph 83.

76. Ibid., at paragraphs 81-82.

77. European Court of Human Rights, *Adalı v. Turkey*, Application No. 38187/97, Judgment of 31 March 2005, at paragraph 231.

78. Ibid., at paragraph 231.

already at an early stage of the investigation and on an insufficient basis discarded that possibility” and “no search was conducted on the papers and other belongings of the deceased with a view to finding any evidence which could cast light on the motives behind the killing”.⁷⁹

The Inter-American Court of Human Rights has emphasised the importance of pursuing logical lines of inquiry in linking between the professional work of journalists and their targeting as victims of violence. The Inter-American Court has indicated that investigations by state authorities should reflect “the complexity of the facts, the context in which they occurred and the systematic patterns that explain why the events occurred”, ensuring that there are “no omissions in gathering evidence or in the development of logical lines of investigation”.⁸⁰ In the case of *Manuel Cepeda Vargas v. Colombia*, the Inter-American Court of Human Rights held that the Colombian state authorities failed to pursue logical lines of inquiry into the murder of a journalist and politician and failed to investigate the hypothesis and strong evidence which pointed to the masterminds of the crime.⁸¹ In *Vélez Restrepo and Family v. Colombia*, in finding that state authorities had failed to seriously investigate the attack on a journalist and subsequent threats to him and his family, the court found the state should have done more to take into account “the reasonable connection between the attack motivated by the exercise of freedom of expression ... and the subsequent threats and harassment that escalated into an attempted deprivation of liberty”.⁸² It is interesting to note that the court emphasised that Mr Vélez Restrepo was beaten both for and while he was undertaking his work – something an effective investigation would have surely identified.⁸³

Fourth, states have a duty to ensure that an investigation into an attack on a journalist is effective in the sense that it is capable of resulting in a decision as to whether the force applied was or was not justified in the circumstances, and also to the identification and punishment of those responsible.⁸⁴ This requires state authorities to undertake a comprehensive evidence gathering exercise. In *Gongadze v. Ukraine*, a case concerning the murder of a political journalist, the European Court of Human Rights stated that this means the “authorities must have taken all reasonable steps to secure the evidence concerning the incident” and “[any] deficiency in the investigation which undermines its ability to establish the cause of death or the persons responsible ... will risk falling foul of this standard”.⁸⁵

79. *Ibid.*, at paragraph 231.

80. Inter-American Court of Human Rights, *Rochela Massacre v. Colombia*, Judgment of 11 May 2007, Series C No. 163, paragraph 158.

81. Inter-American Court of Human Rights, *Manuel Cepeda-Vargas v. Colombia*, Judgment of 26 May 2010, Series C No. 213, at paragraphs 106-110, 167.

82. Inter-American Court of Human Rights, *Vélez Restrepo and Family v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 3 September 2012, Series C No. 248, paragraphs 211 and 252.

83. *Ibid.*, at paragraph 142.

84. European Court of Human Rights, *Dink v. Turkey*, Application Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, Judgment of 14 September 2000, paragraph 82-91.

85. European Court of Human Rights, *Gongadze v. Ukraine*, Application No. 34056/02, Judgment of 8 November 2005, paragraph 176.

Access to investigative and judicial processes

Family members of a journalist who has been killed should be provided with information about the investigation by state authorities. Any investigation files should be made available to the family who should be kept regularly briefed about the conduct of and progress made in the investigation. The 2012 Joint Declaration recognises that victims and family members should be “afforded effective access” to the investigation and subsequent proceedings, including by sharing the relevant documents with them. The European and Inter-American human rights systems have reinforced this standard, which is reflected in the “Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions” (UN Economic and Social Council 1989: section 16).

The European Court of Human Rights in *Adalı v. Turkey* emphasised “the importance of involving the families of the deceased or their legal representatives in the investigation and of providing them with information as well as enabling them to present other evidence”.⁸⁶ The Court held that the wife of a “disappeared” journalist suffered degrading treatment in violation of Article 3 of the ECHR on account of the emotional distress caused by the attitude and inaction of state authorities investigating the disappearance and of her husband.⁸⁷ The journalist’s wife was consistently refused access to information in the case file and was only given access to the file five years after he first disappeared.⁸⁸ States within the Inter-American human rights system have a similar obligation to ensure that the family members of journalists who have been killed will have complete access at all stages and at all levels of the investigation and corresponding judicial process, including punishment and reparation (OAS Inter-American Commission on Human Rights 2008a: paragraph 41).

Interestingly, the 2012 Joint Declaration goes further by recommending that civil society organisations should be able to actively participate in complaints concerning such crimes as “killings, abductions or disappearances” of journalists and media workers, specifically “where the next-of-kin are unwilling or unable to do so – and intervene to [*sic*] in the criminal proceedings” (UN Office of the High Commissioner for Human Rights 2012).

Protection of persons involved

The general duty to investigate within the framework of due process guarantees also carries with it an obligation to protect those involved in the process of investigation – notably, victims, victims’ families, witnesses, investigators, judges – from threats or harassments which are “designed to obstruct the proceedings, impede the clarification of the facts of the case, and prevent the identification of those responsible.”⁸⁹

86. European Court of Human Rights, *Adalı v. Turkey*, Application No. 38187/97, Judgment of 31 March 2005, at paragraph 232.

87. European Court of Human Rights, *Gongadze v. Ukraine*, Application No. 34056/02, Judgment of 8 November 2005, paragraphs 184-186.

88. *Ibid.*, at paragraph 185.

89. Inter-American Court of Human Rights, *Rochela Massacre v. Colombia*, Judgment of 11 May 2007, Series C No. 163, paragraph 171.

In *Vélez Restrepo and Family v. Colombia*, the victim and his family were threatened and harassed repeatedly because of his reporting and, in particular, his decision to pursue criminal and disciplinary sanctions against the state security forces that attacked him for covering their abuse of unarmed demonstrators. The Inter-American Court of Human Rights found Colombia responsible for failing to protect Mr Vélez Restrepo and his family, a failure that eventually forced him and his family to flee the country.⁹⁰ The court reached a similar conclusion in *Manuel Cepeda Vargas v. Colombia*, in which it found that members of the family of the victim, a Colombian journalist and politician who was murdered by members of the armed forces, were threatened with the aim of preventing accountability for his killing and forced into exile.⁹¹

Female journalists

From a gender perspective, the Inter-American Court of Human Rights has held that, in cases of attacks on women, including journalists who are women, it is “particularly important that the authorities in charge of the investigation carry it out ... in a determined and effective manner, taking into account society’s obligation to reject violence against women and the State’s obligation to eliminate it and to ensure that victims trust the State institutions for their protection”.⁹² The Inter-American court has also emphasised specific duties on states to investigate allegations of rape which may be relevant to understanding the scope of states’ obligations in connection with sexual violence perpetrated against journalists, whether men or women.⁹³

4.1.2. Duty to prosecute and punish

Statutes of limitations

Statutes of limitations should not present obstacles to seeking justice for journalists and media workers who have lost their lives, been injured or threatened. The Special Rapporteur on extrajudicial, summary or arbitrary executions recommends that “[s]tatutes of limitation should not allow prosecutions to be blocked” (UN Human Rights Council 2012c: paragraph 111). The 2012 Joint Declaration similarly provides that “crimes against freedom of expression, and the crime of obstructing justice in relation to those crimes, should be subject to either unlimited or extended statutes of limitations (i.e. the time beyond which prosecutions are barred)” (UN Office of the High Commissioner for Human Rights 2012), while the United Nations Plan of Action on the safety of journalists and the issue of impunity calls upon member states to fully

90. Inter-American Court of Human Rights, *Vélez Restrepo and Family v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 3 September 2012, Series C No. 248, paragraphs 203-204.

91. Inter-American Court of Human Rights, *Manuel Cepeda-Vargas v. Colombia*, Judgment of 26 May 2010, Series C No. 213, paragraphs 194-195.

92. Inter-American Court of Human Rights, *Rosendo Cantú et al. v. Mexico*, Judgment of 31 August 2010, Series C No. 216, paragraph 177.

93. *Ibid.*, at paragraph 178.

comply with “the principle that there should be no statute of limitations on persons guilty of crimes against freedom of expression” (UNESCO 2013: paragraph 5.9; 1997).

Proportionality of punishment

Through their formal texts and reports, international human rights bodies have reiterated that the attacks on journalists should be properly investigated and that perpetrators of attacks on journalists should be prosecuted (for example, UN Human Rights Council 2012b: paragraph 98; 2012c: paragraph 70). Yet such bodies have not generally elaborated on the issue of the appropriate penalties for attacks on journalists as such (Human Rights Council 2012a, 2103). The 2012 Joint Declaration does state, however, that such crimes should be “recognised in the criminal law, either explicitly or as an aggravated circumstance leading to heavier penalties for such crimes, taking into account their serious nature”, and should meet the requirement of proportionality (UN Office of the High Commissioner for Human Rights 2012).

Under established principles of international law, any punishment for those properly convicted of killings and non-fatal attacks against journalists and media workers should indeed be proportionate. According to the Working Group on Arbitrary Detention, an individual may be deprived of her/his right to liberty under Article 9 of the ICCPR only in so far as it is necessary to meet a pressing societal need, and in a manner proportionate to that need (UN Commission on Human Rights 2005: paragraph 63; UN Human Rights Council (2014c: paragraph 72). This key principle of sentencing means that any sentence for an attack on a journalist or media worker should “fit the crime”. The European Court of Human Rights has recognised that proportionality is an essential part of sentencing and has held that in exceptional cases a “grossly disproportionate” sentence could be found to breach Article 3 of the ECHR.⁹⁴ The relevance of the principle of proportionality to sentencing has also been endorsed by the Inter-American Court of Human Rights. In *Rochela Massacre v. Colombia*, the court held that in order for states to fulfil their duties to investigate, prosecute, punish and provide redress for serious human rights violations, they must observe “due process and guarantee the principles of expeditious justice, adversarial defence, effective recourse, implementation of the judgment, and the proportionality of punishment, among other principles”.⁹⁵ It continued that the punishment of a crime “should be proportional to the rights recognised by law and the culpability with which the perpetrator acted, which in turn should be established as a function of the nature and gravity of the events [*sic*]”.⁹⁶

Remedies

Journalists and media workers who are victims of attacks should receive appropriate redress or remedies for threats or violations of their right to life or freedom of

94. European Court of Human Rights, *Harker and Edwards v. the United Kingdom*, Application No. 32650/07, Judgment of 17 January 2012, at paragraph 134; see also European Court of Human Rights, *Rrapo v. Albania*, Application No. 58555/10, Judgment of 25 September 2012, at paragraph 90.

95. Inter-American Court of Human Rights, *Rochela Massacre v. Colombia*, Judgment of 11 May, 2007, Series C No. 163, paragraph 193.

96. *Ibid.*, at paragraph 196.

expression. This principle is well supported by international human rights bodies (UN Human Rights Committee 2011: paragraph 23; UN Human Rights Council 2012c: paragraph 43; 2012a: paragraph 7). In *Velásquez Rodríguez v. Honduras*, the Inter-American Court of Human Rights held that not only must states “prevent, investigate and punish any violation of the rights”, they should “attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation”.⁹⁷

The 2012 Joint Declaration indicates that remedies should include financial compensation as well as rehabilitation, and civil remedies should be available irrespective of whether there has been a conviction for a crime against freedom of expression. In the circumstances where there has been a conviction for a crime against freedom of expression, there should be a “system ... to ensure that an adequate remedy is provided to the victims, without the need for them to pursue independent legal action”. Besides being proportionate, remedies “should include financial compensation, and a range of measures to rehabilitate the victims and to facilitate the return of victims to their homes in conditions of safety” (UN Office of the High Commissioner for Human Rights 2012).

The range of remedies available at the Inter-American Court of Human Rights in cases of attacks on journalists is characteristic of the positive approach of that regional court in granting reparations. Consider that the court in *Vélez Restrepo and Family v. Colombia*, besides ordering the state to conduct an effective criminal investigation and pay compensation for pecuniary and non-pecuniary damage, ordered the state to: guarantee the conditions for the members of the Vélez Román family to return to live in Colombia, if they so decided; “provide health care to the victims through its specialized health care institutions if the victims indicated their intention of returning to live in Colombia”; pay to the victims sums of money in order to help cover the costs of health care if the members of the Vélez Román family decided not to return to live in Colombia; and, most interestingly, “incorporate into its human rights education programs for the armed forces a specific module on the protection of the right to freedom of thought and expression and on the role of journalists and social communicators”.⁹⁸ The Inter-American Court of Human Rights in *Manuel Cepeda Vargas v. Colombia* also ordered the state to: adopt all necessary measures to guarantee the safety of Manuel Cepeda Vargas’s family and to prevent them from having to move or to leave the country again as a result of threats, or acts of harassment or persecution against them that might follow its own judgment; publish key parts of the judgment on an appropriate webpage of the state; organise a “public act of acknowledgement of international responsibility for the facts of this case”; prepare with his family and disseminate a publication and make an audiovisual documentary on the political life, journalism career and political role of the Senator, Manuel Cepeda Vargas; and “provide the medical and psychological treatment that the victims require”.⁹⁹

97. Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, Series C No. 04, paragraph 166.

98. Inter-American Court of Human Rights, *Vélez Restrepo and Family v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 3 September 2012, Series C No. 248, paragraph 317 (operative paragraphs).

99. Inter-American Court of Human Rights, *Manuel Cepeda-Vargas v. Colombia*, Judgment of 26 May 2010, Series C No. 213, at paragraph 265 (operative paragraphs).

4.2. The duty to protect

The duty to protect journalists and media workers stems from the state's positive obligations in relation to the right to life as well as to the right to freedom of expression. Under international human rights law, states are required under this obligation to protect journalists and other media workers from threats by non-state actors, especially if they have been identified as facing a particular risk of attack (UN Human Rights Committee 2004). According to the UN Human Rights Committee, states have obligations to "put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression" (UN Human Rights Committee 2011: paragraph 23).

The 2012 Joint Declaration provides that "a range of protection measures, which should be tailored to the individual circumstances of the person at risk," should be implemented "where there is an ongoing and serious risk of crimes against freedom of expression" (UN Office of the High Commissioner for Human Rights 2012). Relevant UN experts have emphasised the value of "special measures" as a means of protection in their respective reports. The Special Rapporteur on freedom of opinion and expression has recommended that "special measures should be put in place to deal with attacks and to support journalists who are displaced by attacks" and the Special Rapporteur on extrajudicial, summary or arbitrary executions has urged "states where there is a pattern of killing of journalists" to "take special measures to address this issue" (UN Human Rights Council 2012b: paragraph 102; 2012c: paragraph 112). Moreover, the UN Plan of Action also urges states to "take prompt action in response to attacks by establishing national emergency mechanisms, which different stakeholders can adopt" (UNESCO 2012: 5.8). A range of existing special programmes for the protection of journalists, as well as measures to establish them where they do not exist at the national level in the OAS region (specifically in Colombia, Mexico, Brazil, Guatemala and Honduras) are showcased by the 2013 major report of the OAS Special Rapporteur on Freedom of Expression on *Violence against Journalists and Media Workers: Inter-American standards and national practices on prevention, protection and prosecution of perpetrators* (OAS Inter-American Commission on Human Rights 2013: 55-98).

Significantly, the UN Human Rights Council, in its most recent resolution on the subject, "takes note" of the existing "good practices of different states" and urges states to "develop and implement strategies for combating impunity for attacks and violence"; such as: "the creation of special investigative units or independent commissions"; "the appointment of a specialized prosecutor"; the adoption of specific protocols and methods of investigation and prosecution"; the "training of prosecutors and the judiciary regarding the safety of journalists"; "the establishment of information-gathering systems, such as databases"; and the establishment of an early warning and rapid response mechanism to give journalists, when threatened, immediate access to the authorities and protective measures" (UN Human Rights Council 2014a: paragraphs 4-5). The Council of Europe's newly established "Platform to promote the protection of journalism and safety of journalists" may certainly be considered a regional protection mechanism for alerting relevant bodies.

Regional jurisprudence on the positive obligations of the state is relevant to determine the circumstances in which measures to protect should be applied. In *Kılıç v. Turkey*,

a case concerning the killing of a journalist who had previously asked for protection measures from the state authorities for himself and others, the European Court of Human Rights held that the test for a breach of a positive obligation was whether:

the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.¹⁰⁰

The Court found that Kemal Kılıç, as a journalist, was exposed to the risk of an “immediate and real” attack, that the authorities were aware of this risk and, additionally, that they “were aware, or ought to have been aware, of the possibility that this risk derived from the activities of persons or groups acting with the knowledge or acquiescence of elements in the security forces”.¹⁰¹ After finding that the Turkish state had “failed to take reasonable measures . . . to prevent a real and immediate risk to the life of Kemal Kılıç”, the Court held that there had been a violation of Article 2 of the ECHR.¹⁰² In assessing whether the state failed to meet its obligation to protect the life of a journalist “from a known risk to his life”, the European Court of Human Rights has taken into account the extent to which such bodies, particularly public prosecutors, “ought to have been aware of the vulnerable position in which a journalist who covered politically sensitive topics placed himself/herself *vis-à-vis* those in power at the material time”.¹⁰³ The European Court of Human Rights did not consider the complaint in *Kılıç v. Turkey* from the perspective of Article 10 of the ECHR, however, on the grounds that it arose from the same facts as the complaint based on Article 2 of the ECHR in relation to which the Court found a violation.¹⁰⁴

The Court found violations of both Article 2 and Article 10 of the ECHR, however, in the most significant case decided by the European Court of Human Rights on the issue of the protection and safety of journalists, *Dink v. Turkey*. The case concerned the killing of Hrant Dink, a Turkish journalist and editor of a Turkish-Armenian weekly newspaper. Dink’s articles on the identity of Turkish citizens of Armenian extraction had previously drawn aggressive responses from extreme nationalists who had staged demonstrations, written threatening letters and also lodged a criminal complaint against him that had resulted in him being found guilty. The Court found that the Turkish security forces could reasonably be considered to have been informed of the intense hostility towards the journalist in extreme nationalist circles, that the law-enforcement authorities had been informed of the likelihood of an assassination attempt and even of the identity of the alleged instigators so that the threat of an assassination was real and imminent. Despite all these factors, the Turkish authorities failed to take reasonable measures to protect Dink’s life. (In the Court’s opinion,

100. European Court of Human Rights, *Kılıç v. Turkey*, Application No. 22492/93, Judgment of 28 March 2000, paragraph 63.

101. *Ibid.*, at paragraphs 66-68.

102. *Ibid.*, at paragraph 77.

103. European Court of Human Rights, *Gongadze v. Ukraine*, Application No. 34056/02, Judgment of 8 November 2005, paragraphs 166 and 168.

104. European Court of Human Rights, *Kılıç v. Turkey*, Application No. 22492/93, Judgment of 28 March 2000, paragraph 87.

although Dink had not requested increased protection, he could not have known of the plan to assassinate him.) The Court found that the decision of Turkish courts that Dink was guilty of denigrating Turkishness by itself or coupled with the absence of protection measures for the journalist constituted an interference with his right to freedom of expression. The Court found that this conviction, which penalised Dink for having written articles criticising the state institutions' denial of the 1915 Armenian genocide, issues of important public concern and debate in a democratic society, did not meet a "pressing social need" and was therefore not necessary in a democratic society. Given the failure of the state authorities to protect Dink from attacks by the extreme nationalist group and the conviction in the absence of a pressing social need, the state had failed to meet its positive obligations with respect to freedom of expression.¹⁰⁵ In this regard, the Court held that states should ensure that there is a positive climate for the exercise of this right. More specifically:

States should create a favourable environment for full participation in public debates by all persons concerned, enabling them to express their opinions and ideas without fear, even if such opinions and ideas are contrary to those held by the authorities or a significant share of public opinion, or viewed as offensive or shocking.¹⁰⁶

The Inter-American Court of Human Rights took an identical approach in *Pueblo Bello Massacre v. Colombia* to the European Court in *Kilic v. Turkey* in determining when a state's positive obligations to protect life would be breached.¹⁰⁷ In *Vélez Restrepo and Family v. Colombia*, the Inter-American Commission on Human Rights found that the state had failed to protect a journalist and his family against a series of threats which eventually forced him into exile. More specifically, the commission concluded that the state of Colombia had not adopted "in a diligent manner and in good time the necessary measures to protect Mr. Vélez and his family from the threats and attacks brought to the attention of the authorities" and consequently, "the violation of the physical and moral integrity of Mr. Vélez and his family members is attributable to the State for omitting to implement effective means of protection despite having been notified and made aware of the risk run by the journalist and his family".¹⁰⁸ The Inter-American court agreed with the commission's conclusions. Significantly, it held that "States have the obligation to adopt special measures of prevention and protection for journalists subject to special risk owing to the exercise of their profession" and factors such as "the type of events they cover, the public interest of the information they disseminate, or the area they must go to in order to do their work".¹⁰⁹

105. European Court of Human Rights, *Dink v. Turkey*, Application Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, Judgment of 14 September 2000, paragraphs 64-75, 106-108, 137-138 (French).

106. *Ibid.*, at paragraph 137.

107. Inter-American Court on Human Rights, "*Pueblo Bello Massacre*" v. *Colombia*, Judgment of 31 January 2006, Series C No. 140, paragraph 124, citing European Court of Human Rights, *Kilic v. Turkey*, Application No. 22492/93, Judgment 28 March 2000, paragraph 63.

108. Inter-American Commission on Human Rights, *Vélez Restrepo and Family v. Colombia*, Report No. 136/10 Case 12.658, 23 October 2010.

109. Inter-American Court of Human Rights, *Vélez Restrepo and Family v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 3 September 2012, Series C No. 248, paragraph 194.

In the case of the journalist Vélez Restrepo, the Inter-American court concluded that he “clearly faced real and immediate risk to his personal integrity” and that the state, despite being aware of this situation, failed to act diligently to adopt the necessary protection measures for the journalist and his family in a timely manner.¹¹⁰ The court stressed that state authorities should have familiarised themselves with “the situation of special risk in order to determine or assess whether the person who is the target of threats and harassment requires measures of protection or to refer the case to the competent authority to do this, and also to offer the person at risk timely information on the measures available”.¹¹¹ Noting the steps taken by the Colombian state authorities to protect at-risk journalists, the court urged Colombia to “continue taking all necessary measures to adopt and strengthen the special programs designed to protect journalists at risk”.¹¹²

4.3. The duty to prevent

4.3.1. General considerations

The obligations to prevent attacks are deeply connected to, and overlap with, those to protect journalists from attack and violence, particularly in contexts where the authorities know or ought to have known that there is a real and immediate risk that a journalist or media worker may suffer an attack. As the European Court of Human Rights indicated in *Gongadze v. Ukraine*, a state’s obligations “[extend], in appropriate circumstances, to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose lives are at risk from the criminal acts of another individual”.¹¹³ The Inter-American Court of Human Rights has also held that a prevention strategy should be comprehensive and deal with challenges facing women in particular. The court has stated that such a strategy should “prevent the risk factors and, at the same time, strengthen the institutions that can provide an effective response in cases of violence against women”.¹¹⁴ From these perspectives, an absence of a general public policy of prevention and a failure to take account of any risk factors facing women journalists can mean that the state has failed in its duty to prevent.¹¹⁵

The 2012 Joint Declaration contains a substantial section elaborating upon legal and non-legal measures that should be taken to meet the obligation to prevent crimes against freedom of expression “where there is a risk of these occurring and in specific situations where the authorities know or should have known of the existence of a real and immediate risk of such crimes, and not only in cases where those at risk

110. *Ibid.*, at paragraph 194.

111. *Ibid.*, at paragraphs 209, 194, 195, 197, 201 and 203.

112. *Ibid.*, at paragraphs 289 and 290.

113. European Court of Human Rights, *Gongadze v. Ukraine*, Application No. 34056/02, Judgment of 8 November 2005, paragraph 164.

114. Inter-American Court of Human Rights, *González et al. (“Cotton Field”) v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 16 November 2009, Series C No. 205, paragraph 258.

115. *Ibid.*, at paragraph 282.

request State protection". While the Joint Declaration urges the establishment of a specific class of "crimes against freedom of expression" as a measure of prevention, it focuses on preventive non-legal measures. These include the following:

- i. appropriate training on crimes against freedom of expression, including gender specific crimes, should be provided to relevant law enforcement officials, including the police and prosecutors, as well, where necessary, to military personnel;
- ii. operation manuals and guidelines should be developed and implemented for law enforcement officials when dealing with crimes against freedom of expression;
- iii. training supported by the State should be available for individuals who may be at risk of becoming victims of crimes against freedom of expression and this issue should be covered in university courses on journalism and communications;
- iv. systems to ensure effective access to information about the circumstances, investigation and prosecution of crimes against freedom of expression, including media access to the courts, should be put in place, subject to appropriate guarantees of confidentiality; and
- v. consideration should be given to putting in place general measures of protection such as providing health care, insurance and other benefit programmes to individuals who may be at risk of becoming victims of crimes against freedom of expression (UN Office of the High Commissioner for Human Rights 2012: paragraph 2c).

The UN Plan of Action takes an expansive view of "prevention mechanisms and actions to address some of the root causes of violence against journalists and of impunity" which includes measures to address corruption and organised crime, as well as "laws that curtail freedom of expression (e.g. overly restrictive defamation laws)" (UNESCO 2012: paragraph 1.6). It encourages states "to take an active role in the prevention of attacks against journalists, and take prompt action in response to attacks by establishing national emergency mechanisms" (UNESCO 2012: paragraph 5.8).

The following sections highlight various key elements of the duty to prevent.

4.3.2. Fostering a climate for prevention

States should foster a climate within society that prevents attacks on journalists and media workers from occurring in the first place. Such a climate could be nurtured in numerous ways.

Crimes against freedom of expression

As indicated above, states should establish a specific category of crimes against freedom of expression in order to use the dissuasive power of criminal law to prevent violence against journalists. The 2012 Joint Declaration recommends that "the category of crimes against freedom of expression should be recognised in the

criminal law, either explicitly or as an aggravated circumstance leading to heavier penalties for such crimes, taking into account their serious nature” (UN Office of the High Commissioner for Human Rights 2012). This draws from UNESCO Resolution 29, which calls on states to “refine legislation to make it possible to prosecute and sentence those who instigate the assassination of persons exercising the right to freedom of expression” (UNESCO 1997).

Speaking out

State officials should positively use their freedom of expression to “unequivocally condemn attacks committed in reprisal for the exercise of freedom of expression and should refrain from making statements that are likely to increase the vulnerability of those who are targeted for exercising their right to freedom of expression” (UN Office of the High Commissioner for Human Rights 2012). They should therefore consider the swift and energetic condemnation of attacks on journalists and media workers as an aspect of their duty to punish those responsible, but also as an aspect of their duty to prevent.¹¹⁶ As the Special Rapporteur on extrajudicial, summary or arbitrary executions recommended, “a clear public stand should be taken at the highest level of government to condemn extrajudicial, summary or arbitrary executions of journalists and threats to their lives, and to re-emphasise the important role of journalists in society” (UN Human Rights Council 2012c: paragraph 110), a view also taken by the Council of Europe Commissioner for Human Rights (2011: foreword).

In *Perozo et al. v. Venezuela*, the Inter-American Court of Human Rights considered attacks on the employees of a television company against the backdrop of statements made by high-ranking public officials that the company, its owners and executives were “enemies of the revolution”, “enemies of the people of Venezuela”, “fascist” and participants in the 2002 *coup d’état* against President Hugo Chávez.¹¹⁷ The public officials obviously had a right to express themselves, but this should be exercised with special care in sensitive social situations. Since public officials are “in a position of guarantors of the fundamental rights”, “their statements cannot be such that they disregard said rights so that they must not amount to a form of interference with or pressure impairing the rights of those who intend to contribute to public deliberation”. This particular “duty of special care is particularly emphasized in those situations of greater social conflict, disorderly conducts or social and political bias”.¹¹⁸

Education and training

States should ensure that relevant officials receive appropriate education and training on the protection of journalists. The Special Rapporteurs of the UN and OAS have noted “that properly educating State security forces on the role of the press in a

116. Inter-American Court of Human Rights, *Ríos et al. v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 28 January 2009, Series C No. 194, paragraph 151.

117. Inter-American Court of Human Rights, *Perozo et al. v. Venezuela*, Preliminary, Judgment of 28 January 2009, Series C No. 195, paragraphs 141-142, 139.

118. *Ibid.*, at paragraphs 141-142, 151.

democratic society is an important step in preventing violence against journalists and media workers in situations of social unrest” (UN and OAS 2013). According to the 2012 Joint Declaration, while relevant law-enforcement and military officials should have appropriate training and education programmes, including “operational manuals and guidelines”, on “crimes against freedom of expression, including gender specific crimes”, those “who may be at risk of becoming victims” of such crimes should also have access to state-supported training, and university courses on journalism and communications should address the issue too (UN Office of the High Commissioner for Human Rights 2012).

As regards *Vélez Restrepo and Family v. Colombia*, the Inter-American Court of Human Rights appreciated “the measures taken by Colombia ... through directives that seek to raise awareness within the Armed Forces about the work of journalists and social communicators and the danger they face, especially during armed conflicts, and also about the necessary respect they must exercise so that the latter can exercise their profession without obstacles”.¹¹⁹ Nonetheless, it ordered the Colombian state to “incorporate into its human rights education programs for the Armed Forces, a specific module on the protection of the right to freedom of thought and expression and on the work of journalists and social communicators”.¹²⁰

Data-gathering

In order to protect individuals but also to prevent future attacks, states should collect and maintain “detailed and disaggregated statistics” on attacks on journalists and media workers as well as “the prosecution of these crimes” (UN Office of the High Commissioner for Human Rights 2012). Such data-gathering by states on killings and threats to journalists and media workers should be complemented by similar efforts by intergovernmental and non-governmental organisations, and should “analyse the trends and developments, including in a gender sensitive way” (UN Human Rights Council 2012c: paragraph 107).

Female journalists

The particular vulnerability and “specific risks faced by women journalists in the exercise of their work” means that states should adopt a gender-sensitive approach when considering measures to address the safety of journalists, according to the UN Human Rights Council (2013b: paragraph 3). Such a “gender-sensitive approach” has also been endorsed by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (UN Human Rights Council 2012b: paragraph 52). Education and training programmes should therefore serve to counter gender stereotypes about female journalists and media professionals who may be especially exposed to certain types of attacks (OAS Inter-American Commission on Human Rights

119. Inter-American Court of Human Rights, *Vélez Restrepo and Family v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 3 September 2012, Series C No. 248, paragraph 277.

120. *Ibid.*, at paragraph 317.

2011: paragraph 181). The growing phenomenon of online attacks on female journalists and other communicators highlights that responses to these gendered attacks in particular need to encompass, among other things, gender-sensitive training at journalism schools, as well as measures to combat society misogyny more generally.

4.3.3. An environment for a free media

From a freedom of expression perspective, states should go one step beyond preventing attacks against journalists and media workers who may be at risk from such attacks: they should “also [create] an environment where independent, free and pluralistic media can flourish and journalists are not placed at risk of imprisonment” (UN Human Rights Council 2012b: paragraph 78). In terms of the legal framework, there should be two key features for such an environment to exist: first, journalists should not be forced to reveal their sources; and, second, they should not be charged with criminal defamation.

Confidentiality of sources

While the Human Rights Committee endorsed this “limited journalistic privilege not to disclose information sources” through General Comment No. 34 at the international level (UN Human Rights Committee 2011: paragraph 45), it has also been emphasised on numerous occasions by regional bodies of the Council of Europe,¹²¹ the African Commission on Human and Peoples’ Rights (African Commission on Human and Peoples’ Rights 2002: XV), and the OAS Inter-American Commission on Human Rights (2000: principle 8). This “right of journalists not to disclose their sources except under very narrowly defined circumstances” is significant for the protection of journalists and media workers as well as their sources from attack.¹²² As the Office of the OAS Special Rapporteur on freedom of expression recently observed “the protection of confidential sources not only contributes to the press’s fundamental role as watchdog but also helps to prevent journalists from becoming victims of violence” (OAS Inter-American Commission on Human Rights 2013: paragraph 54). The imposition of an obligation upon a journalist to reveal her/his sources or even the perception that there exists such an obligation “not only limits their ability to access sources of information, but also increases their risk of being targeted by violent groups”, particularly in situations of social unrest (UN and OAS 2013).

The protection of journalistic sources has been prioritised by the European Court of Human Rights as “one of the basic conditions for press freedom” since the seminal case of *Goodwin v. the United Kingdom*.¹²³ In that case, the Court held:

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

121. See for example, Council of Europe Committee of Ministers (2000); Council of Europe Parliamentary Assembly (2011).

122. UN Human Rights Council (2012c) at paragraph 59, referring to Council of Europe Parliamentary Assembly (2005, 2007a, 2010).

123. European Court of Human Rights, *Goodwin v. the United Kingdom*, Application No. 17488/90, Judgment of 27 March 1996, paragraph 39.

press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest.¹²⁴

This protection is “part and parcel of the right to information”, rather than a “mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of [the] sources”.¹²⁵ Any orders requiring disclosure of the journalists’ sources must be justified in the public interest. If they are not, they will “have a detrimental impact not only on the source in question, whose identity may be revealed, but also on the newspaper against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure and on the members of the public, who have an interest in receiving information imparted through anonymous sources and who are also potential sources themselves”.¹²⁶ In *Sanoma Uitgevers BV v. the Netherlands*, the Grand Chamber of the European Court of Human Rights 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.¹²⁷ The Court held that whether an order for disclosure actually resulted in the disclosure or prosecution of journalistic sources is not decisive in determining whether there has been a violation of the journalist’s rights under Article 10 of the ECHR. This is because “a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources”.¹²⁸

The European Court of Human Rights 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.¹²⁹

124. Ibid.

125. European Court of Human Rights, *Tillack v. Belgium*, Application No. 20477/05, Judgment of 27 November 2007, paragraph 65.

126. European Court of Human Rights, *Financial Times Ltd and others v. the United Kingdom*, Application No. 821/03, Judgment of 15 December 2009, paragraph 63.

127. European Court of Human Rights, *Sanoma Uitgevers BV v. Netherlands*, Application No. 38224/03, Judgment of the Grand Chamber of 9 September 2010.

128. Ibid., at 71.

129. European Court of Human Rights, *Weber and Saravia v. Germany*, Application No. 54934/00, admissibility decision of 29 June 2006, paragraph 145. On the issue of surveillance, see also European Court of Human Rights, *Bucur and Toma v. Romania*, Application No. 40238/02, Judgment of 8 January 2013, in which the court found a violation of Article 10 in the case of a whistleblower who was sanctioned (with a two-year suspended prison sentence) for releasing information to the media about the intelligence services surveillance of journalists, politicians and businesspeople.

Criminal defamation

Laws on criminal defamation, alongside violence against journalists, have been identified as one of the key challenges to freedom of expression by intergovernmental authorities on freedom of expression (UN Human Rights Council 2010: paragraph 2; OAS Inter-American Commission on Human Rights 2009: paragraph 55). The Special Rapporteur on freedom of opinion and expression has on numerous occasions expressed his concern “at the continuing existence and use of criminal laws against journalists and members of the media, which are often used by authorities to suppress ‘inconvenient’ information and to prevent journalists from reporting on similar matters in the future”, particularly matters in the public interest. The mandate-holder has recommended the decriminalisation of defamation laws everywhere, on the grounds that they “are inherently harsh and have a disproportionate chilling effect on the right to freedom of expression” (UN Human Rights Council 2012b: paragraphs 79 and 105) and financial sanctions for civil defamation “to be strictly proportionate to the harm caused and limited by law” (ibid: paragraphs 79 and 106). Defamation should only breach civil law and not criminal law, according to the UN Plan of Action (UNESCO 2012: point 5.9). The Parliamentary Assembly of the Council of Europe has also urged member states to abolish prison sentences for defamation without delay (Council of Europe Parliamentary Assembly 2007b).

While the UN Human Rights Committee and the European Court of Human Rights have not held that criminal defamation laws should be repealed as such, the circumstances in which these bodies will accept them are very limited. In General Comment No. 34, the UN Human Rights Committee has urged states to consider the decriminalisation of defamation, stating that “the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty”. Furthermore, according to the committee, a state should not “indict a person for criminal defamation, but then not to proceed to trial expeditiously [as] such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others” (UN Human Rights Council 2011: paragraph 47).

Although the European Court of Human Rights has indicated that criminal law sanctions for defamation are not necessarily disproportionate, it will take into account the imposition of criminal sanctions in considering the issue of proportionality.¹³⁰ Prison sentences have by their “very nature ... a chilling effect on the exercise of journalistic freedom”.¹³¹ Therefore “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 seriously impaired, as, for example, in cases of hate

130. European Court of Human Rights, *Radio France and others v. France*, Application No. 53984/00, Judgment of 30 March 2004, paragraph 40; European Court of Human Rights, *Lindon, Otchakovsky-Laurens and July v. France*, Application Nos. 21279/02 and 36448/02, 22 October 2007, paragraph 59.

131. European Court of Human Rights, *Mahmudov and Agazade v. Azerbaijan*, Application No. 35877/04, Judgment of 18 December 2008, paragraph 51.

speech or incitement to violence”.¹³² A conviction for defamation involving a prison sentence for insulting public officials may therefore be found to be in violation of the Convention.¹³³

5. CONCLUSION

This chapter has shown that international and regional human rights bodies and courts have developed over the years a growing body of norms and principles on the protection and safety of journalists and media workers. Indeed, the multiplicity of sources – jurisprudence of regional courts, resolutions from UN human rights bodies, declarations and reports of international authorities and experts, and the UN Plan of Action – together offer both a corpus of law as well as credible policy guidance for states in developing effective responses to violence against journalists and media workers around the world today and the related impunity that often exists. A greater awareness and understanding of this legal and policy framework by states, NGOs and the media itself would surely facilitate the implementation of states’ international obligations and responsibilities to counter the challenge of ongoing attacks against journalists and media workers, as well as emerging violations.

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Chapter 3

Does the remedy jurisprudence of the European Court of Human Rights do enough for media freedom?

Başak Çalı¹

There is a tremendous sense of urgency about enhancing the safety of journalists and other media actors, and it was repeatedly stressed that there is a need to move from the current reliance on reactionary measures to a more pre-emptive mode (McGonagle 2014).

1. INTRODUCTION

European human rights law holds that freedom of expression, in particular protection for journalists to impart information and for the public to receive it, is a fundamental pillar of European human rights protection. In spite of this, and in spite of the case law that has been developed since the 1970s,² media freedom cases continue to be brought before the European Court of Human Rights (the Court). What is more, many high-profile freedom of expression cases concerning the protection of journalists are pending execution before the Committee of Ministers.³ The question has to be asked as to whether the European human rights system as a whole is adequately equipped to address the gap between the immanent value accorded to the protection of journalists and the effective implementation of this value in domestic legislation and practice.

1. Director, Center for Global Public Law and Associate Professor in International Law, Koç University, Istanbul, Turkey, bcali@ku.edu.tr.
2. The statistics from the European Court of Human Rights show that, between 1959 and 2014, the Court found 594 freedom of expression violations (European Court of Human Rights 2015a).
3. See for example *Dink v. Turkey*; *Incal Group v. Turkey*; *Muradova v. Azerbaijan*.

My goal here is to address the protection of the rights of journalists through the use of one of the tools available to entrench rights: the remedy jurisprudence of the European Court of Human Rights. I define remedy jurisprudence as jurisprudence that seeks to effectively remedy existing human rights violations and to prevent similar repetitions in the future. Remedy jurisprudence is distinct from the Court's substantive jurisprudence. In the latter, the Court identifies the core modalities for interpreting rights, their scope and circumstances of legitimate restriction. Remedy jurisprudence seeks an implementation-focused approach to individual cases at hand. It engages more directly with underlying problems that cause rights violations, ways of preventing them in the future and the specific ways in which an individual violation of the European Convention on Human Rights (the Convention) ought to be remedied.

In this chapter I aim to answer two interrelated questions. First, what are the central characteristics of remedy jurisprudence of the European Court of Human Rights in the protection of journalists? Second, is the remedy jurisprudence of the Court adequate in terms of effectively contributing to the much-needed general and individual measures with respect to the protection of journalists and ensuring media freedom?

To answer these questions here I look at the "declaratory judgments" paradigm, which forms the standard approach of the Court to remedies. I argue that this paradigm suffers from two weaknesses in the case of media freedom.

First, the Court's remedy jurisprudence does not send robust signals to states with regard to their compliance with the principles of journalistic freedoms and protection of journalists. This is despite the highly developed substantive jurisprudential account of the importance of freedom of expression in a pluralistic democracy and the close scrutiny of the margin of appreciation of states in infringing these rights. Clearly spelt out principles do not lead to the full implementation of Court judgments due to states' preferences for minimalistic compliance with Court cases and the slow and conventional execution processes before the Committee of Ministers.

Second, the approach of the European Court of Human Rights which focuses on standard setting rather than preventing future violations leads to repetitive cases from countries where the implementation of human rights judgments is not a priority.

In sum, there is a need for the European Court of Human Rights to adopt a more strategic and preventive approach in order to facilitate the narrowing of the gap between principles of media freedom and their implementation on the ground. Although the Committee of Ministers is charged with the execution of human rights judgments and the appropriateness of remedies,⁴ the protection of journalists is an area where the Court can leverage its "normative power"⁵ over states more effectively to support the work of the Committee of Ministers.

4. Alongside these tasks specific to execution, the Committee of Ministers has also taken on an important standard setting task with regard to protection of journalists (see Council of Europe Committee of Ministers 2014). The Russian Federation made a reservation concerning this Committee of Ministers' Declaration, specifically denying its application to "other media actors", as it considers this term to be unspecific and without any basis in binding international legal documents.

5. Normative power of the Court constitutes its guiding power over Council of Member states concerning the appropriate steps to take in the field of human rights law. For more on this, see Çalı and Koch (2014).

In what follows, I first set out the relationship between remedy jurisprudence and effective rights protections in general terms and lay out the central characteristics of the remedy jurisprudence of the European human rights system. I then explore the general trends in the remedy jurisprudence of the Court in the field of freedom of expression, focusing in particular on the protection of journalists and media freedoms. Thirdly, I discuss the weaknesses of current remedy jurisprudence for the effective entrenchment of rights, defend a more strategic approach by the Court to media freedom and respond to potential objections for carving out a carefully delineated, but more activist role for the Court in this field. I conclude by suggesting ways forward within the legal framework of the current system to bridge the gap between principles and practices in the field of the protection of rights of journalists and media freedom across the Council of Europe space.

2. REMEDY JURISPRUDENCE OF THE EUROPEAN HUMAN RIGHTS SYSTEM

The European human rights system is best known for the substantive jurisprudence of the European Court of Human Rights. With over 12 000 judgments delivered, the Court has had the opportunity to interpret all the substantive provisions of the European Convention on Human Rights since it concluded its first case in 1960. Such interpretation has led to groundbreaking jurisprudential work in defining the scope of rights and impermissible grounds for their infringement by treating the Convention as a living instrument.⁶ The Court has well-developed case law and sophisticated right-specific tests for interpreting the individual provisions of the Convention. These set out how positive obligations are to be conceptualised for each right category,⁷ how qualified rights can be upheld in concrete circumstances and what relationship exists between the margin of state authorities and the respect for rights.⁸ In the domain of positive obligations, the Court has made significant inroads in the development of procedural obligations that are attached to the substantive positive obligations of the provisions of the Convention.⁹

While the Court has developed a significant jurisprudence of rights adjudication over time, it has remained conservative in the development of a remedy jurisprudence that corresponds to Convention violations. The Court's remedy jurisprudence for a significant part of its existence remained within the declaratory judgments paradigm. The Court, in its dicta, explains why a state has violated the Convention, but it does not offer general or specific guidance on (i) how to remedy the violation

6. See representatively, *Demir and Baykara v. Turkey*, 12 November 2008 [GC], paragraphs 65-68.

7. On the development of positive obligations, see Mowbray (2004).

8. See representatively, *Smith and Grady v. the United Kingdom*.

9. In the case of Article 2 and Article 3 violations, this is particularly well developed. See generally, *Sayev and others v. Russia*, Application No. 43368/04, 21 June 2011, paragraphs 186-187; *Anguelova v. Bulgaria*, Application No. 38361/97, 13 June 2002, paragraph 161; *Mahmut Kaya v. Turkey*, Application No. 22535/93, Judgment of 28 March 2000, paragraph 107; and, as regards allegations of ill-treatment, see, for example, *El-Masri v. The former Yugoslav Republic of Macedonia* above, paragraph 255; *Labita v. Italia*, Application No. 26772/95, 6 April 2000, paragraph 131. See also Brems and Lavrysen (2013).

in all its dimensions or (ii) what measures a state ought to take in order to prevent repeat violations in the future. Instead, the Court awards pecuniary or non-pecuniary compensation to the victims of human rights violations under Article 41 of the Convention, and on the basis of equity.¹⁰ The Court has justified this by pointing to the division of labour between the Committee of Ministers and the European Court of Human Rights in the execution of judgments under Article 46 of the Convention.¹¹ It has traditionally held that it does not enjoy the authority to grant remedial measures.¹²

It is well known that, from the 1990s onwards, the Court came up against a seemingly Sisyphean case load. The sources of this – an increase in cases from a small number of Council of Europe member states¹³ and repetitive cases¹⁴ – point to a lack of effective implementation of Convention standards in domestic law, policy and case law. The Convention system as a whole responded to the case load by taking a number of measures. At the institutional level there were attempts to increase the efficiency of the Court's work.¹⁵ At the political level, the Council of Europe made the effective implementation of human rights judgments a central policy concern. This concern can be seen in implementation-focused declarations from the Committee of Ministers. As early as 2000, the Committee of Ministers recommended that cases where the Court found a violation would be best remedied by enabling retrials (Council of Europe Committee of Ministers 2000). Significantly, in 2004, the Committee of Ministers asked the Court's assistance through more guidance on the implementation of its judgments (Council of Europe Committee of Ministers 2004). The Committee of Ministers further pointed to the institutional domestic gaps in implementation by asking states to establish focal points for implementation (Council of Europe Committee of Ministers 2008). The implementation of Court judgments in the form of general and specific measures has continued to feature in the work of the Committee of Ministers through high-level declarations in Interlaken, Brighton,

10. It has been pointed out by authors that the Court has followed a narrow interpretation of the notion of "just satisfaction" in its Article 41, interpreting just satisfaction only to mean compensation. See Shelton (2006) page 197.

11. The Court's well-known dictum on this matter is "The Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment". See, *inter alia*, *Scozzari and Giunta v. Italy* [GC], Nos. 39221/98 and 41963/98, paragraph 249, ECHR 2000-VIII; and *Brumărescu v. Romania* (just satisfaction) [GC], No. 28342/95, paragraph 20, ECHR 2001-I.

12. Cf. *Saïdi v. France*, 20 September 1993, paragraph 47, Series A No. 261-C.

13. In May 2015, five countries – Ukraine, Russia, Turkey, Italy and Romania – shared 68.5% of all pending cases, amounting to 64 350 cases before the Court. See European Court of Human Rights (2015b).

14. On July 2014 of the 85 000 cases on the Court's docket, 39 721 were repetitive applications. See European Court of Human Rights (2014).

15. Information on the reform process of the European Court of Human Rights is available at www.echr.coe.int/Pages/home.aspx?p=court/reform&c=#n13740528735758554841286_pointer, accessed 21 July 2015.

Izmir and, most recently, in Brussels in 2015.¹⁶ The Parliamentary Assembly of the Council of Europe also supported this, asking the Court for more frequent guidance on general and individual measures (Council of Europe Parliamentary Assembly 2000: paragraph 11 B).

Alongside the concern with implementation of Court judgments, the political processes within the Council of Europe further emphasised the need for the Court to pay due regard to the good faith efforts of domestic legal systems to give domestic effect to Convention rights. In the Brighton Declaration, this culminated in an emphasis on the principle of subsidiarity, pointing to domestic systems as the first place to respect Convention rights. Protocol No. 15 reflects this concern, where the “margin of appreciation” is added into the preamble of the Convention.

These twin developments, the focus on implementation and the concern for the subsidiarity of the Convention system, have further led to qualitative shifts in the interpretation of the Convention by the Court. There are two corresponding characteristics of this shift.

First, the Court has positively responded to the invitation to make its judgments more “implementation friendly” by specifying the kinds of measures that need to be taken by domestic legal systems either in the dicta of the Court judgments, or by creating designated implementation-focused remarks under Article 46 sections of the Court’s judgments or under a procedure it introduced in 2004 – “pilot judgments”.

As a matter of substantive case law, the Court, in the dicta of its judgments, has started to point out that the presence and/or absence of legislative and regulatory frameworks may lead to human rights violations.¹⁷ In this way, the Court has chosen to signal to states and the Committee of Ministers what types of legislative measures, mindset shifts and even urgent individual measures are required to prevent future human rights violations in similar cases and to remedy the applications.

The Court, in particular since 2004, has started making innovative use of Article 46 of the European Convention on Human Rights by placing a separate section in its judgments to discuss individual and general measures. It has made use of Article 46 to illustrate the necessity of taking specific individual measures, but the exact specification of individual measures has, to date, been rare.¹⁸ The Court, for example, has asked for the ending of unlawful detention and unlawful imprisonment, the lifting of imprisonment orders, the execution of a particular court judgment, and for information to be provided to an applicant by the intelligence services.¹⁹ In instances where the Court specifies such measures, thus departing from its declaratory paradigm, this is justified by a “logical necessity” test. Here, the Court states that no other

16. See the “Brighton Declaration”, paragraphs 3 and 4; also paragraph 12.c, the “Interlaken Declaration”, paragraph 3, and Action Plan paragraph E.9; and the “Izmir Declaration”, paragraph 6 (Council of Europe Committee of Ministers 2010, 2011, 2012).

17. See, *inter alia*, *Opuz v. Turkey*.

18. For important examples of these, see *Assidanze v. Georgia*, *Volkov v. Ukraine*, *Fattulayev v. Azerbaijan*.

19. See, *inter alia*, *Assanidze v. Georgia*, *Fattullayev v. Azerbaijan*, *Emre v. Switzerland*, *Karanonić v. Bosnia and Herzegovina*.

measure would, by way of logical conclusion, satisfy the required remedy.²⁰ As to general measures, the Court turns to Article 46 when it identifies that a violation in a particular case is systemic or has systematic features. The separate discussion of systemic or structural problems that need to be remedied to prevent future violations or compliance with judgments is often regarded as a stronger signal to states and the Committee of Ministers than any discussion of similar issues in the dicta of the Court.

The final response of the Court to the implementation crisis has been to institute the “pilot judgment procedure” (Rules of the Court, European Court of Human Rights, 2011). The pilot judgment procedure is most relevant to the repetitive cases problem. By declaring a pilot case, often one amongst hundreds of similar cases, the Court identifies systemic and structural problems that lead to repetitive human rights violations. It demands that states urgently tackle the problems identified, often through the introduction of legislation, within a specified timeframe.²¹ In the meantime, the Court freezes processing similar cases and awaits information from the Committee of Ministers as to the pilot judgment’s implementation.

Secondly, and as a response to the call for more direct engagement with the principle of subsidiarity, the Court has introduced two nascent doctrines – the “responsible courts doctrine” and “responsible parliaments doctrine”.²² Under the first of these, the Court recognises that, provided that domestic courts are applying the well-established principles of the Convention in their judicial deliberations, it is happy not to review the substantive outcomes of deliberations.²³ In the wording of the Court, it would require “strong reasons” for directly passing judgment on the outcome of the deliberations.²⁴ Under its nascent responsible parliaments doctrine, the Court recognises that it will pay due regard to: (i) whether the substantive political deliberations carefully weigh the rights at stake; and (ii) whether the procedural quality of the deliberations are sufficiently inclusive, so as to cover the interests of all relevant stakeholders.²⁵ The impact of these two evolving doctrines, centring on the notion of subsidiarity for the remedy jurisprudence of the Court, is the explicit assessment of the available domestic judicial and legislative remedies at their very source. In other words, the Court has taken a more explicit approach in assessing the adequacy of domestic remedies, in the form of judicial decisions and parliamentary deliberations. It has established a dialogue with its judicial counterparts on the correct application of Convention principles.

20. As the Court states: “In certain cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure.” *Assanidze v. Georgia* [GC], No. 71503/01, paragraph 202. In this respect, use of specific individual measures by the Court is qualitatively different from the use of the same measures by the Inter-American Court of Human Rights. The latter, as a matter of principle, identifies a full list of individual measures that need to be taken in each and every case. See Shelton (2000).

21. The Court proposes time limits of one year or eighteen months, but there are no clear rules on the appropriate time limits and these are to be exercised on a case-by-case basis (European Court of Human Rights 2015d).

22. On the contours of this doctrine, see Çalı (2013).

23. For an application of this doctrine, see *Van Hannover v. Germany* (2).

24. *Ibid.*, paragraph 107.

25. *Animal Defenders v. the United Kingdom, SAS v. France*.

3. THE REMEDY JURISPRUDENCE OF THE EUROPEAN HUMAN RIGHTS SYSTEM AND MEDIA FREEDOM

I now aim to assess the impact of the qualitative shift in the interpretation of the Convention towards a more implementation-focused approach in the field of media freedom. In what ways has the Court's development of remedy jurisprudence in its overall case law contributed to ensuring more effective remedies in cases where violations of media freedom take place? In so doing, I aim to assess the standard-setting and implementation-focused dicta of the Court's case law, the use of specific individual measures, and resort to Article 46 judgments and pilot judgments.

3.1. The standard-setting dicta of the Court and implementation

It is well known that the Court views freedom of expression as a cornerstone of the Convention.²⁶ Freedom of expression, under the Court's case law is a central indicator of democratic governance. It does not only need protection in its own right; its protection is instrumental to the health of a pluralist democratic regime.²⁷ In this respect, media freedom, in particular the protection of journalists²⁸ and media outlets,²⁹ and, more recently, citizens and non-governmental actors who impart information for public debate,³⁰ receive special protection under Article 10 of the Convention. Media workers are "public watchdogs".³¹ The Court in its substantive case law concerning media freedom emphasises that journalists enjoy protection both *qua* individuals and *qua* journalists.³² The reason for the latter is the importance of the protection of journalists and their medium to impart public information for society as a whole. A lack of protection for journalists harms both the rights of journalists and the public's right to receive information. In the famous wording of the Court, any type of curtailment of the rights of journalists and media produces a "chilling effect",³³ undermining both individual rights and the quality of a democratic pluralistic society. Restrictions on media freedom must be construed very strictly,

26. *Stoll v. Switzerland*, No. 69698/01, 10 December 2007, paragraph 110.

27. *MGN v. the United Kingdom*, Application No. 39401/04, Judgment of 18 January 2001 at paragraph 141; European Court of Human Rights, *Flux v. Moldova*, Application No. 28702/03, Judgment of 12 November 2007 at paragraph 43; European Court of Human Rights, *Castells v. Spain*, Application No. 11798/85, Judgment of 23 April 1992 at paragraph 43; European Court of Human Rights, *Thorgeir Thorgeirson v. Iceland*, Application No. 13778/88, Judgment of 25 June 1992 at paragraph 63.

28. Cf. *Observer and Guardian v. the United Kingdom*, 26 November 1991, Series A No. 216; *De Haes and Gijssels v. Belgium*, 24 February 1997, paragraph 37, *Recueil* 1997-I.

29. Cf. *Case Centro Europa 7 S.r.l. and Di Stefano v. Italy*; *RTBF v. Belgium*, Judgment of 29 March 2011.

30. European Court of Human Rights, *Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05, Judgment of 14 April 2009; European Court of Human Rights, *Youth Initiative for Human Rights v. Serbia*, Application No. 48105/08, Judgment of the Grand Chamber of 22 April 2013 at paragraph 20.

31. *Observer and Guardian v. the United Kingdom*, 26 November 1991, paragraph 59, Series A No. 216, and *The Sunday Times v. the United Kingdom (No. 2)*, 26 November 1991, paragraph 50, Series A No. 217.

32. *Matúz v. Hungary* (2014).

33. *Cumpăna and Mazare v. Romania*, 33348/96, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), 17 December 2004.

leaving a very narrow margin of appreciation to states and justifying the intensity of review by the Court.³⁴ A state must accept a wide scope of positive obligations in order to protect journalists, including from third parties,³⁵ and to create an enabling environment in which journalists are able to do their work.³⁶

Despite the central importance of media freedom for the Convention as a whole, standards with regard to the protection of media freedom have developed within the paradigm of declaratory judgments. That is, in each case where the Court has engaged with media freedom, it has focused on the substantive jurisprudential aspects of the cases. It has, however, left the scope of effective implementation of the judgments to the individual states under the supervision of the Committee of Ministers. In so doing, the Court has highlighted the limited scope of margin of appreciation, the requirement of accessible laws,³⁷ and the necessity³⁸ and proportionality³⁹ of measures taken by the domestic authorities. Undoubtedly, the dicta of the Court have contributed significantly to the discussion of appropriate general and individual remedies that are required by domestic systems before the Committee of Ministers.⁴⁰ This, however, has remained an implicit concern within the case law of the Court, without having the qualities of a specific remedy jurisprudence with a focus on a prevention or a comprehensive remedial approach for injured individuals beyond symbolic monetary compensation.

3.2. Strasbourg standards: focus on domestic court reasoning

It can be argued that, if one reads the well-established case law of the Court, a state party can receive enough guidance on which standards it must strive for and how it must remedy individual rights violations. Indeed, Court judgments on media freedom, when read carefully, often indicate what future failures would lead to further violation judgments. In the Court's overall case law on journalistic freedoms, it would, however, be reasonable to suggest that the Strasbourg Court has been more concerned with offering specific indications to domestic courts rather than to other implementation partners in the domestic contexts – namely parliaments, governments and regulatory agencies. The Court seeks to send clear signals to domestic courts on the requirement to take a freedom of expression angle and on the need to carry out careful scrutiny of the necessity and the proportionality of the interference with the right of expression.

34. *Hertel v. Switzerland*, 25 August 1998, paragraph 46, Reports of Judgments and Decisions 1998-VI; *Tammer v. Estonia*, No. 41205/98, paragraph 59, ECHR 2001-I; and *Steel and Morris v. the United Kingdom*, No. 68416/01, paragraph 87, ECHR 2005.

35. *Özgür Gündem v. Turkey*, No. 23144/93, 16 March 2000, paragraphs 43 and 46.

36. *Dink v. Turkey*, Nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010, paragraph 137.

37. *Editorial Board of Pravoya dela and Shtekel v. Ukraine* (2011), paragraph 65.

38. *Sürek v. Turkey (No. 1)* [GC], No. 26682/95, paragraph 61, ECHR 1999-IV.

39. *Erla Hlynisdóttir v. Iceland* (No.3) (2015).

40. For an overview of the standards that emerge from the case law of the Court concerning media freedom and protection of journalists, see Leach (2013).

As an example of the Court's primary occupation of standard setting for its domestic counterparts, consider the discussion of the deficiencies in the reasoning of the Hungarian domestic courts in the *Matúz* case. Here, the Strasbourg Court decided that journalists working for a public broadcaster continue to enjoy freedom of expression *qua* journalists and they could not be merely treated as civil servants:

as to the manner in which the applicant's labour case was reviewed, the domestic courts found that the mere fact that the applicant had published the book was sufficient to conclude that he had acted to his employer's detriment. However, they paid no heed to the applicant's argument that he had been exercising his freedom of expression in the public interest, and limited their analysis to finding that he had breached his contractual obligations. Moreover, the Supreme Court's judgment explicitly stated that the subject matter of the case was limited to an employment dispute and did not concern the applicant's fundamental rights. As a result, they did not examine whether and how the subject matter of the applicant's book and the context of its publication could have affected the permissible scope of restriction on his freedom of expression, although it is such an approach that, in principle, would have been compatible with the Convention standards.⁴¹

This dictum offers ample guidance for domestic courts considering a similar future case in its emphasis that, in cases that involve journalists, domestic courts must consider the protection of freedom of expression as a priority. When the nature of journalistic freedom judgments are in effect a judicial dialogue between the Court and its domestic counterparts, and the Court, through its judgments, is guiding domestic courts in their correct application of Convention standards, the declaratory judgment model, with detailed dicta on substantive standards, has a lot of purchase. In this context, as both Strasbourg and domestic courts are independent judicial institutions, the best way to protect the freedom of journalists through courts would be through standard setting by the European Court of Human Rights. The Court has also confirmed this in its own judgments. For example in the *Animal Defenders* case, the Court explicitly stated that "the quality of ... judicial review of the necessity of the measure is of particular importance in this respect, including the operation of the relevant margin of appreciation".⁴² The Court expects that similar violations will be avoided by the translation and effective dissemination of this judgment, a standard request by the Committee of Ministers to member states, and the clear communication of standards by Strasbourg to domestic courts.

Having recognised the dialogue the Court has established with domestic courts concerning journalistic freedoms, it is also important to note that, despite the specificity of the dicta, this approach still faces difficulties in ensuring the effective implementation of judgments, as can best be seen in the Court's approach to general criminal defamation laws. Criminal defamation trials as interferences in journalists' rights have become commonplace in some Council of Europe member states. Since

41. *Matúz v. Hungary*, paragraph 49.

42. *Animal Defenders International v. the United Kingdom* [GC], No. 48876/08, paragraph 108, ECHR 2013.

the Court delivered its first judgment in a defamation case in *Lingens v. Austria*,⁴³ it has, as a matter of general principle, indicated that criminal defamation laws should not be used when there are civil alternatives.⁴⁴ It has added that, in general, criminal defamation laws should only be used in response to extreme instances of defamation.⁴⁵ It also pointed out, however, that the existence of criminal defamation laws does not in itself violate the freedom of expression.⁴⁶ From a substantive jurisprudence perspective, not declaring criminal defamation laws which are contrary to media freedom incompatible with freedom of expression is not problematic per se. This is because the Court has a very strict test for the possible proportionate use of such laws and deems such laws inappropriate if they are used when there are civil alternatives.

From an effective implementation perspective, however, this runs into difficulties. Criminal defamation laws may have a very wide scope and are often used as a tool to indirectly punish journalistic activities. Even in cases when journalists are acquitted, criminal trials produce a chilling effect on media freedom as a whole. Where criminal defamation laws are present, the Court's substantive jurisprudential approach relies on the positive co-operation of both prosecutors and judges for the appropriate and rare use of such laws. Where states do not co-operate positively or when there are systematic administration of justice problems in a country, however, substantive principles cannot help in putting an end to repetitive cases.⁴⁷ In other words, the approach of establishing a standard for the rare use of criminal defamation laws does not provide an effective outcome in countries where such laws may be used to suppress journalists due to larger systemic problems with prosecutorial and court practices.

3.3. Strasbourg standard-setting dicta and other implementing actors

While we may hold that the standard-focused dicta offer ample guidance to domestic judges about how to use Convention standards, the same observation does not hold for domestic legislators, prosecutors, government actors or other regulatory actors who may affect the guarantee of media freedoms. Instead, we may argue that the Court primarily relies on good faith obligations of the other implementing actors in paying due attention to the findings of judgments from Strasbourg.

When we look at political science research findings about compliance with Court judgments, however, the dominant view is that the mere setting of standards often may not necessarily lead to the effective implementation of judgments. In the face

43. *Lingens v. Austria*, 8 July 1986, Application No. 9815/82.

44. *Mahmudov and Agadze v. Azerbaijan*, Application No. 35877/04, 18 December 2008.

45. *Gavrilovici v. Moldova*, Application No. 25464/05, 15 December 2009, paragraph 60.

46. *Makarenko v. Russia*, 22 December 2009, Application No. 5962/03, paragraph 156.

47. See for example, cases under enhanced supervision before the Committee of Ministers with respect to freedom of the press, *Muradova v. Azerbaijan*, *Najafli v. Azerbaijan*, and *Rizvanov v. Azerbaijan*, available at www.coe.int/t/dghl/monitoring/execution/reports/pendingcases_EN.asp?CaseTitleOrNumber=&StateCode=AZE&SectionCode=ENHANCED+SUPERVISION, accessed 22 July 2015.

of a lack of clear or specific guidance, states often may opt for minimum rather than maximum compliance (Agnostiou 2013; Hillbrecht 2014). They may also not have the resources to identify the correct steps to comply with judgments in a timely fashion (Chayes and Chayes 1998). In the European human rights system, the Committee of Ministers monitors the specification of remedies, and technical assistance for compliance with judgments is provided by the Secretariat for the Execution of the Judgments of the European Court of Human Rights.⁴⁸ In other words, the Strasbourg dicta are not merely left to their own devices.

This secondary mechanism, however, faces important delays in monitoring and the risk of under-monitoring and politicised monitoring exists.⁴⁹ The focus of the Court as regards developing substantive standards rather than an effective remedy jurisprudence may not, therefore, be productive in bringing about effective implementation of judgments by political organs.

There is, of course, an obvious dilemma here. The Court risks either getting too involved in implementation or it risks offering an ineffective implementation framework for the rights of a protected group that it perceives as being a cornerstone of a pluralist democracy.

This dilemma can best be seen in positive obligations cases concerning journalistic freedoms where the Court by implication demands that states introduce new legislation in order to afford protection to journalistic freedoms. Two Turkish cases are fitting examples of this. By following its declaratory approach, the Court, in its dictum, indicated in *Özgür Gündem* that the state had positive obligations to protect journalists from hostile third parties.⁵⁰ In *Dink* it went further and indicated that states have an obligation to create an “efficient system to protect authors and journalists” and “an environment which allows full participation in open debates”.⁵¹ When taken to their full conclusion, these obligations require explicit preventive remedies and early warning mechanisms for attacks on the safety of journalists, as well as media laws that do not allow for monopolies to emerge.

When we look at the range of general measures put into effect by Turkey since 2007, they include: the translation of the judgment into Turkish and its dissemination, awareness training activities for judges and prosecutors, a Ministry of the Interior Circular of 17 September 2010 on protective measures for “threatened persons” and an amendment to Article 301 of the Criminal Code so that prosecutions under this provision require the authorisation of the Ministry of Justice thus leading to the prosecution of fewer individuals.⁵² While the case is still under enhanced supervision, from a look at the measures taken so far one can identify a gap between the spirit of the dictum and measures taken. While the dictum makes reference to an

48. On this compliance system, see Çalı and Koch (2014).

49. Ibid.

50. *Özgür Gündem v. Turkey*.

51. *Dink v. Turkey*, Nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010, paragraph 137.

52. See *Dink v. Turkey*, (Enhanced Supervision) available at www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=Dink&StateCode=&SectionCode=, accessed 22 July 2015.

efficient and preventative system to protect journalists, the general measure refers to a circular for all threatened persons, thereby undermining the idea that general measures should be centred on vulnerable journalists. The measures also do not indicate any effort by the authorities to carry out an assessment of the media environment as to whether it is an enabling environment for all in terms of access and free participation. The general measures thus far confirm the insights of those that view states as minimalistic compliers.

3.4. Implementation-focused dicta of the Court

The implementation-focused dicta of the Court place a more explicit emphasis on preventing future similar human rights violations. In this respect, the Court may indicate what existing legal frameworks are clearly inadequate and need amending or what new legal frameworks, in specific terms, need to be put in place. All of these discussions, however, take place in the dicta. It is, therefore, up to the Committee of Ministers and the Department for the Execution of Judgments to identify these specific directions.

In terms of legislation review, an important example is *Cumpănă and Mazăre v. Romania* where the Court laid out an almost absolute rule that prison sentences for defamation are never justified under Article 10, where any defamatory statements concern a matter of public interest.⁵³ Here, the Court stated that:

Although sentencing is in principle a matter for the national courts, the Court considers that 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 seriously impaired, as, for example, in the case of hate speech or incitement to violence.⁵⁴

In *Belpietro v. Italy*, the Court reaffirmed this standard, thus highlighting the need for specific changes in the scope of prison sentences.

In recent years, the Court has developed a stream of case law on media freedom where the Court connects rights violations with the absence of domestic safeguards for media freedom. Compared to its standard-setting dicta, this offers a much more implementation-focused approach to cases. In this way, the Court is able to directly engage with the adequacy of existing domestic remedies and give specific directions to state authorities with regard to putting new legislation in place. Two positive examples of this approach are *Editorial Board of Pravoya Delo and Shtekel v. Ukraine* (2011) and *De Telegraaf v. The Netherlands* (2012).

In the first case, *Pravoye Delo*, a Ukrainian newspaper, published an anonymous letter posted on an Internet site that accused senior local officials of involvement in criminal activities. The newspaper credited the source of the information and specified that the content of the letter was not verified and could, indeed, be false. One of the officials cited in the letter sought damages for defamation, resulting in an award against the editorial board and editor-in-chief of the newspaper. Ukrainian

53. *Cumpănă and Mazăre v. Romania*, Application No. 33348/93 (2004).

54. *Ibid.*, paragraph 115.

domestic law exempts journalists from civil responsibility for referencing materials that have already been published by another press outlet. The domestic courts in this case, however, held that the exemption does not apply to material obtained from Internet publications that are not duly registered. The Court found that given that the existing law did not regulate registration of Internet media, the journalists could not have foreseen that the exemption did not apply in this instance. The Court pointed out that Ukraine needed a new law that ensured that Ukrainian journalists were not “required to pay compensation in defamation cases if they did not disseminate the untrue information intentionally, acted in good faith and verified the information, or if the injured party failed to use the available possibilities to settle the dispute before going to court”.⁵⁵ In this way, the Court, in its dictum, not only indicated that a general measure in the form of legislation was required, but also pointed out what the scope of the legislation should include.

De Telegraaf v. The Netherlands concerned the right to protect journalistic sources. The Court held that this right has to be safeguarded by sufficient procedural guarantees, including the guarantee *ex ante* of review by a judge or other independent and impartial decision-making bodies, before the police or the public prosecutor have access to information capable of revealing such sources. Having reviewed the Dutch law, the Grand Chamber unanimously concluded that:

the quality of the law was deficient in that there was no procedure attended by adequate legal safeguards for the applicant company in order to enable an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources.⁵⁶

As in the Ukrainian case, despite remaining within the declaratory judgment paradigm, the Court defined the need for a specific legislation that needs to be put in place as a procedural safeguard for journalistic freedoms.

3.5. Specific and urgent individual measures

As discussed earlier, the Court primarily identifies its dicta as a space for it to perform interpretive functions. As a corollary to this, specific individual measures are rarely ordered by the Court in its judgments.⁵⁷ The Court employs specific and urgent individual measures when it indicates that its substantive findings cannot otherwise support any other alternative solutions. This, by its very nature, is a limited approach and it indicates how wary the Court is of involving itself directly with the implementation of its judgments.

Individual measures in the field of journalistic freedom have been used on two occasions and have received speedy responses from recipient states. The first case concerned the ordering of specific individual measures relating to the imprisonment

55. *Editorial Board of Pravoya Delo and Shtekel v. Ukraine* (2011) paragraph 65.

56. *De Telegraaf v. The Netherlands* (2012), paragraph 100.

57. *Maestri v. Italy* [GC], No. 39748/98, paragraph 47, ECHR 2004-I; *Assanidze v. Georgia* [GC], No. 71503/01, paragraph 198, ECHR 2004-II; and *Ilaşcu and Others v. Moldova and Russia* [GC], No. 48787/99, paragraph 487, ECHR 2004-VII.

of a journalist. In the case of *Fattullayev v. Azerbaijan* in 2010,⁵⁸ following the “no real choice” test⁵⁹ for specifying individual measures, and having found that interference in the applicant’s right to freedom of expression through imprisonment was not justified under Article 10, paragraph 2, of the Convention, the Court ruled that:

having regard to the particular circumstances of the case and the urgent need to put an end to the violations of Article 10 of the Convention, the Court considers that, as one of the means to discharge its obligation under Article 46 of the Convention, the respondent State shall secure the applicant’s immediate release.⁶⁰

There is no doubt that this case sent a strong signal from a Court that rarely orders urgent individual measures concerning the vulnerability of journalists to imprisonment. This is also an advance from the earlier case law of the Court, where the Court was unwilling to link the vulnerability of journalists to violations of other substantive Convention rights.⁶¹ The decision to ask for an urgent individual measure is compatible with broader concerns that the Court has with the chilling effects of imprisonment practices. It further creates a precedent for the Court’s view of journalists’ arbitrary imprisonment in the future.

Following on from the *Fattullayev* precedent, the Court has not applied its “no real choice” approach to other cases in which the vulnerability of journalists to harsh government measures is at stake. It is a well-known fact, also in the case law of the Court, that, alongside imprisonment, journalists often become the victims of physical attack in fragile or weak democracies where governments are concerned with suppressing unfavourable expression rather than taking positive measures to protect journalists.⁶²

A telling example of this is the *Najafli v. Azerbaijan* case of 2012. This concerns a journalist being physically assaulted by police officers while he was reporting on a demonstration. He was assaulted despite indicating repeatedly that he was a journalist. The Court found a violation of Article 3 and also made an important finding with regard to Article 10 rights of journalists. The Court stated that “it cannot be disputed that the physical ill-treatment by state agents of journalists while the latter are performing their professional duties seriously hampers their exercise of the right to receive and impart information”.⁶³ In addition, the Court found that a period of three months between the incidents of violation and the launch of the initial relevant procedural steps violated the state’s obligation to carry out an effective investigation under the procedural aspect of Article 3 of the European Convention on Human Rights. Despite the close connection between the beating of the journalist and the importance of journalistic safety and freedoms to society, however, this judgment was delivered as a declaratory one. It was a missed opportunity for the Court to articulate what urgent individual measures would be necessary in such instances. For example, the Court could have asked for a speedy trial of those involved in the

58. *Fattullayev v. Azerbaijan* No. 40984/07, Judgment (Merits and Just Satisfaction), Court (First Section), 22 April 2010.

59. Cf. *Assanidze v. Georgia* [GC], No. 71503/01, paragraph 202.

60. *Fattullayev v. Azerbaijan*, paragraph 177.

61. See for example, *Kılıç v. Turkey*, paragraphs 84-87.

62. *Özgür Gündem v. Turkey*.

63. *Najafli v. Azerbaijan*, paragraph 68.

beatings and for an official apology to be made to the journalist. These individual measures would have strengthened the more implicit finding of the Court that crimes against journalists require effective remedies and acknowledgment.

The second journalistic freedom case where the Court has left its declaratory approach is the *Youth Initiative for Human Rights v. Serbia* case of 2013. This case is significant from a number of perspectives as the Court viewed the non-governmental organisation as imparting valuable information to the public and viewed their activities of asking for information from the intelligence services concerning electronic surveillance data as a legitimate gathering of information. In this case, the Court followed the “no real choice” test under Article 46 and went a step further in its individual remedy jurisprudence in two crucial aspects. First it indicated that:

the most natural execution of its judgment, and which would best correspond to the principle of *restitutio ad integrum*, would have been to secure that the Intelligence Agency of Serbia provide the applicant with the information requested (namely, how many people were subjected to electronic surveillance in the course of 2005).⁶⁴

Secondly, the Court asked the Serbian Government to provide the requested information within three months.

The *Youth Initiative for Human Rights* case shows the flexibility of the “no real choice” test developed by the Court. The test can extend to demands for the release of journalists as well as for their rights to receive and impart information.

3.6. Quasi-pilot and pilot judgments

To this date the Court has not delivered any pilot judgments with respect to journalistic freedoms. Pilot judgments were originally developed in order to tackle the caseload problem of the Court by assessing the systemic and systematic shortcomings in one case among thousands and then returning the cases back to the domestic legal systems with guidance on the resolution of these problems (Leach et al. 2010). A general overview of pilot judgments thus far shows that the Court continues to use this procedure as a pragmatic one for dealing with the large number of cases pending before it.⁶⁵ Journalistic freedom cases are a regular occurrence before the Court with repetitive rights violations. It may, however, be argued that media freedom cases coming from certain countries are never so numerous that they would warrant the use of the pilot judgment procedure.

Instead, we see that the Court has delivered a number of Article 46 judgments pertaining to general measures in the field of journalistic freedoms. These judgments are

64. *Youth Initiative for Human Rights v. Serbia*, paragraph 32.

65. Whilst the pilot judgment procedure can be delivered with respect to any of the rights protected in the Convention the recent experience of the Court shows that there needs to be a significant number of cases pending before it for this procedure to be used. With regard to the diversity of subject matters of pilot judgments, *Broniowski*, *Hutten-Czapska* and *MC and Others* concern property matters; *Ümmühan Kaplan* concerns the excessive length of domestic legal proceedings; *Kuriç and Others* concerns the erasure of citizenship after the break-up of the former Yugoslavia; *Ališić and Others* concerns the inability to recover “old” foreign-currency savings during the same period and *Torreggiani* concerns inhuman or degrading prison conditions.

sometimes called “quasi-pilot judgments” as they, too, make references to systemic or systematic problems and point to ways in which these may be resolved. They are different from the pilot judgments on two grounds: (i) the Court does not stop assessing similar violations cases; and (ii) no deadline is provided. It is understood that Article 46 judgments are there to send strong signals to the states and to assist them in speedy implementation with regard to problems identified in the Court judgments.

With regard to the use of Article 46 in journalistic freedom cases, the Court does not follow a well-specified test. In *Ürper and others v. Turkey* in 2009, concerning the suspension of newspapers, the Court left its usual dictum space to discuss how the violations took place and indicated under the Article 46 section of its judgment that violations of the journalists’ rights under Article 10 “originated in a problem arising out of the Turkish legislation, namely section 6(5) of Law No. 3713”.⁶⁶ The Court went on to indicate that “several other applicants concerning the same issue are currently pending before the Court. Without prejudging the merits of those cases, the above facts indicate that the problem at issue is of a systemic nature”.⁶⁷ As a consequence, the Court asked Turkey to revise section 6(5) of Law No. 3713 to ensure that suspending future publications and distribution of entire periodicals would no longer happen.⁶⁸ The approach of the Court in using Article 46 in this case is not dissimilar to the use of the pilot judgment procedure, as the Court makes a specific reference to the cases currently pending before it.

In the case of *Manole and others v. Moldova*, a case that concerned the lack of impartiality of the public television broadcaster, the Court followed a different approach.⁶⁹ The Court first highlighted that:

The State, as the ultimate guarantor of pluralism, must ensure, through its law and practice, that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting *inter alia* the diversity of political outlook within the country and that journalists and other professionals working in the audiovisual media are not prevented from imparting this information and comment.⁷⁰

It then indicated that specific standards to ensure impartiality that have been developed by the Committee of Ministers of the Council of Europe⁷¹ must guide the

66. *Ürper and others v. Turkey* (2009), paragraph 51.

67. *Ibid.*

68. The Court followed a similar approach in the case of *Gözel and Özer v. Turkey* in 2010 declaring that Article 6(2) of Law 3713 does not meet Article 10 standards and its compatibility with the Convention must be ensured to prevent similar violations.

69. *Manole and others v. Moldova*.

70. *Ibid.*, paragraph 107.

71. *Ibid.*, paragraphs 51-54. Specifically the Court referred to Resolution No. 1 of Ministers of the States participating in the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) on the future of public service broadcasting (1994); the Committee of Ministers Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting (1996); the Committee of Ministers Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector (2000); the Declaration of the Committee of Ministers on the guarantee of the independence of public service broadcasting in the member states (2006).

legislative activities in this area. This is a significant judgment from the perspective of remedy jurisprudence as the Court has referred a state to specific standards developed by the Committee of Ministers to implement its own judgments. Finally, despite having pointed these out in the dictum of the judgment, the Court went on to discuss the need for a legislative framework, taking into account the existing standards separately under Article 46 of the judgment as well.

As the Court stated:

In the present case the Court recalls that it has found a violation of Article 10 arising *inter alia* out of deficiencies in TRM's legislative framework. It considers that the respondent State is under a legal obligation under Article 46 to take general measures at the earliest opportunity to remedy the situation which gave rise to the violation of Article 10. In the light of the deficiencies found by the Court, these general measures should include legislative reform, to ensure that the legal framework complies with the requirements of Article 10 and takes into account the Committee of Ministers' Recommendation No. R(96)10 and the recommendations of Mr Jakubowicz.⁷²

The approaches taken towards Article 46 general measures, therefore, are diverse. In *Ūrper and others*, the Court was concerned with the pending cases before it and used Article 46 as an efficient way to communicate with the state with regard to the solution for repetitive cases. The use of Article 46 in *Manole* is not concerned with repetitive cases, but with a broader concern to enable the Moldovan public broadcaster to become an impartial institution. In other words, the systemic importance of the matter motivates the Court to specifically address legislative reform in Article 46.

4. RESPONSIBLE COURTS AND PARLIAMENTS: WHAT ROLE FOR SUBSIDIARITY REVIEW FOR THE PROTECTION OF MEDIA FREEDOM?

The nascent responsible courts and parliaments doctrines introduced by the Court in response to calls for respect for the subsidiarity of the Convention system do not directly address the remedy jurisprudence (Spano 2014: 12). It has, however, important knock-on effects for the remedy jurisprudence of the Court. The responsible courts and parliaments doctrines essentially rely on the idea that domestic institutions that take due regard of Convention principles in their deliberations should enjoy a margin of appreciation. The Court has been willing to use these doctrines in the field of freedom of expression, including journalistic freedom.⁷³ As the Court stated in the *Animal Defenders* case, "[t]he quality of the parliamentary and judicial review of the necessity of the measure is of particular importance ... including to the operation of the relevant margin of appreciation".⁷⁴ This general view suggests that if the Court is satisfied with the quality of the engagement with questions surrounding

72. *Ibid.*, paragraph 117.

73. For the most recent example of this, see *Erla Hlynisdóttir (No. 3) v. Iceland*, Application No. 54145/10, 2 June 2015, paragraph 59, and the Concurring Opinion of Judge Sajo.

74. *Animal Defenders International v. United Kingdom*, Application No. 48876/08, 22 April 2013, paragraph 10.

journalistic freedoms by domestic courts and parliaments, it may not carry out a strict review in an individual application, and, in turn, it is not likely to find a violation. This is indeed what happened in the *Animal Defenders* case where the Grand Chamber found that the UK prohibition on political advertising on television and on radio, which prevented the applicant – a social advocacy group for the protection of animals – from broadcasting its own television advertisement, did not amount to a disproportionate interference with the applicant’s right to freedom of expression.

The quality of parliamentary deliberations begs the question as to how the Court interprets the notion of “quality”. In the *Animal Defenders* case, for example, the Court paid due attention to the fact that the issue was discussed by a range of committees and that it also was supported by a cross-party group.⁷⁵ The Court was thus considering quality of parliamentary processes in issues pertaining to freedom of expression for decisions regarding assigning a margin of appreciation to states. This might weaken the remedy jurisprudence of the Court as it might render the Court more open to a diversity of approaches on the protection of freedom of expression rather than its more traditional standard-setting approach under Article 10, justified by the immanent role of freedom of expression in the Convention. This development, therefore, is contrary to the more activist role the Court has assumed by ordering urgent individual measures to protect journalists and engaging with Article 46 judgments.

With regard to the responsible courts doctrine, we see that the Court has established more strict standards. As the Court has stated in *Von Hannover v. Germany*:

If the balance struck by the national judicial authorities is unsatisfactory, in particular because the importance or the scope of one of the fundamental rights at stake was not duly considered, the margin of appreciation accorded to the decisions of the national courts will be a narrow one. However, if the assessment was made in the light of the principles resulting from its well-established case-law, the Court would require strong reasons to substitute its own view for that of the domestic courts, which consequently will enjoy a wider margin of appreciation.⁷⁶

The reference to the use of well-established case law of the Court as a trigger to defer to domestic courts suggests that there is no apparent tension between the responsible courts doctrine and the developing remedy jurisprudence of the Court in the field of journalistic freedoms. In his concurring opinion in the *Erla Hlynsdottir (No.3)* case, Judge Sajo, however, still called for caution in this regard, emphasising that explicit references to the “subsidiarity” of the Convention in freedom of expression cases might lead to misunderstandings by states with regard to their duties to give effect to freedom of expression.⁷⁷ In the case of *Erla Hlynsdottir (No. 3)*, the Court, under the declaratory judgment paradigm, found a violation of journalistic freedoms as it found that the balance between fair trial rights and a journalist’s right and duty to impart information had not been struck. Significantly the Court found that when reporting on an ongoing criminal trial “a journalist’s good faith should be assessed

75. *Animal Defenders*, paragraph 114.

76. *Von Hannover v. Germany (No. 2) [GC]*, Nos. 40660/08 and 60641/08, paragraph 107, ECHR 2012.

77. *Erla Hlynsdottir (No. 3) v. Iceland*, Application No. 54145/10, the Concurring Opinion of Judge Sajo.

on the basis of the knowledge and information which was available to him or her at the time of writing the item(s) in question.”⁷⁸

5. TAKING STOCK OF THE REMEDY JURISPRUDENCE OF THE COURT AND WAYS FORWARD

In the preceding section, I reviewed the remedy jurisprudence of the European Court of Human Rights in the field of journalistic freedoms. The analysis shows that the Court has a large number of tools at its disposal to entrench journalistic freedoms in domestic contexts. Alongside its traditional standard-setting jurisprudence on media freedom, the Court has delivered dicta that are implementation-focused and urgent general measures offering protection to journalists and those that fulfil journalistic functions, as well as Article 46 judgments specifically identifying domestic legislation as the root cause for lack of effective implementation and calling for the change of that legislation. In sum, the Court’s newly identified role as a “strategic partner” to the Committee of Ministers in the implementation of judgments and preventing repetitive violations has found its reflection in the field of journalists’ freedoms and protections.

Against this background, this chapter has also attempted to show that the use by the Court of requests for urgent general measures or specific general measures has at best been sporadic and has not – as yet – taken into account the general deteriorating atmosphere in a specific country regarding journalistic freedoms.

First, despite multiple cases in which the safety and security of journalists have come before the Court with regard to Azerbaijan, the Court only employed urgent individual measures in one case. It would have been more fitting for the Court to have paid attention to its repetitive case docket, also when ordering urgent individual measures. As the ordering of urgent individual measures is one of the strongest signals the Court is able to send to member states, it may be more fitting in countries where not just one journalist is in danger, but the whole profession, for the Court to consider urgent individual measures in all similar repetitive cases. The alternative, namely leaving the request of the urgent individual measure to the initiation of the state in its action plans in consultation with the Secretariat of the Committee of Ministers, is not feasible. This method is subject to delays and states are not currently required to submit action plans earlier than six months after a final judgment (European Court of Human Rights 2009). In repetitive cases where the safety and ill-treatment of journalists are at stake, there is an important role that can be played by the Court in ensuring the release of journalists or the effective investigation of crimes committed against them.

Second, the range of urgent measures thus far ordered by the Court has been limited. As the protection of journalists *qua* journalists is a central concern for the Court, it may benefit, on a case-by-case basis, from engaging with a wider spectrum of individual measures. One may argue that there is no need for the Court to order retrials or the erasing of criminal records, as these form part of the established remedy

78. See *Erla Hlynsdottir (No. 3) v. Iceland*, Application No. 54145/10, 2 June 2015, paragraph 71.

jurisprudence of the Committee of Ministers. Over time, the Committee of Ministers may widen its scope of individual matters. Given the current execution backlog before the Committee of Ministers, and political sensitivity concerning which case to pick to ask for specific individual measures, it may be more beneficial for the Court to point to the possibility of such measures in the operative parts of its judgments. Indeed, in the case of *Youth Initiative v. Serbia*, the Court has shown that *restitutio ad integrum* in the field of journalistic freedoms may require case-specific urgent measures. Even though the Court has not yet done this, in cases where journalists have been subjected to torture and ill-treatment, it may consider asking states to offer immediate physiological support for journalists. Six months or more after the conclusion of a case is too late for this to be considered. There are examples of this from the Inter-American Court of Human Rights.⁷⁹ The European Court of Human Rights signalling the need for urgent remedies to the Committee of Ministers would then enable the Committee of Ministers to follow the example of the Court in other cases. Again, the Court must pay due attention to the urgency of the individual measure before deciding to deliver a declaratory judgment.

As we have seen in the cases against Turkey and Moldova, there is no impediment for the Court, under Article 46 of the Convention, to point to a well-defined general measure, such as asking for a revision of a statute or the creation of a new legislative framework. Similar to my criticism of the use of urgent measures, however, the Court's approach to invoke Article 46 decisions of this kind are also not clearly laid out or foreseeable. Decisions to use Article 46 have so far depended on two factors: (i) an indication that similar cases are pending before the Court with regard to the same issue and (ii). the need for a legislative framework where Council of Europe standards are in place.

The latter factor shows that the Court is cautious to use Article 46 when it identifies the non-existence of good laws. As seen in the *Manole* case, the Court was keen to rely on the Committee of Ministers' standards in order to point to the scope of legislation needed to ensure that the public broadcasters are impartial and give access to pluralist views. This approach shows the importance the Committee of Ministers politically undertaking specific standard-setting work in the field of journalistic freedom. In other words, the Court may indicate that the duty to create an "enabling environment" is best developed by political organs of the society. Once such standards are developed, it may be easier for the Court to incorporate them into its own remedy jurisprudence.

A second avenue to make more effective use of Article 46 would be for the Court to point to the existence of systematic practices. A good example of this is the use of prosecutorial indictments against journalists that leads to acquittals. The standard-setting case law of the Court has long recognised the fact that when a prosecution ends in an acquittal, it does not mean that there has not been an interference with the freedom of the press. Given the widespread involvement of prosecutors in freedom

79. Inter-American Court of Human Rights, *Vélez Restrepo and Family v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 3 September 2012, Series C No. 248, paragraph 317; Inter-American Court of Human Rights, *Manuel Cepeda-Vargas v. Colombia*, Judgment of 26 May 2010, Series C No. 213 at paragraphs 265.

of expression, in particular in jurisdictions with the highest number of freedom of expression violation judgments, the Court may find itself well placed to raise this issue under Article 46 of the judgment.

The Court does not have any pilot judgments in the field of journalistic freedoms. It ought to be highlighted that the Court is not bound by “hundreds” of cases in this regard. In *Rumf v. Germany*, for example, there were only 55 cases concerning the lack of remedies for excessive lengths of proceedings in administrative court cases but this was enough for the Court to initiate a pilot judgment procedure. In addition, the Court is not obliged to take a purely pragmatic approach to the pilot judgment procedure. Following the *Manole* example, in cases where the Court finds systemic and structural problems, it may still invoke the pilot judgment procedure without a long list of cases. The use of this remedy would confirm the importance of media freedom and send a strong signal to states as well as to the Committee of Ministers.

6. CONCLUSION

In this chapter, I argued that the European Court of Human Rights can play both a more strategic and symbolic role in bolstering Europe-wide protection of journalistic freedoms. This can be achieved through more principled use of its remedy jurisprudence.

I defend the use of remedy jurisprudence for three reasons:

First, for reasons of political expediency, the Committee of Ministers, without the assistance of the Court, may not ask for non-standard individual measures, such as releasing a journalist from prison or making intelligence service information available. For such specific and fine-grained individual measures, the Committee of Ministers needs specific guidance from the Court to offer better protection for journalists whose cases come before the it.

Second, the Committee of Ministers is unable to decide on urgent individual measures. Action plans from government agents do not need to appear before the Secretariat of the Committee of Ministers until six months after a final judgment and delays after six months are both possible and permitted. The Committee of Ministers system, therefore, is not designed for urgent individual measures. The Court has a role to play here in order to offer increased protection to journalists.

Third, the Committee of Ministers does not have a full picture of repetitive cases pending before the European Court of Human Rights on journalistic freedoms. From this perspective, the Court is better placed to highlight systemic and structural problems, as it did in the case of *Ürper and others*. This broader view that the Court enjoys over its docket makes it an important partner for the Committee of Ministers in providing effective solutions to emerging freedom of press problems in different jurisdictions. The Court, however, does not need to wait for cases to reach the “hundreds” in this field. Furthermore, given the importance of journalistic freedoms for the Convention system as a whole, I argue that it ought not to wait and should take a more proactive stance with regard to the cases in its docket. The gap between its substantive standards and the implementation of judgments must remain a concern for the Court.

The European human rights system has unique characteristics due to the power sharing that exists between the Court, the Committee of Ministers and the Parliamentary Assembly of the Council of Europe for the protection of human rights and the emphasis on respecting the domestic legal systems' good faith attempts to respect the Convention through the principle of subsidiarity. In this multi-actor setting, each party must act to its full potential and co-operate with the others in order to protect one of the most eminent rights of the Convention – journalistic freedom.

It is both possible and necessary that the Court takes a more active and principled approach to journalistic freedoms as a matter of its remedy jurisprudence. The Committee of Ministers' declaration on the protection of journalism and safety of journalists and other media actors of 30 April 2014 and its ongoing efforts to provide recommendations on this matter, as per the *Manole* precedent, will certainly have a positive effect on the development of the Court's remedy jurisprudence in this field.

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Chapter 4

Freedom of journalistic news-gathering, access to information and protection of whistle-blowers under Article 10 ECHR and the standards of the Council of Europe

Dirk Voorhoof, Ghent University (Belgium)

INTRODUCTION¹

Some 33 years ago, the Council of Europe's Declaration on Freedom of Expression and Information emphasised a firm attachment to the principles of freedom of expression and information "as a basic element of a democratic and pluralist society". This Declaration, adopted on 29 April 1982 (1982 Declaration), in particular referred to Article 10 of the European Convention on Human Rights (ECHR) focusing on the:

protection of the right of everyone, regardless of frontiers, to express himself, to seek and receive information and ideas, whatever their source, as well as to impart them under the conditions set out in Article 10 of the European Convention on Human Rights.

1. This chapter is based on the research and some earlier draft papers or publications, in particular: Voorhoof D. (2015a); Voorhoof D. (2014a); and Voorhoof D. and Humblet P. (2013). An overview including a database on the most important case law of the ECtHR on freedom of expression, media and journalism can be found in an e-book on the subject, published by the European Audiovisual Observatory (Strasbourg: Iris): [http://www.obs.coe.int/documents/205595/2667238/IRIS+Themes+III+\(final+9+December+2013\).pdf/2e748bd5-7108-4ea7-baa6-59332f885418](http://www.obs.coe.int/documents/205595/2667238/IRIS+Themes+III+(final+9+December+2013).pdf/2e748bd5-7108-4ea7-baa6-59332f885418). See also Voorhoof D. (2015b).

The 1982 Declaration also emphasised that, in the field of information and mass media, one of the objectives is:

the pursuit of an open information policy, including access to information, in order to enhance the individual's understanding of, and his ability to discuss freely political, social, economic and cultural matters.

One year earlier, on 25 November 1981, the Committee of Ministers of the Council of Europe had issued a recommendation (1981 Recommendation) which more explicitly, but without referring to Article 10 ECHR, recommended the member states to recognise in their jurisdictions the right for everyone to obtain, on request, information held by public authorities, other than legislative bodies and judicial authorities.²

Although the 1981 Recommendation and the 1982 Declaration referred to the right "to seek information" and the right "to access information" and the right "to have access to public documents", it must be observed that the text of Article 10 ECHR, guaranteeing the right to freedom of expression, itself did not, and still does not, refer to such a right.³ However, the text of the 1982 Declaration and other policy documents issued by the Council of Europe illustrate the importance of, and the need to include or incorporate within the right to freedom of expression, the right to seek information and the right of access to public documents. It has been emphasised and reiterated that transparency is essential in a democratic society and that a wide access to information on issues of general interest allows the public to have an adequate view of, and to form a critical opinion of, the state of the society in which they live.⁴ In its case law since 1979 the European Court of Human Rights (the Court) has recognised, reiterated and emphasised "the right of the public to be properly informed" on matters of interest to society.⁵

In its Recommendation of 21 February 2002, the Committee of Ministers of the Council of Europe went one step further. It not only confirmed the principle that member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities, but it stated that access to information also included proactive actions by public authorities to make information of public interest more easily accessible. Indeed, it also stated that member states should consider it a duty of a public authority

at its own initiative and where appropriate to take the necessary measures to make public information which it holds when the provision of such information is in the

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2. Council of Europe Committee of Ministers (1981).
 3. See in contrast Article 19 of the UN Covenant on Civil and Political Rights (ICCPR), requiring States to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas regardless of frontiers. The right to seek and receive information and ideas embraces "a right of access to information held by public bodies": Human Rights Committee, *General Comment No. 34 CCPR/C/GC/34, On Freedom of Opinion and Expression (Article 19 ICCPR)*, 12 September 2011.
 4. Darbshire H. (2015). See also Hins W. and Voorhoof D. (2007).
 5. *Sunday Times v. the United Kingdom (No. 1)* and more recently *Morice v. France*, §§ 150-153 and *Erla Hlynisdóttir v. Iceland (No. 3)*, § 62, in which the Court reiterated: "Not only does the press have the task of imparting ... information and ideas" on all matters of public interest, "but the public also has a right to receive them".

interest of promoting the transparency of public administration and efficiency within administrations or will encourage informed participation by the public in matters of public interest.⁶

The Court, however, has been very reluctant to recognise a right of access to information, especially a right of access to documents held by the authorities and to make such a right enforceable under Article 10 ECHR. It is only few years ago that the Court started, hesitantly, to change its approach and to include, to some extent, a right of access to public documents, related to the right to express and receive information and ideas. Especially since its judgments in *Társaság a Szabadságjogokért (TASZ) v. Hungary* and *Kenedi v. Hungary* in 2009, the Court's case law has started to recognise and develop a right of access to public documents under the scope of Article 10 ECHR.⁷ Simultaneously in 2009 the European Convention on Access to Official Documents was promulgated, which in turn referred to the Council of Europe Recommendations of 1981 and 2002 and to Article 10 ECHR. The 2009 European Convention on Access to Official Documents states that:

Each Party shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities. Each Party shall take the necessary measures in its domestic law to give effect to the provisions for access to official documents set out in this Convention.⁸

The recognition by the Court under Article 10 ECHR of a right of access to documents held by public authorities implies that the member states, their administrative bodies and judicial authorities can no longer solely determine the scope and practical implementation of their national laws guaranteeing a right of access to public documents, as the practical and effective guarantee of this right is now also under the scrutiny of the Court. Even without the 2009 Convention on Access to Official Documents having come into force, Article 10 ECHR and the case law of the Court form a legally binding framework for the application of the right of access to public documents in the member states of the Council of Europe. Any interference with the right of access to public documents must be justified as being necessary in a democratic society within the scope of Article 10(2) ECHR, eventually in combination with Article 6 ECHR (right to a fair trial) and Article 13 ECHR (right to an effective remedy). In recent case law, the Court has emphasised that:

in cases where the applicant was an individual journalist and human rights defender, it has held that the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom.

6. Council of Europe Committee of Ministers (1981) and Council of Europe Committee of Ministers (2002).

7. *Társaság a Szabadságjogokért v. Hungary* and *Kenedi v. Hungary*.

8. Council of Europe Convention on Access to Official Documents (CETS No. 205), Article 2. Available at: www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=205&CM=8&DF=24/09/2012&CL=ENG. This Convention, however, is still not in force: only six member states have ratified it (Bosnia and Herzegovina, Hungary, Lithuania, Montenegro, Norway and Sweden), while 10 ratifications are needed for its entry into force. For an analysis of developments in national law of the right to information, see Coliver S. (2015).

And the Court reiterates:

that obstacles created in order to hinder access to information which is of public interest may discourage those working in the media, or related fields, from pursuing such matters. As a result, they may no longer be able to play their vital role as public watchdogs and their ability to provide accurate and reliable information may be adversely affected.⁹

This broadening of the scope of application of the right to freedom of expression and information goes hand-in-hand with another development in the Court's case law, which has contributed to gradually guaranteeing more transparency in society on matters of public interest by also protecting under Article 10 ECHR the rights of whistle-blowers, who disclose or "leak" information to the media. The right to freedom of expression by whistle-blowers has been recognised and effectively guaranteed by the Court in its case law of the last few years, especially since the Court's Grand Chamber judgment in *Guja v. Moldova* in 2008.¹⁰ This move to provide additional guarantees for whistle-blowers' protection is also reflected in the Council of Europe Recommendation Rec(2014)7 on the protection of whistle-blowers (2014 Recommendation), which states:

individuals who report or disclose information on threats or harm to the public interest ("whistle-blowers") can contribute to strengthening transparency and democratic accountability.¹¹

Therefore, whistle-blowers can invoke their right to freedom of expression when disclosing information to the media. The Parliamentary Assembly of the Council of Europe, in a Resolution of 23 June 2015, stressed the importance of the case law of the Court in upholding the freedom of speech and protection of whistle-blowers. It has called for the creation of:

a binding legal instrument (convention) on whistle-blower protection on the basis of the Committee of Ministers Recommendation CM/Rec(2014)7, taking into account recent developments.¹²

The direct protection of whistle-blowers under Article 10 ECHR is complementary to the Court's firm and elaborated case law on the protection of journalistic sources, guaranteeing a high level of protection of people who act as (confidential) sources for journalists. The right of journalists to protect their sources has been upheld in many cases, and shows the need for the protection of whistle-blowers, as illustrated in the Court's case law in *Goodwin v. the United Kingdom, Roemen and*

9. *Guseva v. Bulgaria*, § 37. See also *Shapovalov v. Ukraine*, § 68 and *Dammann v. Switzerland*, § 52.

10. *Guja v. Moldova*.

11. Council of Europe Committee of Ministers (2014), Recommendation CM/Rec(2014)7 on the protection of whistleblowers.

12. The resolution emphasises the need to guarantee whistle-blower protection also for employees of national security or intelligence services and of private firms working in this field and to grant asylum in any member State of the Council of Europe to whistle-blowers whose disclosures are in line with the Council of Europe standards. In the same Resolution of 23 June 2015 the Parliamentary Assembly requested the United States of America "to allow Mr Edward Snowden to return without fear of criminal prosecution under conditions that would not allow him to raise the public interest defence".

*Schmit v. Luxembourg, Voskuil v. the Netherlands, Tillack v. Belgium, Financial Times Ltd. v. the United Kingdom and Nagla v. Latvia.*¹³

In this chapter, the recognition of a right of access to public documents and the right of civil servants and private-sector employees to act as whistle-blowers and journalistic sources will be situated in the legal framework of the Council of Europe and the interpretation of the ECHR. The development and characteristics of these rights, as well as their limitations, will be illustrated by references to landmark judgments delivered by the Court, applying Article 10 ECHR in concrete circumstances, as well as by referring to relevant policy documents of the Parliamentary Assembly and the Committee of Ministers of the Council of Europe. The application of both “extensions” of the protection of Article 10 ECHR is especially relevant in support of investigative and independent journalism and for media and non-governmental organisations (NGOs), playing their role as public watchdogs in transparent and sustainable democratic societies. A striking and important characteristic of the expanding scope of Article 10 ECHR is that both the right of access to public documents and the protection of whistle-blowers are applicable and enforceable in the fields of national security and intelligence, fields which traditionally, under national laws, were excluded from transparency because of the priority given to secrecy and confidentiality in those domains.

ARTICLE 10 ECHR

The right to freedom of expression and information is guaranteed by Article 10 ECHR in all 47 member states of the Council of Europe, from Norway to Cyprus, from Iceland to Azerbaijan and from Portugal to Russia. The trend towards a better guarantee of this right in (most of) the Council of Europe’s member states has undoubtedly been influenced by the dynamic application of Article 10 ECHR by the Court. Article 10 ECHR reads as follows:

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.

Article 10(1) ECHR stipulates the principle of the right to freedom of expression and information, while Article 10(2) ECHR, by referring to “duties and responsibilities” that go

13. *Goodwin v. the United Kingdom; Roemen and Schmit v. Luxembourg; Voskuil v. the Netherlands; Tillack v. Belgium; Financial Times Ltd. and Others v. the United Kingdom and Nagla v. Latvia.*

together with the exercise of this freedom, opens the possibility for public authorities to interfere with this freedom by way of formalities, conditions, restrictions and even penalties. However, at the same time, Article 10(2) substantially reduces the possibility of interference with the right to express, receive and impart information and ideas. Interference by public authorities is only allowed under the strict conditions that any restriction or sanction must be “prescribed by law”,¹⁴ must have a “legitimate aim” and finally and most decisively, must be “necessary in a democratic society”.

The Court’s case law shows how its rulings have helped to add value to the protection of freedom of expression, journalistic freedom, freedom of the media and public debate in the ECHR’s member states. In nearly 600 cases, the Court has found violations of the right to freedom of expression and information as guaranteed by Article 10 ECHR, hence developing a higher level of protection compared to that in the defendant national states’ domestic laws. The Court’s jurisprudence has clearly reduced the possibilities of interference with the rights of freedom of expression and information, by emphasising the characteristics of a democratic society in terms of tolerance, broadmindedness, pluralism and especially the importance of participation in public debate, including the protection of expressions, ideas and information that “shock, offend or disturb”.

The Court’s case law has recognised the pre-eminent function of the media and journalism in a state governed by the rule of law, regularly emphasising that the media play the vital roles of public watchdog and purveyor of information in a democracy. However, various domestic laws and regulations still restrict freedom of expression, news-gathering and media content. The aims of such restrictions are to protect:

- i. the national interest (protection of state security and public order);
- ii. morals;
- iii. reputation or privacy or, more generally, the rights of others;
- iv. confidentiality of information; or
- v. the authority and impartiality of the judiciary.

Other legal provisions protect personal data and prohibit “hate speech” that incites violence, racism, xenophobia, hatred or discrimination. In addition, broadcasting law, audiovisual media services regulations and legal provisions on advertising or other forms of “commercial speech” contain restrictions on freedom of expression or on media content.¹⁵ On several occasions, the Court has reiterated that Article 10 ECHR does not guarantee wholly unrestricted freedom of expression to the media, even with respect to coverage of matters of serious public concern:

While enjoying the protection afforded by the Convention, journalists must, when exercising their duties, abide by the principles of responsible journalism, namely to

14. In only a few cases the Court came to the conclusion that the condition “prescribed by law,” which includes foreseeability, precision and publicity or accessibility and which implies a minimum degree of protection against arbitrariness, was not fulfilled, such as e.g. in *Ahmet Yıldırım v. Turkey*; *Youth Initiative for Human Rights v. Serbia* and *Guseva v. Bulgaria*.

15. For an overview and analysis, see Commissioner for Human Rights (2011) and Casadevall J. et al. (2012).

act in good faith, provide accurate and reliable information, objectively reflect the opinions of those involved in a public debate, and refrain from pure sensationalism.¹⁶

This also means that media that apply the standards of journalistic ethics or journalists who respect the principles of responsible journalism are strongly protected by Article 10 ECHR.¹⁷ However, it does not imply that journalists must act in compliance with the norms of good journalistic practice in all circumstances in order to be shielded by Article 10 ECHR. In some cases, the Court was of the opinion that, although it would have been “advisable” for a newspaper and its journalists to have obtained comments beforehand from a person criticised in the newspaper for being involved in fraud and improper use of public funds,

the mere fact that it had not done so is not sufficient to hold that the interference with the applicant company’s right to freedom of expression was justified.¹⁸

NATIONAL GOVERNMENTS CAN NO LONGER DECIDE ON THE LIMITS OF FREEDOM OF THE MEDIA AND JOURNALISTS

Until a few decades ago, the limits on, and restrictions of, freedom of expression were determined by national governments, ultimately scrutinised by their own domestic judicial authorities, without any external control. This paradigm was significantly changed in Europe by the advent of the ECHR and its enforcement framework, in which the Court plays a crucial role.¹⁹

Since the Court’s judgment in *Sunday Times v. the United Kingdom (No. 1)*²⁰ in 1979, it has become clear that Article 10 ECHR has effectively reduced national sovereignty and the scope of national limitations to restrict the freedoms of expression and information. On many occasions, the Court has established a higher level of protection for journalistic reporting on matters of public interest, also recognising “the right of the public to be properly informed” about matters of interest to society. Over the years, the Court’s abundant case law has made clear that national laws prohibiting, restricting or sanctioning expression or information as forms of public communication may only be applied if they are: (i) sufficiently legally precise; (ii) not arbitrarily applied; (iii) justified by a legitimate aim; and, most importantly, (iv) are considered necessary in a democratic society. The Court has also stated on several occasions

16. *Armellini and Others v. Austria*, § 41.

17. *Flux and Samson v. Moldova*; *Timpul Info-Magazin and Anghel v. Moldova*; and *Standard Verlags GmbH v. Austria*.

18. *Krone Verlag GmbH & Co v. Austria (No. 5)*. See also *Standard Verlags GmbH v. Austria (No. 3)*.

19. See also Harris D. J. et al. (2009).

20. *Sunday Times v. the United Kingdom (No. 1)*. A few years before, in its first judgment on freedom of expression (*Handyside v. the United Kingdom*), the Court firmly emphasised the importance of freedom of expression in a democratic society, but *in casu* found no breach of Article 10 of the Convention, as the protection of minors was considered to justify the interference by public authorities against the “Little Red Schoolbook” and its publisher, Mr Handyside.

that the ECHR is a “living instrument”, and, as such, is intended “to guarantee not rights that are theoretical and illusory, but rights that are practical and effective.”²¹

With the *Sunday Times* case as a starting point in 1979, many European countries have been found in breach of Article 10 ECHR after journalists, editors, publishers, broadcasting organisations, academics, politicians, artists, activists or NGOs took their claims of being victims of illegitimate, unjustifiable or disproportionate interference in their freedom of expression to the Court. As a consequence of the Court’s case law, and due to the binding character of the ECHR, its member states are under a duty to amend and improve their protection of the freedom of expression by Article 1 ECHR. This approach has particularly affected the protection of journalistic reporting, political debate and discussion of matters of public interest, pushing back some traditional limitations of freedom of expression in many countries which can no longer be considered as justified in a democratic society. In more recent years the Court has also guaranteed access to public documents under Article 10 ECHR and, on several occasions, has found that sanctions applied to whistle-blowers for disclosing information of public interest to the media breached their right to freedom of expression and information (cf. *infra*).

At the same time, the Court has become an important actor in defending press freedom against new initiatives or attempts to restrain it. The Court’s case law has consistently opposed the introduction of new limitations or additional obligations that risk harming the important role of critical and independent media in a democratic society. A pertinent illustration is the Court’s judgment in *Mosley v. the United Kingdom* in 2011. The Court held that the right of privacy guaranteed by Article 8 ECHR does not require the media to give prior notice of intended publication to those who feature in them.²² In *Węgrzynowski and Smolczewski v. Poland*, the Court rendered an interesting judgment regarding a request for the removal of an online newspaper article that two lawyers claimed damaged their reputations. In previous libel proceedings before the Polish courts, the claim had been found to be based on insufficient information and the article had remained accessible to the public on the newspaper’s website. The Court held that the newspaper was not obliged to remove the article from its Internet archive. It accepts that Poland had complied with its obligation to strike a balance between the rights guaranteed on the one hand by Article 10 ECHR and, on the other hand, by Article 8 ECHR. The Court is of the opinion that the removal of the online article for the sake of the applicant’s reputation in the circumstances would have been disproportionate under Article 10 ECHR, and that a rectification or an additional comment on the website would have been a sufficient and adequate remedy.²³

The Court has also reinforced the right of individuals to access the Internet, in a judgment against wholesale blocking of online content in which it asserted that the Internet has now become one of the principal means of exercising the right to freedom of expression and information. The Court made it clear that a restriction on

21. See e.g. *Centro Europa 7 S.R.L. and Di Stefano v. Italy*.

22. *Mosley v. the United Kingdom*.

23. *Węgrzynowski and Smolczewski v. Poland*. Compare with CJEU Grand Chamber 13 May 2013, C 131/12, *Google Spain*.

access to a source of information is only compatible with the ECHR if a strict legal framework, containing guarantees, is in place. The judgment further made it clear that the national courts should have realised that such a measure would render large amounts of information inaccessible, thus directly affecting the rights of Internet users and having a significant collateral effect on their right of access to the Internet.²⁴

It is important to note that the Court's case law has stated that national authorities should not only abstain from interferences in freedom of expression and press freedom that are not necessary in a democratic society, but that they also have positive obligations to protect the right of freedom of expression against interferences by private individuals or corporate organisations. In a case against Sweden, the Court made clear that, although its task is not to settle disputes of a purely private nature:

it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice, appears unreasonable, arbitrary, discriminatory or, more broadly, inconsistent with the principles underlying the Convention.²⁵

The Court has also emphasised that:

in addition to the primary negative undertaking of a State to abstain from interference in Convention guarantees, there may be positive obligations inherent in such guarantees. The responsibility of a State may then be engaged as a result of not observing its obligations.²⁶

In *Özgür Gündem v. Turkey* the Court developed this approach by claiming that:

genuine, effective exercise of freedom of expression 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.

After a campaign that involved killings, disappearances, injuries, prosecutions, seizures and confiscation, the newspaper *Özgür Gündem* had ceased publication. According to the Court, the Turkish authorities had failed to comply with their positive obligation to protect the newspaper and its journalists in the exercise of their freedom of expression.²⁷

24. *Ahmet Yıldırım v. Turkey*. Also in *Delfi AS v. Estonia*, the Court dealt with an important issue of freedom of expression on the Internet, more precisely on the (limited) liability of the provider of an online news portal regarding defamatory and insulting comments posted by users. In this case, holding the publisher of the online newspaper responsible for defamatory content posted by users, did not amount to a violation of Article 10. This approach was confirmed in the Grand Chamber judgment in *Delfi AS* of 16 June 2015. While the Court acknowledges "that important benefits can be derived from the Internet in the exercise of freedom of expression, it is also mindful that liability for defamatory or other types of unlawful speech must, in principle, be retained and constitute an effective remedy for violations of personality rights" (§ 110). For a critical comment, see Voorhoof D. (2015c).

25. *Khurshid Mustafa and Tarzibachi v. Sweden*.

26. *Fuentes Bobo v. Spain*; *Özgür Gündem v. Turkey*; *VgT Verein gegen Tierfabriken v. Switzerland (No. 1)*; *VgT Verein gegen Tierfabriken v. Switzerland (No. 2)*; and *Wojtas-Kaleta v. Poland*. See also *Appleby and Others v. the United Kingdom*.

27. *Özgür Gündem v. Turkey*.

In other cases, the Court has also applied the positive obligations doctrine in application of other provisions of the ECHR, such as in cases of assassinations of journalists that amounted not only to a breach of Article 10, but also to breaches of the right of life (Article 2) or of the prohibition of torture or inhuman or degrading treatment (Article 3), in combination with the right to an effective remedy (Article 13).²⁸ In a recent case related to a violent attack on a journalist, the Court reiterated that member states, under their positive obligations under the ECHR, are required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear. In this particular case, the failure to carry out an effective investigation meant that the Court found that the criminal investigation of the journalist's claim of ill-treatment had been ineffective and that there had been a breach of Article 3 ECHR (prohibition of torture or inhuman or degrading treatment). In this particular case, a journalist had been the victim of a violent attack by two men only few hours after publishing an article in a newspaper in which he accused a senior military officer of corruption and illegal activities. The journalist was hit several times with a blunt instrument and he was also punched by his aggressors. The attack took place outside the newspaper's office. Although a formal criminal investigation was started in connection with the attack, no further steps were taken in order to identify the perpetrators. Relying on Article 3 ECHR, the journalist argued that government agents had been behind the attack on him and that the police had failed to carry out an effective investigation of his ill-treatment. The Court found numerous shortcomings in the police investigation, which led it to conclude that the investigation of the journalist's claim was ineffective and that Article 3 ECHR had been breached.²⁹

THE MEDIA, JOURNALISTS, NGOS AND CIVIL SOCIETY AS A PUBLIC WATCHDOG

The Court has made clear that, in a democratic society, in addition to the media, NGOs, campaign groups and organisations with a message outside the mainstream must be allowed to carry on their activities effectively and must be able to rely on a high level of freedom of expression, as there is:

a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.³⁰

28. *Gongadze v. Ukraine*. See also *Dink v. Turkey*.

29. *Uzeyir Jafarov v. Azerbaijan*.

30. *Steel and Others v. the United Kingdom*. See also *Hertel v. Switzerland*; *VgT Verein gegen Tierfabriken v. Switzerland (No. 1)*; *VgT Verein gegen Tierfabriken v. Switzerland (No. 2)*; *Vides Aizsardzibas Klubs v. Latvia* and *Mamère v. France*. See also *Open Door and Dublin Well Women v. Ireland*; *Hashman and Harrup v. the United Kingdom*; *Çetin and Şakar v. Turkey*; *Women on Waves v. Portugal*; *Hyde Park and Others v. Moldova (Nos. 5-6)*; *Schwabe and M.G. v. Germany*; *Tatár and Fáber v. Hungary*; *Kudrevičius and Others v. Lithuania* (referred to Grand Chamber) and *Taranenko v. Russia*.

In a democratic society, public authorities should be exposed to permanent scrutiny by citizens and everyone has to be able to draw the public's attention to situations that they consider unlawful.³¹

Particular attention is paid to the public interest involved in the disclosure of information, contributing to debate on matters of public interest:

In a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence.³²

In such circumstances, journalists should not be prosecuted or sanctioned because of breaches of confidentiality or the use of illegally obtained documents.³³ The Court has accepted that the interest in protecting the publication of information originating from a source which obtained and retransmitted the information unlawfully may in certain circumstances outweigh those of an individual or a private or public entity in maintaining the confidentiality of the information. A newspaper that has published illegally gathered emails between two public figures, directly related to a public discussion on a matter of serious public concern, can be shielded by Article 10 ECHR against claims based on the right of privacy as protected under Article 8 ECHR.³⁴

In a case concerning the conviction of four journalists for having recorded and broadcast an interview using hidden cameras, the Court found that the Swiss authorities had breached the journalists' rights under Article 10 ECHR. The Court emphasised that the use of hidden cameras by the journalists was aimed at providing public information on a subject of general interest, whereby the person filmed was targeted not in any personal capacity but as a professional broker. The Court found that the interference with the private life of the broker had not been serious enough to override the public interest in information on denouncing malpractice in the field of insurance brokerage.³⁵

In its Grand Chamber judgment in *Stoll v. Switzerland*, the Court confirmed that press freedom assumes even greater importance in circumstances in which state activities

31. *Vides Aizsardzibas Klubs v. Latvia*. See also *Tatár and Fáber v. Hungary*.

32. *Guja v. Moldova and Bucur and Toma v. Romania*. See also *Morice v. France*.

33. *Fressoz and Roire v. France; Dammann v. Switzerland; Dupuis and Others v. France; Peev v. Bulgaria and Guja v. Moldova*. See also *Radio Twist v. Slovakia and Pinto Coelho v. Portugal*.

34. *Jonina Benediktsdóttir v. Iceland; Fressoz and Roire v. France and Radio Twist v. Slovakia*.

35. *Haldimann and Others v. Switzerland*. Compare with *Tierbefreier E.V. v. Germany*. In this case the European Court took into consideration that an injunction against the use by an animal rights organisation of footages secretly taken by a journalist was no violation of Article 10 ECHR, as the injunction did not include the use for journalistic purposes by the media, but only the unfair use by the animal rights organization including the footages in a film "Poisoning for profit" on its website, by accusing a firm that the legal regulations on the treatment of animals were disregarded. The Court observed that the domestic courts carefully examined whether to grant the injunction in question would violate the applicant association's right to freedom of expression, fully acknowledging the impact of the right to freedom of expression in a debate on matters of public interest. The Court points out that there was no evidence however that the accusations made in the film "Poisoning for profit", according to which the C. company systematically flouted the law, were correct.

and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature. The prosecution and conviction of a journalist for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest. As a result, the press may no longer be able to play its vital role as a public watchdog and the ability of the press to provide accurate and reliable information may be adversely affected.³⁶ In cases in which journalists reported confidential information in a sensationalist way³⁷ or in which the leaked documents did not concretely or effectively contribute to public debate or only concerned information about the private life of the persons concerned,³⁸ the Court accepted (proportionate) interference in their freedom of expression.

In cases where journalists or the media could not provide reliable or relevant evidence for their (serious) allegations, insinuations or accusations, the Court accepts convictions and (proportionate) sanctions imposed by the national authorities as not being in breach of Article 10 ECHR.³⁹ The requirement that a journalist needs to prove that the allegations made in an article were “substantially true” on the balance of probabilities, constitutes a justified restriction on the right to freedom of expression under Article 10(2) ECHR.⁴⁰ In some cases the obvious lack of evidence in support of published allegations even led the Court to rule a claim inadmissible under Article 10 ECHR.⁴¹ On the other hand, the Court has also considered that, as part of their role as a public watchdog, the media’s reporting of “stories” or “rumours” emanating from persons other than an applicant, or “public opinion” must be protected.⁴² On several occasions, the Court has accepted that value judgments, allegations or statements had only “a slim factual basis” or that it was sufficient that there was “no proof the description of events given in the articles was totally untrue,” or that the “opinions were based on facts which have not been shown to be untrue.”⁴³ Value

36. *Stoll v. Switzerland*. See also *Goodwin v. the United Kingdom* and *Fressoz and Roire v. France*.

37. *Stoll v. Switzerland*. See also *Armellini and Others v. Austria*, § 41.

38. *Leempoel and S.A. Ciné Revue v. Belgium* and *Marin v. Romania*. See also *De Diego Nafria v. Spain* and *Cumpănă and Mazăre v. Romania*. See also *Ruusunen v. Finland* and *Ojala and Etukeno Oy v. Finland*.

39. *Prager and Oberschlick v. Austria*; *McVicar v. the United Kingdom*; *Perna v. Italy*; *Radio France v. France*; *Chauvy v. France*; *Pedersen and Baadsgaard v. Denmark*; *Rumyana Ivanova v. Bulgaria*; *Alithia Publishing Company Ltd. and Constantinides v. Cyprus*; *Backes v. Luxembourg*; *Flux v. Moldova (No. 6)*; *Cuc Pascu v. Romania*; *Petrina v. Romania*; *Brunet-Lecomte and Others v. France*; *Kania and Kittel v. Poland*; *Ziemiński v. Poland*; *Růžový panter, o.s. v. Czech Republic*; *Novaya Gazeta and Borodyanskiy v. Russia*; *Lavric v. Romania*; *Salumäki v. Finland* and *Armellini and Others v. Austria*. In some cases the Court found no violation of Article 10, while it accepted that the applicant had not been guaranteed a fair trial and that there had been a violation of Article 6(1) of the Convention: see, e.g., *Constantinescu v. Romania* and *Mihaiu v. Romania*.

40. *McVicar v. the United Kingdom* and *Pedersen and Baadsgaard v. Denmark*.

41. See, e.g., *László Keller v. Hungary*; *Corneliu Vadim Tudor v. Romania*; *Falter Zeitschriften GmbH v. Austria*; *Tomasz Wolek, Rafal Kasprów and Jacek Łęski v. Poland* and *Vittorio Sgarbi v. Italy*. See also *Verdens Gang and Kari Aarsted Aase v. Norway*; *Gaudio v. Italy*; *Dunca and SC Nord Vest Press SRL v. Romania* and *Ciuviță v. Romania*.

42. See, e.g., *Thorgerir Thorgeirson v. Iceland* and *Cihan Öztürk v. Turkey*.

43. See, e.g., *Nilsen and Johnsen v. Norway*; *Dalban v. Romania*; *Dichand and Others v. Austria* and *Flux and Samson v. Moldova*.

judgments and criticism can be based on “unconfirmed allegations or rumours”.⁴⁴ The Court does not accept the reasoning of domestic courts that allegations of serious misconduct levelled against individuals or public persons should first have been proven in criminal proceedings.⁴⁵ In the *Kasabova* case, the Court explained that

while a final conviction in principle amounts to incontrovertible proof that a person has committed a criminal offence, to circumscribe in such a way the manner of proving allegations of criminal conduct in the context of a libel case is plainly unreasonable, even if account must be taken, as required by Article 6(2), of that person’s presumed innocence.⁴⁶

Describing an act or behaviour of a politician as “illegal” is to be considered as expressing a personal legal opinion amounting to a value judgment of which the accuracy cannot be required to be proven.⁴⁷

Defamation laws and proceedings cannot be justified if their purpose or effect is to prevent legitimate criticism of public officials or the exposure of official wrongdoing or corruption. A right to sue for defamation of the reputation of officials could easily be abused and might prevent free and open debate on matters of public interest or scrutiny of the spending of public money.⁴⁸ Especially in cases where information is published on alleged corruption, fraud or illegal activities in which politicians, civil servants or public institutions are involved, journalists, publishers, the media and NGOs should be able to count on the highest standards of protection of freedom of expression. The Court has emphasised that

in a democratic state governed by the rule of law, the use of improper methods by public authorities is precisely the kind of issue about which the public has the right to be informed.⁴⁹

The Court expressed the opinion that

the press is one of the means by which politicians and public opinion can verify that public money is spent according to the principles of accounting and not used to enrich certain individuals.⁵⁰

In some cases the Court has ordered the government of the defendant member state to take concrete and urgent measures in order to have the applicants’ freedom

44. *Timpul Info-Magazin and Anghel v. Moldova*. See also *Cihan Öztürk v. Turkey*. The Court in this case however also considered that “there was a sufficient factual basis for the applicant to make a critical analysis of the situation and to raise questions about the restoration project, since the authorities had already brought criminal proceedings against the applicant for breach of duty”.

45. See *Nilsen and Johnsen v. Norway*; *Flux v. Moldova* (No. 6); *Folea v. Romania*; *Dyundin v. Russia*; *Godlevskiy v. Russia* and *Kydonis v. Greece*. Compare with *Constantinescu v. Romania* and *Petrina v. Romania*. See also *Brosa v. Germany* and *Erla Hlynsdóttir v. Iceland* (No. 3).

46. *Kasabova v. Bulgaria*.

47. *Vides Aizsardzibas Klubs v. Latvia*. See also *Selistö v. Finland* and *Karhuvaara and Iltalehti v. Finland*. See also *Brosa v. Germany*.

48. *Cihan Öztürk v. Turkey*.

49. *Voskuil v. The Netherlands*.

50. *Krone Verlag GmbH & Co v. Austria* (No. 5).

of expression and information immediately respected or restored, as in *Fatullayev v. Azerbaijan* (where the Court ordered the immediate release from prison of a journalist convicted of defamation of the government) or in *Youth Initiative for Human Rights v. Serbia* (where the Court ordered the Intelligence Agency of Serbia should provide the applicant NGO with the information it had requested).⁵¹

Interference by public authorities by means of prosecutions or other judicial measures with regard to journalists' research and investigative or news-gathering activities should undergo the most scrupulous examination from the perspective of Article 10 ECHR.⁵² In a currently pending case, the Grand Chamber of the Court has been asked to rule on the question of whether or not a Finnish press photographer's arrest and conviction for disobeying the police while covering a demonstration that turned violent, breached his freedom of expression under Article 10 ECHR. The applicant in this case, Mr Pentikäinen, is a photographer and journalist who was taking photographs of a large demonstration in Helsinki. The event turned into a riot and the police decided to seal off the area. Defying a police order, a group of around 20 people remained in the area, including Pentikäinen, who had assumed the order to leave the area only applied to the demonstrators and not to him, as he was working as a journalist. He also tried to make clear to the police that he was a media representative, by showing his press badge. A short time later, he was arrested with the demonstrators by the police. He was detained in police custody for more than 17 hours and then charged by the public prosecutor with disobeying the police. He was found guilty of this offence by the Finnish court, but no penalty was imposed as the court thought his actions were excusable. In his complaint to the Court at Strasbourg, Pentikäinen complained that his rights under Article 10 ECHR had been breached by his arrest and conviction, as he had been prevented from doing his job as a journalist, while gathering news of public interest. The Court recognised that Pentikäinen, as a newspaper photographer and journalist, had been confronted with an interference in his right to freedom of expression. However, as the interference was prescribed by law, pursued several legitimate aims (the protection of public safety and the prevention of disorder and crime) and was to be considered necessary in a democratic society, there had been no breach of his rights under Article 10 ECHR. The Court also held that the fact that the applicant was a journalist did not give him a greater right to stay at the scene than the demonstrators and that the conduct of which he had been found guilty was not his journalistic activity as such, but his refusal to comply with a police order when the demonstration had turned into a riot. By a majority verdict (five votes to two), the Court therefore concluded that the Finnish court had struck a fair balance between the competing interests at stake and that there had been no breach of Article 10 ECHR. Pentikäinen requested a referral to the Grand Chamber, supported by the Finnish Union of Journalists, the International Federation of Journalists and the European Federation of Journalists,

51. *Fatullayev v. Azerbaijan* and *Youth Initiative for Human Rights v. Serbia*.

52. See *De Haes and Gijssels v. Belgium*; *Fressoz and Roire v. France*; *Bladet Tromsø and Stensaas v. Norway*; *Du Roy and Malaurie v. France*; *Thoma v. Luxembourg*; *Colombani and Others v. France*; *Vides Aizsardzības Klubs v. Latvia*; *Radio Twist v. Slovakia*; *Ukrainian Media Group v. Ukraine* and *Dupuis and Others v. France*. See also *Nagla v. Latvia*.

arguing that the Court's ruling risked undermining press freedom and the rights of journalists covering issues of importance to society. On 2 June 2014, the panel decided to refer the case to the Grand Chamber, where the hearing took place on 17 December 2014. The final judgment is expected in the second half of 2015.⁵³ The Grand Chamber judgment in *Pentikäinen v. Finland* will undoubtedly have an impact on future applications concerning the right to gather news by journalists in zones of conflict, demonstrations or violent uproar, where the armed forces or police become involved. Upholding the Court's finding of no breach of Article 10 ECHR in this case is likely to create a chilling effect on press freedom.

TOWARDS A RIGHT OF ACCESS TO OFFICIAL DOCUMENTS

An important development further expanding journalists' right to freedom of expression and information is reflected in the Court's case law related to access to public documents. For a long time, the Court refused to apply Article 10 ECHR in cases of denial of access to public documents.⁵⁴ In *Leander v. Sweden*, *Gaskin v. the United Kingdom* and *Guerra and Others v. Italy*, the Court pointed out that

freedom to receive information ... basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. That freedom cannot be construed as imposing on a state, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.⁵⁵

In *Roche v. the United Kingdom* in 2005, the Grand Chamber referred to the *Leander*, *Gaskin* and *Guerra* judgments and saw no reason "not to apply this established jurisprudence".⁵⁶

This approach by the Court contrasted sharply with the interpretation of the Inter-American Court of Human Rights (IACHR) in its judgment of 19 September 2006 in *Claude Reyes and Others v. Chile*. The IACHR unanimously found that there had been a breach of the right of freedom of expression guaranteed by Article 13 of the American Convention on Human Rights, stating that this right "protects the rights of all individuals to request access to state-held information, with the exceptions permitted by the restrictions established in the Convention". Interestingly, the IACHR stressed the connection between the right of access to information held by the state and democracy.⁵⁷

53. *Pentikäinen v. Finland*. See Voorhoof D. (2014b).

54. The Court got on a new track in *Sdruženi Jihočeské Matky v. Czech Republic*. See also Hins and Voorhoof (2007).

55. *Leander v. Sweden*, § 74; *Gaskin v. the United Kingdom*, § 52 and *Guerra and Others v. Italy*, § 53.

56. *Roche v. the United Kingdom*, §§ 172-173.

57. Inter-American Court of Human Rights 19 September 2006, *Claude Reyes and Others v. Chile*, www.corteidh.or.cr. It should be noted that, in contrast with Article 10 ECHR and similar to Article 19 ICCPR, the right guaranteed by Article 13 of the American Convention on Human Rights (ACHR) also includes the freedom "to seek" information and ideas, apart from the right to impart and receive information and ideas.

The approach of the Court in denying a right of access to public documents under Article 10 ECHR also contrasted with the 2002 Recommendation, which emphasised the need to include or incorporate within the right to freedom of expression the right to seek information and the right of access to public documents.⁵⁸

However, in a 2007 judgment, the Court expressed its opinion that:

particularly strong reasons must be provided for any measure affecting this role of the press and limiting access to information which the public has the right to receive,⁵⁹

implicitly recognising at least a right of access to information. In the spring of 2009, the Court delivered two important judgments in which it recognised, to some extent, the right of access to official documents. The Court made it clear that, when public bodies hold information that is needed for public debate, the refusal to provide relevant documents to those who request access to them is a breach of the right to freedom of expression and information as guaranteed under Article 10 ECHR. In *TASZ v. Hungary*, the Court's judgment mentioned the "censorial power of an information monopoly" when public bodies refuse to release information needed by the media or civil society organisations to perform their watchdog function. It also considered that the state had an obligation not to impede the flow of information sought by journalists or interested citizens. The Court referred to its consistent case law in which it has recognised that the public has a right to receive information of general interest and that the most careful scrutiny on the part of the Court is called for when the measures taken by a national government are capable of discouraging the participation of the press, one of society's watchdogs, in the public debate on matters of legitimate public concern, even when those measures merely make access to information more cumbersome. The Court emphasised once more that the function of the media, including the creation of forums for public debate, is not limited to the media or professional journalists. Indeed, in the present case, the preparation of the forum of public debate was conducted by an NGO. The Court recognised civil society's important contribution to the discussion of public affairs and qualified the applicant association, which is involved in human rights litigation, as a "social watchdog". In these circumstances, the applicant's activities warranted protection from the ECHR similar to that afforded to the media. Furthermore, given the applicant's intention to impart the requested information to the public, thereby contributing to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired.⁶⁰

In *Kenedi v. Hungary* the Court held unanimously that there had been a breach of the ECHR, on account of the excessively long proceedings – over ten years – during which Mr Kenedi 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.

58. Council of Europe Committee of Ministers (2002), Recommendation Rec(2002)2.

59. *Timpul Info-Magazin and Anghel v. Moldova*.

60. *Társaság a Szabadságjogokért v. Hungary*.

The Court noted that Kenedi had obtained a court judgment granting him access to the documents in question, following which the Hungarian courts had repeatedly found in his favour in the ensuing enforcement proceedings. The Hungarian authorities had persistently resisted their obligation to comply with the Hungarian court's judgment, thus hindering Kenedi's access to documents he needed to write his study. The Court concluded that the Hungarian authorities had acted arbitrarily and in defiance of domestic law and it held, therefore, that they had misused their powers by delaying Kenedi's exercise of his right to freedom of expression, in breach of Article 10 ECHR.⁶¹

In the Grand Chamber judgment in *Gillberg v. Sweden*, the Court recognised that the requestors of the information, in the form of scientific data, had a right of access to that information which was protected by Article 10 ECHR and which would contribute "to the free exchange of opinions and ideas and to the efficient and correct administration of public affairs"⁶²

More recently the European Court has reiterated, in *Youth Initiative for Human Rights v. Serbia*, that:

the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom

and that:

obstacles created in order to hinder access to information which is of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as "public watchdogs", and their ability to provide accurate and reliable information may be adversely affected.

Referring to *TASZ v. Hungary*, the Court stated explicitly that "the notion of 'freedom to receive information' embraces a right of access to information". The Court is of the opinion that, as the applicant NGO, the Youth Initiative for Human Rights, was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate, there has been an interference with its right to freedom of expression. The applicant NGO requested the Intelligence Agency of Serbia to provide it with some factual information concerning its use of electronic surveillance measures. The Agency refused the request, relying on the provisions of domestic Serbian law applicable to secret information. The Youth Initiative for Human Rights complained to the Court about this refusal to grant access to the requested information held by the Agency, notwithstanding a final and binding ruling by the Information Commissioner in its favour. The Court found that the restrictions imposed

61. *Kenedi v. Hungary*. The Court came to the conclusion that in this case Article 13 (effective remedy) had also been violated since the Hungarian system did not provide for an effective way of remedying the violation of the freedom of expression in this situation. The Court found that the procedure available in Hungary at the time and designed to remedy the violation of Kenedi's Article 10 rights had been proven ineffective. There had, therefore, been a violation of Article 13 read in conjunction with Article 10 of the Convention.

62. *Gillberg v. Sweden*.

by the Intelligence Agency of Serbia, resulting in a refusal to give access to public documents, did not meet the criterion of being “prescribed by law”. The Court held that the “obstinate reluctance of the Intelligence Agency of Serbia to comply with the order of the Information Commissioner” was in defiance of domestic law and tantamount to arbitrary behaviour, and that accordingly there had been a breach of Article 10 ECHR. The Court ordered Serbia to ensure that the applicant was given the information requested by the Intelligence Agency within three months.⁶³

The Court’s recognition of the applicability of the right to freedom of expression and information in matters of access to official documents is undoubtedly an important new development which further expands the scope of application of Article 10 ECHR.⁶⁴ This approach is also fully in line with General Comment No. 34 of the UN Human Rights Committee, which provides that Article 19 of the International Covenant on Civil and Political Rights “embraces a right of access to information held by public bodies”.⁶⁵

In more recent case law, the Court has created an extra level of guarantee for a right of access to public documents, especially when the applicant is involved in the legitimate gathering of information of public interest with the aim of contributing to public debate.⁶⁶ The Court showed a similar approach in *Roşianu v. Romania*, reiterating that collecting information and guaranteeing access to documents held by public authorities is a crucial right for journalists in order to be able to report on matters of public interest, thus helping to implement the right of the public to be properly informed on such matters. The Court’s judgment made it clear that efficient enforcement mechanisms are necessary in order to make the right of access to public documents under Article 10 ECHR practical and effective for journalistic purposes. The Court will not accept arbitrary restrictions on the right of access to public documents, as they may become a form of indirect censorship. Gathering information is an essential preparatory step in journalism and is an inherent, protected part of press freedom. Given that the journalist’s intention had been 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 also observed that the complexity of the requested information and the considerable work required to select or compile the requested documents had been used only to explain the impossibility of providing that information rapidly, but could not be a sufficient or pertinent argument to refuse access to the requested documents altogether.⁶⁷ In a judgment of 17 February 2015, in *Guseva v. Bulgaria*, the Court held that

63. *Youth Initiative for Human Rights v. Serbia*.

64. See also Tiilikka P. (2013) and the Council of Europe Convention on Access to Official Documents, CETS No. 205. Available at: www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=205&CM=8&DF=24/09/2012&CL=ENG.

65. Human Rights Committee (2011). The General Comment also stipulates that “to give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States should make every effort to ensure easy, prompt, effective and practical access to such information” (No. 19).

66. *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria* and *Guseva v. Bulgaria*.

67. *Roşianu v. Romania*.

the gathering of information with a view to its subsequent provision to the public can be said to fall within the applicant's freedom of expression as guaranteed by Article 10 ECHR ... by not providing the information which the applicant had sought, the mayor interfered in the preparatory stage of the process of informing the public by creating an administrative obstacle ... The applicant's right to impart information was, therefore, impaired.⁶⁸

In this case, the Court came to the conclusion that Bulgarian law provided no clear timeframe for enforcement of the right of access to public documents and the question was left to the goodwill of the administrative body responsible for the implementation of the judgment ordering communication of the requested documents. The Court found that such a lack of a clear timeframe for enforcement created unpredictability as to the likely time of enforcement, which, in the event, never materialised. Therefore, the applicable domestic legislation lacked the requisite foreseeability to meet the Court's test under Article 10(2) ECHR.

However, some decisions by the Court have created doubts about the scope and future developments of the right of access to documents held by public authorities. In a recent decision, delivered by a panel of three judges, no breach of Article 10 ECHR was found with regard to the refusal of the applicant's request to a municipal administration to provide a list of payments made from municipal funds to political parties, parliamentary groups and political foundations in the years 2000, 2001 and 2002. The applicant also requested information on payments made to political parties by holding companies owned by the municipality.⁶⁹ The Court noted that the applicant was involved in gathering information of public interest and assumed that his aim was to impart it to the public. The Court did not consider it necessary to decide whether or not the applicant qualified as a member of the press or whether or not his work could be considered similar to that of an NGO when it comes to information gathering. The Court's judgment refers to its judgment in *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria* of 28 November 2013, in which it:

assumed a right of access to information in a case where authorities had not published relevant information of considerable public interest in an electronic database or in any other form.

However, the Court continued by referring to its case law (*Leander v. Sweden* 1987 and *Guerra v. Italy* 1998) that:

in the specific context of access to information, the Court has held that the right to receive information basically prohibits a government from preventing a person from receiving information that others wished or were willing to impart ... It has also held that the right to receive information cannot be construed as imposing on a state positive obligations to collect and disseminate information of its own motion ... Therefore, the Court does not consider that a general obligation on the state to provide information in a specific form can be inferred from its case law under Article 10, particularly when, as in the present case, a considerable amount of work is involved.

68. *Guseva v. Bulgaria*.

69. *Friedrich Weber v. Germany*.

The decision focuses on the difference with *TASZ v. Hungary*, as in that case

the Court had regard to the fact that the information sought was “ready and available” and did not necessitate the collection of any data by the Government.

On the basis of an ambiguous reasoning, the Court came to the conclusion in *Friedrich Weber v. Germany* that

in the present case, regardless of his possible status as a member of the press, there has been no interference with the applicant’s right to receive and to impart information as enshrined in Article 10 § 1 of the Convention.⁷⁰

However, on the basis of the judgments in *TASZ v. Hungary*, *Kenedi v. Hungary*, *Gillberg v. Sweden*, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, *Youth Initiative for Human Rights v. Serbia*, *Roşiiianu v. Romania* and *Guseva v. Bulgaria* it can be concluded that Article 10 ECHR does protect the right of access to public documents, where:

- (i) the information is held by public authorities under an information monopoly;
- (ii) it is in the public interest that the information sought be disclosed; and
- (iii) the requestor is acting in the role of a public watchdog.

As the Court has stated, “freedom to receive information embraces a right of access to information”. This right, as has been demonstrated in *Youth Initiative for Human Rights v. Serbia*, can also include the right to be given access to documents of an intelligence agency and its surveillance activities. The Court can even order the authorities of a member state to compel an intelligence agency to provide a journalist or NGO with the information requested.⁷¹

PROTECTION OF WHISTLE-BLOWERS

The Court has added another crucial element in order to promote transparency and to ensure that the media can play their role as a public watchdog in a democratic society, reporting on matters of public interest. After having developed a high level of protection of journalistic sources, in order to keep the journalists’ sources’ identity confidential, the Court has also started to protect whistle-blowers directly on the basis of Article 10 ECHR, protecting their right to freedom of expression. In essence, whistle-blowers are those who expose misconduct, fraud, corruption, mismanagement, or dishonest or illegal activity within a company, an administration or a private or public organisation. Whistle-blowers report breaches of integrity and thus very often criticise employers, companies or management teams. In most cases they (also) breach a duty of confidentiality or an obligation of secrecy, especially when breaches of integrity are reported to journalists or to the media.

70. See also *Shapovalov v. Ukraine*.

71. *Youth Initiative for Human Rights v. Serbia*.

Protection of whistle-blowers and the right of journalists to protect their sources

The protection of journalistic sources is an indirect way to shield whistle-blowers from prosecution or retaliation for having disclosed information to journalists or the media in cases where public interest is at stake, such as corruption, fraud or illegal activities.

According to the Court:

protection of journalistic sources is one of the basic conditions for press freedom, as recognised and reflected in various international instruments including the Committee of Ministers Recommendation ... 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. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.⁷²

Interferences with the right to protection of journalists' sources can only be justified when respect for strict substantial and procedural guarantees is ensured. The Court can only issue a disclosure order in order to meet an "overriding requirement in the public interest", for instance, preventing or investigating major crimes or acts of (racist) violence, protecting the right to life or preventing the sexual abuse of minors that would qualify as inhuman or degrading treatment.⁷³

On several occasions, the Court has held that searches of the homes or places of work of journalists amounted to a breach of Article 10 ECHR, and of the principles of subsidiarity and proportionality.⁷⁴ The case law of the Court shows that, in several cases, the right of journalists to protect their sources prevented the whistle-blower's employer – both public and private sector – from knowing the identity of the employee who allegedly disclosed confidential information of public interest to a journalist. In *Goodwin v. the United Kingdom* and *Financial Times Ltd. and Others v. the United Kingdom* the Court found that attempts to reveal the identity of journalists' sources who leaked corporate information were breaches of Article 10 ECHR, as were

72. *Goodwin v. the United Kingdom*.

73. *Nordisk Film & TV A/S v. Denmark* and *Šečić v. Croatia*. See also *Stichting Ostade Blade v. the Netherlands*. In this last decision the Court found no violation of Article 10 ECHR, considering that the search and confiscation of computers and other editorial materials and data were justified as the judicial authorities were trying to identify the perpetrator of a series of bomb attacks and that they had good reason to believe that the confiscated material at a magazine newsroom could help their investigation.

74. *Roemen and Schmit v. Luxembourg*; *Ernst and Others v. Belgium*; *Voskuil v. the Netherlands*; *Tillack v. Belgium*; *Financial Times Ltd. and Others v. the United Kingdom*; *Sanoma Uitgevers BV v. the Netherlands*; *Martin and Others v. France*; *Ressiot and Others v. France*; *Telegraaf Media Nederland Landelijke Media N.V. and Others v. the Netherlands*; *Saint-Paul Luxembourg S.A. v. Luxembourg* and *Nagla v. Latvia*. See also Committee of Ministers of the Council of Europe, Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information, 8 March 2000, www.coe.int/t/dghl/standardsetting/media/; Parliamentary Assembly of the Council of Europe, Recommendation 1950 (2011) on the Protection of Journalists' Sources, 25 January 2011, <http://assembly.coe.int/mainf.asp?Link=/documents/adoptedtext/ta11/errec1950.htm>.

searches and confiscations in newsrooms and journalists' private houses, with the aim of identifying an alleged "leaking" civil servant or employee, such as in *Roemen and Schmit v. Luxembourg*, *Tillack v. Belgium* and *Nagla v. Latvia*.

Protection of whistle-blowing and the right to freedom of expression

Over and above this indirect protection of whistle-blowers through the recognition and application of journalists' right to protect their sources, the Court's recent case law has added substantial direct protection of whistle-blowers. Indeed, while in most European countries there is no solid or effective protection of whistle-blowers,⁷⁵ the Court has tried to remedy this situation by securing protection for whistle-blowers under Article 10 ECHR. In its judgment in *Guja v. Moldova*, the Grand Chamber considered the dismissal of a civil servant who had leaked information, more specifically, in a letter to the media, to be an unlawful restriction of the right to freedom of expression.⁷⁶ In other more recent cases, the Court has held that there have been breaches of Article 10 ECHR where whistle-blowers had experienced interference with their right to freedom of expression, including the disclosure of confidential information to the media.

The Guja case: six criteria for whistle-blowing⁷⁷

In Moldova, two politicians, the Deputy Speaker of the Parliament and the Deputy Minister of Internal Affairs, had sent a letter to the Prosecutor-General urging him to drop all charges in a criminal investigation against four policemen. Mr Guja, the head press officer in the Prosecutor-General's department, sent a copy of the letter to a newspaper, as a clear example of political pressure on the judiciary. The letter was the basis of an article in which the two politicians were accused of interfering in an ongoing criminal investigation. It soon became clear that Guja had leaked the letter to the newspaper, and disciplinary proceedings against him were started. Guja told the Prosecutor-General that he had leaked the letter because he believed it could help to prevent the unlawful pressure. Despite his noble intentions, he was dismissed.

This case featured a very specific situation, the exercise of the freedom of expression in a case of political corruption. In its judgment, the Court noted the UN treaties ratified by Moldova and the Treaties of the Council of Europe that protect persons (including employees) who expose corruption. It also quoted ILO Convention No. 158, whose Article 5 stipulates that:

the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent authorities

is no valid reason for the termination of an employment contract.

75. Stevenson and Levi (2012). This study recommends that States should "put in place, or improve, national laws on the protection of workers against retaliation in circumstances where they make a disclosure of information, whose disclosure is in the public interest, which comes to their attention through their work".

76. *Guja v. Moldova*.

77. For a commentary see Junod (2009) and Voorhoof and Gombeer (2008).

Taking into account the fact that Guja was a civil servant, the principles upheld by the Court in other judgments relating to the right of freedom of expression of civil servants were, *mutatis mutandis*, applicable in this case. However, the Court did differentiate somewhat because this was a case of whistle-blowing. Most importantly, the Court noted that:

a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgence or publication corresponds to a strong public interest.⁷⁸

The Court has thus recognised that, in certain circumstances, the exposure of wrongdoing has to be protected, for instance when a civil servant is the only person, or one of the few persons, who is aware of what is happening in the workplace and he/she is best placed to reveal it.⁷⁹ However, given that civil servants have a duty of discretion or confidentiality, the employee should first inform his/her superiors. Making the information public or leaking it to the media is only permitted as a last resort (*ultimum remedium*).⁸⁰ Therefore in *Guja v. Moldova* it was necessary to examine whether or not the information could have been communicated in another way in order to reveal and remedy the wrongdoing at issue. The Court imposed the condition that an internal duty to report also has to be an effective mechanism to remedy the wrongdoing:

In assessing whether the restriction on freedom of expression was proportionate, therefore, the Court must take into account whether there was available to the applicant any other effective means of remedying the wrongdoing which he intended to uncover.

In addition to this condition of no other efficient alternatives (1), there are some more factors to take into account:⁸¹ (2) a public interest must be at issue; (3) the information that has been leaked must be authentic and accurate; (4) the damage the information can produce and the public interest will have to be weighed up; (5) good faith must be at the basis of the motives for uncovering the information; and (6) the sanction imposed must be proportionate.

Having regard to each of these criteria, the Court concluded that Guja's dismissal amounted to a violation of his right to freedom of expression and especially his right to impart information.

The Court phrased its conclusion as follows:

Being mindful of the importance of the right to freedom of expression on matters of general interest, of the right of civil servants and other employees to report illegal conduct and wrongdoing at their place of work, the duties and responsibilities of employees towards their employers and the right of employers to manage their staff, and having weighed up the other different interests involved in the present case, the Court comes to the conclusion that the interference with the applicant's right to freedom of expression,

78. *Guja v. Moldova*.

79. See also *Marchenko v. Ukraine*, § 46.

80. *Guja v. Moldova*, § 73.

81. *Ibid.*, §§ 74-78.

in particular his right to impart information, was not “necessary in a democratic society”. Accordingly, there has been a violation of Article 10 of the Convention.⁸²

Other whistle-blower cases in which the Court found violations of Article 10 ECHR

Since the *Guja* judgment, whistle-blowing by civil servants, government officials and even by magistrates and employees of military intelligence agencies is effectively protected pursuant to Article 10 ECHR. The judgment in *Kayasu v. Turkey* concerned the disciplinary sanction and criminal conviction of a prosecutor who, as a citizen, had presented a petition to the Public Prosecutor’s Office of the State Security Court in which he accused two former high-ranking military officers of involvement in a military coup. The prosecutor had also leaked the text of the petition to the media, which subsequently reported it. The Turkish authorities considered the text of the petition as breaching the professional duties of the prosecutor, discrediting state institutions in an insulting way and damaging the reputation of high-ranking military officials. However, the Court pointed out that “le discours litigieux servait fondamentalement à démontrer un dysfonctionnement du régime démocratique” (“the debate in question served basically to demonstrate a disfunctioning of the democratic regime”, copy-editor’s translation). Given the gravity of the sanctions, the Court concluded that the interference with the prosecutor’s right to freedom of expression was a breach of Article 10 ECHR.⁸³

Kudeshkina v. Russia also concerned a form of whistle-blowing.⁸⁴ In 2005, Olga Borisovna Kudeshkina lodged a complaint with the Court regarding her dismissal as a judge from the Moscow City Court, where she had served for over 18 years. She was dismissed from her post by a disciplinary tribunal because of a number of statements she had made in the media stating that she had been taken off a case investigating large-scale corruption and financial fraud. She made these statements after she had been suspended from her job as a judge, at her own request, because she was a candidate at the parliamentary elections. In several election campaign interviews she had referred to manipulation and interventions by high-ranking officials, business people and politicians, who systematically put the judges of the Moscow Court under pressure. In her campaign, she advocated a thorough judicial reform with a view to a better performing and more independent judiciary. However, she was not elected to the Duma, and shortly after her reinstatement as a judge, she was dismissed. The Court held that Kudeshkina’s dismissal because of these public statements was a breach of Article 10 ECHR, which guarantees everyone, including civil servants and magistrates, the right to freedom of expression. The judgment made it clear that the Court did not consider the alleged breach of professional confidentiality and dissemination of false information to be a convincing justification for her dismissal. For Kudeshkina had not published concrete information about pending criminal proceedings, and her allegations could not be considered as personal, unfounded attacks on individual judges or the judiciary as a whole, but rather as relevant and fair comments on a matter of major public interest.

82. *Ibid.*, § 97.

83. *Kayasu v. Turkey*.

84. *Kudeshkina v. Russia*, § 99.

The Court pointed out that:

the applicant made the public criticism with regard to a highly sensitive matter, notably the conduct of various officials dealing with a large-scale corruption case in which she was sitting as a judge. Indeed, her interviews referred to a disconcerting state of affairs, and alleged that instances of pressure on judges were commonplace and that this problem had to be treated seriously if the judicial system was to maintain its independence and enjoy public confidence. There is no doubt that, in so doing, she raised a very important matter of public interest, which should be open to free debate in a democratic society. Her decision to make this information public was based on her personal experience and was taken only after she had been prevented from participating in the trial in her official capacity.⁸⁵

Although one could take some exception to the ferocity with which Kudeshkina had phrased her points of view, the Court held that her well-founded criticism contributed to an important societal debate:

However, even if the applicant allowed herself a certain degree of exaggeration and generalisation, characteristic of the pre-election agitation, her statements were not entirely devoid of any factual grounds ... and therefore were not to be regarded as a gratuitous personal attack but as a fair comment on a matter of great public importance.⁸⁶

Furthermore, the Court considered the dismissal of a judge with a track record of 18 years to be a disproportionate sanction, the more so because it would no doubt make other magistrates shrink from expressing critical comments on the functioning of the judiciary and on justice policy in the future. Once again, the Court pointed at the chilling effect, as a result of which one may no longer dare to make a public statement for fear of punishment. It emphasised that such a chilling effect is detrimental to democracy and that Kudeshkina certainly had the right to raise public awareness about the matters she denounced.

The Court's message is clear: (Russian) magistrates who contribute to the public debate, in the media, about manipulation of the judiciary should be supported instead of being punished with dismissal. Unfortunately, even after this supportive judgment by the Court, the Russian authorities refused to re-open the proceedings concerning Kudeshkina's dismissal from the judiciary. Hence despite the Court's finding that the Russian authorities had breached the applicant's right to freedom of expression guaranteed by Article 10 ECHR, this case illustrates the difficulty of effectively applying the Court's rulings on the protection of whistle-blowers in some ECHR member states.⁸⁷

85. *Kudeshkina v. Russia*, § 94.

86. *Kudeshkina v. Russia*, § 95.

87. *Olga Borisovna Kudeshkina v. Russia* (No. 2), and *Kudeshkina v. Russia*. Under Article 46 § 2 ECHR, the Committee of Ministers is vested with the powers to supervise the execution of the Court's judgments and evaluate the measures taken by respondent States. It is for the Committee of Ministers to assess, in the light of the above principles of international law and the information provided by the respondent State, whether the latter has complied in good faith with its obligation to restore as far as possible the situation existing before the breach. While the respondent State in principle remains free to choose the means by which it will comply with this obligation, it is also for the Committee of Ministers to assess whether the means chosen are compatible with the conclusions set out in the Court's judgment of 26 February 2009, at para 95. With regard in particular to the reopening of proceedings, the Court does not have jurisdiction to order such measures.

Other judgments show that the aim of the Court's case law is to stimulate the disclosure or reporting of (serious) wrongdoings or offences, especially in situations in which only one or a few persons or employees are informed.⁸⁸ In *Marchenko v. Ukraine*, just like in *Guja v. Moldova*, the Court emphasised that:

the signalling of illegal conduct or wrongdoing in the public sector must be protected, in particular as only a small group of persons was aware of what was happening.⁸⁹

Also in *Frankovicz v. Poland*, the Court found a breach of Article 10 ECHR, this time following the disciplinary sanctioning of a doctor who, in a medical report on a patient, had made negative comments about the treatment and care of the patient in a certain hospital.⁹⁰ The Court added that the report was not a gratuitous personal attack on colleagues, but a report based on medical data regarding the medical treatment of a patient by another doctor, thus indicating that the report was related to a public concern. In these circumstances, the disciplinary sanction of a reprimand was not necessary in a democratic society and was to be considered as a breach of the doctor's right to freedom of expression. In *Sosinowska v. Poland* the Court observed in a similar way that the reprimanding of a doctor by a medical court amounted to a breach of her right to freedom of expression. The Court found that the Polish authorities had failed to recognise that Dr Sosinowska had been defending a socially justified interest, as she had produced a critical assessment, from a medical point of view, concerning issues of public interest.⁹¹

In *Bucur and Thoma v. Romania* the Court considered that the general interest in the disclosure of information to the media revealing illegal activities within the Romanian Intelligence Services (RIS) was so important in a democratic society that it prevailed over the interest in maintaining public confidence in that institution. Applying the six "Guja criteria", the Court was not convinced that a formal complaint to a parliamentary commission would have been an effective means of tackling the irregularities within the RIS. It also observed that the information about the illegal telecommunications surveillance of journalists, politicians and businessmen that had been disclosed to the press affected the democratic foundations of the Romanian state. Hence the information was about very important issues for the political debate in a democratic society, in which public opinion had a legitimate interest.

The fact that the data and information at issue were classified as "ultra-top-secret" was not a sufficient reason to interfere with the whistle-blower's rights in this case, and the measures taken against Bucur also risked having a chilling effect. The conviction of Bucur for the disclosure of information to the media about the illegal activities of the RIS was held to be a breach of Article 10 ECHR.⁹² In its judgment, the Court also

88. *Juppala v. Finland* and *Marchenko v. Ukraine*.

89. *Marchenko v. Ukraine*, § 46.

90. *Frankovicz v. Poland*, § 51.

91. *Sosinowska v. Poland*.

92. *Bucur and Toma v. Romania*, §§ 111-112. Notice that in some other cases the Court showed more respect for secret, classified military information: *Pasko v. Russia*, §§ 86-87. In *Pasko v. Russia* the Court failed to apply the Guja-criteria, while the information at issue concerned serious environmental issues, related to nuclear pollution.

cited Resolution 1729(2010) of the Parliamentary Assembly of the Council of Europe on protecting whistle-blowers.

Whistle-blowers in the private sector can also invoke their right to freedom of expression, if they reveal allegedly unlawful conduct by their employers. In *Heinisch v. Germany*, the Court also applied, *mutatis mutandis*, the *Guja* criteria:⁹³

While such duty of loyalty may be more pronounced in the event of civil servants and employees in the public sector as compared to employees in private-sector employment relationships, the Court finds that it also without doubt constitutes a feature of the latter category of employment. It therefore shares the Government's view that the principles and criteria established in the Court's case law with a view to weighing an employee's right to freedom of expression by signalling illegal conduct or wrongdoing on the part of his or her employer against the latter's right to protection of its reputation and commercial interests also apply in the case at hand. The nature and extent of loyalty owed by an employee in a particular case has an impact on the weighing of the employee's rights and the conflicting interests of the employer.⁹⁴

Other judgments of the Court clearly reflect the high level of protection of the right to freedom of expression of individuals taking part in public debate, relying on information from their professional environment, such as in *Wojtas-Kaleta v. Poland*⁹⁵ and *Rubins v. Latvia*.⁹⁶ This approach is also found in the Court's Grand Chamber judgment in *Morice v. France*,⁹⁷ where it was held that the applicant Morice, a lawyer, who had written an article that was published in the newspaper *Le Monde*, had expressed value judgments with a sufficient factual basis and that his remarks concerning a matter of public interest had not exceeded the limits of his right to freedom of expression:

a lawyer should be able to draw the public's attention to potential shortcomings in the justice system; the judiciary may benefit from constructive criticism.

The Grand Chamber also considered that respect for the authority of the judiciary cannot justify an unlimited restriction of the right to freedom of expression. Although the defence of a client by his lawyer must not be conducted in the media, but in the courts, involving the use of any available remedies, the Grand Chamber accepted that there might be "very specific circumstances justifying a lawyer making public statements in the media, such as in the case at issue".

In its judgment in *Matúz v. Hungary* the Court again firmly emphasised the importance of whistle-blower protection, *in casu* for a journalist who alarmed public opinion with his book alleging censorship within the Hungarian public broadcasting

93. At the time of the *Guja* judgment it was not completely certain whether those principles would also apply to employees in the private sector, see Junod (2009:240 ff).

94. *Heinisch v. Germany*, § 64.

95. *Wojtas-Kaleta v. Poland*.

96. *Rubins v. Latvia*. This judgment is another example of a disproportionate interference with the right to freedom of expression of an employee, in this case of a university professor expressing sharp criticism of the employer's policy and management. The Court states that the employee's dismissal in this case "was liable to have a serious chilling effect on other employees of the University and to discourage them from raising criticism" and that such a severe sanction, which such consequences, in the light of the case of as a whole, is difficult to justify in a democratic society.

97. *Morice v. France*.

organisation. The Court also confirmed the severity of dismissing a whistle-blower for legitimate activity in the public interest.⁹⁸ Once again, the Court referred to, and applied, the six Guja criteria (cf. supra). It stressed that the content of Matúz's book was essentially a matter of public interest and it confirmed that it did not dispute that the documents published by Matúz were authentic and that his comments had a factual basis. It went on to state that, having regard to the role played by journalists in society and to their responsibilities to contribute to, and encourage, public debate, the obligation of discretion and confidentiality cannot be said to apply to journalists in the same ways as to members of the public, given that it is in the nature of journalism to impart information and ideas. The Court also noted that the journalist had referred to confidential documents with no other intention than to corroborate his arguments on censorship, and that there was no appearance of any gratuitous personal attacks. Furthermore, the decision to make the information and documents public was based on his experience: neither his complaint to the Chairman of the broadcasting organisation nor his letters to the members of the organisation's board of directors had prompted any response. Hence the Court:

is satisfied that the publication of the book took place only after the applicant 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.

Finally, the Court observed that the Hungarian courts had found that the mere fact that Matúz had published the book was sufficient to conclude that he had acted to damage his employer, and that he had thus breached his contract of employment. The Hungarian courts had ignored Matúz's argument that he had been exercising his freedom of expression in the public interest. Moreover, the Hungarian Supreme Court's judgment explicitly stated that the case was limited to an employment dispute and not an alleged breach of the applicant's human rights. Such an approach shows neglect of the human right of freedom of expression by the Hungarian courts, which did not even examine how the subject matter of Matúz's book and the context of its publication could have affected the restriction of his freedom of expression. The Court also noted that "a rather severe sanction was imposed on the applicant", namely the termination of his contract of employment with immediate effect, and concluded that the interference with the applicant's right to freedom of expression was not necessary in a democratic society:

Being mindful of the importance of the right to freedom of expression on matters of general interest, of the applicant'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 concludes that the interference with the applicant's right to freedom of expression was not "necessary in a democratic society".

Accordingly, the Court unanimously held that there had been a breach of Article 10 ECHR.⁹⁹ This judgment has undoubtedly contributed to further raising awareness

98. *Matúz v. Hungary*.

99. See also Voorhoof (2014c). See also Council of Europe Committee of Ministers (2014), Recommendation Rec(2002)2.

about the lack of protection of whistle-blowers in many countries in Europe. At the same time, the Court's case law has elaborated a framework for whistle-blowing protection based on the right to freedom of expression, under a clear set of criteria:

1. Was it not possible for the employee or civil servant to call on his employer, department head or any other authority to disclose the wrongdoings and to remedy them?
2. Does the information relate to serious malpractice or a socially relevant issue?
3. Was the leaked information authentic, reliable and accurate?
4. What harm has been caused to the employer by leaking and making public internal, confidential documents?
5. What motivated the whistle-blower?
6. What kind of sanction was the whistle-blower subjected to and what are the consequences thereof?

Whistle-blowing and the policy of the Council of Europe

In line with the Court's case law applying Article 10 ECHR in cases of whistle-blowing, the Parliamentary Assembly of the Council of Europe has highlighted the importance of whistle-blowing in its Resolution 1729/2010:

The Parliamentary Assembly recognises the importance of whistle-blowers – concerned individuals who sound an alarm in order to stop wrongdoings that place fellow human beings at risk – as their actions provide an opportunity to strengthen accountability and bolster the fight against corruption and mismanagement, both in the public and private sectors. Potential whistle-blowers are often discouraged by the fear of reprisals, or the lack of follow-up given to their warnings, to the detriment of the public interest in effective management and the accountability of public affairs and private business.¹⁰⁰

The resolution insists on protective mechanisms for whistle-blowers in accordance with a number of basic principles as developed in the case law of the Court. The resolution aims at “comprehensive legislation”, with a wide scope of application to protect whistle-blowing,¹⁰¹ both for civil servants as well as for private-sector employees.¹⁰² A strong legal foundation for whistle-blowers is insisted upon, *inter alia*, in employment law, in order to prevent unjustified dismissal or other forms of employment-related retaliation. Finally, the member states are invited to guarantee the protection of whistle-blowers and to develop mechanisms to protect them (more) appropriately.¹⁰³

100. Parliamentary Assembly of the Council of Europe (2010a).

101. Parliamentary Assembly of the Council of Europe (2010a): “6.1.1. the definition of protected disclosures shall include all bona fide warnings against various types of unlawful acts, including all serious human rights violations which affect or threaten the life, health, liberty and any other legitimate interests of individuals as subjects of public administration or taxpayers, or as shareholders, employees or customers of private companies.”

102. Parliamentary Assembly of the Council of Europe (2010a): “6.1.2. the legislation should therefore cover both public and private sector whistle-blowers, including members of the armed forces and special services.”

103. Parliamentary Assembly of the Council of Europe (2010b).

In a statement made on 7 December 2011, the Committee of Ministers of the Council of Europe called for a better legal protection of whistle-blowers, including those who use online media and new digital platforms. The Committee of Ministers pointed out that:

people, notably civil society representatives, whistle-blowers and human rights defenders, increasingly rely on social networks, blogging websites and other means of mass communication in aggregate to access and exchange information, publish content, interact, communicate and associate with each other. These platforms are becoming an integral part of the new media ecosystem. Although privately operated, they are a significant part of the public sphere through facilitating debate on issues of public interest; in some cases, they can fulfil, similar to traditional media, the role of a social watchdog and have demonstrated their usefulness in bringing positive real-life change.¹⁰⁴

Therefore, the Committee of Ministers urges that action be taken with a view to effective protection of whistle-blowers pursuant to Articles 10 and 11 ECHR. In the meantime, the jurisprudence of the Court applying Article 10 ECHR in protecting whistle-blowers has contributed in an impressive way to the actual protection of individuals who, in the context of their work, report or disclose information on threats to the public interest, thus contributing to strengthening transparency and democratic accountability. On many occasions recently (e.g. the media coverage of “Lux Leaks” and “Swiss Leaks”), the crucial importance of whistle-blowers for informing the media about important matters of public interest has been demonstrated.

That is also the message of the Committee of Ministers’ Recommendation CM/Rec(2014)7 on the protection of whistle-blowers of 30 April 2014 (the Recommendation), which reaffirms that “freedom of expression and the right to seek and receive information are fundamental for the functioning of a genuine democracy”. The recommendation also recognises:

that individuals who report or disclose information on threats or harm to the public interest (“whistle-blowers”) can contribute to strengthening transparency and democratic accountability

and it refers explicitly to the right of freedom of expression and information guaranteed by Article 10 ECHR. It goes on to recommend that member states should have in place:

a normative, institutional and judicial framework to protect individuals who, in the context of their work-based relationship, report or disclose information on threats or harm to the public interest.¹⁰⁵

In order to fulfil this mission, the national frameworks in the member states should foster an environment that encourages reporting or disclosure in an open manner and individuals should feel safe to freely raise public-interest concerns. It is recommended that “clear channels should be put in place for public-interest reporting

104. Council of Europe Committee of Ministers (2011).

105. Council of Europe Committee of Ministers (2014).

and disclosures and recourse to them should be facilitated through appropriate measures". These channels for reporting and disclosures comprise:

- ▶ reports within an organisation or enterprise (including to persons designated to receive reports in confidence);
- ▶ reports to relevant public regulatory bodies, law enforcement agencies and supervisory bodies;
- ▶ disclosures to the public, for example to a journalist or a member of parliament.

It is important that whistle-blowers should also be able to invoke legal protection and be able to rely on their right to freedom of expression under Article 10 ECHR in cases where they bring information into public view by disclosing confidential information to media or journalists.¹⁰⁶

It is obvious that the Court's case law has not only created important protection for whistle-blowing based on the right to freedom of expression, it has also contributed to raising awareness about the lack of protection of whistle-blowers in many countries in Europe. The recommendation requests the member states to take action to stimulate, facilitate and protect whistle-blowing, and to aim to implement at the national level a higher threshold of protection of public-interest whistle-blowing, in line with the Court's case law.¹⁰⁷ The Parliamentary Assembly of the Council of Europe, in a Resolution of 23 June 2015 (the resolution), stressed the importance of the case law of the Court in upholding freedom of speech and the protection of whistle-blowers. The resolution calls on the member states to:

agree on a binding legal instrument (convention) on whistle-blower protection on the basis of the Committee of Ministers Recommendation CM/Rec(2014)7, taking into account recent developments.¹⁰⁸

The resolution also emphasises the need to guarantee whistle-blower protection for employees of national security or intelligence services and of private firms working in this field, referring to the public interest involved in mass surveillance by the security and intelligence services. As the Court stated in *Bucur and Thoma v. Romania*, the general interest in the disclosure of information to the media that revealed illegal activities within the RIS was so important in a democratic society that it prevailed over the interest in maintaining public confidence in that institution: information about the illegal telecommunications surveillance of journalists, politicians and businessmen that was disclosed to the media affected the democratic foundations of the state.¹⁰⁹

106. Notice that actually this protection is not guaranteed in the EU Guidelines on Whistle-blowing: see Bang (2015).

107. Council of Europe Committee of Ministers (2014).

108. Parliamentary Assembly of the Council of Europe (2015).

109. *Bucur and Toma v. Romania*, §§ 111-112.

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Salumäki v. Finland, Application No. 23605/09, 29 April 2014

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Šečić v. Croatia, Application No. 40116/02, 31 May 2007

Selistö v. Finland, Application No. 56767/00, 16 November 2004

Shapovalov v. Ukraine, Application No. 45835/05, 31 July 2012

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Chapter 5

The silencing effect on dissent and freedom of expression in Turkey

Yaman Akdeniz¹
Kerem Altıparmak²

INTRODUCTION

Turkey has a long history of censoring and criminalising speech, which goes beyond traditional media and which was extended in 2007 to cover the Internet and social media.

This chapter will provide a critical overview and assessment of the current state of freedom of expression in Turkey. It will take as its theme the “silencing effect” of several of the Justice and Development Party (AKP) government’s recent actions, including aggressive prosecutions and criminal investigations, the issuing of prior restraint orders, vexatious civil lawsuits, abuse of the statutory right to reply, forced removal of Internet content, blocking of websites and social media platforms, administrative sanctions and tax investigations involving media owners and companies and forcing such companies to dismiss journalists who are critical of the government and its policies. The silencing and chilling effect of such practices on the media (including the printed press, audiovisual media and journalists), NGOs and human rights activists, as well as on academia, will be part of this assessment. In addition to our own assessment criteria, the United States Department of State’s, Bureau of Democracy, Human Rights and Labor Country Reports on Human Rights Practices for 2014 referred to assumptions of widespread use by the Turkish authorities of legal and illegal eavesdropping, bugging and wiretapping having a chilling effect on freedom of expression, and stated that such practices encouraged self-censorship in both private and professional environments. The overall result of such government practices is that freedom of speech has been replaced with a climate of fear with less political speech and dissent.

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1. Faculty of Law, Istanbul Bilgi University (Turkey).
 2. Faculty of Political Sciences, University of Ankara (Turkey).

THE STATE OF FREEDOM OF EXPRESSION IN TURKEY

Broadly speaking, Turkey has always been one of the most restrictive member states of the Council of Europe as far as freedom of the media and freedom of expression is concerned. So far as its track record at the European Court of Human Rights (the Court) is concerned, out of an overall total of 591 judgments involving breaches of Article 10 of the European Convention on Human Rights (ECHR) involving freedom of expression between 1959 and 2014, 248 of them involved Turkey, placing it easily in first place, ahead of Austria with 34 judgments and France with 31 judgments.

Since Turkey was compelled to recognise the jurisdiction of the Court, its judgments have led to a number of amendments to Turkish law concerning freedom of expression. Despite the considerable improvements made³ in this field, there are still concerns about the stance of the Turkish courts in the implementation of the standards of the ECHR. As a consequence, a law introducing the monitoring of cases relating to freedom of expression is still being discussed by the Turkish Committee of Ministers.⁴

At the Court, the main themes in Turkish freedom of expression cases have been terrorism and violence. Indeed, the Court's judgments are mostly related to convictions for disseminating propaganda on behalf of terrorist organisations (under Articles 6 and 7 of the Turkish Anti-Terrorism Law); for publishing articles or books or preparing messages addressed to a public audience inciting hatred or hostility or praising a crime or a criminal (under Article 312 of the former Criminal Code and Articles 215 and 216 of the current Criminal Code); insulting or vilifying the Turkish nation, the Turkish Republic, the Grand National Assembly, or the moral personality of the government, ministries and armed forces (under Article 159 of the former Criminal Code and Article 301 of the current Criminal Code); and automatic convictions under Article 6(2) of the Anti-Terrorism Law for the publication of statements made by a terrorist organisation, without taking into account the context or content of such statements. The Court's opinion was that these statements (in articles, books, publications etc.) did not incite hatred or violence and therefore did not justify interference with the applicants' freedom of expression. Although there have been other judgments concerning convictions for insulting Atatürk,⁵ insulting religion and insulting the Prophet Mohammed⁶ or the placing of restrictions on the Internet,⁷ these were exceptions. Apart from criminal prosecutions of critics of Turkey's position on the Kurdish issue, violence against journalists and intellectuals has been another

3. Amongst those amendments, the most emblematic one is Law No. 6459, entitled "Amendments Made in Some Laws within the Context of Human Rights and Freedom of Expression". The Explanatory Report to the Draft Law clearly showed that the Law was enacted to bring relevant provisions in line with the Strasbourg jurisprudence. For the text, debates and reports of the Law see <https://www.tbmm.gov.tr/sirasayi/donem24/yil01/ss445.pdf>.
4. Notably, the *İncal Group*, *Gözel* and *Özer Group* cases. The last decision in these cases is CM/Del/Dec(2015)1230/22 / 12 June 2015.
5. *Murat Vural v. Turkey*, No. 9540/07, 21.10.2014; *Odabaşı and Koçak v. Turkey*, No. 50959/99, 21.2.2006.
6. *Aydın Tatlav v. Turkey*, No. 50692/99, 02.05.2006.
7. *Ahmet Yıldırım v. Turkey*, No. 3111/10, 18.12.2012.

matter of concern for the Court. The *Özgür Gündem* case was emblematic in this area. In its judgment in this case, the Court stated:

the Court is satisfied that from 1992 to 1994 there were numerous incidents of violence, including killings, assaults and arson attacks, involving the newspaper and the journalists, distributors and other persons associated with it.⁸

The Court concluded that the government had failed, in the circumstances, to comply with their positive obligation to protect *Özgür Gündem* in the exercise of its freedom of expression.⁹ The *Hrant Dink* case is also illustrative in this context. Mr Dink was found guilty of insulting Turkishness and was then killed by ultra-nationalists in Istanbul. The Court reiterated that Turkey had failed to honour its obligation to create an enabling environment for public debate.¹⁰

As this short survey shows, for the last two decades there have been two major concerns about Turkish laws which restrict public debate:

- (i) Criminal prosecutions of journalists and intellectuals for violence and terrorism that have led to their imprisonment;
- (ii) Physical attacks by police or private individuals on people who express alternative opinions on politically sensitive issues.

The long struggle at Strasbourg by journalists and others has led to a number of considerable amendments to Turkish law, as already stated. Although Turkey led the world in 2013 for jailing journalists, with 40 of them behind bars,¹¹ this number sharply dropped the following year to just seven, according to the Committee to Protect Journalists.¹² Considering that the Turkish government has endeavoured to comply with the Court's judgments, is it possible to say it has created an enabling environment for public debate as required by the Court?

The authors of this chapter would give a negative response to this question for three reasons.

First, despite certain improvements relating to political speech on the Kurdish issue, the stance of the Turkish judiciary is still unstable and a cause for concern.

Secondly, and more importantly, the main theme concerning freedom of expression in Turkey has changed since the AKP came to power. Whereas in the 1980s and 1990s, most anti-free-speech prosecutions were for insulting Atatürk, Turkishness and the indivisibility of the country, these were replaced by prosecutions for insulting religion, the government and the President in recent times. Thus, the slight advances in the protection of the freedom of speech were negated by the new reasons for prosecution. Not only the subject but also the methodology of restrictions

8. *Özgür Gündem v. Turkey*, No. 23144/93, 16.3.2000.

9. *Ibid.*, para. 38-46.

10. *Dink v. Turkey*, No. 2668/07 and others, 14.9.2010, para. 137.

11. This is due to amendments made to Section 220/6-8 of the Criminal Code and Sections 6-7 of the Anti-Terror Law. However, the problem is far from fully resolved.

12. See <https://cpj.org/imprisoned/2014.php>. However, according to the Turkish Independent Communication Network (BIA), 22 journalists and distributors were sent to prison in 2015, 14 of whom are from Kurdish media. See www.bianet.org/bianet/medya/162748-medyanin-3-yili-grafik-ozet.

of freedom of speech have changed in recent years. Although physical attacks on journalists have become rare, and the torture or ill-treatment of students and intellectuals exceptional, thousands of criminal cases are brought for trivial reasons by the President, the Prime Minister, government ministers and the notorious mayor of Ankara against journalists, students, civil servants, media companies, social media users and almost anyone who criticises the government. The defendants in these cases are almost always found guilty and various administrative sanctions are imposed on them. The AKP government has replaced the heavy handed methods used in the 1980s and 1990s with a more sophisticated, complex and complicated machinery to attack freedoms by different methods. As a commentator has noted, this new style of dealing with dissent is “less brutal but much more effective”.¹³ The new methodology includes, in addition to what has already been said, prior restraint and banning orders, court judgments blocking access to websites and social media platforms, strict state control of the Radio and Television Authority, and attacks on newspapers and journalists by pro-government media groups.

Last but not least, all these problems are related to the lack of impartiality of the Turkish judiciary, as will be discussed in this chapter. For many years, the Turkish judiciary has been criticised for its lack of independence and impartiality. However, the current crisis is not limited to such general criticism. More recently, the government has started to directly interfere with the judiciary, especially after cases alleging corruption were brought against high-level bureaucrats, government ministers and their families and the Prime Minister. On 17 December 2013, the Istanbul police began an investigation after allegations of corruption were made, and the sons of three cabinet ministers and a number of well-known businessmen were arrested. The government and the Prime Minister claimed there was a plot against the government, and transferred the police officers, public prosecutors and judges involved in the investigation to other positions. Subsequently, Turkish law was amended to give the Minister of Justice complete control of the judiciary and the public prosecution service. Since then, all the decisions on police investigations are now made by the newly created Criminal Justices of the Peace, who work in secret. Thousands of new judges and public prosecutors have been appointed and others dismissed without explanation. Thus, the crisis in the freedom of expression is now directly connected to the crisis in the rule of law in Turkey.

As will be demonstrated in detail below, an environment that really enables public debate can only be maintained under a legal system which respects the rule of law.

ECHR AND COUNCIL OF EUROPE PRINCIPLES ON FREEDOM OF EXPRESSION

From what has already been said, it is clear that there is less and less tolerance of alternative views in Turkey in recent years. Although the Court has adopted the

13. Jacob Weisberg, “President Erdogan’s new style of media censorship is less brutal and much more effective”, www.slate.com/articles/news_and_politics/foreigners/2014/10/president_erdogan_s_media_control_turkey_s_censorship_is_less_brutal_but.html.

concept of an “enabling environment”¹⁴ to explain the overall potential for everyone concerned to join a public debate and express their opinions and ideas without fear,¹⁵ it needs to be explained in more detail what is meant by this concept.

The Court has made it clear that “freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the ECHR”.¹⁶ Within the Council of Europe’s member states, any restrictions on the freedom of speech and content must meet the strict criteria laid down in Article 10 ECHR.

According to the case law of the Court, a strict three-part test must be applied to any restriction on the freedom of expression. The first and most important requirement of Article 10 ECHR is that any interference by a public authority with the exercise of freedom of expression must be lawful:

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.¹⁷

The second paragraph of Article 10 clearly stipulates that any restriction on freedom of expression must be “prescribed by law”. In order to comply with this important

14. For the concept see Peter Krug and Monroe E. Price, “The Enabling Environment for Free and Independent Media: Contribution to Transparent and Accountable Governance”, The USAID Office of Democracy and Governance Occasional Paper Series, January 2002, Doc. No. PN-ACM-006; Monroe Price and Peter Krug, “The Enabling Environment For Free and Independent Media” in Mark Harvey, Ed., *Media Matters: Perspectives on Advancing Governance & Development from the Global Forum for Media Development* (Beijing, Internews Europe, 2007), pp. 94-101.

15. “Elle estime aussi que les obligations positives en la matière impliquent, entre autres, que les Etats sont tenus de créer, tout en établissant un système efficace de protection des auteurs ou journalistes, un environnement favorable à la participation aux débats publics de toutes les personnes concernées, leur permettant d’exprimer sans crainte leurs opinions et idées” *Dink v. Turkey*, para. 137 (*The Court also considers that the positive obligations in this area imply, among other things, that the States are obliged to create, while at the same time establishing an efficient system of protection of journalists, a favourable environment for participation in public debate for all interested people, that allows them to express their opinions and ideas without fear, copy-editor’s translation*).

16. *Lingens v. Austria*, Series A no. 103, 8.7.1986, para. 42.

17. Note also Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights within this context. See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/17/27, 16 May 2011, at www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf. See further General Comment No.34 on Article 19 which was adopted during the 102nd session of the UN Human Rights Committee, Geneva, 11-29 July 2011, at www2.ohchr.org/english/bodies/hrc/docs/CCPR-C-GC-34.doc.

requirement, such interference does not merely need a basis in domestic law. The law itself must correspond to certain requirements of “quality”. In particular, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct.¹⁸ The degree of precision depends, to a considerable extent, on the content of the instrument at issue, the field it is designed to cover, and the number and status of those to whom it is addressed.¹⁹ The notion of foreseeability applies not only to a course of conduct, but also to “formalities, conditions, restrictions or penalties,” which may be attached to such conduct, if found to be in breach of the national law.²⁰ If the interference is in accordance with the law, then the aim of the restriction should be based on those listed in Article 10(2) ECHR (national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of public morals, or the protection of the rights and freedoms of others). Finally, the restrictions must be “necessary in a democratic society”,²¹ and the state interference must correspond to a “pressing social need”.²² The state response and the limitations provided by law should be “proportionate to the legitimate aim pursued”.²³ The Court requires the reasons given by national authorities for such interference to be relevant and sufficient.²⁴

The Council of Europe member states have a certain margin of appreciation in assessing whether or not a “pressing social need” exists, thus justifying the introduction of speech-based restrictions to their national law based on Article 10 ECHR. Nevertheless, the state action is subject to supervision at the European level by the Court, and the necessity of the content-based restrictions must be convincingly established by the member state.²⁵ The Court is therefore empowered to give the final ruling on whether or not a restriction can be reconciled with freedom of expression as protected by Article 10 ECHR.²⁶ The Court’s supervision will be strict because of

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18. See, for example, *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 41, European Court of Human Rights 2007-XI.
 19. See *Groppera Radio AG and Others v. Switzerland*, 28 March 1990, § 68, Series A no. 173.
 20. See *Kafkaris v. Cyprus* [GC], No. 21906/04, § 140, European Court of Human Rights 2008.
 21. See *Sunday Times v. the United Kingdom* (No. 2), Series A No. 217, 26.11.1991, para. 50; *Okçuoğlu v. Turkey*, No. 24246/94, 8.7.1999, para. 43.
 22. See *Sürek v. Turkey* (No. 1) (Application No. 26682/95), judgment of 8 July 1999, Reports 1999; *Sürek* (No. 3) judgment of 8 July 1999.
 23. See *Bladet Tromsø and Stensaas v. Norway* [GC], No. 21980/93, European Court of Human Rights 1999-III.
 24. The Court notes that the nature and severity of the penalty imposed, as well as the “relevance” and “sufficiency” of the national courts’ reasoning, are matters of particular significance when it comes to assessing the proportionality of an interference under Article 10(2): See *Cumpănă and Mazăre v. Romania* [GC], No. 33348/96, § 111, European Court of Human Rights 2004, and *Zana v. Turkey*, 25 November 1997, § 51, *Reports of Judgments and Decisions* 1997-VII. The Court also reiterates that Governments should always display restraint in resorting to criminal sanctions, particularly where there are other means of redress available. See further *Başkaya and Okçuoğlu* judgment of 8 July 1999, Reports 1999.
 25. *The Observer and The Guardian v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, pp. 29-30, § 59.
 26. *Lingens v. Austria*, 8 July 1986, Series A No. 103, p. 26, § 41; *Perna v. Italy* [GC], No. 48898/99, § 39, ECHR 2003-V; and *Association Ekin v. France*, No. 39288/98, § 56, European Court of Human Rights 2001-VIII.

the importance given to freedom of expression. While the measure taken need not be shown to be “indispensable”, the necessity for restricting the right must be convincingly established.²⁷ According to the Council of Europe Committee of Experts for the Development of Human Rights:

at the core of the examination of any interference in the exercise of freedom of opinion is therefore a balancing of interests, in which the Court takes account of the significance of freedom of opinion for democracy.²⁸

However, an examination of the “balancing of interests” in a concrete case is not enough to understand the wider scope of freedom of expression that must be protected by the member states. For instance, whereas blocking a single website might have a limited impact on freedom of expression or imposing a small fine on a journalist could be justified under certain conditions, if what they actually do is to create a silencing effect, then they would be unacceptable according to the standards of the Council of Europe.²⁹

An environment where alternative views, and, as a result, proper working democracy, can flourish, requires states, on the one hand, to refrain from arbitrarily interfering with the rights of individuals, while, on the other hand to impose positive obligations on individuals to respect each other. Now it is widely accepted that such positive obligations protect individuals not only from the government but also from other private individuals.³⁰

Such obligations guarantee the principle of pluralism, where every individual has the right to seek and receive information and to impart information and ideas of all kinds through any media, regardless of national frontiers. The facts that are imparted might be wrong and the ideas that are expressed might offend, shock or disturb.³¹ Although the level of positive obligations vary, depending on the kind of rights to freedom of expression at stake,³² the main aim of the ECHR and the Council of Europe can be summarised as creating an open space for public debate. Thus, the main aim of the ECHR is not to protect governments against dissent, but rather to protect an environment in which people can express themselves without fear.

Some principles developed in the Court’s jurisprudence have clarified what is required from governments in this context. First of all, the doctrine that all rights guaranteed by the ECHR must be “practical and effective” and not merely “theoretical or illusory”.³³ Secondly, the concept of the “chilling effect” in an “enabling environment”.

27. *Autronic AG* judgment of 22 May 1990, Series A No. 178, § 61.

28. Council of Europe Steering Committee For Human Rights, Committee of Experts for the Development of Human Rights, Working Group A, Report on “Hate Speech”, document GT-DH-DEV A(2006)008, Strasbourg, 9 February 2007, para. 22. Note further the *Handyside* judgment of 7 December 1976, Series A No. 24, §49.

29. Thus the fine of 30 euros imposed against the applicant for insulting the President was found enough to violate Article 10 in *Eon v. France*, Application No. 26118/10, 14.3.2013, para. 34-35.

30. See amongst other authorities, *Palomo Sánchez and Others v. Spain* [GC], Application No. 28955/06 and others, 12.9.2011, para 60; *Fuentes Bobo v. Spain*, Application No. 39293/98, 29.2.2000, para. 38.

31. *Handyside v. the United Kingdom*, Application No. 5493/72, para. 49.

32. *Özgür Gündem v. Turkey*, para. 43.

33. *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32.

Restrictions upon freedom of expression cannot be evaluated in a vacuum. Most of the measures taken against journalists, activists and social media users mentioned above also frightened others away from taking part in discussions or imparting information. The forced disclosure and identification of anonymous sources,³⁴ for instance, causes a chilling effect on other journalists. It can also make people think that reporting anything about certain subjects will lead to legal sanctions³⁵ including, but not limited to, injunctions, prior restraint or banning orders.

To summarise, whereas the Court hears and judges specific cases, its jurisprudence provides clear guidance to member states on how to protect the principle of pluralist democracy against legal and practical attacks from both public and private individuals and organisations. As will be shown in the remainder of this chapter, Turkey's sophisticated control and censorship machine is flagrantly violating this principle.

THE SILENCING EFFECT ON DISSENT AND FREEDOM OF EXPRESSION IN TURKEY

Unlike in the 1990s, physical attacks on journalists and killings by unknown perpetrators connected to "deep state" agents are nowadays rare in Turkey. However, there have been concerns about the government exerting control over the judiciary and using the courts to silence opposition views. This relevantly new strategy has drawn little attention from international observers,³⁶ as, *prima facie*, it is not as frightening as the previous draconian measures such as jailing journalists and executing intellectuals. However, the series of events described below has made the abuse of the law by the government more visible.

The government took control of the High Council of Judges and Prosecutors after the Constitutional Referendum of 2010. The Gezi Park protests against the government's abuse of the law during the summer of 2013 challenged the authority of the government for the first time in a decade. Following the launch of a police investigation into allegations of corruption among high-level politicians and their family members in December 2013, the then Prime Minister accelerated measures to interfere with the judiciary. In February 2014 the law was amended to strengthen the powers of the Minister of Justice within the High Council of Judges and Prosecutors. Based on this new law, the Minister of Justice replaced key members of the administrative staff of the High Council and reassigned members of the Council to other duties. Although a number of the February 2014 amendments were declared unconstitutional by the Constitutional Court on 10 April 2014, the Minister's decisions were not reversed.

More recently, the Venice Commission noted problems with the independence of the judiciary in Turkey and published its "Declaration on Interference with Judicial

34. *Goodwin v. the United Kingdom*, No. 17488/90, 27.3.1996, para. 39; *Financial Times Ltd and Others v. the United Kingdom*, No. 821/03, 15.12.2009, para. 70.

35. See for instance *Cumhuriyet Vakfı and Others v. Turkey*, No. 28255/07, 08.10.2013, para. 62.

36. No doubt, there are important exceptions to this apathy. The Council of Europe's Human Rights Commissioner Thomas Hammerberg released a detailed assessment on freedom of expression in 2011. CommDH (2011)25, 12 July 2011.

Independence in Turkey” in which it pointed out a pattern of interference with the independence of the judiciary in clear violation of European and universal standards:

- ▶ Judgments and requests from public prosecutors were not executed;
- ▶ Public prosecutors were suddenly removed from cases prepared by them over long periods;
- ▶ Judges and public prosecutors were allegedly arbitrarily transferred to other courts;
- ▶ Judges were dismissed after making “anti-government” judgments;
- ▶ Judges and public prosecutors were arrested because of judgments or decisions taken by them.³⁷

Amendments were made to the Criminal Procedural Code to abolish magistrates’ courts, whose decisions could be referred to the Criminal Courts of First Instance, (by Law No. 6545 in June 2014)³⁸ and to replace them with Criminal Justices of the Peace (CJPs), whose decisions could only be referred to another CJP, not to the Criminal Court of First Instance. These new CJPs swiftly become a new weapon in the government’s efforts to suppress dissent in the media, among journalists, on the Internet and on social media platforms, as will be explained later in this chapter.

Under this new strategy, everything is carried out in line with the letter of the law. Some decisions taken by the courts and prosecutors have even referred to the Court’s jurisprudence to justify sanctions in a democratic society. Criminal cases are in most cases initiated either by lawyers representing politicians or supporters of the AKP bringing complaints against individuals. Another scenario involves pro-government newspapers inviting public prosecutors to initiate criminal investigations of dissenters, most of whom are found guilty. The position of the mayor of Ankara is striking in this respect. He has 2.71 million followers on Twitter. Once he claimed that he had initiated 3 000 prosecutions and criminal complaints of defamation. Similarly, the current President of Turkey has also initiated hundreds of criminal and/or civil cases. The current Prime Minister has also become as litigious as his predecessor. In theory, the legal costs involved in so many criminal and civil court cases would cost an individual a fortune, so how these so-called “public servants” can they afford them without illegal use of public funds remains a mystery. However, of more interest than the financial aspect of these cases is to understand how the legal machinery is working. Following thousands of people is difficult. It seems that some of the lawyers representing politicians must be devoting all their time to catching those who are allegedly defaming their clients or insulting religion or state institutions. In most cases, this must be like looking for a needle in a haystack as they dig up any obscure comment, slight expression of dissent or criticism, regardless of whether or not they were read or seen by a significant number of people. Although the Court has set fairly wide limits of permissible criticism of politicians and, to a lesser degree, civil servants, its principled approach and jurisprudence are almost always disregarded,

37. Venice Commission Declaration on Interference with Judicial Independence in Turkey, 20 June, 2015 at <http://venice.coe.int/files/turkish%20declaration%20June%202015.pdf>.

38. Law No. 6545, which amends Turkish Criminal Law and Certain Codes entered into force through its publication in the Official Gazette dated 28 June, 2014, no: 29044.

and prosecutions are initiated simply by relying on the complaints allegedly received by the lawyers representing politicians.

Therefore, all the legal measures and actions taken by politicians and government figures, as summarised below, must be set against this background. There is no doubt that the right of an individual to protect his/her reputation is protected by Article 8 ECHR³⁹ and Article 10(2) ECHR allows national authorities to restrict freedom of expression to maintain the authority and impartiality of the judiciary.⁴⁰ Article 9 ECHR imposes positive duties upon national governments to protect the freedom of religion.⁴¹ Thus, it is legitimate to ask courts to protect rights recognised by the ECHR. However, as Article 17 ECHR clearly states:

nothing 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.

As we show below, the new Turkish censorship machinery violates this principle in a systemic and widespread manner.

Silencing dissent by aggressive prosecutions and criminal investigations

There are far too many speech-related crimes under Turkish law. Most of them are listed in the Criminal Code and they have been systematically used to initiate criminal investigations leading to prosecutions in most cases. The targets of such criminal investigations and prosecutions are usually journalists, but other people, including several celebrities, public personalities, human rights activists, students and users of social media platforms such as Twitter and Facebook have also been targeted.

Criminal defamation of those in public office is one of the most frequently used offences in the Criminal Code (Article 125(3)(a)) in recent years to silence criticism of politicians and the government. The Court has stated that:

although sentencing is in principle a matter for the national courts, the Court considers that 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 seriously impaired, as, for example, in the case of hate speech or incitement to violence.⁴²

According to the Court:

a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest – presents no justification whatsoever for the imposition of

39. *Axel Springer AG v. Germany*, No. 39954/08, 07.02.2012, para. 83.

40. See e.g. *July a. Sarl Liberation v. France*, No. 20893/03, 14.02.2008.

41. See *İ. A v. Turkey*, Application No. 42571/98, 13.9.2005. But note the strong dissenting opinion in this judgment.

42. *Cumpăna and Mazare v. Romania*, No. 33348/96, 17.12.2004, para. 115.

a prison sentence ... such a sanction, by its very nature, will inevitably have a chilling effect, and the fact that the applicants did not serve their prison sentence does not alter that conclusion.⁴³

In a striking contrast with the Court's jurisprudence, under Turkish law, a successful prosecution for this offence would result in a minimum of one year's imprisonment, or a suspended sentence for first-time offenders.

The number of prosecutions under Article 125(3)(a) has exploded in the last three years. According to official statistics, there were 299 such cases involving 403 defendants in 2012, followed by 312 cases involving 370 defendants in 2013 and 162 cases involving 192 defendants in 2014. In terms of new cases, 239 were initiated in 2012, 285 in 2013 and 124 in 2014. In the first three months of 2015, eight cases were initiated for defaming Erdoğan as Prime Minister and 21 cases as President, plus seven cases for insulting his son Bilal, and three for insulting the Erdoğan family.⁴⁴ According to the latest US Country Report for Turkey, in April 2014 Erdoğan appeared as a plaintiff in 503 complaints handled by the Ankara Public Prosecutor's Office. This means that hundreds of others similar cases must be pending in the other provinces of Turkey.⁴⁵ In almost none of these defamation cases have the courts sought a balance between Articles 8 and 10 ECHR or applied the principled approach of the Court.⁴⁶

Examples of the journalists prosecuted for criminal defamation include: Barış Ince (of *Birgün* – pending), Can Dündar (of *Cumhuriyet* – charges dropped), Hayko Bağdat (of *Taraf* – pending), Burcu Karakaş (of *Milliyet* – pending), Kemal Göktaş (of *Milliyet*), Musa Kart (cartoonist for *Cumhuriyet*), Mine Bekiroğlu (freelance journalist – suspended sentence of six months' imprisonment), Canan Coşkun (of *Cumhuriyet* - pending), Merve Büyüksaraç (model and former Miss Turkey – pending), and Atilla Taş (musician and author – pending). In March 2015, Bahadır Barukter and Özen Aydoğan (of *Penguen* magazine) received suspended sentences of 11 months' imprisonment for drawing a cartoon depicting President Erdoğan. A local journalist in Gaziantep was sentenced to 23 months' imprisonment for sharing another person's post, which allegedly insulted Erdoğan, then Prime Minister, on his Facebook wall.⁴⁷ Another criminal defamation investigation was launched following the online publication of a banner showing the four ministers who were forced to resign following the 2013 corruption and bribery scandal with masks photo-shopped onto their faces.⁴⁸

43. Ibid., para. 116; *Marchenko v. Ukraine*, No. 4063/04, 19.2.2009, para. 52; *Mariapori v. Finland*, No. 37751/07, 06.07.2010, para. 68. In *Azevedo v. Portugal*, a fine of 10 euros per day that can be converted to up to 66 days' imprisonment was found to be disproportional. No. 20620/04, 27.3.2008, para. 33.

44. www.bianet.org/bianet/medya/164185-erdogan-i-elistiren-kendini-mahkemede-buluyor-iste-davalar.

45. Turkey 2014 Human Rights Report, p. 27.

46. See generally *Axel Springer AG v. Germany*, No. 39954/08, 07.02.2012.

47. "Erdoğan'a hakaret içeren paylaşımın paylaşımına 1 yıl 11 ay 10 gün hapis cezası" www.hurriyet.com.tr/gundem/28644180.asp.

48. "Maskeli Dörtler' pankartına 'kamu görevlisine hakaret'ten sekiz yıla kadar hapis istemi", www.diken.com.tr/maskeli-dortler-pankartina-kamu-gorevlisine-hakarettten-sekiz-yila-kadar-hapis-istemi/.

There are other criminal defamation cases where public servants and politicians are not the targets. A local leader of the AKP's Youth Club in Tuzla brought a complaint against a woman who allegedly insulted the participants at an Erdoğan rally in a post on her Facebook wall. The accused was found guilty of insulting both Erdoğan and the participants and fined TRY 10 120 (EUR 3 500).⁴⁹ Businessmen allegedly involved in corruption have also successfully brought complaints against journalists and others. One recent example involved Tuğba Tekerek, a journalist working for the daily newspaper *Taraf*. She tweeted that tape recordings released online reveal that a businessman (referred to as "I.A."), had paid officials a bribe when tendering for a government energy contract and had then been rewarded by being nominated as a member of the Board of Directors of Turkish Airlines. Following publication of her tweet, the businessman involved made a complaint of defamation against Tekerek, and a criminal investigation was initiated against her.⁵⁰

Various state agencies have also made complaints alleging defamation. The Anatolian Agency, the government news agency has been frequently criticised for its biased reporting in recent years. After the local elections of March 2014, many people, including a number of journalists, criticised it for announcing misleading results in favour of the AKP. Not only the head of the Agency, but also the Agency as a legal entity made formal criminal complaints about this to the public prosecutor's office in Ankara, which initiated a criminal investigation for defamation involving 58 people, including the journalists Can Dündar, Burcu Karakaş, Melis Alphan and Ahmet Şık.⁵¹

Furthermore, an alarming number of Turkish citizens, from students to celebrities, are facing criminal charges of defaming or insulting President Erdoğan under Article 299 of the Criminal Code. Under Article 299(1), anyone who is found guilty of defaming the President of the Republic shall be imprisoned for between one and four years. The Court held in *Artun and Güvener v. Turkey* that "conferring Heads of State with special privileges cannot be reconciled with modern practice and political conceptions."⁵² In *Otegi Mondragon v. Spain* the Court held that:

the fact that the King occupies a neutral position in political debate and acts as an arbitrator and a symbol of State unity should not shield him from all criticism in the exercise of his official duties.⁵³

Thus, the Court has rejected a privilege provided for a King who only represents the unity of the state and people, in contrast to President Erdoğan, who acted as if he represents only the AKP (rather than the country) during the 2015 elections. According to the Turkish Ministry of Justice's reply to a question from Istanbul MP Melda Onur, of the 1 359 cases sent to the Minister for permission to launch a prosecution over seven years, permission was granted on only 545 occasions. According to official statistics, 141 prosecutions for defamation were initiated in 2012, 140 in

49. "Erdoğan'a Facebook'tan hakaret eden kişiye ceza!", www.yeniakit.com.tr/haber/erdogana-facebooktan-hakaret-eden-kisiye-ceza-50164.html.

50. <http://t24.com.tr/haber/gazeteciye-rusvet-tweeti-sorusturmasi,302449>.

51. www.hurriyet.com.tr/gundem/28589276.asp.

52. *Artun and Güvener v. Turkey*, No. 75510/01, 26.6.2007, para. 31.

53. *Otegi Mondragon v. Spain*, No. 2034/07, 15.3.2007, para. 56.

2013 and 132 in 2014. In the first seven months of Erdoğan's Presidency, 236 permissions were requested, of which 105 were granted, and an arrest was made in eight of these cases.⁵⁴

By contrast, according to media reports and research, at least 84 people have been charged since August 2014 (when Erdoğan became President) with insulting the President in public or on social media, meaning that the vast majority of prosecutions for defamation in 2014 were initiated after Erdoğan became President. A report by *Ileri Haber*, a news website, claimed that 187 people had been subjected to criminal investigations under Article 299 since August 2014. As of the beginning of April 2015, that number is estimated to have risen to around 220. Furthermore, media reports suggest that 61 journalists have been fined for insulting Erdoğan and 22 journalists are currently in prison. It is worth mentioning some recent examples of this trend. In December 2014, a 16-year-old student in Konya was arrested in the middle of a class at his school and then interrogated by police for allegedly calling Erdoğan the "chief of thieves" during a student protest. He is currently facing up to four years' imprisonment. Political activist Onur Kılıç was arrested in February 2015 and charged with insulting the President for chanting "Thief, Murderer, Erdoğan" during a protest against compulsory religious education lessons in schools, and was remanded in custody to await trial. The Minister of Justice gave permission for the prosecution to proceed under Article 299. Onur Kılıç also faces up to four years' imprisonment if convicted. His indictment also refers to his tweets. A criminal investigation was also initiated following the publication of a headline in the newspaper *Birgün* which called Erdoğan "a Murderer and a Thief" following the arrest and detention of Onur Kılıç.

Prosecutions of journalists reporting on corruption cases and allegations or any other issue deemed politically sensitive or damaging to the government are not limited to defamation. Journalists are also widely prosecuted for breaching the confidentiality of investigations under Article 285 of the Criminal Code. In 2012, there were 413 such prosecutions,⁵⁵ 224 in 2013⁵⁶ and 336 in 2014.⁵⁷ Article 285(1)&(2) was originally drafted to protect the presumption of innocence and this ground for restricting rights has been found legitimate by the Court.⁵⁸ The Committee of Ministers has also underlined the importance of the presumption of innocence in reporting criminal cases.⁵⁹ However, since there is little scope under Article 10(2) ECHR for restrictions on the freedom of expression in matters of public interest,⁶⁰ restrictions in corruption cases can only

54. www.bianet.org/bianet/ifade-ozgurlugu/165934-erdogan-dan-haberciye-iki-secenek-hapis-ve-para.

55. 370 cases for 285(1) and 43 cases for 285(2) were initiated during 2012.

56. 180 cases for 285(1) and 44 cases for 285(2) were initiated during 2013.

57. 256 cases for 285(1) and 80 cases for 285(2) were initiated during 2014.

58. "Journalists reporting on criminal proceedings currently taking place must, admittedly, ensure that they do not overstep the bounds imposed in the interests of the proper administration of justice and that they respect the accused's right to be presumed innocent". *Du Roy and Malaurie v. France*, No. 34000/96, 03.10.2000, para. 34.

59. See Recommendation Rec(2003)13 of the Committee of Ministers of the Council of Europe to member States on the provision of information through the media in relation to criminal proceedings provides, especially Principles 2 and 6.

60. *Wingrove v. the United Kingdom*, 25.11.1996, Reports 1996-V, para. 58; *Sürek v. Turkey (No. 1)* [GC], No. 26682/95, para. 61.

be acceptable when a journalist makes comments which are likely to prejudice the chances of a person receiving a fair trial or undermine the confidence of the public in the role of the courts in the administration of criminal justice.⁶¹ However, once again, the Turkish courts have not sought a balance between freedom of expression and presumption of innocence in corruption-related news coverage in such cases. The new CJPs who are determined to shut down corruption investigations have themselves also started criminal proceedings against too many journalists who reported about the corruption scandal. Examples of this trend include the prosecution of Aysun Yazıcı from the daily newspaper *Taraf* for reporting about the General Manager of a State Bank who had hidden TRY 4.5 million in shoe boxes at his home, in contrast to the treatment of the General Manager, who was arrested after the incident but then released without charge. Ms. Yazıcı is now on trial for breaching the confidentiality of the investigation.⁶² Furthermore, three businessmen against whom all corruption allegations were dropped, despite strong evidence, claimed that journalists from the daily newspaper *Cumhuriyet* had breached the confidentiality of their investigation by reporting on the case. The case against the journalists is currently pending.⁶³ Even reporting a meeting of the main opposition party in the Turkish parliament has led to a criminal investigation under Article 285: Ezelhan Üstünkaya from the *Bugün* newspaper, reported a speech by Kemal Kılıçdaroğlu, the opposition party's leader, in which he shared leaked wiretaps from the corruption investigations. A *nolle prosequi* decision was issued by the public prosecutor's office.⁶⁴

A number of other legal provisions have been invoked by public prosecutors to initiate cases against journalists. For many years, Articles 6 and 7 of the Anti-Terror Law have been used against journalists⁶⁵ and periodicals have also been banned under Article 7.⁶⁶ Despite clear guidance from the Court, the Turkish CJPs have continued to issue judgments which contradict the Court's jurisprudence, especially in cases concerning Kurdish and Socialist journalists. Article 220 of the Criminal Code has also been invoked to label many journalists as terrorists. Until amendments made in 2013, these provisions were widely used to jail a considerable number of journalists. Similarly, Article 314 of the Criminal Code, which criminalises membership of an armed organisation, was used to prosecute left-wing or Kurdish journalists, writers, lawyers, academics and students who wrote about or worked on the Kurdish issue.

However, the new "sacred" values of the AKP government have led the Turkish CJPs to use other provisions in the Criminal Code as bases for investigations more frequently. Article 216 (formerly Article 312) that prohibits hate speech, has been

61. *A.B. v. Switzerland*, No. 56925/08, 01.07.2014, para. 45.

62. <http://bianet.org/bianet/ifade-ozgurlugu/161720-dort-bakan-yolsuzluktan-kurtuldu-haberini-yapanlar-ise-yargilaniyor>.

63. *Ibid.*

64. See Diken, "Tape çıkmazı: Yargı basın özgürlüğü diyor, RTÜK ceza kesiyor," 04.06.2014, at www.diken.com.tr/tape-cikmazi-yargi-basin-ozgurlugu-diyor-rtuk-ceza-kesiyor/.

65. For a recent analysis of cases under those provisions see Kerem Altıparmak and Hüsnü Öndül (2013), *Monitoring Report on the Implementation of the Judgment of Gözel and Özer v. Turkey*, available at www.aihmiz.org.tr/files/04_Gozel_ve_Ozer_Report_EN.pdf.

66. See semi-pilot judgment *Ürper v. Turkey*, No. 14526/07 and others, 20.10.2009.

frequently used against Kurds, in contrast to the spirit in which it was drafted in the 1990s. Article 216(3) states that:

a person who openly denigrates the religious values of a section of the population shall be sentenced to imprisonment for a term of six months to one year if the act is likely to disturb public order.

In recent times, the number of prosecutions brought under Article 216 has escalated. According to official statistics, 66 prosecutions were initiated in 2012, 107 in 2013 and 47 in 2014.

The European Commission for Democracy through Law (Venice Commission) has issued a report on the relationship between freedom of expression and freedom of religion.⁶⁷ The report states that:

it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) *simpliciter*, without the element of incitement to hatred as an essential component.⁶⁸

However, it seems that, in practice, these comments have been ignored by the Turkish CJPs, who have interpreted Article 216 as an anti-blasphemy law.

In June 2012, the world-renowned pianist Fazil Say was charged under Article 216(3) by the Istanbul Public Prosecutor's Office after he posted a series of tweets in April of that year. In fact, he had merely re-tweeted an extract from a poem by the famous 11th-century Persian poet, Omar Khayyam:

"You say its rivers will flow in wine.
Is the Garden of Eden a drinking house?
You say you will give two houris to each Muslim.
Is the Garden of Eden a whorehouse?"

Say had added to his retweet "I don't know whether you have noticed or not, but wherever there is a stupid person or a thief, they are believers in God. Is this a paradox?" He was convicted of insulting Islam and offending Muslims because of these tweets and received a suspended sentence of 10 months' imprisonment.

Another case was brought against the Turkish-Armenian author, Sevan Nişanyan, who, in an article written after the release of the satirical YouTube film "The Innocence of Muslims" argued that talking about this film should not be criminalised in Turkey. He argued that, while mocking the Prophet Mohammed is "ugly" it does not constitute a "hate crime." He wrote:

it is not "hate crime" to poke fun at some Arab leader who, many hundred years ago, claimed to have established contact with a Deity and made political, economic and sexual profit as a result. It is almost a kindergarten-level case of what we call freedom of expression.

67. European Commission for Democracy through Law (Venice Commission), Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, 17-18 October 2008, Doc. No. CDL-AD(2008)026.

68. *Ibid.*

Nişanyan was found guilty and sentenced to 13.5 months' imprisonment. Similarly, journalists found themselves under fire after the *Charlie Hebdo* attack. Although the Turkish Prime Minister took part in the protest rally against the attack in Paris, websites that had translated or shared the first issue of *Charlie Hebdo* published after the attack were subjected to blocking orders in Turkey. In addition, public prosecutors filed criminal complaints against several journalists, including columnists Ceyda Karan and Hikmet Çetinkaya of *Cumhuriyet* who are currently being prosecuted for including the *Je Suis Charlie* cartoon of the Prophet Mohammed in their columns. If they are convicted, they could be sentenced to up to 5 years' imprisonment.⁶⁹

Other examples of this trend include the prosecution of a teacher in Muş for using a Twitter account named "Allah CC" ("C.C." is an abbreviation of the honorific "[Allah's] glory is so almighty"). The teacher was sentenced to 15 months' imprisonment, but he has appealed.⁷⁰ Furthermore, the Istanbul Anadolu 32nd Court of First Instance found Sedat Kapanoğlu, the founder of *Ekşi Sözlük*, a popular Turkish social media platform, together with a contributor to the platform guilty of insulting religious values and sentenced him to ten months' imprisonment in 2014, although this sentence was later suspended.⁷¹

Another new phenomenon, which emerged after the Gezi Park protests, is increasing pressure on meetings and demonstrations. In the same way as it leads the Council of Europe member states in the number of hostile judgments from the Court in freedom of expression cases under Article 10 ECHR, the 63 judgments against Turkey out of a total of 165 for all member states makes Turkey the leader in hostile judgments from the Court under Article 11 ECHR, by a wide margin. In two recent cases,⁷² the Court applied the Article 46 procedure and indicated general measures to the Turkish authorities.⁷³ However, this appears to have had no effect on the Turkish government, whose enactment of its notorious Internal Security Package, despite strong opposition, has made matters worse.⁷⁴

These new measures not only criminalise those who participate in illegal demonstrations but also those who invite others to join them or who make positive comments on these demonstrations, especially through the social media platforms. Public prosecutors have filed criminal complaints against such people for breaching several provisions of Law No. 2911 on Meetings and Demonstrations as well as Article 214, (incitement to commit an offence), Article 215 (praising an offence or offender) and Article 217 (incitement to disobey the law) of the Criminal Code.

For instance, 29 young people were prosecuted under Articles 214 and 217 of the Turkish Criminal Code, charged with incitement to commit a crime and to disobey

69. "Ceyda Karan ve Hikmet Çetinkaya'ya 4.5 yıl hapis istemi" www.hurriyet.com.tr/gundem/28683799.asp.

70. Daily Mail, "Turkish Twitter user jailed because he had 'Allah' in his handle," 31 May, 2014.

71. See Bianet, Media Monitoring Report, 18 September 2014 at www.bianet.org/english/freedom-of-expression/158586-bia-media-monitoring-report-full-text.

72. *İzci v. Turkey*, No. 42606/05, 23.7.2013; *Abdullah Yaşa and Others v. Turkey*, 44827/08, 16.7.2013.

73. For a detailed analysis, see Başak Çalı (2015), *Monitoring Report of the Execution of the Ataman Group Cases*, available at www.aihmiz.org.tr/files/AtamanMonitoringReport.pdf.

74. Law No. 6638 amending Police Powers and Duties and other Laws, publicly known Internal Security Package published in the Official Gazette on 4 April 2015.

the law, as well as under several provisions of Law No. 2911 on Meetings and Demonstrations in relation to their tweets during the Gezi Park protests of June 2013. Their tweets included the telephone numbers of doctors, the contact details of emergency defence lawyers and open Wi-Fi passwords for communications.⁷⁵ The only complainant and alleged victim was the then Prime Minister Erdoğan. In September 2014, the CJP found 27 of the 29 defendants not guilty. Of the other two defendants, one was found guilty and fined TRY 8 100(his sentence was later suspended) and the other had fled the court's jurisdiction, so a warrant was issued for his arrest.

In Istanbul, a lawyer was tried and acquitted for breaching Article 215 of the Criminal Code just for sharing a picture of herself on a burned car on Instagram during the Gezi Park protests of 2013.⁷⁶ This case was brought by the public prosecutor after the photo in question was published in an extremist right-wing newspaper, which had publicly condemned her.

Silencing dissent by publication banning orders

Since around 2010, it has become common practice for CJPs to issue all-out publication banning orders, which last for an extended period of time (or indefinitely in certain cases) and prohibit the media, including websites, television and radio channels, from publishing or disseminating information on specific matters of public interest, including criminal investigations and prosecutions. In 2010, four banning orders were issued, rising to 36 in 2011, 43 in 2012, 42 in 2013, and 26 in the first six months of 2014, making a total of 149 orders between 2010-2014, according to an official government parliamentary reply.⁷⁷ Although the government claims that most of these orders were issued in divorce, homicide and child-abuse cases, it is well known that CJPs have not hesitated to order full publication bans in a number of politically sensitive cases, such as the *Deniz Feneri* (Lighthouse) charity embezzlement case; the Musa Anter murder trial; the attempt to publish a list of the members of the JITEM;⁷⁸ the 2011 football match-fixing investigation; the assassination of two police officers in Bingöl province; the ISIL attack on the Turkish Consulate in Mosul; the Soma mining disaster; the Reyhanlı car-bomb attacks; the Uludere/Roboski massacre; the raid on the Aktütün military outpost; the killing of three soldiers in Hakkari Yüksekova on 25 October 2014; the illegal tapping of telephones belonging to high-level governmental officials dealing with Syria; the raid on trucks belonging to the National Intelligence Organization (MIT) containing weapons in Adana; the allegations of illegal funding by Turkey of the civil wars in Iraq and Syria; government corruption, and the parliamentary enquiry into allegations of corruption involving four former ministers.

75. 28 out of 29 accused were acquitted after an 18-month trial. İzmir Asliye Ceza Mahkemesi, No. 2014/78, D. 2014/34, 22.9.2014.

76. İstanbul 6. Asliye Ceza Mahkemesi, No. 2014/339, D. No. 2015/23.

77. TBMM Soru Önergesi Sayı 71366025-031-1057, 17.07.2014.

78. JITEM (Intelligence and Counter-Terrorism Police) is a formerly secret organization whose existence was only admitted in the late 1990s and is suspected of involvement in disappearances, assassinations, narcotics smuggling and weapons trafficking – among other things – related to the ongoing conflict between the Kurdish PKK and the Turkish government.

The CJs ignore the principles developed by the Court in the *Cumhuriyet Vakfi* judgment, not only in choosing the subjects of their banning orders but also in the way such orders are issued. In that judgment, the Court examined the scope, duration and reasoning behind the interim injunction and also the lack of opportunity for the defendant to challenge the interim injunction before it was issued.⁷⁹ This case is typical of all politically sensitive cases: publication banning orders are issued without justification and for an unlimited period. More importantly, the scope of these orders is vague and arbitrary: the courts simply ban the publication of any news linked to the case at hand without giving any justifying reasons.

The banning order issued with respect to the parliamentary enquiry into allegations of corruption involving four former ministers is a good example, as it is extremely broad and arbitrary. The ban was issued by the Ankara 7th CJP sitting alone on 25 November 2014 and expired on 27 December 2014. The ban was challenged by a CHP Member of Parliament, as well as by two journalists and the two authors of this chapter, on 28 November 2014. When this appeal against the banning order was rejected by the Ankara 8th CJP, the applicants appealed to the Constitutional Court on 3 December 2014. Given the time limit on the ban, the General Assembly of the Constitutional Court, heard the appeal as a priority, but dismissed it on the grounds of inadmissibility for *ratione personae* reasons by a majority decision of nine to seven on 10 December 2014.⁸⁰ The Constitutional Court refused leave for the defendants to appeal against this decision on the ground that they had not been the victims of the banning order. Thus, the Constitutional Court implicitly concluded that banning orders can only be challenged by the people directly affected by them, but not by journalists, academics or parliamentarians. It thus seems clear that the Turkish courts have unfettered discretion to prevent journalists and other people from seeking and receiving information on political issues, as long as the parties to the case agree to the measure. Although the Court requires particularly strong reasons for any measure limiting access to information which the public has the right to receive,⁸¹ the Constitutional Court, by a small majority, decided not to discuss the merits of the case including the legality of publication bans and their compatibility with the constitution and the ECHR. The reasons behind this surprising decision, in the light of the Constitutional Court's previous decisions involving Twitter and YouTube, can only be explained by political pressure. Such governmental pressure and its silencing effect that is the theme of this chapter was also evident in the Constitutional Court, previously thought by many to represent "one of the last fortresses left for the government to conquer."⁸² Throughout 2014, the Constitutional Court had "angered Erdoğan and the AKP with a series of liberal rulings, including its lifting of the Twitter ban in April and its lifting of the YouTube ban in May, on the grounds that both were a violation of freedom of expression."⁸³

79. *Cumhuriyet Vakfı and Others v. Turkey*, para. 62-74.

80. The reasoned decision was not published on the Official Gazette until 20 February 2015.

81. See *Timpul Info-Magazin and Anghel v. Moldova*, No. 42864/05, § 31, 27 November 2007; *Węgrzynowski and Smolczewski v. Poland*, No. 33846/07, § 57, 16 July 2013.

82. William Armstrong, "Explained: Erdoğan vs. the Constitutional Court," *Hürriyet Daily News*, 16 December, 2014.

83. *Ibid.*

Erdoğan went as far as calling the Twitter decision “unpatriotic”⁸⁴ and has stated that he will not respect it.⁸⁵

Publication banning orders remain a significant political control tool for the government and their silencing effect continues. It remains to be seen whether or not the government will continue to rely on them after the General Election in June 2015.

Silencing dissent by forced removal of Internet content and blocking decisions

According to the Court, the Internet is:

an information and communication tool particularly distinct from the printed media, in particular as regards the capacity to store and transmit information. The electronic network serving billions of users worldwide is not and potentially cannot be subject to the same regulations and control.⁸⁶

The Court also notes that:

in light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information generally.⁸⁷

In fact, the Internet “has now become one of the principal means of exercising the right to freedom of expression and information.”⁸⁸

Although until 2007 Turkey had a predominantly “hands-off” approach to Internet content and communications, a sea change occurred in Turkish policy in early 2007, with the first ever complete access blocking of the YouTube platform in Turkey. That swiftly led to a new Law allowing the Telecommunications and Communication Presidency (TIB) and the courts to block access to websites in the name of protecting children from harmful content on the Internet.

The enactment of this new Law (Law No. 5651 entitled *Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publication*⁸⁹) in May 2007 allowed the blocking of access to approximately 90 000 websites by court orders and administrative blocking orders issued by the TIB by July 2015.⁹⁰ Currently, access to popular platforms and websites such as Scribd, Last.fm, Metacafe, FunnyorDie

84. The exact word is “gayrı-millî,” which literally means “non-national.”

85. See further Mustafa Akyol, “The Constitutional Court conspiracy,” *Turkish Daily News*, 9 April, 2014.

86. See *Editorial Board of Pravoye Delo and Shtetel v. Ukraine*, Application No. 33014/05, Judgment of 05.05.2011, para 63.

87. See *Times Newspapers Ltd (Nos. 1 and 2) v. The United Kingdom*, Applications 3002/03 and 23676/03, Judgment of 10 March 2009, Final: 10 June 2009; and *Ashby Donald and Others v. France*, No. 36769/08, § 34, 10 January 2013 –not yet final.

88. *Ahmet Yıldırım v. Turkey*, Application No. 3111/10, judgment of 18 December 2012, 18.03.2013 (final).

89. Law No. 5651 was published on the Turkish Official Gazette on 23.05.2007, No. 26030.

90. Official statistics are not published by the TIB or any other government authority. However, detailed unofficial statistics can be obtained through <http://engelliweb.com/istatistikler/>.

and Grindr is blocked in Turkey. Access to Wordpress, Blogspot, DailyMotion and Vimeo has been blocked temporarily by recent court orders. Access to YouTube was blocked between May 2008 and October 2010 and again more recently, as will be detailed below. A number of alternative news websites that report news on south-eastern Turkish and Kurdish issues remain indefinitely blocked in Turkey as well as the *Charlie Hebdo* website since 27 February 2015. The website of Turkey's only Atheist Association was also blocked by the same order.

The blocking provisions of Law No. 5651 were reviewed by the Court in December 2012. In *Ahmet Yıldırım v. Turkey*, a case involving blocking access to the Google platform in Turkey, the Court, finding a breach of Article 10 ECHR, held that a restriction on access to a source of information is only compatible with the Convention if a strict legal framework is in place regulating the scope of such a ban and affording the guarantee of judicial review to prevent possible abuses.⁹¹ Despite this finding, and instead of improving freedom of expression on the Internet, as a response to the corruption allegations of 17-25 December, 2013, the Turkish government introduced further restrictions in February 2014 by amending Law No. 5651, to extend criminal liability to hosting and access providers; to compel ISPs to set up a new Association of Access Providers (ESB), membership of which is compulsory; to compel ISPs to centrally enforce blocking orders within 4 hours of receipt and to introduce URL-based blocking provisions for requests involving violation of personal rights and privacy infringements. All those steps were taken amid intense international criticism. According to the OSCE's Representative on Freedom of the Media:

these measures are not compatible with OSCE commitments and international standards on freedom of expression and they have the potential to significantly impact free expression, investigative journalism, the protection of journalists' sources, political discourse and access to information over the Internet.⁹²

Following the February 2014 amendments to Law No. 5651, two separate administrative decisions were issued by the TIB to block access to the Twitter and YouTube platforms on 18 and 27 March 2014 respectively. The fact that these decisions resulted in the complete blocking of access to the Twitter and YouTube platforms is a clear indication that the amended Law No. 5651 is still not in compliance with the Court's findings in *Ahmet Yıldırım v. Turkey*. These blocking decisions were found unconstitutional by the Constitutional Court, which stressed that the complete blocking of access was not only a far-reaching measure but also had no legal basis.⁹³ In

91. Access to Google Sites was blocked in Turkey until August 2014.

92. See OSCE, The Representative on Freedom of the Media, *Briefing on Proposed Amendments to Law No. 5651 The Internet Law of Turkey*, January 2014, at www.osce.org/fom/110823?download=true.

93. The authors of this chapter, Akdeniz and Altıparmak jointly lodged individual petitions to the Turkish Constitutional Court to overturn the blocking decisions with regards to both Twitter (see Judgment of the Second Section of the Constitutional Court, dated 2/4/2014, App. No. 2014/3986) and YouTube (see Judgment of the General Assembly, dated 28/5/2014, App. No. 2014/4705) during 2014. The applicants lodged their individual petitions to the Constitutional Court as users of the Twitter and YouTube platforms. In relation to both petitions the Constitutional Court ruled in favour of the applicants, Akdeniz and Altıparmak and stated that the applicants' freedom of expression guaranteed by Article 26 of the Constitution had been violated. Hence the Court ordered to lift the blocking orders involving Twitter and YouTube.

addition, the Constitutional Court concurred with the findings of the Court in *Ahmet Yıldırım v. Turkey* that the provisions of Law No. 5651 did not meet the requirement of foreseeability and were not clear in terms of scope and substance in setting out the procedure for blocking access to websites.

Problems since the February 2014 amendments were also noticed by the Council of Europe's Committee of Ministers during its third special meeting on human rights⁹⁴ which examined the state of implementation of judgments of the Court, including that of *Ahmet Yıldırım v. Turkey*. In the decision adopted⁹⁵ with regards to the execution of the *Ahmet Yıldırım v. Turkey* decision, the Committee of Ministers considered:

that the legislative amendments made to Law No. 5651, in February 2014 do not satisfy the foreseeability requirement of the Convention and that the legislative framework is still not in compliance with the Court's findings in the present case.⁹⁶

More importantly, the Committee of Ministers stressed that:

these amendments do not respond to the concerns raised by the Court as to the arbitrary effects of decisions on wholesale blocking of access to websites since access to the host websites, Twitter and YouTube, were blocked after these legislative amendments came into force.⁹⁷

At this stage, readers may expect Turkey's track record to improve with regards to Internet freedom. However, the truth is to the contrary: since the Constitutional Court issued its historic decisions involving Twitter and YouTube, the situation has become even worse. The government argued that the new provisions in the Law aimed at preventing infringements of personal rights and the privacy of individuals, which the state is supposed to protect under Article 8 ECHR. However, in a very short time it became clear that these provisions were enacted to protect politicians and businessmen against whom allegations of corruption had been made. In fact, in August 2014, the ESB started to receive all the blocking decisions involving violation of personal rights and privacy infringements (under Articles 9 and 9A of Law No. 5651) with orders to distribute them to its member ISPs. Subsequently, Articles 9 and 9A have been widely used to restrict political speech and government critics, especially through social media platforms. Over 3 000 such decisions were issued across Turkey by CJPs and over 20 000 URLs were subjected to blocking. Approximately 700 of these decisions are related to Twitter accounts and tweets, 500 to Facebook and 200 to content published on the YouTube platform. Likewise, the daily newspapers *Cumhuriyet* received around 60 blocking orders, *Sözcü* 36 orders, *Radikal* 28 orders, *Zaman*, 24 orders and online news provider *T24* around 40 orders. More worryingly, 95 of these blocking orders were requested and obtained by Ahmet Davutoğlu, the Prime Minister of Turkey and 50 blocking orders were requested and obtained by President Erdoğan. These were all granted by CJPs based in Ankara and Istanbul. There are also other political figures who regularly request and obtain blocking orders.

94. 1208DH meeting of the Ministers' Deputies, 23-25 September 2014.

95. Case No. 23, DH-DD(2014)916; DH-DD(2014)161; DH-DD(2014)820.

96. Para 2 of the Decision of 25.09.2014.

97. Para 3 of the Decision of 25.09.2014.

Among others it is worth mentioning the former Transport Minister Binali Yıldırım (obtained around 20 blocking orders), the former Minister of the Environment and Urban Planning, Erdoğan Bayraktar (obtained around 90 blocking orders) and the President's Chief Advisor, Mustafa Varank (obtained around 50 blocking orders).

A close examination of these blocking orders reveals that they mainly target posts and accounts that criticise politicians over issues such as corruption and state-sponsored violence. Such matters that fall within the realm of freedom of political expression are expected to be subject to close public oversight and the protection of these rights must be subject to a wide interpretation.⁹⁸ The systematic issuing of hundreds of “boilerplate” judgments by the same CJPs, devoid of any legal reasoning and with a total disregard for freedom of expression disrupts an essential element of informed public debate on social media platforms at a time when the Turkish media is in crisis. It is clear that this method constitutes a systemic and structural problem for social media in general and Twitter in particular.

Although the majority of these blocking orders are not notified to the users by the courts, Twitter has started to notify its users about them. In almost all cases, this forces the users to remove the relevant tweets from their accounts and self-censor themselves, rather than going through a legal appeal. If the user does nothing, Twitter exercises its “country withheld content policy”, meaning that the outcome is almost the same, either the content is removed by the users or it is blocked by Twitter. Between 1 July and 31 December 2014, Twitter received 328 such orders in Turkey (out of 376 worldwide) and it blocked 62 Turkish accounts (out of 85 worldwide) and 1 820 Turkish tweets (out of 1 982 worldwide) under its country withheld content policy. What is clear from these statistics is that Twitter's deployment of its country withheld content policy has been controversial in relation to Turkey. For instance; on 17 December 2013, a wide-ranging criminal investigation of charges of corruption was launched against senior bureaucrats, including certain ministers and mayors, and the allegations were widely discussed on Twitter. Reports were made on these developments via the *@fuatavni* Twitter account, whose posts were considered to be important by a wide audience and the account was followed by hundreds of thousands of Twitter users. On 5 August 2014, access to the account was blocked with the notice *@fuatavni withheld. This account has been withheld in Turkey*.⁹⁹ The blocking order issued by the 5th Istanbul CJP¹⁰⁰ reads as follows:

the court hereby rules for the blocking of the URL address of the user 'fuatavni' on the twitter.com website as per Articles 3 and 4 of Law No. 6518 S9, dated 06/02/2014.

However, the decision does not mention what content triggered the court to issue a blocking order or why such content was deemed criminal. There have been 27 separate blocking orders with regard to the *@fuatavni* Twitter account and its variants. More recently, tweets posted by the *Birgün* newspaper linking to news reports regarding the MIT (National Intelligence Agency) trucks which were allegedly carrying weapons to various groups in Syria in 2014 were blocked

98. *Castells v. Spain*, 11798/85, 23.04.1992; *Lingens v. Austria*, 9815/82, 08.07.1986.

99. The account remains blocked to date.

100. Decision No. 2014/109D. İŞ, a copy of which can be accessed on the chillingeffects.org website.

with the notice “This Tweet from @BirGun_Gazetesi has been withheld in: Turkey,” undoubtedly a clear violation of the freedom of the press.

In the same way that none of the decisions noted above give information about the legal grounds for the blocking orders, no other CJP has included reasons in its decisions denying leave to appeal against earlier decisions. This is a similar practice observed across all blocking orders. In other words, blocking orders are issued without any reasoning whatsoever and in an arbitrary manner. Since there is no reasoning in these decisions, judges do not hesitate to block hundreds of URLs in a single decision, even there is no legal basis to do so. For instance, the Ankara Gölbaşı CJP¹⁰¹ decided to block 49 different URLs in a single judgment, including <http://charliehebdo.fr> and https://en.wikipedia.org/wiki/Charlie_Hebdo. Although, Article 9 of Law No. 5651 only protects personal rights, the CJPs have interpreted this very broadly to include religious feelings. Although no individual had officially complained about their personal rights being infringed or being offended by such content, it was TIB that complained to a public prosecutor’s office, who then requested those 49 web addresses to be blocked. The court implicitly recognised that all Muslims are affected by such content and granted the blocking order. An appeal against this decision was rejected by another CJP. This case is now pending before the Constitutional Court.

In another controversial decision, the Istanbul 1st CJP¹⁰² blocked access to 166 URLs on 3 April 2015, following the murder of Public Prosecutor Mehmet Selim Kiraz on 31 March 2015. Before his death, militants of the outlawed Revolutionary People’s Liberation Front had taken him hostage and published a picture of him held at gunpoint on social media platforms.¹⁰³ The Istanbul CJP’s decision required all Turkish ISPs to block access to the 166 websites that had published the photos, including direct links to stories published by Turkish and foreign newspapers (including *The Independent* and the *Daily Mail* from the UK) that featured the controversial photographs. This decision together with similar decisions issued by the Istanbul 8th CJP on 1 April 2015 and the Istanbul 6th CJP on 4 April 2015 also resulted in the complete blocking of access to the Twitter, Facebook and YouTube platforms for approximately 6 hours on 4 April 2015.

Obviously, these three CJPs had not applied the *Ahmet Yıldırım* test developed by the Court nor recalled the Constitutional Court’s two separate decisions involving Twitter and YouTube. In the *Ahmet Yıldırım*, case, the Court had stated that judges should weigh up the various interests at stake, having regard to the criteria established and applied by the Court under Article 10 ECHR. Such an obligation, however, flows directly from the ECHR and from the case law of its institutions.¹⁰⁴ It is also worth adding that three separate appeals against these blocking orders were dismissed by three separate CJPs and subsequently an appeal was made to the Constitutional Court.

101. Gölbaşı (Ankara) Criminal Justice of the Peace Court, 27.02.2015, No. 2015/191.

102. İstanbul 1st Criminal Justice of the Peace, 03.04.2015, No. 2015/1644.

103. See e.g. *The Guardian*, “Turkey bans Twitter in bid to block ‘propaganda’ pictures of kidnapping,” 6 April, 2015 at www.theguardian.com/world/2015/apr/06/briton-suspects-turkish-militant-raid-hostage.

104. *Ahmet Yıldırım v. Turkey*, para. 66.

As if this was not enough, Law No. 5651 was further amended by Article 127 of Law No. 6552 in September 2014 to give further administrative blocking powers to the head of TIB with regards to national security, the protection of public order and the prevention of crime. Article 8(16) of Law No. 5651 which included this new measure was annulled by the Constitutional Court in early October 2014.¹⁰⁵ Subsequently, yet another amendment was made in March 2015 and a new provision, Article 8A, was added to Law No. 5651. The new Article 8A intends to restrict access to content that breaches national security or that threatens public order and the protection of life, property and public health or that works against the prevention of crime. In contrast to the other blocking provisions provided in Law No. 5651, Article 8A allows government ministries, including the Prime Minister's office, to order the removal or blocking of such content, by "executive decision", in addition to the CJPs. Such orders will be made direct to TIB, which then has to instruct the ISPs and hosting companies to block and/or remove such content within 4 hours. Orders from government ministries require TIB to obtain approval from a CJP within 24 hours.

It did not take long for the CJPs to take notice of Article 8A, and when the daily newspaper *Cumhuriyet* published images of weapons carried on MIT trucks on its front page and on its website on 29 May 2015, the Istanbul 8th CJP issued a URL-based blocking order by relying on Article 8A.¹⁰⁶ Appeals against the blocking order were rejected by the Istanbul 9th CJP without any reasoning. This case has been appealed to the Constitutional Court.

Although originally created to protect children from harmful content, the amendments made in 2014 and 2015 have changed Law No. 5651 into a political control mechanism for Internet content through extensive blocking orders. Silencing dissent is the theme of this chapter and, certainly, the massive number of blocking orders, as well as the predominantly political nature of the requests, have undoubtedly created a chilling effect on social media use in Turkey.

Silencing dissent by vexatious civil lawsuits and abuse of the statutory right to reply

The political influence of the government has been observed more clearly since the CJPs started handling requests for blocking orders, as described above. Equally, the CJPs have issued hundreds of statutory "right of reply" orders to newspapers. An examination of the data regarding the demands for formal denials and the right of reply reveal the procedure by which these CJPs now function. For example, until June 2014, the *Cumhuriyet* newspaper had received only three demands for a formal denial whereas 30 such orders have been issued by the CJPs since June 2014, 17 of which were linked to blocking orders. All the appeals made by *Cumhuriyet* against these decisions were dismissed.¹⁰⁷ According to the Turkish Publishers Association's

105. Constitutional Court Decision, E. 2014/149, K. 2014/151, 2.10.2014, Off. Gazz: 01.01.2015.

106. Decision No. 2015/1330 D.İş. dated 29.05.2015.

107. See. Can Dündar "Cumhuriyet'e Açık Teşekkür", 7 December 2014 www.cumhuriyet.com.tr/koseyazisi/157629/Cumhuriyet_e_Acik_Tesekkur.html.

2015 Freedom of Expression and Thought Report,¹⁰⁸ *Cumhuriyet's* writers, columnists and journalists are currently facing 16 criminal investigations, 41 criminal cases and 33 civil law cases, most initiated by politicians.

Moreover, according to data provided by the Turkish Journalists' Association and the Turkish Journalists' Union, the newspapers *Birgün*, *Bugün*, *Cumhuriyet*, *Evrensel*, *Sol*, *Taraf*, *Aydinlik*, *Ulusal Kanal* and *Zaman* as well as 60 individual journalists, were charged in over 100 cases of civil and criminal defamation, as well as massive numbers of statutory "right of reply" orders during 2014, all connected with the police investigation of allegations of corruption from 17-25 December 2013.¹⁰⁹ For the civil defamation cases alone, the politicians and other individuals involved have claimed damages of between TRY 20 000 (EUR 7 000) and TRY 50 000 (EUR 17 000) per case.

According to *The Wall Street Journal* article, after just two years in power, Erdoğan had initiated 57 defamation lawsuits and won 21 of them, receiving the equivalent of US\$ 440 000 (EUR 381 500) in damages.¹¹⁰ Since there is no transparency on this issue, it is estimated that the total amount of damages paid to him may amount to millions of dollars (or euros). Considering that Erdoğan was awarded \$440 000 from 21 cases, it is speculated that the mayor of Ankara, who has announced that he had initiated some 3 000 criminal and civil defamation cases has been awarded a fortune in damages.

Silencing dissent by other methods

Apart from the legal system, the AKP government has used other methods to silence dissent and opposition. The first and foremost method is by controlling the media. As media companies generally also work in other fields in Turkey, having good a relationship with the government is essential. More significantly, it is well known that the government successfully resold the assets of the Turkish banks that went bankrupt in the early 2000s. The Turkish Savings Deposit and Insurance Fund, which should be autonomous of the government, approached media groups offering them the banks' assets to clear the banks' debts.¹¹¹ In almost all cases, the media companies were then sold to pro-government businessmen. A good example of these operations is Sabah-ATV. In 2007, it was the second-largest media group in Turkey and was sold to Çalık Holding, whose CEO was the then Prime Minister Erdoğan's son-in-law Berat Albayrak. In addition, Albayrak's brother was head of the group's media division. Çalık Holding received loans from two state-owned banks worth US\$ 750 million (EUR 650 million) of the US\$ 1.1 billion (EUR 954 million) purchase price. Sabah-ATV's editorial line rapidly shifted from centre-left to ardently pro-government.¹¹²

108. See www.turkyaybir.org.tr/images/UserFiles/Documents/Editor/YOR%20Haziran%202014-2015-ing.pdf.

109. See <http://tgc.org.tr/images/duyurular/davaacilangazetecilistesesi.pdf>.

110. *The Wall Street Journal*, "Call the Prime Minister a Turkey, Get Sued," 07 June, 2011 at www.wsj.com/articles/SB10001424052702304563104576357411896226774.

111. For more details see Rethink Institute, *Diminishing Press Freedom in Turkey*, Rethink Paper 18, 2014, p. 5.

112. Freedom House, *Democracy in Crisis: Corruption Media, and Power in Turkey*, p. 7.

Since not all Turkish media groups could be controlled in this way, those that oppose to the government are sanctioned in different ways. The best-known method is by heavy tax fines. The Turkish tax authorities fined Doğan Media Group the equivalent of US\$ 74 million (EUR 67 million), which forced it to sell its two major newspapers, *Milliyet* and *Vatan*.¹¹³

The third way is to compel media companies to dismiss journalists or to force their resignation. According to the Turkish Journalists' Union, 59 journalists lost their jobs during the Gezi Park protests alone.¹¹⁴ Nuray Mert, Hasan Cemal and Ahmet Altan were amongst them. According to leaked wiretaps, Erdoğan allegedly¹¹⁵ telephoned the owners of media companies and executive editors of TV channels to interfere with the content of programmes or to ask for journalists to be dismissed.

Finally, some journalists, especially Turkish journalists working for foreign news agencies, became the direct targets of the Turkish government. Erdoğan called Amberin Zaman, who was working for *The Economist* and *Taraf*, a "shameless woman" at an election rally. The OSCE signalled its concern about this statement.¹¹⁶ Selin Girit, the BBC's reporter in Turkey, was another target. She was accused of "treachery" and acting as a "foreign agent" in a series of tweets by Melih Gökçek, the longstanding Mayor of Ankara, during the Gezi Park protests.¹¹⁷ The pro-government newspaper *Takvim*, carried the slander to a new level when it splashed a fake interview with CNN International star Christiane Amanpour on its front page.¹¹⁸ Erdoğan accused Ivan Watson of acting as a spy in Turkey¹¹⁹ after he was arrested in Taksim while reporting protests in the anniversary of the Gezi Park protests.¹²⁰

CONCLUSION

As was stated in the introduction to this chapter, Turkey has always been one of the most restrictive member states of the Council of Europe, so far as freedom of the media and freedom of expression are concerned. During the 1990s and 2000s, Turkish applicants brought cases to the Court in Strasbourg to challenge the Turkish

113. See Today's Zaman, "Milliyet, Vatan dailies sold for \$74 million," 22 April, 2011 at www.todayszaman.com/business_milliyet-vatan-dailies-sold-for-74-million_241715.html. See further Kurban, D. and Sözeri, C., *Caught in the Wheels of Power: The Political, Legal and Economic Constraints on Independent Media and Freedom of the Press in Turkey*, TESEV, at www.tesev.org.tr/Upload/Publication/0a3511ab-e048-4666-abca-a6618d5d15a8/12301ENGmedya3WEB09_07_12.pdf.

114. *Ibid.*, p. 9.

115. When asked after the first leak, Mr. Erdoğan accepted that he called Fatih Saraç, an executive at *Habertürk TV*. However other wiretaps have not been publicly accepted by the Prime Minister or any other public official. www.cumhuriyet.com.tr/video/video/40147/Erdogan__Alo_Fatih_i_tiraf_etti__Evet_aradim_yanlis_mi_.html.

116. www.hurriyetdailynews.com/osce-alarmed-over-turkish-pms-intimidation-of-female-journalist.aspx?PageID=238&NID=70236&NewsCatID=338.

117. www.theguardian.com/media/2013/jun/24/bbc-journalist-tweets-turkish-mp.

118. www.al-monitor.com/pulse/tr/originals/2013/06/foreign-journalists-targeted-in-turkey.html.

119. www.rt.com/news/163380-erdogan-accuse-cnn-spy/.

120. www.independent.co.uk/news/world/europe/cnn-reporter-ivan-watson-detained-by-turkish-police-live-on-air-9465926.html.

government's failure to prevent physical attacks on dissenters or the imposition by the Turkish courts of heavy penalties on anyone who imparted opinions that challenged the indivisibility of the Turkish state. Although these problems have not been completely resolved, considerable measures have been taken to bring Turkey's law in line with Council of Europe standards.

However, this has happened partly because of the new government's changed priorities and tactics. Protecting Turkishness, Atatürk and the army is no longer a priority for the AKP government, and has been replaced by efforts to silence criticism of the government (for example linked to corruption allegations) and to promote conservative values, especially Islamic religious values. The Gezi Park protests of 2013 fuelled these efforts to silence protest, dissent and demonstrations.

The AKP government's methodology has also changed recently: the crude methods of the 1990s have given way to a sophisticated censorship mechanism involving different tools.

This chapter has tried to explain the significant changes in the AKP government's tactics and trends to suppress political speech and dissent in Turkey during the last few years. It has shown that the government has not shied away from amending the law with regards to the appointment of judges and public prosecutors, making significant changes by abolishing the magistrates' courts and replacing them with the new CJs and amending Turkish law on the Internet four times between February 2014 and April 2015 to introduce further restrictions and wider blocking measures.

There is no doubt that, since the Gezi Park protests of 2013 and the corruption allegations and related investigations of 17-25 December, 2013, there has been an increase in the number of criminal investigations and prosecutions as well as blocking orders involving websites and social media platforms.

Heavy reliance on criminal investigations and prosecutions, general prior restraint and banning orders on the media, civil court cases against newspapers and journalists and blocking orders on social media platforms and websites has created a silencing and chilling effect on dissent and freedom of expression in Turkey.

In addition to these, other practices such as the 2009 investigation of the Doğan Group by the Turkish tax authorities, which forced the group to sell two of its daily newspapers, *Vatan* and *Milliyet*, in addition to journalists who are critical of the government and its policies losing their jobs because of governmental pressure, have created a privatised silencing effect on the media. "Publish and perish" has become the norm since the dramatic events of Gezi Park and the corruption allegations and investigations, for journalists who dare to report on matters of public interest. The dramatic events following the Gezi Park protests exposed the complicity and almost complete government control of the mainstream Turkish media, which largely failed to report the protests. The non-reporting of the Gezi Park protests led the BBC to cut its ties with the Turkish state broadcaster NTV, which chose to broadcast a documentary about Hitler rather than to report on the protests. The EU Progress Report of 2014 summarised and highlighted these concerns further:

Statements by state officials had an intimidating effect on media and press and led to investigations by public prosecutors, i.a. against editors and journalists. Moreover,

state officials themselves continued to launch court cases against journalists and writers, some of them ending with prison sentences. This, together with numerous dismissals of journalists, as well as the high concentration of media ownership in the hands of business conglomerates with interests going far beyond the free circulation of information, continued to lead to widespread self-censorship by media owners and journalists, including on issues of public interest, such as corruptions allegations.¹²¹

Although not covered in this chapter, it is worth adding that, since December 2013, the Turkish Supreme Board of Radio and Television has issued warnings to, and fined, several TV channels that reported on allegations of government corruption.

With the self-censorship and privatised control mechanisms in place, together with heavy-handed criminal-law provisions and banning and blocking orders regularly issued by the CJs it could be argued that the government has the functional control and censorship machinery necessary to suppress free speech and dissent in Turkey.

The future, therefore, looks bleak. Despite the result of the June 2015 general election, and the formation of an AKP-led coalition government, there is so far no sign of any dismantling of the complex control and censorship machinery described in this chapter. Some readers may take some comfort in the series of freedom-of-expression-related decisions by the Constitutional Court in 2014 and after the 2015 general election. However, we should remember that the historic decisions of the Constitutional Court with regards to Twitter and YouTube had zero effect on Internet restrictions in Turkey and, as detailed in this chapter, Internet censorship has continued at a high level, regardless of those decisions. So, it remains to be seen whether and if the lower courts and the public prosecutors in Turkey will notice and apply these important decisions for the freedom of expression. Otherwise, as in the case of the Court's jurisprudence, in the absence of implementation or the political will to considerably amend existing laws, things will never change. In fact, if the rule of law is not restored in Turkey, the control and censorship machinery described in this chapter will probably become worse. The foundations of an Orwellian surveillance society may well be built upon this control and censorship machinery, pushing Turkey further away from the standards laid down by regional institutions such as the European Union and the Council of Europe.

121. See *Turkey Progress Report 2014*, p. 52 at http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf.

Chapter 6

Public-service media in Europe: a quiet paradigm shift?

Katharine Sarikakis, University of Vienna¹

The following discussion focuses on the question of public communicative spaces, as spaces for citizens' participation in public debate and, ultimately, public policy.

For a functioning democracy, the existence of institutions based on an architecture geared towards benefiting the public good is (or should be) paramount. The concepts of "public good" and "public interest" are inextricably connected to the pursuit of "the good life" as a political claim and goal of public policy. For Aristotle the good life or *eudaimonia* is the ability to know what the "right thing" is and the ability to do it. In his theory of the good life, developed in the *Nicomachean Ethics*, Aristotle speaks of the good life as the happy life, but he does not identify the good life with merely the *feeling* of being happy or amused. Rather, the good life for a person is the *active* life of functioning well in those ways that are essential and unique to humans. Hence, there remains an "active life of the element that has a rational principle" (Aristotle, 1098a). This proclamation consists of two parts that are relevant to his definition of *eudaimonia*: for one, it is the element of the "active life", and second, that of rational principle (or in other words, the *logos*) through which public life ought to be governed.

1. This paper has benefited from the research support of Dr Ramon Rodriguez-Amat, Petar Mitric and Izabella Korbiel.

Aristotle believed that the ability to reason was exclusive to human beings and therefore the good for humans was the maximum realisation of that function. The good life was thought by Aristotle to be the activity of the soul in accordance with virtue. As for the state, in his work *Politeia*, Aristotle asserts that political society exists not simply to provide for a communal life but “for the sake of noble actions” (Pol. III. 9.1281a3). Doing the right thing was, for Aristotle, part and parcel of being an active citizen; a person who participated in the public affairs of his/her community and helped shaped the decision-making process. Democracy then is understood to be the utmost participation in public life. By extension, the state has the responsibility to act in such manner as to pursue the good life of its citizens by enabling them to participate fully in public affairs. The direct kind of democracy the Athenians enjoyed not only allowed efficient administration of the state, but financed Greek drama, invested in great public works such as the construction of the Parthenon, and made itself responsible for the welfare of its people.

Hence, the good life of citizens demands an active state, an active citizenry, public engagement and public support. Seeking the creation and sustenance of enabling environments for public debate is at the core of political action across the world, from the social movements now known as the Arab Spring of more recent times, to social movements for global justice, from Occupy to anti-austerity protests across Europe. What connects all these movements ultimately is the quest for enabling the conditions to exercise full citizenship, that is to participate fully in public life and the politics of the city. Deprivation of structural and material resources undermines citizenship and democracy because, without them, any law providing for the core values of equality, personhood and the right to free association is without foundations.

For the meaningful participation of citizens in public life, certain fundamental conditions must be fulfilled. These conditions refer to the legal, structural and economic, political, cultural and social aspects surrounding the governance of political participation and the governance of the “political society”. For a start, the legal provision for freedom of expression and its associated rights must be guaranteed for all citizens. The exercise of these rights must also be facilitated and enabled by social and state institutions. For that reason, disproportionate limitations and excessive exceptions to the exercise of these rights, state or administrative secrecy, cannot be considered in the spirit of free communication and deliberation. Moreover, structural impediments must be limited to the minimum possible degree so that the maximum possible degree of citizens’ participation can be achieved. Here, questions of education, availability and accessibility of information resources, equality and inclusion are core elements in enabling environments. Moreover, the ethical responsibility to truthfulness and protection against deception and misinformation are further prerequisites in building the right condition for public deliberation. Habermas’s (1984) “ideal speech situation”, for example, refers to these conditions as well as the freedom from fear of retribution, so that all opinions can be expressed. For Aristotle, the generation of knowledge, the path to knowledge, whether as scientific enquiry or in the political society, goes through dialectic, that is the existence of oppositional voices and the questioning of falsity in each position. For that purpose, Aristotle envisions a freedom of juxtaposition and equality among people, whether or not distinguished by their skills to apply the scientific method or not (Berti 1978). A dialectic of opinion

is to Aristotle necessary for democracy and freedom of expression in relation to this dialectic necessary, not for the right of a private individual but “as the contribution of the individual to the realisation of the common good of a political or scientific nature” (Berti 1978: 369). Hence, the historical understanding of what common good entails in relation to the citizen brings us to the fundamental principles underlying a democratic polity. Without this participation, which for Aristotle would have to be pursued also through the extinction of extreme economic inequalities, the governance of a society is characterised by tyranny.

This brief discussion on the connection between the common good, public participation and freedom of expression is useful to set the foundations for an empirically detailed discussion of the environments within which European societies today are called to defend democratic institutions and re-energise the connection between citizens and those institutions. Public debate is the cornerstone of democracy, but only if access to the public sphere is guaranteed and enabled for all citizens and with diverse voices and experiences. In particular, the claim for universal access to the public sphere in both mediated – through mass media, for example – and direct ways has several conditions embedded, one of which is freedom of expression. Furthermore, freedom of expression depends on structural and symbolic determinants. Not only are spaces for debate required to be accessible and usable, for example, affordable media for information, user-friendly technologies for participation and so on. They must also support a culture of inclusiveness and respect that allows and creates spaces for interaction among historically or otherwise marginalised groups and views.

This chapter explores the ways in which public service broadcasting faces survival challenges in Europe and what kinds of implications this has, and will have, for democracy and social cohesion in the continent. The discussion situates the current “troubles” of public service broadcasters (PSBs) within the context of the economic crisis and its impact on journalism and the free flow of information and the historical development of auditing controls for public service media, which, in general, have been disproportional to the expectations of accountability for private media organisations. PSBs, or, more precisely, public-service media (PSM) organisations, occupy historically a unique position of organisations with uninterrupted functions for nearly a century in the European continent. They stand as the only institutions tasked with comprehensive missions for universal reach in order to bring information, culture and education to the citizenry and also as the only media institutions wholly owned by the public in service of the public. The question this discussion therefore aims to lead to is “what happens in a society without PSM?” We will be discussing the particulars of a case study of the shutdown of Hellenic Radio & Television (ERT) by the Greek government on 11 June 2013 and then take a look around Europe by way of a “loose” comparison to question the degree to which ERT constituted a unique and extreme case, determined by the extraordinary financial conditions in the Greek economy, or whether the “ERT case” could be referred to as the epitome of trends in the governance of public-service media and, by extension, in the governance of free speech and public organisations in European societies.

It is necessary to investigate the current state of PSM within the context of a prolonged and unpredictably persistent financial crisis in Europe. The overall environment for free debate on democratic grounds does not offer reasons for celebration, at least

when one looks at the ways in which citizens see institutions, and it tests their trust in the role of established media institutions in public debate. Admittedly, a political malaise has begun to dominate European public life, characterised by distrust in institutions, the premeditated cultivation of polarisation among European nations towards non-European migrants, refugees and asylum-seekers, combined with weak plurality of voices reporting these issues. Citizens' discontent is visible in physical and online spaces, through protests, the setting up of a multitude of media fora and other ways to communicate, often bypassing established means of communication and seeking direct connections with each other in an effort to reclaim their place in democratic politics, indeed to "restore" democratic politics.

THE MANY CRISES IN THE COMMUNICATIVE SPACES OF EUROPE

The governance of communicative environments is strategic at a time when unpopular and arguably unconstitutional public policies are being implemented over a sustained time-frame, as is most vividly the case in Greece, but also in other European countries. Changes in the media landscape are not simply consequences of the crisis, but rather strategic acts in managing public opinion, rather than managing the crisis.

On the European periphery, from the UK and Ireland to Portugal, Spain and Greece, although the economic contexts vary, the withdrawal of the state from the social safety net and welfare and the deterioration of living standards have raised waves of protest and oppositional politics. Despite repeated "packages", "bail-out programmes", "emergency measures" and so on, since 2008, poverty has risen: the average European population at risk of poverty or social exclusion increased from 23.5% in 2008 to 24.2% in 2011. In Greece, the increase was from 28.1% to 31%, and in Spain from 22.9% to 27%. Spain has 12.4 million "poor" people and Greece 3.4 million (Eurostat, 2012). The number of children living in poverty has risen dramatically in the UK reaching the highest in absolute numbers for decades (DWP 2015). In the past four years, suicide rates have increased in Greece by 45% (Branas et al. 2015). Suicide as a political act and an act of ultimate agency has reached new heights. In 2012, in response to the rise in suicides, Spain's banking association announced it would freeze evictions in cases of extreme hardship (The Guardian 2013b). According to the *Plataforma de Afectados por la Hipoteca* (Platform of People Affected by Mortgages), there have been 400 000 evictions in Spain since the financial crisis began in 2007.

Social mobilisation through strikes and protests is a daily occurrence across Europe and is, as expected, stronger in crisis-hit countries. Co-ordinated, bottom-up pan-European actions have multiplied: school and kindergarten teachers, health workers, university staff, journalists and communication workers, as well as general workers' councils have mobilised. Demonstrating solidarity in the face of what are perceived to be unworkable crisis measures has become a permanent feature in European cities, in contrast to the discourses of segregation and polarisation among political elites. It is at this crucial intersection of an evident gap between governments and citizens across Europe where a robust public debate, supported by strong investigative

journalism and encouraging environments for finding ways out of what many see as a vicious circle, is urgently needed. Social mobilisation suggests that these spaces for debate are indeed open and vibrant and that, by definition, the media should be an integral part of it.

The evidence, however, gives cause for concern: international organisations have raised the alarm for the most important aspects of freedom of speech. Since the beginning of the crisis in 2009, Reporters Without Borders has warned about the decline of the European press in the freedom of expression index. In 2013, it recorded a polarisation in the directions taken by various countries according to the degree of freedom of the press they enjoy; some have maintained their positions, such as Finland, Germany and Austria, and some have lost ground rapidly, such as Hungary, Greece, Italy and even France. The factors contributing to these falls are a combination of incremental legal reforms and drastic changes, the politico-economic position of the media and the rise of informal forms of governance through networks of interests. The annual global surveys conducted by Freedom House have noted an all-time low in world freedom and falling standards of freedom in mature democracies. Index on Censorship has shown in detail the innumerable cases of censorship, violence and intimidation against media workers and journalists who attempt to present critical views.

The OSCE found in 2007 that almost half of its 56 member states imposed legal sanctions on journalists who obtain and publish classified information. This was most evident in Eastern and Central Europe, where many countries have introduced new laws on state secrets, such as the Czech Republic, Moldova, Bulgaria, Albania and Croatia. In this context, Banisar detects “a significant trend in the use of state secret laws to penalise whistle-blowers and journalists who publish information of public interest” (Banisar 2008:15). Such cases have been recorded in Denmark, Croatia, Bulgaria, Romania, the UK, Germany and Switzerland.

Meanwhile, in very real terms, austerity and the crisis have hit the already precarious profession of journalism hard. Closely related to the change in the communicative landscapes is the loss of jobs and the deepening of precarity for the vast majority of active journalists. Work options for journalists have been transformed dramatically over the past decade and the crisis has exacerbated this. In Spain, for example, *El País* reported in 2012 that more than 27 000 journalists were unemployed – a three-fold rise from a year earlier (*El País* 2012b). The Prisa Group alone dismissed 1 281 employees in 2012 (*20 Minutos* 2012). In Greece, long-term unemployment has become the new norm and, moreover, most available jobs are precarious, paying an average monthly salary of 400 euros and often insisting that articles are written anonymously. There are at least 2 500 unemployed journalists in Greece, according to POESY, the umbrella union of all journalists’ unions in the country. This figure is inaccurate in that it includes only those journalists who are registered members of one of the unions. Registration is not straightforward if one has not completed a certain number of hours’ work in the media. Given that most media industries only employ freelancers, this means that the vast majority of particularly young journalists is automatically excluded from union membership. A Catch-22 situation thus exists: it is almost impossible for freelancers to register and gain accreditation as a journalist, but without full accreditation, journalists and photojournalists are forced

to work under uncertainty and risk their lives in volatile situations, such as when covering protests in Greece. The outcome has been, as Reporters Without Borders states, that being a journalist has become more and more unprotected in situations of social unrest and clashes with the police. Index on Censorship and Reporters Without Borders have characterised the situation in Greece as volatile: they have likened covering protests there to covering war zones, because of the violence and abuse of power by the police, who not only indiscriminately, but also strategically, target journalists and physically attack them. Amnesty International has issued a report about the Greek police, stating that it operates in a culture of impunity and violence (Amnesty International 2012).

On the matter of police impunity from prosecution for attacks on journalists, the 2014 Report On Impunity includes references to journalists whose lives are at risk. A combination of factors contributes to the detrimental state of health and safety of professional journalists, including the lack of investigation of cases of police assault and intimidation; the criminalising of journalists; and state policies of secrecy, lack of transparency and manipulation. According to Freedom House, Greece experienced the worst and largest score changes between 2009 and 2013, placing it below Bahrain, Ukraine, Egypt, Kazakhstan and Azerbaijan in the category of a “partly free” country. The closure of ERT contributed to this overall detrimental effect.

Although the critical condition of the labour market for media workers is not the focal point of this discussion, it helps us understand the crucial role of public-service media in an environment of instability and precarity. PSM organisations have historically functioned as stable points of reference in this market, all the more so when market forces drive salaries to as little as EUR 200 per month for writing 28 articles a day (Milanuncios 2013). In the case of Greece, where the stakes of implementing austerity measures – as opposed to different measures that rely less on reducing salaries and privatisation – are extremely high, indirect government control of the public sector is effectively applied through intimidation, on top of the existential context within which the majority of journalists find themselves. Employment opportunities for young journalists are achieved by the systematic dismissal of older, dissident journalists like the above-mentioned cases of the public media in Greece and in Spain. Other examples are the international award-winning Greek journalist Kostas Vaxevanis, of the *Hot Doc* investigative magazine, who was arrested after publishing what has become known as the “Lagarde list” of wealthy Greeks that it was suggested the Greek government should investigate for tax evasion (Smith 2012); or Lefteris Charalampopoulos, reporter for the Greek *Unfollow Magazine*, who was threatened after reporting allegations that Aegean Oil was involved in a smuggling scandal (Zenakos 2013). Physical assaults involving an extraordinary degree of violence by the Greek police have also been well documented, especially the case of Mario Lolos, the head of the Greek Union of Photojournalists, who was left permanently disabled (Index on Censorship). Other journalists, who had clearly identified themselves to the police, were also assaulted and required treatment in hospital. And such assaults have also occurred elsewhere. In Spain, a purge of journalists who ask awkward questions has been reported by international newspapers (Murado 2012 and Baboulias 2012).

THE FOURTH MODEL OF PSB GOVERNANCE? FROM THE SHUTDOWN OF ERT TO ERTOPEN

It was in this climate that the decision of the Greek government to shut down ERT arbitrarily, and without parliamentary approval, was announced on 11 June 2013. The closure was effected by a Special Decree which, in theory, required validation by the Greek Parliament, but the parliament was never given the opportunity to vote on the Special Decree. With immediate effect, over 2 500 highly skilled professionals, including many journalists, joined the high numbers of the unemployed. Greek television screens turned black, in what has become known in Greece and internationally as “The Black”. The former ERT employees occupied the ERT buildings in Athens and Thessaloniki (the headquarters of ERT3, the major non-Athens based television and radio station with remit for the coverage of the rest of Greece). For several months after 11 June 2013, citizens turned the ERT buildings in Athens and Thessaloniki into a place of public debates that were broadcast by the former ERT employees. This spontaneous decision to keep on broadcasting turned into a long-term political action that would eventually bring ERT back to Greek television screens: on 11 June 2013 the newly elected Syriza government gained parliamentary approval for a new legal framework to allow ERT to reopen. At the time of writing, ERT is broadcasting a full programme, albeit temporarily, without having returned to previous levels of operations.

The decision to shut down ERT was announced by the government spokesman Simos Kedikoglou, himself a former ERT employee, citing “the chronic corruption and mismanagement” of the corporation (Kedikoglou 2013 and Euronews 2013). This was despite categorical denials made by Kedikoglou on his website on 15 and 19 May that ERT was being closed down. This website has apparently since been hacked and is now offline. “ERT is a case of an exceptional lack of transparency and incredible extravagance. This ends now,” government spokesman Simos Kedikoglou told a news conference (BBC News 2013). Nearly a month before, Kedikoglou was denying in several interviews rumours about an imminent closure of ERT:

Notably, it was Kedikoglou who, in several instances, had categorically denied that ERT was about to be shuttered, including in interviews as recently as May 15th and 19th, and on his website (which has apparently since been hacked and is now offline).

The shutdown of ERT immediately called into question various clauses in the Greek constitution, as well as the Treaty of Amsterdam, which oversees public service broadcasting in Europe (Nevradakis 2013).

These contradictory declarations echo Psychogiopoulou et al. (2011:4) that “Greek media policy has been characterised for years by an essentially non-transparent, government-centred model of policy-making”. The shutdown received widespread international condemnation from journalists’ unions, the EBU, the European Parliament and NGOs such as Reporters Without Borders. *TEXTE*, the magazine published by the public-service broadcasters of Austria, Germany and Switzerland devoted an issue to the events in Greece (Mitschka & Unterberger 2013). Within eight months of the shutdown, typing “ERT” as an Internet search term yielded over a million social media mentions.

The European Commission claimed that it was outside its jurisdiction to intervene in national affairs and demand the reinstatement of ERT (European Commission 2013). In Greece, the Council of State Court, the highest administrative court, immediately ordered the government to reinstate ERT, but this was ignored. The trade unions representing ERT staff immediately filed lawsuits, for each geographical location separately, against the government for unlawful and unconstitutional dismissal. The first court decision, issued in Heraklion, Crete, declared the dismissal of ERT employees as unconstitutional and ordered the government to reinstate them and compensate them with immediate effect. The government did nothing. Similar judgments were pronounced in the other cases across Greece. In the meantime, the government, under international pressure, was forced to set up a transitional PSB called *Dimosia Tileorasi* (DT), at a cost of over a million euros per month. DT gave way to a new PSB called NERIT, which was, like DT, under the direct supervision of the Ministry of Finance. NERIT continued until 10 June 2015, the day before ERT was reinstated. The process of recruiting staff for NERIT was plagued with problems, due to the lack of transparency in its hiring procedures. The senior management team resigned and NERIT became mired in scandals, including the infamous television “interview” of the then Prime Minister, Antonis Samaras, by two NERIT journalists, where Samaras read his answers to the questions from an auto-cue. For many observers, this incident highlighted the difference between NERIT and ERT.

Not only was ERT self-financed by charging viewers fees of approximately EUR 4 per month per household, but by 2010, it had managed to pay off its debts and generate a profit of approximately EUR 100 million. At the time of its closure, therefore, not only was it not costing the Greek government money, but it had already offered to use its funds for nationwide social assistance programmes, such as the rehabilitation of drug-addicts programme, but the government had turned down this offer. ERT had undergone several restructuring attempts recently. Beyond any particularities that differentiate ERT and RTVE (the Spanish PSB), governments, irrespective of their ideologies, have seen PSBs as their own instruments. In the two years preceding the ERT shutdown, its Director-General, Emiliós Liatsis, who was appointed by the Greek government, exercised intensive censorship of programmes and came under immense criticism for surrounding himself with overpaid secretarial staff (Reporters Without Borders 2011). During the same period, attempts were made by the government to prevent journalists on the morning television magazine show from reporting on important issues such as police violence and the impact of austerity policies. The level of political intervention in ERT led to expressions of concern from Article 19 (2012), especially the case of the removal of Marilena Katsimi and Kostas Arvanitis from the morning magazine programme for expressing their disagreement with the declarations of the Minister of Public Order in relation to an anti-fascist demonstration.

During the two years from the shutdown to the reinstatement of ERT, the PSB continued broadcasting based on a self-governance model, initially from its studios in Athens and then from ERT3’s studios in Thessaloniki. These broadcasts included round-the-clock radio news programmes from 16 of its 19 regional radio stations. Its television broadcasts were moved from Athens to Thessaloniki in November 2013, following a raid by the riot police on its Athens studios. Despite the disabling of its digital service, ERT used “guerilla tactics” to keep its analogue transmitters working, meaning that between

50% and 70% of Greek households outside Athens were able to receive its radio and television broadcasts during those two years. Moreover, ERT kept broadcasting online through ERTOpen (still, at the moment of writing, live at www.ERTOpen.com, with the full online service resuming on 29 June 2015 at www.ert.gr).

Although it is not the aim of this chapter to describe in detail how ERT developed a self-governance system, it is important to refer to some core elements of this experience. In the first weeks after the shutdown, former employees – now strangely similar to “pirate” broadcasters – followed a self-discipline model of continuing to operate in their positions (technicians, journalists and so on), although there was a realisation that the old hierarchies were no longer valid. Over the next 24 months, many left ERT for various reasons, including a sizeable minority who applied for positions with DT and then NERIT. Those who decided to stay decided to reorganise the governance model of ERT by adding a workers’ council, trade unions and general and regional assemblies, which made decisions on the programme of broadcasts and the financing of those continuing to produce this programme, from purchasing consumables (tapes, hardware and so on) to paying for teams to travel from Athens to Thessaloniki to provide support for the daily news programmes. Funding came from the staff themselves, donations from ex-colleagues and later from contributions from all over the world, including citizens’ solidarity groups, and fundraising events.

Radio and television programming decisions were made on a weekly basis, centred on a daily news bulletin. Staff, including editors, rotated jobs. Everyone involved in keeping ERT on air had to learn – and teach – new skills to support the production of the news programme. As new programmes were added, this activity was extended to social groups and wider society members, who, with the support of professionals, created new programmes run almost entirely by non-professionals. As the months turned into years, these skills were further developed among young people, such as recent graduates or volunteer journalists for community media, as well as others with an interest and the ability to run a project, such as the production of a programme on a regular basis. Immediately, the openness of ERTOpen, and, in particular, of ERT3, attracted social movements and civil society groups, who donated information and resources. It is not an exaggeration to state that ERT3 became the core point of reference for a variety of social actors and groups, especially those involved in providing some form of public service, such as teachers, healthcare workers, public-sector cleaners and even environmental activists such as the Anti-Gold movement and the Save the Water European Citizens, Initiative.

The outcome of these new connections with the wider society has been a direct way of communication that ensured the input of resources for the sustenance of the organisation. The model of self-governance developed over those two years is perhaps unique in the history of European media, but certainly not unknown, if we consider South American community media initiatives or other self-managed, worker-led enterprises across the world. Indeed, such examples demonstrate that professionalism and quality assurance on the one hand, and fulfilment of the PSB remit on the other hand, are functions that can be fully served through democratic models of governance that do not depend on permanent, hierarchical structures. The “living experiment” at ERT proves in a practical way that a pragmatic approach to ensuring the full acceptance of PSBs by, and their legitimacy in, society runs

through to the core of the organisation of its daily business. To dismiss such models as utopian or unrealistic, especially when dealing with a fully fledged organisation with thousands of employees, misses the point. Not only can such a governance model make a meaningful contribution in terms of a philosophical approach to the present and future of PMB, it can also provide solutions for the problems encountered by large organisations. It remains to be seen if, and to what extent, the recent re-establishment of ERT can withstand the pressures to return to the perceived normality of its previous incarnation.

The reopening of ERT attracted as much interest in Greece and internationally as its shutdown. Looking back, what were the reasons for, and the impact of, its closure? The government's reasoning was to clean up the organisation and create a "Greek BBC". The claims about financial mismanagement and extraordinarily overpaid employees proved misleading. ERT's news programmes had managed to remain investigative and interrogatory about the developments in the country, in particular on the impact of the crisis on social groups, despite government attempts to exert more control over them. At the conference of his New Democracy Party in 2013, then Prime Minister Antonis Samaras stated in his leader's speech that each government had made its own appointments to ERT, but that all the people ERT had hired itself were "communists", making it clear to many observers that the motives behind the closure of ERT by Samaras' government were party political. However, another motive may well have been the sale of the rights to run digital broadcasting in Greece. The call for tenders for this project was issued by the government only a few days after the shutdown of ERT, and with ERT out of the running, the contract was easily won by DIGEA, a joint-venture by the five largest private media companies in Greece.

THE STATE OF EUROPEAN PUBLIC-SERVICE MEDIA: A PATTERN OF DISMANTLING?

The forced closure of the Greek PSB may appear at first to be an extreme case or merely a "storm in a teacup". Yet, a closer look elsewhere in Europe shows that partial closures of, and the placing of restrictions on, European PSBs are rapidly becoming the new norm. Soon after the forced closure of ERT in Greece, the Spanish government moved to close down the Valencian PSB, and the Israeli government proceeded to shut down its own PSB. While these shutdowns may also be claimed to be extreme cases, it is important to survey developments in the structural resources of PSBs across Europe.

Greece and Spain are not the only two countries on the periphery of Europe that have had to face economic difficulties. Both countries were run by dictatorships in their recent history and freedom of expression occupies a particular space in popular memory and culture. Historically, ERT in Greece and RTVE in Spain were state-owned corporations. During the dictatorships, both national PSBs were used as propaganda weapons: for example, the Greek PSB television channel ERT2 began in the 1960s as YENED, operated and controlled by the Greek army. Spanish PSB television came into existence under the Franco dictatorship, on the recommendation of liberal ministers interested in the economic development of the country. It was not until the 1990s

that the Spanish PSB developed technologically and began to seek international audiences. Over the past decade, the deficit of the Spanish PSB has led to several changes in its organisation: in June 2006, the RTVE Public Body and its companies TVE S.A. (National Television) and RNE S.A. (National Radio) were merged to form RTVE. The new corporation then cut its workforce by 4 855 employees to become the smallest PSB in Europe. The austerity measures adopted in Spain as a result of the economic crisis also provided an excuse for the conservative government to put pressure on RTVE to dismiss experienced, critical journalists and interviewers who ask politicians “real” (i.e. awkward) questions (Murado 2012). The RTVE management replaced these journalists and interviewers with members of the ruling conservative Popular Party (Burgin 2012).

The closure of sections and services of RTVE was effected by privatisation, fewer in-house productions and by laying off staff. The government began a new discourse to legitimise its changes to the management of RTVE, claiming it would enable the organisation to make “faster and more efficient” decisions and to cut its spending further (BOE 2012:30986). The changes, although not of the severity of Greece, led Spain to be added to the list of European countries that have reduced the reach and function of their PSM on multiple levels. The Popular Party’s most significant change to the governance of RTVE was to give the government the right to appoint the RTVE’s Director-General without having to gain the approval of Parliament. The Royal Decree 15/2012 (BOE 2012:30985), which enacted this change, was approved by the Parliament in which the Popular Party had an overall majority. The Popular Party justified this change by saying that the previous process was “visibly ineffectual because it does not allow the renewal of the board of directors with the necessary agility to avoid paralysis of the normal functioning of the Corporation” (BOE 2012:30986). The change was accompanied by the following government statement: “In relation to the public sector, of which the RTVE Corporation is part, the Government has assumed a commitment to achieve maximal austerity and efficiency and is currently immersed in a process of rationalisation” (BOE 2012: 30985). In the same way, the preamble of the Royal Decree clearly states that the objectives of the governance change are to make budget cuts and to equip RTVE with a management team that will implement such changes.

The same Royal Decree empowered the government to shut down PSM television stations in the autonomous regions by privatising their services (Congreso Diputados 2012). The press referred to this new policy as an austerity measure to “flexibilise” the regional PSM model. If the autonomous regions decide to keep their PSM services, they can directly or indirectly manage them, on condition that the PSM providers make budgetary cuts (ABC 2012). This means, effectively, that regional PSM are open to privatisation (El País 2012a). The impact of such a move would probably also mean a centralised and unvaried content distributed to the regions. In August 2012, some of the regional services began closing down, too: the first was “7 Region de Murcia” after six years of public service, to reduce costs. In Catalunya, the employees of the Catalan PSB Corporation, opposed privatisation and job cuts. The Catalan Regional Parliament was forced to set up a commission to manage the changes (Parlament de Catalunya 2013: 324). The workers’ representatives pointed out that the lower-ranked employees of the PSB, whose salaries are publicly visible, were facing a 35% reduction in their pay,

whereas their highest salaried colleagues, whose salaries were confidential, were not facing a pay cut (Parlament de Catalunya 2013: 324). The trade unions denounced the government's budget cuts as part of an overall strategy to dismantle the Catalan PSB. For its part, the Catalan Regional Government stated that the changes to the Catalan PSB were merely to simplify its structure and to move from doing everything in-house to outsourcing more work (Parlament de Catalunya 2013: 5).

The economic crisis offers a discursive and normative framework within which governments present measures to cut public assets and services – of which PSM are the first in line for cuts. The government of the Netherlands, a coalition between the conservative-liberal VVD Party and the PvdA (Labour) Party, provoked a huge reaction when it announced its decision to cut the budget of the Netherlands Public Broadcasting Organisation (NPO) by EUR 100 million in 2016, following a cut of EUR 200 million in 2011 and reducing the NPO's overall income by a third. The consequence of this budget cut was a reduction of the NPO's broadcast channels from 22 to 8 (European Broadcasting Union (EBU) 2013a). The Dutch government claims that these measures will make the NPO "simpler and more efficient" (Government-NL 2013). The NPO has stated that it clearly cannot function under these conditions and, in a highly unusual move, called on members of the public to demonstrate and protest against these cuts (RNW 2010).

PSM are not simply broadcasting units or television channels. The budgets of their public choir and orchestras were also halved. In addition, the NPO's "World Service" (Public Radio Netherlands Worldwide) became an entity of the Ministry of Foreign Affairs, with a budget reduced by 70%. The EBU estimates that these cuts will severely weaken the NPO, which is currently the "most trusted broadcaster" and holds the largest audience share in the country. It should be noted that the plans to reduce the reach and breadth of work produced by the NPO was already part of a 2003 strategic policy plan which was abandoned after the change of government.

In the meantime, there have been two attempts to close down Radio e Televisao de Portugal (RTP) in the past decade. The discussion started when the Minister of Parliamentary Affairs announced the possible privatisation of RTP (Pfanner 2012); and it came to an end when RTP and the Portuguese government signed a new contract in early 2014. RTP remains one of the most underfunded PSBs in Europe: in 2013 its annual budget was cut by EUR 30 million (EBU 2013c). During the negotiations of the new contract, the entire RTP board resigned in protest and the EBU wrote a letter to Prime Minister Passos Coelho, stating:

To entrust management of a valuable national asset to commercial interests – a step unprecedented anywhere in the world – would put at risk the reputation earned by RTP since 1974 ... Commercial and public interests would be mixed and pluralism endangered. Citizens could lose a trusted reference point forever (Pfanner, 2012).

The discussion about how to meet the budgetary goals included privatising or closing RTP2; "restructuring the portfolio of activities and services offered by the company and in addition reducing the number of staff"; or selling a concession to run RTP1 to a private company, funded by the current licence fee. Some of Coelho's political opponents have pointed to the attempted privatisation of RTP as a means of curtailing media criticism of the Passos Coelho Government (Pfanner, 2012).

In the North of Europe, the First Baltic Channel (PBK) was ordered to suspend broadcasts of its Russian-produced programmes (about 70% of its output) for three months. PBK is one of the most fined television channels in Europe, and a cause of concern internationally. The OSCE's Freedom of the Press Secretariat stated that this undermines media pluralism and that "such an excessive measure must be restricted to instances of intentional and dangerous incitement to violence only" (OSCE 2013).

Also in 2013, the EBU's Director-General Ingrid Deltenre criticised the Romanian government for excessive political interference in its PSBs: "Whereas Romanian radio is a strong member of the EBU, the same could be true of TV Romania if only its Chief Executives were given time for the reforms to take effect." Noting that only one of the Chief Executives of TV Romania was allowed to serve his full term, she continued: "The Parliament has frequently used the two broadcasters' annual reports as excuses to dismiss their chief executives – often for apparently political reasons" (EBU 2013b).

One of the most problematic cases in Europe is Hungary, which was categorised as an "unfree media system" in 2011 due to its new media laws (Brouillette 2012). At the time, the EBU appealed to Prime Minister Viktor Orbán to ensure media pluralism (EBU 2011). The EBU asked him "to be responsive to (EBU) concerns about threats to freedom, independence and pluralism of the media in Hungary posed by the new law". The Press and Media Act (2010 Act 104 on the Freedom of the Press and the Fundamental Rules on Media Content) and the Media Law (2010 Act 185 on Media Services and Mass Media) were adopted six months after Orbán came to office. The Article 19 pressure group produced a report expressing concern about the loss of independence of the Hungarian PSB and its contribution to the deterioration of the media situation in Hungary (Article 19 2011a, 2011b).

Meanwhile, the Polish PSB Telewizja Polska (TVP) transferred 411 of its employees to Leasing Team, a private outsourcing company, in 2014. Among the 411 employees transferred were 116 editors and almost 270 journalists. This reorganisation was decided by TVP's management board on 15 April 2014, to improve the company's poor financial situation (TVP receives only 15% of its income from public funding). The Chairman of TVP, Juliusz Braun, reported a loss of over PLN 220 million (EUR 53 million) in 2012, which was reduced to PLN 20 million (EUR 4.8 million) in 2013. In 2014, for the first time in many years, TVP made a profit of PLN 6 million (EUR 1.45 million). According to Braun, TVP had made total cost savings of PLN 300 million (EUR 72 million). Back in 2011, the number of TVP employees was reduced from over 4 000 to 2 838, again through a "leasing manoeuvre". As in most cases, the reasons behind such decisions were unclear and based on questionable assessment procedures. The remaining TVP staff saw their roles and positions change from specialised editors, reporters and section leaders to general "co-ordinators". Their job descriptions were also changed to a vague task of "producing and broadcasting news", without further specification. Several of the TVP staff trade unions and several former employees have launched lawsuits against TVP and the leasing company, alleging that the transfer of employees to the leasing company was illegal, because they had not consented to it. When TVP offered its journalists the option of becoming freelance contractors, only a few accepted: the majority refused (Pytlakowski 2015).

More recently, the EBU issued a warning about the critical, "near-collapse" condition of HRT, the PSB (television and radio) for Bosnia-Herzegovina. HRT is made

up of Radio-Televizija Federacije BiH (RTFBiH), covering the Federation of Bosnia-Herzegovina, and Radio-Televizija Republike Srpske (RTRS), covering Republika Srpska (EBU 2015). The reasons given are chronic severe underfunding and political interference by the Bosnia-Herzegovinan government. The OSCE and EU representatives in Bosnia-Herzegovina have voiced similar concerns. On closer examination, it is clear that HRT has not been properly funded for years, receiving neither adequate funds from a licence fee, nor benefiting from a proposed new financing plan, as this has never been adopted. This is a disaster, given the significance of a properly functioning PSB to connect and facilitate dialogue among the different ethnic groups in Bosnia-Herzegovina and in view of the wide public support for reforms of the country's PSB system (UNDP 2004).

This rather brief survey of PSBs and PBM around Europe has sketched a pattern of change and challenges for the institutions, exacerbated by the pressures from politicians trying to cope with the effects of the economic crisis. Not only have PSM, as public communicative spaces for information and education, been under continuous pressure to define and re-define their missions and remits, as institutions, they have suffered from pressure from the market and governments, as well as from a crisis in their public image, and thus their legitimacy among their viewers and listeners. For example, in their study of the impact of policy debates on the BBC, Lunt et al. (2012) argue that the questions about the role of PSBs in society, as raised by OFCOM, weakened the position of the BBC, rather than supporting its further development and its mission. In particular, OFCOM raised the question of whether a fully commercialised media environment would (or should) be the preferred media landscape of the future, thus undermining the BBC's image and *raison d'être*.

The ways in which the governance of PSBs has changed in recent years, more intensively and without much public debate, are concentrated in three core strategies:

- i. Previously autonomous or otherwise decentralised PSBs (radio and television stations) see their administrative capacities reduced and decision-making processes transferred to a central administration.
- ii. This *recentralising* process reinforces the view that regions and localities are peripheral to a central core, both culturally and politically.
- iii. This, in turn, makes PSBs more vulnerable to political control: direct interference from a political centre is still one of the two most significant impediments to the functioning of a healthy organisation. The second is financial starvation, by withdrawing sources of funding of PSM, either by changing the rules of licence fees, by limiting advertising revenues or by reducing subsidies.

CONCLUSION

The impact of these changes is multi-level and long-term. The destruction of PSM represents a waste of historical public investment and strikes a serious blow to the intellectual capital of these organisations. It also means uncertainty for the future protection of cultural heritage, activities and identity. It is certain that the impact of these changes will be to render PSM secondary to public debate and culture, possibly marginalising them to the point where they are unable to ever recover and offer a

real alternative to private media. The ramifications of this in terms of the future of Europe and its regions are simply too serious to outline here.

In the private sector, staff reductions and pay cuts take place, irrespective of any pressing financial need. A collateral effect of such changes is the progressive marginalisation – and criminalisation – of dissent. This can be demonstrated by the use of journalists as scapegoats, both in Spain or Greece. Agnes Callamard of pressure group Article 19 put it in these words:

These dismissals send out a dangerous message to other journalists, who might now be cautious about criticising the government for fear that they will face reprisals themselves. The suspension of the (Greek) presenters could give way to self-censorship by other journalists (Article 19, 2012).

The change in the governance of PSBs is based on exceptional economic and political conditions, as has been the abrupt move towards a “corporate business model” for ERT and the “need to bring a new, clean, public broadcaster”. The implementation of legal reforms to accompany such changes has required that national parliaments are kept outside the policy-making process, to minimise debate and questions. Press scrutiny and involvement are also minimised. Furthermore, the emergence of new institutions to “normalise” change has been observed in the cases of ERT and RTVE, as was the setting up of committees or new organisations to replace others or to steer change.

Despite these pressures, the role of PSM continued to be to contribute to and to facilitate enabling communicative environments and spaces for genuine public debate in more ways than one. PSM invest resources in journalism and factual programmes and tackle areas and topics that are too expensive for private media, or for which private media do not have the expertise. PSM promote cultural diversity in programming and can take risks. PSM invest in the education and training of media and arts professionals, who feature strongly in the whole media landscape of Europe. Finally, society has invested in PSM historically, to develop intellectual capital that pushes the quality standards of the rest of the media higher to the benefit of the citizenry.

Normative, discursive and institutional changes go hand-in-hand with the transformation of public spaces that PSM represent. The discursive constructions about the “ills” of PSM are embedded in dominant discourses about the economic and political crises that are based on “dilemmas”, “urgency” and “necessity”. They remind us strongly of the first wave of deregulation in Europe in the early 1980s, where the arguments for the dismantling of the welfare state and the privatisation of public assets were that public organisations are too slow to innovate, too large, too bureaucratic, too restricting to customers’ choices. Now, against the background of the economic crisis, public assets are said to be too expensive, too slow to innovate, not transparent enough or unnecessary. Again, the discourse of “efficiency” and economic “urgency” for technocratic solutions for “modernisation” is directed to citizens deprived of independent and rigorous journalism. The (mediated) spaces of open debate and critique are shrinking rapidly. This second paradigm assault on European PSM serves two functions: not only does it leave digital and other spaces available to be used by private interests in the broadcasting “wars”, it also exercises an effective censorship of critical free speech. The disconnect of citizens

from established institutions, including mainstream media (Sarikakis et al. 2013), is caused by the sense of secrecy, non-responsiveness, and failed promises by politicians and other representatives, including journalists (Reporters Without Borders 2011). Public discontent and disquiet do not show signs of subsiding, yet the need to maintain control over the public sphere is so pressing that states and their elites have responded with violence.

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Chapter 7

Ethical journalism: an inspiration for responsible communications in Europe

Aidan White

1. INTRODUCTION

In an age when humane citizenship and societal empathy are in short supply across much of Europe, the need for civility in public discourse has never been greater. In some countries, such as Ukraine and Russia, information wars, stoked by nationalist propaganda, are being fought as a regional battle over territory and divisive post-cold-war politics continue to dominate the news agenda. In others, news media, increasingly the trophy possessions of rich and powerful forces, are used to promote their political or business interests with little regard for notions of mission and the wider public interest. This turbulent information landscape is made more challenging by the expansion of the Internet, which has dramatically increased the scope for freedom, but has also opened the door to more unruly, unrestrained and often abusive communications.

In this context, ethical journalism, which has its roots in the emergence of mass media some 150 years ago, is an old idea but it is emerging as increasingly important in setting out the conditions for responsible communications in Europe.

Ethical journalism is a framework for providing reliable, accurate and relevant information and it depends upon the capacity of editors and journalists to think and act independently in reporting news and information. It cannot exist without transparency, pluralism and professionalism from the top to the bottom of the media pyramid. But these conditions are in short supply in the modern media environment. Across Europe commercial and political pressures dominate the newsroom and journalists struggle to express themselves in a framework of values.

In all countries, the turbulent changes and financial crisis caused by converging media, digital technologies and a radically transformed culture of communications pose challenging questions about the future: How do we pay for public-interest media and journalism when traditional market models are broken beyond repair? How do we maintain ethics, particularly accuracy and tolerant discourse, when the Internet audience, fragmented and self-regarding, is increasingly part of the process of gathering and disseminating news? And what is the future of journalism when political spin, public relations and naked self-interest are increasingly the driving force of the news business?

In the search for solutions, this chapter explores the nature and importance of ethical journalism and its place in the modern European information space, and we look at some of the ethical challenges facing journalists and editors in their daily work.

Journalists, who operate in a distinct branch of freedom of expression, enjoy free speech protection, but it is not without limits. The European Convention on Human Rights, for instance, makes clear that restrictions on free expression may be necessary in the interests of, for instance, national security and public safety. However, the exceptions from the basic rule about everyone's right to free speech must be prescribed by law, serve a legitimate interest and be necessary in a democracy. This is particularly important for journalists whose job it is to scrutinise the exercise of power and who rely on the defence of public interest to allow them to do so. Any form of censorship, restrictive laws and other measures to control media tend to have a chilling effect on the media, but also a negative impact on society as a whole, including for the whole spectrum of human rights.

Journalism is a form of expression that is not entirely free. Indeed, as this paper will explain, it is, in fact, a form of constrained expression in which the media community themselves develop ethics which are designed to protect individuals or group interests from unacceptable abuse. This voluntary restraint is what makes journalism distinct from the wider world of free expression and thereby also demonstrates that state interventions to regulate or control it are not necessary or desirable.

Ethical journalism is defined in this paper as the manner in which reporters, editors and others provide, gather, prepare and disseminate news and commentary on the events that shape people's lives. It is rooted in moral values and has evolved hand-in-hand with human rights protection in Europe. In essence, ethical journalists serve the public's right to know. They are professionals also in the sense that they seek the truth and resist distortions. These are the ethics which should be promoted.

These basic principles provide a useful starting point. They can build confidence in newsrooms and do much to strengthen public trust in the value of independent news and information. But there are many more challenges as well, including policies to strengthen public funding of public-interest journalism and invest in confidence-building measures to promote pluralism and diversity.

The world of information is undergoing a radical transformation, but the need for public access to reliable, useful and timely information as a counter to rumour, speculation and propaganda remains constant. How that will be achieved requires fresh commitment to strengthening ethical journalism and the expansion of people's

access to free and independent media. These are essential parts of the structure of democracy and to defend them we need to better understand how information in the European public sphere is defined in the digital age.

2. THE DIFFERENCE BETWEEN JOURNALISM AND FREE EXPRESSION

Ethical journalism, as we said earlier, has evolved over recent decades in tandem with the development of human rights and democracy in Europe, but today journalism and human rights intersect at a moment of remarkable and historical change linked with globalisation and the explosion of digital media.

In that context it is useful to begin with an examination of the need for a fresh discussion of the ethical challenges facing journalism and free expression.

Journalism covers an information community much wider than the traditional family of people who are recognised as media professionals. It can include anyone engaged in the dissemination of information in the public interest. Journalism combines free expression with a commitment to professional and ethical standards. Journalism has a public purpose to provide, as honestly and as independently as possible, accurate and reliable intelligence for the communities it serves.

There is, of course, still a close relationship between ethics of journalism and human rights standards and, particularly, freedom of expression. Journalists, at least as much as governments, have a vested interest in the defence and promotion of high standards of human rights and independent journalism.

But new players also have an interest. People from outside the newsroom who help gather, prepare and disseminate information – whether bloggers or other non-traditional communicators – are an essential part of the new framework of digital media and new forms of communication known as “open and networked journalism”. They, too, have a role to play in creating a new culture of responsible communications that can be nourished and supported by respect for human rights standards.

At the same time, journalism, as a public good, is under pressure and in many European countries the independence of existing public media is not secure. This is a challenging context which requires reflection and action from journalists and from states and civil society.

Ethical journalism has always been at the heart of notions of professionalism in media and has always been reflected in the creation of codes of conduct for journalists and forms of self-regulation both at local and national level.

Discussion of ethical behaviour is not academic or theoretical but should be rooted in the social and political realities of journalistic work. While codes reflect the aspirations of journalists to be responsible and accountable, they need to be implemented in a practical context through detailed guidelines and training that are developed by media professionals themselves. Also, self-regulation of the media is presented as a valuable means of resolving conflicts, protecting the independence of journalism, promoting ethical standards and reducing the risk of legal sanctions on journalists.

There are, of course, many initiatives that aim to actively promote ethical standards of journalism and the protection of information rights at international, European or national level, and these may serve as examples for further good practice.

But much more needs to be done to strengthen the attachment to ethical values of journalists and others who seek to provide information through responsible public communications. To do this it is necessary to explore what makes journalism, and the work of people from traditional and non-traditional public-interest communications, distinct from free expression.

Although the right to freedom of expression, as set out in Article 10 of the European Convention on Human Rights, covers a multitude of forms of expression, journalists see their role in the framework of press freedom, which is a form of expression that supports the discovery of truth.

The core importance of press freedom is that it is embedded in discussion in which different opinions are not only expressed, but are tested in open debate. Freedom of expression in the widest sense does not support the discovery of truth. It gives everyone a right, within narrowly defined legal limits, to say what they want, how they want and when they want. They have the right to be decent or indecent, honest or dishonest, fair or biased.

More than ten years ago, Onora O'Neill, professor of philosophy at the University of Cambridge, described unrestrained freedom of expression as "self-regarding" while journalism and media set out to be "other regarding", guided by core ideals of mission and aspiring to standards and values (O'Neill 2004).

The distinction made by Professor O'Neill has become increasingly relevant in the age of social networks and online communications. Today the world of Twitter, Facebook and online chat combine to create a plethora of self-centred and unrestrained chatter, debate and occasionally abusive communications. Journalism is, therefore, not free expression. It is constrained expression framed by the ethics of journalistic mission – truth-telling, independence, accountability, fairness and respect for others. It is a commitment to voluntary restraint that is not commonly found across the modern open information landscape and, indeed, would not be recognised or acknowledged by many bloggers or users of social networks, who jealously guard their right to free expression.

But for journalists to be able to exercise self-restraint they must be allowed to work free from pressure and intimidation. In the expanded world of public communications where journalists work hand-in-hand with the audience, many of whom are also providing journalistic work, the need for creating a secure, pressure-free environment is essential. For this reason journalists, as much as governments, have a vested interest in the defence and promotion of high standards of human rights.

3. FROM CRISIS TOWARDS A FRESH VISION FOR ETHICAL JOURNALISM

The spectacular changes of the last 20 years brought on by the Internet and digital communications have turned the media world upside down, but we cannot turn the clock back.

The following comment from United States President Barack Obama in July 2013 (Blum 2013) sums up the reality that faces traditional journalism and media in Europe:

It used to be there were local newspapers everywhere. If you wanted to be a journalist, you could really make a good living working for your hometown paper. Now you have a few newspapers that make a profit because they are national brands, and journalists have to scramble to piece together a living, in some cases as freelancers and without the same benefits that they had in a regular job for a paper. What's true in journalism is true in manufacturing and is true in retail. What we have to recognize is that those old times aren't coming back.

However, in a climate when radical change threatens to overwhelm the ethical values of traditional media something further has to change to reassert these values. The process of change, although stimulating and liberating for many users and people in the communications industry, has not generated great optimism in the newsrooms of Europe. Indeed, there is a loss of confidence and low morale felt in many corners of journalism and the news business. Public-interest journalism is undermined by the uncertain and precarious social and professional conditions in which journalism functions; a legal vacuum over regulation; and heightened fears of more state influence, political spin and content driven by corporate interests.

Restructuring of the media industry has been driven by technological convergence and a revolutionary shift in the way people communicate and disseminate information. As the Internet has opened up new markets, traditional media have witnessed the collapse of their business models. Advertising income has collapsed and revenue forecasts are dire. Even much-followed digital media struggle to be profitable as Internet giants like Google, Amazon and Facebook siphon off advertising revenue.

The financial crisis facing much of the news media has seen a reduction in the resources available to maintain and strengthen journalistic work; in fact, less is spent on employment and training and less time is available for research and fact checking, reinforcing public scepticism and weakening trust. Some media have turned to unpredictable and unreliable social networks and online sources to help fill both advertising and editorial gaps. They promote online comments to encourage audience participation in the hope of triggering potentially lucrative automated advertising. They use user-generated content to feed the voracious appetite of the 24/7 news machine. Meanwhile, other journalists and media – who eschew the policy of “clicks” over content – look to private foundations, philanthropy or new models of public support to underpin the integrity of journalism and to do so without compromising editorial independence.

The firewall that used to protect journalism and editorial work from advertising has collapsed. Advertorials, sponsored sections and editorials linked to commercial interests are common features. Old failings have been fuelled by new technology. The former tabloid obsession with sex, violence and sensation has been supercharged by the Internet and social media. A “rush to publish” sends rumour, speculation and ignorance viral.

Misinformation and stereotypes target the most vulnerable and marginalised groups and reinforce prejudice and hatred. Political spin and public relations are sucked into the vacuum when well-researched journalism is axed, in a process known as

“churnalism” (Davies 2008). Tooth and claw media competition, a weakening market for quality journalism and the increasing influence of social networks, as drivers of the news agenda, are taking their toll.

Not surprisingly, in this environment many media fall well short of their aspirations to be honest, accurate truth-tellers. Journalists and editors face obstacles that prevent them from delivering on their high ethical ambitions. Journalists have always had to counter political and corporate spin, but today it is covert, pervasive and insidious, and there have been cuts in editorial investment that undermine the fabric of journalism. Investigative journalism is reduced and the voices of marginalised and vulnerable communities diminished. Journalism is coming under greater scrutiny as rumour, speculation and celebrity trivia replace journalism that delivers what people have the right to know and nourishes civil society.

But in the midst of this turbulence there is optimism. Many journalists and media professionals have begun to push back against the low morale caused by increasing governmental pressure and the unfair, precarious nature of journalistic work. There are increasing calls from within media for a fresh and invigorated vision of journalism’s future, based upon revival of the spirit of mission and values and a new and inclusive media partnership with the audience.

Many argue that journalism can be a leader of responsible communications across the European information sphere that can be an inspiration to others, but this will only happen if media professional groups work together to strengthen the craft of journalism and to build public trust in media.

It was this notion of building solidarity in a divided media community that led to the launch of the Ethical Journalism Network in 2012,¹ a coalition of owners, editors and media staff working across all platforms of media, calling for co-operation between media, journalism support groups and the public to restrain governmental interference in the work of media and to work together in favour of ethics, good governance and self-regulation in defence of quality journalism.

This initiative taps into two important trends, both initially troubling for journalists, but both providing opportunities for improving the difficult climate in which media work.

The first is the dismantling of the elitist, professionalised structure by which traditional media have wielded enormous power in controlling the news agenda and shaping public opinion. Today media work closely with their audience, who, thanks to technology, can respond instantly to what they see, hear and read. Opportunities to engage with the audience in the preparation and dissemination of news and information are providing opportunities to enlarge the scope of journalistic coverage, to make media and journalism more accountable and to strengthen the debate about standards to take it beyond the newsroom into the battle for improving the quality of content in everyday communications.

The second change is the use of technology to reorganise and refocus the work of journalism to make it more effective in achieving its mission to act as a watchdog and to provide relevant, useful and accurate intelligence to the audience.

1. See <http://ethicaljournalismnetwork.org/en>, accessed 16 July 2015.

The liberating use of technology – the very same technology that is abused by governments to spy on their citizens and journalists or is exploited by others to spread hateful messages – can also be a force for good. It can be used to increase transparency, raise standards and build trust in democracy, and not just within traditional media circles.

4. THE CORE ETHICS OF JOURNALISM

To take advantage of these changing circumstances it is important to better understand the ethical base of journalism – and what makes it distinct from the simple exercise of free expression – and to consider whether these values can be useful in the promotion of civil and respectful public communications within the community at large.

Although in most countries codes for ethical journalism cannot be recited perfectly by all news staff, most editors, editorial managers and newsroom staff are aware of their responsibilities and the purpose of journalism.

The ethical principles of journalism were first elaborated in the 1850s in Britain and the first codes for journalism were adopted in the 1930s. Today, there are more than 400 codes and declarations from around the world.² They emerge from a wide variety of cultural traditions but, in essence, they all boil down to the same five key values that form the voluntary set of constraints and mark out the free expression territory occupied by the craft of journalism.

They are as follows:

1. *Accuracy and fact-based communications*

Journalists cannot always guarantee “truth” but getting the facts right is a cardinal principle of journalism. Journalists should always strive for accuracy, give all the relevant facts they have and ensure that these have been checked. When they cannot corroborate information, they must say so.

2. *Independence*

Journalists must be independent voices; they should not act, formally or informally, on behalf of special interests whether political, corporate or cultural. They should be transparent in their ownership and their work. They should declare to editors – or the audience – any political affiliations, financial arrangements or other personal information that might constitute a conflict of interest.

3. *Fairness and impartiality*

Most stories have at least two sides. While there is no obligation to present every side in every piece, stories should be balanced and add context. Objectivity is not always possible, and may not always be desirable (in the face, for example, of brutality or inhumanity), but impartial reporting builds trust and confidence.

2. One of the most comprehensive collections of codes was that compiled by Jean-Claude Bertrand and now being updated by the Ethical Journalism Network and the Missouri School of Journalism. See www.rjionline.org/media-accountability-systems, accessed 16 July 2015.

4. *Humanity*

Journalists should do no harm. What they publish or broadcast may be hurtful. They should be aware of the impact of words and images on the lives of others, particularly on vulnerable groups, marginalised communities and minorities. They should be particularly sensitive to the dangers of contributing to incitement to hatred or violence.

5. *Accountability*

A sure sign of professionalism and responsible journalism is the ability to be accountable and transparent. When journalists make mistakes, they must correct them, and expressions of regret must be sincere and not cynical. Journalists and media must listen to the concerns of the audience. They may not change what readers write or say, but they should provide remedies when they are unfair.

This ethical framework is a starting point and many media have developed comprehensive newsroom guidelines to help journalists, producers and news directors deal with the multitude of dilemmas that occur in their daily work. The recognition of the importance of ethics in journalism has led to an increasing number of employers including their newsroom codes in employment contracts, as well as a growing commitment to appointment of newsroom ombudspersons and readers' editors.

5. DEFINING ACTS OF JOURNALISM AND WHO IS A JOURNALIST

These developments are encouraging signs of a move towards a fresh vision for journalism across Europe that is also being shaped by media professional groups.

Journalists' bodies, for instance those in membership of the European Federation of Journalists, as well as media employers such as the World Association of Newspapers, are taking initiatives to build more public support for public-interest journalism. They are also looking for fresh solidarity in a divided industry; for a positive response to the challenges of the information revolution; and, above all, for a secure and ethical future for the craft of journalism. The aim is simple – to support the values of honesty, truth and public purpose in media and to build trust in journalism as an instrument of democratic expression, as a guarantor of free speech, and as a reliable and trusted interpreter of the complex world in which we live.

But who is the journalist who will take on this responsibility? In today's media environment there is much debate about who is a journalist and, therefore, who is entitled to the protections that should be granted to people carrying out journalistic work, such as protection of sources. This is an important question and by no means academic. The rule of law in this area – for instance in the granting of protection for journalists' sources of information, or for considering public-interest questions in defamation cases – requires that lawmakers and judges have some clear idea of the circumstances in which to apply these protections and who is covered by them.

Journalists have traditionally been defined according to their employment by a media organisation, by affiliation to a professional association or union, or by completion of an appropriate course of training. Journalism is a craft with two personalities. The skilled and creative worker in full-time employment is part of a media brand,

working in a team dedicated to a mission defined by the owner or management. The freelance, part-time or contract journalist sells his or her services, often in precarious conditions, and these have become the fastest-growing community in the profession. Increasingly the term “journalist” is used to include all those who regularly engage in collecting or disseminating information to the public with a journalistic purpose, for instance concerned bloggers. Even people who have no formal training, who are not members of a professional body or who are not employed by media can commit what might be called acts of journalism.

Many now argue that anyone who publishes information on matters of public interest in this context should benefit from the protection and limited legal privileges given to full-time journalists, including protection from censorship and undue interference, the right to publish in safety and security and the right to protect confidentiality of sources.

In considering the question of protection, the issue of intention to publish in the public interest or attachment to and recognition of certain fundamental ethical values, such as those outlined above, will become increasingly important to ensuring that legitimate protection is provided to everyone (traditional and non-traditional journalists included) who should be entitled to it. Those who aspire to communicate in the public interest should acknowledge the need to disclose any relevant political or other affiliations. Only acts of journalism in good faith are worthy of protection.

Journalism, thankfully, is no longer the self-identifying elite it used to be. But a broader vision of who practises journalism does not justify any dilution in skills, standards or ethics, nor should it diminish in any way the legitimate demands of people from within journalism who seek greater support in the defence of their work and improvements in the conditions in which they work.

Although journalism has become a more open profession, those who earn their living from it have been among the most prominent victims of the economic crisis in Europe and around the globe. Jobs have become precarious and working conditions have deteriorated. Young people scrambling to get a foothold in journalism face the humiliation of lengthy unpaid internships as they vie for the few career opportunities available. The unions and associations that represent the foot soldiers in journalism rightly condemn reduced investment in jobs, training, social conditions and professional capacity. They warn that weakening the status of journalistic work is diminishing democracy.

Creating new structures for co-operation and focusing on quality can inspire the new generation of journalists, which is younger, more varied and no less committed to values than traditional news staff, to join the growing industry consensus to enhance and strengthen journalism and media content. Creating this new broad movement is no easy task given the emerging ethical challenges.

6. ETHICAL CHALLENGE: BUILDING TRUST IN SELF-REGULATION

Self-regulation begins with the individual, and is reinforced in the newsroom and in media houses, but to touch the public consciousness it also needs to work effectively across the media industry at national level.

The voluntary principle of regulating media, with journalists working in partnership with representatives of the public, is the best way to build trust in media. But although the theory of media self-regulation is becoming better understood, there are many questions as to whether such systems, particularly those covering the press, are fit for purpose in an age of increasing political and commercial pressure on journalism.

The recent scandals of phone hacking and press bribery in the United Kingdom involving the global media giant News Corporation, owned by Rupert Murdoch, which saw a major newspaper closed and journalists sent to jail, provided shocking evidence of a failure of self-policing at individual, corporate and industry level.³

One high-profile victim was the Press Complaints Commission, an industry regulator of world renown, which was found to be utterly ineffectual in curbing the excesses of tabloid journalism and unable to provide appropriate and acceptable forms of remedy to victims of press abuse. It closed in 2014. There are ongoing reforms in the UK, which has seen the launch of a new body – the Independent Press Standards Organisation – but serious questions remain over whether this new body is sufficiently independent from the industry and whether it can deliver credible self-regulation. Three major news companies – *The Guardian*, *Financial Times* and *The Independent* – have refused to join.

To build public confidence journalism must connect with its audience and make itself accountable for its mistakes. Journalists should embrace independent self-regulation as a way of strengthening the work they do. Credible systems of media accountability are at the heart of building public trust in media and without them people have no form of effective scrutiny of media or challenge to the abuse of power when journalism goes off the rails.

Most in media would agree, but many journalists and media organisations are reluctant to open themselves up; many have bad experience of how intrusive governments will use the argument for regulation as an excuse to monitor and interfere in the way that media work. This was certainly the case in Hungary in 2011 when a new media law was enacted that introduced a media control body with members appointed by the ruling party. Introduced on the back of complaints of a lack of media regulation, it led to a storm of protest across Europe (Human Rights Watch 2011).⁴

Nevertheless, it is a well-known and accepted truth inside and outside media that journalists are notoriously reticent in admitting their own mistakes. This lack of humility is odd when we consider how media can be lacerating in their criticism of many people in public life.

This die-hard reluctance to accept the notion of independent regulation and to bring about meaningful reform in the way media police their own affairs, particularly in the press, leads to a crisis of trust, such as that seen in the United Kingdom following the phone-hacking scandals of recent years.

3. For a full report on the scandals and the subsequent Leveson inquiry see: <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/>, accessed 16 July 2015.

4. The controversy over the new media law raised serious human rights questions. See Human Rights Watch (2011).

This is ultimately self-defeating. Complaints that are ignored or treated lightly can do enormous damage, while often a quick right of reply or a published correction restores belief that journalism is worth defending. If journalism is to function effectively, it must open up to public scrutiny. Media professionals, themselves members of the public, can help shape the debate about how to make media more credible and trustworthy.

The self-interest of news organisations to protect themselves from outside interference is understandable, but when it leads to the weakening of legitimate public scrutiny of their work this can be an obstacle to effective self-regulation. At the same time, the convergence of communications technologies, for instance, has rendered obsolete the traditional divide between broadcast and print journalism, so why in most countries do we still have different structures and rules for handling public complaints about the content of journalism in the press and on television?

In some countries – Norway, the Netherlands and Belgium, for example – all published journalism on any platform comes under the jurisdiction of a single press or media council. Are these models for others to follow? The mandate of a national self-regulating body should flow from a code of conduct covering the practice of journalism which should be agreed by the media professional community.

There are some basic principles for national self-regulation:

- ▶ The self-regulation body for journalism must be independent of government and parliament.
- ▶ It should strike a balance in membership and representation between journalists across all platforms and the public, representing a broad range of civil society.
- ▶ Membership of the independent self-regulator should be decided through an appointments panel independent of government and the media industry, which itself should be appointed in an independent manner.
- ▶ At all levels the process of content regulation should include people actively engaged in journalism and people who understand how journalism and media work.
- ▶ Where there is statutory definition of this self-regulation process it should be narrowly defined and limited to validation procedures, and not involve any legal interference in the operational work of an independent regulator.
- ▶ Any statute must place an explicit duty on the government and state authorities to uphold and protect the freedom of the press.

There is no one-size-fits-all model, but there are many examples where the job is being done effectively and competently by bodies which have achieved consensus and largely command the trust of the public. In Norway, Denmark, Germany and many other European countries national press councils succeed largely because the owners, journalists and editors have agreed to work together to make self-regulation work in practice, as well as in theory.

And how do we pay for systems of accountability when traditional funding models that rely on cash from the industry are breaking down?

In many countries traditional media markets are in free-fall, circulations are down and advertising is being withdrawn in favour of more lucrative online opportunities. Everywhere there is a growing awareness of the need for more public funding of media accountability systems. There is a strong argument that there is, after all, a genuine public interest in having a credible, accountable and ethical system of journalism. However, using taxpayers' money for media accountability has to be carefully managed. Public funding must not compromise principles of independent regulation.

A key question is what happens when a newspaper or media organisation defies a press council and refuses to publish a retraction or provide remedy when it breaches ethical rules. The media consensus is against legal coercion, preferring voluntary systems and peer pressure. However, there must be a mechanism for dealing with egregious offences that cross a line.

In Sweden the Press Council fines media that break the rules and, although this is a voluntary system, everyone pays because the process is trusted by the industry. In Austria the system broke down when a newspaper flagrantly challenged a Press Council ruling. As a result, the Press Council wound itself up. It took years to rebuild industry consensus to get the press back on track. Coercion by law is available in Denmark although it is narrowly defined and applied in very exceptional circumstances. It is not a model that many favour, as it can encourage legal and political interference, but all forms of independent regulation should be on the table for consideration.

In most countries, building trust in self-regulation remains an enormous challenge at both enterprise and industry level. The evidence suggests that journalism is entering an era of transition not just in the way journalists work and in their relations with the audience, but also in the way reporters and editors are held to account.

Usually there are two ways of regulating journalism at national level: a voluntary system for the press and legal controls over broadcasting.

These structures were created for yesterday's media landscape and are increasingly out of date. Today's digital journalists work on video, print and audio simultaneously. That is why it makes sense to have only one national regulator, and one that covers all platforms of journalism.

Another testing issue is the question of funding. Ideally, journalists and media should pay the bills for press councils, but in these cash-strapped days can media continue to afford it? Increasingly, the answer is no. So who will pay in future? Perhaps we should think about using public funds; after all, independent regulation of media is a public-interest activity. But if we use taxpayers' money, how do we ensure it will not compromise editorial independence?

These questions prompted the Ethical Journalism Network to commission a report, *The Trust Factor*, published in February 2015 which examined the credibility of self-regulation in a number of countries, including across Europe (White 2015a).

The report examined the question of self-regulation at three levels:

1. At the level of the individual

Are journalists generally free to act according to conscience? Are journalists aware of their ethical and professional obligations and duties?

2. *At the level of the media enterprise*

Do media houses have credible systems for handling complaints? Are there ombudspersons or readers' editors? Do media have internal rules to monitor political or commercial conflicts of interest and is there transparency of ownership?

3. *At national level and including industry-wide systems*

Are voluntary press councils and media councils effective and are they respected by journalists and editors? Does the law play a role and who pays for self-regulation?

The conclusions found many weaknesses at all levels. The report reveals that in the midst of revolutionary change inside journalism where the culture of public communications has been transformed, the need for responsible and accountable journalism is greater than ever, but major questions remain over how to develop accountability systems in tune with this new era of information.

The report found Norway to have the most outstanding model of self-regulation. The Norwegian media have a credible system because of a single-minded commitment to independent journalism and media solidarity. Norway's Press Complaints system works because all media players work together and they follow one single code of conduct that is recognised and respected inside journalism and which is applied equally to media on all platforms.

The report also noted that Norway – alone of self-regulating media around the world – allows public access to complaints hearings. It is a level of transparency simply unheard of elsewhere and sets a benchmark for others to follow. It is a system that operates in sharp contrast to countries where media are stifled by media laws, such as Hungary, or where corporate self-interest prevails, as in the United Kingdom.

But it is not just in the newsroom where standards need to be applied. Ethics and self-regulation are equally important in the boardroom. Owners and managers of media are not exempt from practising the standards they expect of their journalists. Indeed, it is vital to the creation of a responsible and free media that there should be a commitment to the values, mission and standards of journalism from the top of the media pyramid to its base.

There is a long-established connection between the quality of mass media and democracy, and some recent research illustrates the importance of free media in building open and confident societies, though this is not guaranteed (Myers 2012). Media organisations must themselves demonstrate high standards. That is why media owners need to promote transparency and good governance inside media houses.

There is a widespread concern in many parts of the world that editors have become much less influential on the work of journalists than media owners. The moral leadership of managements – or lack of it – is a critical factor in shaping the behaviour of journalists (Lambeth 1992). Newsroom managers often set the moral tone of media work according to the preferences of owners whose conflicts of interests, whether cosy relations with politicians or business partners, often lead to open or covert interference in the newsroom. When this happens it inevitably damages the credibility of journalism. The Ethical Journalism Network promotes transparency in

media ownership and the adoption of internal rules of good governance for media. It does so believing that media owners should respect the benchmarks for openness and moral conduct that their journalists apply to others in their daily reporting.

The creation of an *Ethical Media Audit* to help media companies establish their own internal self-reporting process has already been useful in helping media companies in Pakistan to develop more effective internal self-regulation (Ethical Journalism Network 2015). The report highlights how making self-regulation work at enterprise level is perhaps what counts most. Building trust with the audience should be an issue in every newsroom and the growth in the number of in-house ombudspersons or readers' editors is a welcome sign that more media are taking the issue seriously.

The appointment of ombudspersons responsible for correcting errors and explaining how journalism works to the public is a signature commitment to professionalism and accountability and a useful mechanism to create public trust.⁵

At the same time, journalists need to be trained in their ethical duties and they need to have internal systems that constantly review the work of the newsroom, providing them with guidelines on the style and substance of journalism that highlight ethical dilemmas and how to resolve them.

But this is easier said than done at a time when, in the face of editorial cuts, some managements still question money being channelled into cleaning up the mistakes of the newsroom. There is a strong argument that keeping journalism honest is money well spent for media and for the public at large, and it is a good investment for democracy, but many media and policy makers remain to be convinced.

7. ETHICAL CHALLENGE: CONFLICTS OF INTEREST IN MEDIA

Despite the fact that from the top to the bottom of the media establishment people talk of "mission", the public interest and the crucial role that journalism plays as the watchdog on abuse of power by our political and corporate elite, media are much less candid about the murky undergrowth of their own affairs.

As we have said earlier, many media fall well short of their aspirations to be honest, accurate truth-tellers. But journalists and editors also face internal obstacles that prevent them from delivering on their high ethical ambitions. Journalists have always had to counter political and corporate spin but today it is covert, pervasive and insidious and often operating inside the media.

Market conditions have undermined business models that are based on good journalism and strengthened those that see media as a route to profit or political influence. Cuts in editorial investment undermine the fabric of journalism. Investigative journalism is reduced and the voices of marginalised and vulnerable communities diminished.

Everywhere in journalism there are "dark arts" at work: people doing deals with advertisers to carry paid-for material disguised as honest news; reporters accepting

5. See Organization of News Ombudsmen <http://newsombudsmen.org/>, accessed 16 July 2015.

bribes; or any of a multitude of dodgy practices which are kept hidden from the audience. Of course, most journalists and media do an honest job but, in times of financial crisis, many news media, even in the settled democracies of Europe, cut corners and betray their ethical principles. In every country insiders know what is going on, but too often they are reluctant to talk about it openly. The Ethical Journalism Network opened up a debate about these problems in March 2015 with the launch of a report – *Untold stories: how corruption and conflicts of interest stalk the newsroom* (White 2015b).

The report, covering 18 countries, including the states of the Western Balkans, the United Kingdom, Ukraine, Denmark and Turkey, exposes how financially stricken news media are being overwhelmed by political and corporate interest groups. It found that media managers are doing deals with advertisers to carry paid-for material disguised as honest news; some reporters and editors accept bribes and irregular payments; and there is a culture of dependence on political and corporate friends that makes it increasingly difficult to separate journalism from propaganda and impartial reporting from public relations.

To combat this crisis the report calls for new rules on transparency, conflicts of interest and ethical governance. They are much needed. Many media pay lip service to these principles because of financial challenges, but the weakening of public trust in journalism is an inevitable consequence of a failure to improve internal systems of governance in media to eliminate conflicts of interest and corruption.

Although the report notes that the major threats come from outside media, with governments, unscrupulous politicians and corporate communicators increasingly shaping the news agenda and taking advantage of newsrooms weakened by cuts and restructuring of the media economy, it also highlights how many wounds are also self-inflicted. It notes that many of today's media owners do not buy into journalism for commercial reasons, but mostly to promote their own business and political agenda.

The report also reveals how journalism is compromised by politicians and owners in countries where media are on the front line of tough political battles, such as Turkey, and it highlighted how in Ukraine the practice of paid-for journalism is a tool routinely used by politicians at election time.

The struggles facing journalists in settled democracies, such as the United Kingdom, are no less challenging. The growing tension between editorial and commercial departments was exposed in London in February 2015, when Peter Osborne, one of Britain's leading political journalists, dramatically and very publicly quit his job at *The Daily Telegraph*. He accused the management of censoring stories about HSBC bank – a leading advertiser of the newspaper – which was caught up in an international tax scandal. Tellingly, he broke the story on a current affairs news website (Osborne 2015).

The incident highlights why media who value their brand and want to maintain public trust need to have transparent and reliable internal controls to deal with potential conflicts of interest. Osborne is now leading calls for an overhaul of media governance rules and a fresh debate about the editorial independence of the British press. His case underscores the difficulties in keeping ethical journalism on track in the cash-strapped world of digital media.

The report also reveals how in a range of countries in the Western Balkans with a shared and painful history, media corruption hinders attempts to break free from the legacy of war, censorship and political control during decades of communist rule.

Government control over lucrative state advertising, which is often allocated to media according to their political bias, remains widespread. At the same time, the elimination in most countries of the invisible wall separating editorial and advertising has created a surge of so-called “native advertising,” hidden advertorials and paid-for journalism.

Although the major threats come from outside, from governments, unscrupulous politicians and the overweening power of corporations, many wounds are self-inflicted. The report points to a growing culture of dependence on political and corporate power. Some media owners have their own business and political agenda, and many journalists and editors go along with newsroom practice that encourages unethical journalism.

The story everywhere is of an uphill struggle. Corruption and cynicism inside newsrooms saps the confidence of media staff leading to crumbling levels of commitment to ethics, a lowering of the status of journalistic work and a pervasive lack of transparency over advertising, ownership, and corporate and political affiliations.

All of this presents journalists, publishers, editors and anyone who values information pluralism with a massive task: to revive commitment to transparency, good governance and ethical journalism.

This challenge echoes the stark warning issued by Tim Berners-Lee, inventor of the World Wide Web, who in September 2014 said that the Internet is being overwhelmed by corporate and state power (Jeffries 2014). His call for a new “Magna Carta” to protect the Internet is strengthened by ensuring the presence of pluralist and clean forms of journalism in a secure online environment.

In an attempt to give some direction to media people, the *Untold Stories* report (Ethical Journalism Network 2015) comes up with a series of proposals which it calls an “Agenda for Change”. This eight-point plan provides a range of practical actions to promote dialogue inside media and to put in place some urgently needed structures to improve levels of media governance.

1. A meaningful commitment to transparency is needed inside media and the publication of relevant information related to the political and financial interests of owners, managers, editors and all leading journalists and presenters.
2. Rules should be adopted to prohibit undue interference in the work of journalists and media by governments and state institutions and to establish principles for full disclosure of contacts and transactions between media and state officials.
3. Standards should be agreed on the allocation of all forms of public and political advertising and there should be regular public disclosure of payments made for services to all journalists and media.
4. Genuinely independent and transparent systems should be created for assessing circulation and ratings of media.

5. Internal systems should be introduced for disclosing potential conflicts of interest at all levels – whether in the boardroom or in the newsroom – and structures set up for dealing with complaints.
6. Contracts and employment conditions for journalists should meet international labour standards and give them the right, without fear of retribution, to refuse any form of work that infringes upon their professional codes or their conscience.
7. Internal rules and procedures should be agreed in all media houses to ensure full disclosure of all paid-for content and such materials should be made clearly distinct from editorial and journalistic work.
8. Urgent debates should be launched at national and international level on the need for structures to provide public assistance to encourage the provision of pluralist and ethical journalism without infringing upon editorial independence.

8. ETHICAL CHALLENGES: JOURNALISM AND THE INTERNET

It has been more than 15 years since *Daily Mail* Editor Paul Dacre, one of the great contrarians of British journalism, famously told his staff at the newspaper's annual summer party: "A lot of people say that the Internet is the future for newspapers. Well, I say to that: bullshit dot com" (*The Guardian* 2008).

Much has changed in the world of journalism since then, and particularly for Dacre and his colleagues. Their *Mail Online* is now the most visited newspaper-owned news website in the world. This website, dominated by celebrity and pictures rather than long-form reporting, may not be to everyone's taste, but it is an important part of the mix of the Internet and media that has transformed, profoundly and irreversibly, the nature of journalism and its ethics.

Today, a new European media generation is working in partnership with their audience in a freshly scrubbed news environment. It involves old-school professionals like Dacre, whistle-blowers, activists and concerned individuals who are using social networks, micro blogs, data journalism and an array of digital tools to develop new ways of gathering and presenting news. But in the midst of the changing newsroom, owners and publishers face an uphill struggle to spark life into a depressed media market where news rarely delivers revenues that can sustain high-quality journalism, and that includes even news media at the top of the pile.

The Guardian, for instance, is the world's third most frequently visited news site and an acclaimed leader in quality journalism, but it has had to live with eye-watering losses of more than £100 million since 2010 – even though it has provided news of immense public importance, including the *News of the World* phone-hacking scandal, and the Edward Snowden and WikiLeaks stories. *The Guardian* and others battle to maintain and develop high-quality content in a new digital business culture which many argue is itself profoundly unethical.

In his 2011 book *Free ride* Robert Levine complained that every media business has had to contend with growing consumer demand for free online content. As it

is currently configured both technically and legally, he argued, the Internet allows technology companies to reduce the price of content to zero by allowing them to build businesses using content copyrighted by others. By delivering content they do not pay for themselves, or by selling content for far less than what it cost to create, Levine says, information and entertainment distributors such as *YouTube* and *The Huffington Post* become “parasites” on the media companies that invest substantially in journalists, musicians and actors (Levine 2011).

Therefore, it is not surprising that many European journalists, editors and publishers have lashed out at Internet rulers – Facebook, Google, Apple and Amazon – who exploit media content while using technology to plunder advertising revenues. These disputes have led to high-profile confrontations between industry leaders and Google, for instance, which has been accused of building a near monopoly of the online search market in Europe and doing so on the back of using news lifted without payment from traditional providers. Some recent arrangements with news publishers in France and, in particular, an agreement in April 2015 by which Google will provide 150 million euros in funding for journalism projects to a number of European news media illustrates how delicate relations in this area have become (BBC News 2015).

This seismic shift in the power-relations between editorial and commercial departments has created intense pressures on independent journalism. The Internet has given us amazing access to knowledge. It has also created a tsunami of information coming at us from everywhere. There is a barrage of rapid-fire real-time news, with millions of information snippets. More than ever, journalists are needed to clarify what is important, ask the right questions, put information in context and present the news with lashings of style. There is more informal information sharing and more networking. The Internet is creating spaces where many of the issues ignored by mainstream media are getting attention. In Europe, news websites – such as *Stop Fake News* in Ukraine – are providing an invaluable alternative to tainted traditional news sources, by demonstrating how editorial integrity is being undermined by political spin and misinformation.⁶

At the same time there are more online news sources that strive to ensure that minority opinions and the views of others being sidelined by a cash-strapped media sector are given more prominence. However, these positive initiatives are no alternative to developing a new ethical culture inside existing news media. The Internet brings with it new opportunities for the revival of transparent and accountable journalism. This will happen only if newsmakers fully grasp why ethics must be nourished and the craft of journalism strengthened.

The need for ethical communications is increasingly being recognised in the world of the Internet where abuse of rights of free expression is increasingly a matter of concern for users and governments, many of which are dangerously inclined to seek to impose legal curbs on public communications, whether in the name of counter-terrorism, national security or public welfare and the protection of individuals.

6. See www.stopfake.org/en/news/, accessed 16 July 2015.

Journalism at its ethical best can be an inspiration for responsible communications, and counter the worst manifestations of online hate speech, voyeurism, narcissism and prejudice.

Andrew Keen, a veteran of Silicon Valley, has exposed these threats in his 2015 book *The Internet is not the answer* (Keen 2015). He is one of several writers who have targeted a web-based information culture that makes us better connected, but less aware of the world around us. It is a problem eloquently described by Ethan Zuckerman, director of the Massachusetts Institute of Technology Center for Civic Media and co-founder of the international bloggers' website Global Voices.

In *Rewire: digital cosmopolitans in the age of connection*, Zuckerman argues that the Internet has made everyone less dependent on professional journalists and editors for information. People increasingly seek out information via social media or online searches (Zuckerman 2013).

This comes at a price: we now become exposed to what we want to know at the expense of what we need to know. One thing that made traditional forms of journalism useful was that it exposed us to information that was new, out of our comfort zone and about which we knew little. Foreign affairs, political and religious conflict, and the experiences of other communities and cultures can be crucial to understand. But in a world of do-it-yourself information structures in which the public interest is defined as what the public is interested in, there is a danger that the web can lead to increased ignorance and self-interest at the expense of pluralism and other-regarding principles of democracy. Journalism provides an opportunity to counter this danger by focusing on what reporters do best: telling stories that are interesting, relevant, stylish and, above all, trustworthy.

9. ETHICAL CHALLENGES: BIG DATA, VERIFICATION, PLAGIARISM AND A RUSH TO PUBLISH

While media ethics have been defined and upheld for decades, the context in which they are practised has shifted. One of the biggest challenges is the development of data journalism – using technology for rapid and targeted analysis of public information that flows in vast quantities onto the Internet.

This gathering and availability of enormous amounts of data is changing people's lives. But it is also giving more opportunities for others to practise surveillance and it is raising ethical questions for reporters and editors.

In South Africa, data-driven journalism by the *Ziwaphi* community-based newspaper in the Nkomazi district is improving the lives of people in the epicentre of the Aids crisis. The crisis has been worsened by water contaminated by sewage. The newspaper has developed a way to use old smartphones to help residents get safe water. The phones are submerged in plastic bottles and take microscopic photos of water, which can then be compared to images from a public database to detect high *E. coli* levels. The results are then delivered to residents by SMS, informing them where it is safe to collect water.

In Kenya, a radio station has set up Star Health – a toolkit to help its audience do background checks on doctors through digital access to data on medical practitioners.

They help people analyse data to isolate and expose bogus medics and others guilty of malpractice. (For instance, one man working as a doctor turned out to be a vet.) This democratisation of information is only useful if the original data is reliable. Journalists have to be acutely aware of personal privacy and security issues, as well as simple ethical obligations such as accuracy and fairness in reporting. It is not enough to acquire the technical skills to turn raw data into journalism. It has to be done in a way that both protects and informs the public that the data relates to.

Jeff Sonderman at the Poynter Institute believes that editors need to pose a series of basic questions: “Don’t assume data is inherently accurate, fair and objective. Don’t mistake your access to data or your right to publish it as a legitimate rationale. Think critically about the public good and potential harm, the context surrounding the data and its relevance to your other reporting. Then decide whether your data publishing is journalism” (Sonderman quoted in Howard 2013).

Nowhere has the issue of potential harm been more troubling than when WikiLeaks released data from the US Department of Defense and Department of State to multiple news media in 2010 and 2011 or when journalists at *The Guardian* and *The Washington Post* in 2013 faced tough editorial decisions over publication of documents provided by National Security Agency contractor Edward Snowden. These cases raised enormous public-interest issues – the right to privacy; the role of the state, both nationally and globally, in carrying out acts of surveillance; and the responsibility of media and journalists not to reveal information that could endanger the lives of others or prejudice national security.

In both cases editors and reporters working on these stories had to make difficult decisions about what information to publish. They knew lives were at risk.

The sensitivity of the subject matter and the global reach of the published data created a context that could not be ignored. In the end they recognised that these were stories too big for a single media outlet to handle, and opted for collaboration.

According to the Tow Center for Digital Journalism the way that these stories were reported, collaboratively syndicated and the data itself protected, provides an important case study for journalism and media generations to come.

At its best, in cases like this, the use of the Internet, buttressed by ethical values, is an information playground full of inspiring and entertaining moments.

But it also has a dark side where dodgy deals are done, dirty pictures exchanged and where bullies and bigots run freely.

Journalists are not monitors or supervisors of how people behave – that is not their purpose. But they should be careful in their dealings with web-based sources. Malice and deceptive handling of the truth is ubiquitous. A trusted news brand needs to check facts, verify sources of information and steer clear of dangerous rumours and the rush to publish. Never accept, for instance, images and statements on first impressions. In the world of digital manipulation, pictures are not always what they seem, and not everything someone says – no matter how outrageous – is newsworthy. That is difficult at the best of times, but doubly so when the impulse of modern communications is information in the fast lane. Media that are eager to beat

their Internet rivals by chasing down revenue-generating clicks may be prepared to sacrifice the time journalists need to verify facts and ensure that their stories are ethical and balanced. It is a risky strategy: speed never trumps quality, and even the best of media can be embarrassed if they have a too-casual approach to online sources of information.

Sometimes, of course, in moments of emergency and crisis, journalists have to provide what information they have gathered, if only to give context to issues overheated by Internet speculation. But when media publish unverified content they need to issue a simultaneous “health warning”, explaining where the information is from, why it might be unreliable, and to subsequently correct errors as they become known.

Help is at hand. The European Journalism Centre has prepared a useful verification handbook which provides step-by-step guidelines on how to utilise user-generated content during emergencies. Getting the story right has also been the single-minded mission of *Storyful*, a Dublin-based social media news agency that helps media to verify news sources. The company is so successful it was purchased by Rupert Murdoch’s News Corporation last year.

Ensuring that material is original, as well as the protection of copyright and sources, is essential when downloading information for free, and not acknowledging sources is becoming accepted practice. Plagiarism has always been a problem in journalism. Now, the Internet has created a copy-and-paste pandemic. The audience should always be informed about the source. The only exception to this is when there is a pressing public interest or professional reason for not revealing a source. Remember: journalism is about transparency, disclosure and reliability.

At the same time, editors have to deal with the thorny problem of anonymous online communications, and especially the reckless behaviour of so-called “Internet trolls” – people making anonymous and abusive attacks on other people. Dealing with such intruders is difficult because the audience has been invited to comment on our work. It can be lucrative, drawing clicks and the attention of algorithm-driven advertising. The opportunity to comment on journalistic work also opens the door to fruitful debate. But unless it is controlled, it can merely provide an entry point for abuse, prejudice and hatred.

Many media turn off the comments sections on issues that provoke hate and intolerance. Some stories – such as the Arab-Israeli conflict – can simply be too controversial. But staying in control is not easy. The sheer number of comments can sometimes be too high for moderation. Some social networks, such as Facebook, do not even allow media to block comments. Applying one ethical standard to all of news media is a legitimate aspiration, but often unrealistic.

The case of Delfi in Estonia, where an organisation has been condemned by the courts over its failure to monitor and control defamatory and offensive comments – a decision controversially upheld by the European Court of Human Rights – illustrates how the area of editorial control of comments has become a minefield for media who want to generate traffic to their news columns (in the hope of triggering lucrative advertising through automated systems).

Irresponsible public communications by people who cross the line from free expression and robust, even offensive comment and indulge in hate speech or speech that incites violence is a challenge for journalism, but it is also a major challenge for public policy makers striving to balance the rights of free speech with protection of the rights of others. Media will help if they try to apply firm rules about comments and anonymity. Clear guidelines will help the audience respect the values of journalism. Increasing the capacity to moderate online conversations can be expensive. But it is still necessary.

10. ETHICAL CHALLENGES: HATE SPEECH AND TERRORISM

In times of crisis and tension, it is easy for journalists to submit to casual stereotypes and to react thoughtlessly to issues that require careful and sensitive attention. The information wars being fought between Russia and Ukraine, for instance, are based upon propaganda and manipulation of media messages to suit political bias, and pay no respect to the complex historical realities of the two communities involved.

All around Europe, in the midst of public anxiety over terrorism and migration, there is an increasing volume of speech designed by unscrupulous politicians and others to generate intense hatred and even incitement to violence.

It is a dangerous time for media and for journalists. The need for careful and sensitive reporting, for journalists and editors to “be smart” and to avoid raising tensions between communities at a time of austerity and anxiety has never been greater.

When the journalists at *Charlie Hebdo* were killed in Paris, media across Europe were united in their solidarity to denounce the killings. Nothing could justify the execution of journalists, no matter how provocative others might think their actions. But the same media – well around 95% of them anyway – when faced with the choice over whether to reproduce the controversial front page of *Charlie Hebdo* a week after the killings, also showed their solidarity with the principles of journalism and most freely chose not to publish the front page or either did so in a diminished form. *The Guardian*, for instance, published on its website a postage-stamp size illustration of the page and carried a health warning to readers. This approach was, as former editor Alan Rusbridger pointed out, not a decision that reflected on the solidarity with the victims of violence, but an editorial choice made on the basis of reflecting the values of the newspapers and respect for the audience.

This need for sound ethical judgment is important at a time when media can easily make the mistake of giving coverage to the outrageous statements and actions of people without thought as to the consequences. Take the case of Terry Jones, an unknown evangelical Christian from the backwaters of rural Florida who became an overnight global media sensation in 2010, simply by announcing plans to publicly burn the Koran. No one would have noticed, or even cared, had this story not been picked up by a local journalist and magnified by international news agencies and viral online circulation.

The media that rushed to publish this provocation later acknowledged it was wrong to give a bigot such prominence. Indeed, his story should never have made the news

agenda in the first place, but in this case the rush to publish and a biased media news narrative that was susceptible to Islamophobic messages led to riots and scores of deaths in the Middle East. It could have been avoided if journalists had taken time to consider the context of the story.

Isolated acts of individual extremist outrage can often be safely ignored. The same cannot be said about the high-profile violence and sophisticated web-based propaganda techniques of organised terrorists. Using state-of-the-art cameras and recording devices attached to their clothing, extremists are able to produce slick, high-quality and often shocking images of their murderous work. These are uploaded, either to public social networking sites where they hope to shock or influence broader public opinion, or to their own internal websites known only to committed supporters, where the aim is to boost morale and recruitment.

With modern technology terrorists can live-stream their actions, raising the possibility of real-time, on-the-spot propaganda. Among the pioneers of such techniques were Iraqi militants from groups that have been linked to the *Charlie Hebdo* attackers. In the past year, militants in Egypt, Gaza, Iraq and Syria have all broadcast violent images of their work. Slickly produced propaganda videos from terrorist groups like ISIS (Islamic State of Iraq and al-Sham) are broadcast via social media and picked up by mainstream media – even though they are an obvious part of the arsenal deployed by militants to spread their message. The broadcast executions of ISIS hostages have raised troubling questions about what the audience should and should not show.

While most media chose not to show the explicit images of terrorist violence, media might still ask if they are too easily seduced by high-quality terrorist propaganda.

Dealing with hate speech is made more difficult because of the lack of a clear, well-understood definition of what constitutes hate speech itself. Journalists are often accused of hate speech, and indeed some commentators willingly indulge in provocative and abusive talk when it suits them, but in the vast majority of cases journalists and media are guilty only of reporting the foul-mouthed statements of others.

In an attempt to help media, the Ethical Journalism Network has developed a simple five-point test for journalists. It highlights questions to be asked by journalists and editors in deciding whether to use difficult editorial material:

10.1. What is the position or status of the speaker?

Journalists and editors must understand that just because someone says something outrageous that does not make it news. Journalists have to examine the context in which it is said and the status and reputation of who is saying it. A rabble-rousing politician who is adept in manipulating an audience should not get media coverage just because he or she creates a negative climate or makes unsubstantiated and controversial comments. What they say has to be placed and reported in context.

When people who are not public figures engage in hate speech, it might be wise to ignore them entirely. Freedom of speech is a right for everyone, including politicians and public figures, and it is the job of the journalist to ensure that everyone has their say, but that does not mean granting a licence to lie, to spread malicious gossip

or to encourage hostility and violence against any particular group. When people speak out of turn, good journalism should be there to set the record straight for all.

10.2. What is the reach of the speech?

A private conversation in a public place can include the most unspeakable opinions but do relatively little harm and so would not necessarily breach the test of hate speech. But that changes if the speech is disseminated through mainstream media or the Internet. Journalists also have to consider the frequency and extent of the communication – is it a short, momentary, intemperate burst of invective and hatred, or is it repeated deliberately and continuously? Is it a pattern of behaviour or is it a one-time incident? Repetition is a useful indicator of a deliberate strategy to engender hostility towards others.

10.3. What is the intention of the speaker?

Normally, ethical journalists and well-informed editors will be able to quickly identify whether the speech is deliberately intended to attack or diminish the rights of others. As part of the reporting process, journalists and editors have a special responsibility to place the speech in its proper context – to disclose and report the objectives of the speaker. It is not our intention to deliberately expose or diminish people with whom we disagree, but careful, ethical reporting always helps people better understand the context in which a speech is made.

There are key questions that should be asked: How does it benefit the speaker and the interests that he or she represents? Who are the victims of the speech and what is the impact upon them, both as individuals and within their community?

10.4. What is the content and form of speech?

Journalists have to judge whether the speech is provocative and direct, in what form it is made and the style in which it is delivered. There is a world of difference between someone sounding off in the café or the pub and speaking within a small group and a speech made in a public place, before an excitable audience.

Lots of people have offensive ideas and opinions. That is not a crime, and it is not a crime to make these opinions public (people do it on the Internet and social networks routinely), but the words and images they use can be devastating if they incite others to violence.

Journalists should ask themselves the following questions: Is this speech or expression dangerous? Could it lead to prosecution under the law? Will it incite violence or promote an intensification of hatred towards others?

10.5. What is the economic, social and political climate?

Speech that is dangerous or controversial arises particularly in times of austerity and social tension, when public anxieties are high and when politicians are at war with

one another. Journalists must take into account the public atmosphere at the time the speech is being made. The heat of an election campaign when political groups are jostling for public attention often provides the background for inflammatory comments. Journalists have to judge whether expression is fair, fact-based and reasonable in the circumstances.

Above all, journalists have to be careful. It is important for journalists to consider certain aspects: What is the impact of this on the people immediately affected by the speech? Are they able to absorb the speech in conditions of relative security? Is this expression designed or intended to make matters worse or better? Who is affected negatively by the expression?

11. CONCLUSION: A NEW ENVIRONMENT FOR MEDIA POLICY AND ETHICS

Despite the multitude of challenges set out in this paper, there are many reasons to be positive, even optimistic.

New sources of information open the door to more inclusive journalism, more pluralism and a vastly expanded landscape of public opinion and comment. Technology has handed freedom of expression to many millions of people who did not have it before. People can say whatever they want to, no matter how shameful or praiseworthy it may be, and do so whenever they choose.

But a major challenge to this fresh-faced world of open communications is the need to promote standards of responsibility in how we all use information, to give meaning to these new freedoms.

Support in principle for the values set out here is not enough. In order to create an environment in which everyone – journalists and the wider community included – is able to embrace the benefits of an open information society, it is necessary to examine the environment in which journalism is practised; to identify what needs to change; and to adopt a new agenda that will create a new information landscape across Europe.

There is, of course, an important role for government and official media policy to support this challenging task. Four policy issues are detailed here:

- ▶ Member states of the Council of Europe should demonstrate constitutional support for freedom of expression, and where they need to set limits to this freedom this should be narrowly and legally defined. For instance, the laws of defamation and libel, which are a scourge of journalism in many countries, should be decriminalised and there should be an end to unreasonably high fines in civil cases involving media.
- ▶ One key concern of governments is to combat the threat of terrorism and recent events in Europe, not least the appalling murder of 17 people in Paris in January 2015, 12 of them at the offices of *Charlie Hebdo*. This has led to the threat of new laws concerning free expression in support of radical and extremist movements. There is also growing public concern about the

trend towards increased surveillance of citizens. Both of these developments could be threatening to the exercise of journalism and governments need to exercise caution before drafting new laws which could weaken civil liberties.

- ▶ At the same time, governments should support the principle of self-regulation and encourage media to develop systems of credible and effective self-regulation based on a code of ethics agreed by media professionals. There should be mechanisms to receive and respond to complaints, and support for initiatives to promote accountability through media councils or through a local ombudsperson.
- ▶ Importantly, governments and state authorities at national and local level should open themselves to public scrutiny. States can support the efforts of journalists and media to satisfy the public's right to know by responding promptly and constructively to queries from journalists. There should be laws on access to information from public bodies that are as open as possible, with only narrowly defined exceptions that may include public welfare, reasons of security and individual integrity.

These policies are essential to help create an environment in which there is scope for building a new partnership between media and the audience focused on developing a culture of responsible communications. Essential to that will be support for the craft of journalism inside and outside newsrooms. We know already that the public will punish what they see as unacceptable standards in journalism.

As John Birt, a former Director General of the BBC, has said, if journalism gets too big for its boots "the public will not stand for it" (Birt, quoted in Hargreaves 2003: 263). The BBC, which seeks to uphold high standards of journalism, has suffered for its mistakes and so have media tycoons who have profited from tabloid journalism. Rupert Murdoch, perhaps the most powerful late 20th century media owner, was forced by public outrage to close the *News of the World* in the UK in the wake of the scandal over phone hacking. These incidents confirm above all that journalism is not just a business, but a service with a purpose that is shaped by values.

Too often media owners and editors tend to ignore this reality. In future, if they want to build public trust, they will have to be more vigorous in standing up for journalism and in support of transparent and trustworthy media buttressed by newsrooms that are engine rooms of accurate and balanced reporting. They can best do this in partnership with their journalists and with the audience.

The future of journalism in this new fragmented landscape of broader and more flexible public communications will depend on its ability to serve the public interest and to nourish the ethical framework in which news is reported.

The media audience, now a partner in the news-gathering business, is adamant that media should make good on promises of transparency, accountability and fair dealing, and, by responding to this challenge, journalists can put themselves in a position to provide leadership in a fresh debate about ethics and freedom of expression.

What is good for journalism is also good for others. Of course, the values of journalism set out in this paper – accuracy, independence, impartiality, humanity and accountability – cannot be applied across the whole of the public information landscape.

That would be absurd and would challenge the right of self-regarding speech which is central to the notion of free expression.

However, there are some of these journalistic values which can apply to everyone. Even the most biased of communicators, whether in the world of politics, religion, commerce or just personal promotion should find it acceptable that when they enter the public information space, they should be fact-based in their communication; show humanity and respect for others; and be accountable for their mistakes (by correcting false information). These are key values which have their roots in ethical journalism and should be the bedrock of any meaningful media literacy and information policy. Given appropriate support, they can inspire a new era of responsible communications, and not just in Europe but around the world.

Aidan White is the Director of the Ethical Journalism Network. For 24 years he was the General Secretary of the International Federation of Journalists and the founding General Secretary of the European Federation of Journalists.

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Chapter 8

Journalism's dilemmas: Internet challenges for professional journalism and media sustainability

*Eugenia Siapera*¹

1. INTRODUCTION

While there is some debate on the usefulness of the notion of “disruptive innovation” (Christensen 1997), there is little doubt that the Internet has massively disrupted the ways in which journalism is produced, distributed and consumed. Its impact cannot be underestimated, even if we cannot at the moment gauge its long-term effects on the practices, norms and the social and political role of journalism. The short-term effects in the last 20 years or so, since the first newspaper appeared online, have been profoundly ambiguous. This chapter will undertake an overview and analysis of the ways in which the Internet disrupted journalism with a view to identifying some of the challenges that have emerged or that will emerge in the near future. The ultimate goal of this analysis is to identify a space within which journalism can still fulfil its crucial socio-political role. The analysis suggests that despite the many disruptive effects of the technology, journalism's dilemma is still the same: how can it function in an autonomous and independent, albeit sustainable and viable manner?

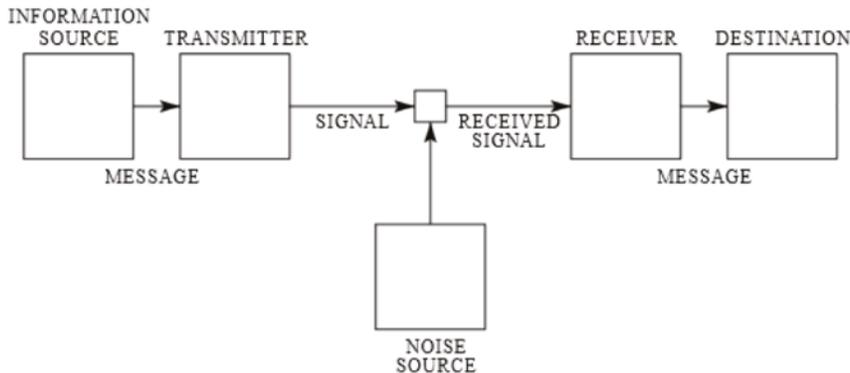
The chapter is organised as follows. It begins with an overview and comparison of the mass media and new/social media communication cycles. It then discusses developments in terms of the three main processes involved in these cycles, namely production, content and consumption or use. It ends with a summary of the main developments, trends and challenges, and with a proposal for a re-socialisation of journalism.

1. School of Communications, Dublin City University, eugenia.siapera@dcu.ie.

2. THE PROCESS OF (MEDIATED) COMMUNICATION

One of the most influential theoretical perspectives on communication originates not from sociology but from mathematics: Claude Shannon's (2001 [1948]) transmission theory of communication, which understands communication as a system involving five parts. Figure 2.1 presents a schematic representation of the system of communication.

Figure 2.1 – A diagram of communication



Source: Shannon 2001 [1948], p. 2.

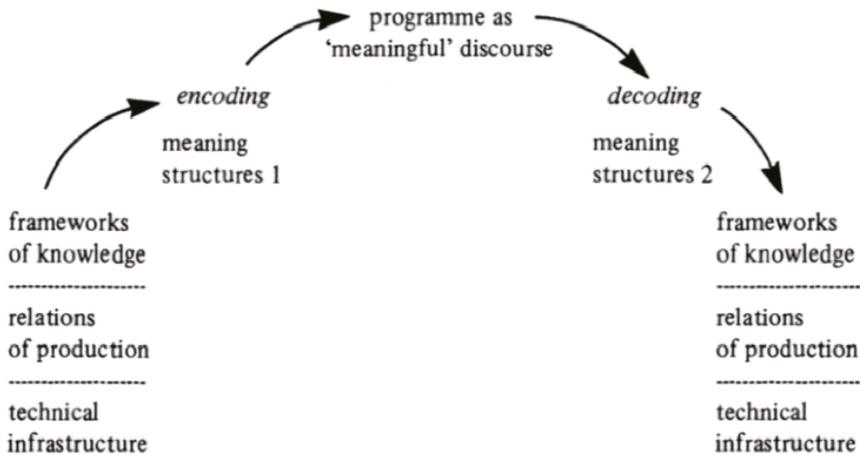
The five parts included (i) an information source, for example a journalist, who produces a message which is then encoded into a signal ready for transmission; (ii) a transmitter, for example the printing press or the camera, which transforms the message into signals suitable for transmission; (iii) the channel, for example the newspaper or the broadcast, which transmits the signal; (iv) the receiver, for example the eyes of the reader or the television set, which help read or decode the message; and (v) the destination, that is, the actual person to whom the message is addressed. The emphasis in this model is to ensure that noise does not interfere and that the message can reach its destination unhindered. Communication here is seen primarily as a question of successful transmission.

Political economic approaches to communication and mass media essentially assumed this linear model of communication, and focused on the ownership of the means of producing and distributing media messages. Classic media political economic analyses showed how processes of concentration of ownership have a significant impact on the diversity of media messages, effectively limiting it. In their pivotal work, Murdock and Golding (1973) identified three processes of concentration: integration, diversification and internationalisation. Integration refers to the merging and takeovers that lead to the creation of large media companies which own not only different media outlets, but also distribution and retailing units, therefore controlling the media market almost in its entirety. Diversification refers to the process whereby a media company acquires interests in other fields, for example in leisure or information provision. Internationalisation involves the expansion to different

national markets. Through these processes, the production of media messages is tightly controlled by a few large media conglomerates. For journalism this is crucial, as concentration of ownership leads to loss of plurality and diversity in the voices that circulate in the public sphere.

However, the assumption of political economic approaches that the media have all the power and that, assuming that there is little or no noise or interference, messages will reach their destination intact, has been questioned. In his path-breaking article on television, Stuart Hall (1980) focused on the encoding of the message and its subsequent decoding, arguing that these were quite distinct “moments”. Hall attempted to understand communication as comprising distinct but related moments, all connected in a cycle. He distinguishes four stages or “moments” in the process: production, circulation, consumption and reproduction. Figure 2.2 presents Hall’s model in a schematic form. The priority in this model is to highlight the production and reception moments as distinct and to point to frameworks of knowledge, professional norms, class position and ideologies as shaping production and reception. Rather than understanding encoding as a technical question of turning a message into a signal, and decoding as impeded by noise or interference in the channel, Hall considered them both as outcomes of the different frameworks of knowledge and class positions. Such differences may produce negotiated and oppositional readings of media messages.

Figure 2.2 – The circuit of communication



Source: Hall 1993 [1980] p. 94

In this article, Hall understands the process of mass communication as one that includes both the producers and receivers of the message. In this process, the producers are fewer than the receivers, and their encoding is circumscribed by professional norms and practices, as well as by their access to technical infrastructure. While political economic approaches to the media highlighted control of the means of producing messages, Hall looked at the more micro-processes of class positions and professional norms as contributing to the ways in which a message is encoded.

In terms of journalism, Hall's perspective is crucial in identifying the role played by professional norms and ideologies, while also showing that readers are not passive recipients of information but active and invested. Thus, a media report that contradicts a person's own experiences and understandings may be rejected. On the other hand, this model tends to bracket the question of circulation or distribution. He includes technical infrastructure as part of the two moments of encoding and decoding but has very little to say about these and their involvement in the communication process.

However, the technical infrastructure and moment of circulation/distribution are becoming increasingly important, if we consider how the process of communication has changed in the era of social media. One of the most radical features of the Internet and social media is that they enable everyone to produce content. Around the mid-2000s, theorists had begun to realise that there was an important shift taking place, as computers became cheaper, interfaces more user-friendly, and the connection speed faster and better. This shift was described in different terms, but they all amounted to the same thing: in the Internet era, everyone is a producer. For example, Rushkoff (2003) speaks of a leap to authorship, Leadbeater and Miller (2004) of the pro-am (professional-amateur) revolution, Rosen (2006) refers to the "people formerly known as the audience" and Bruns (2006) to "producers". This body of work traced the ways in which people were no longer only audiences, receivers and decoders, but active producers of content themselves. This "democratisation" of media production drastically altered the mass communication model, which was based on professional media production and control over content and its distribution. As Meikle has argued, websites produced by users, such as the Indymedia sites, "place the emphasis on the production, rather than the consumption, of media texts" (2002: 87). For journalism, the importance of this shift cannot be overstated: the near monopoly enjoyed by professional journalists and communicators has ended, and journalists' relatively privileged position has been lost.

Since this early appraisal of the Internet/social media communication, there have been significant changes leading to a generally different media ecosystem within which journalism operates. The meteoric rise of social media platforms, such as Facebook and Twitter, the diffusion and popularity of mobile devices, such as tablets and smartphones, and the deepening of globalisation and interdependencies of markets and societies, have affected not only the production but also the distribution, forms and scope of journalism. The next sections will go over these processes in more detail, mapping a series of changes and challenges for journalism.

3. A CHANGING ECOSYSTEM

Drawing on Hall, this section understands the changing media ecosystem in terms of processes of production, distribution, content and form, users and uses. Departing from Hall's model, this section does not privilege production or reception, nor does it consider these moments equivalent. Rather, it will argue that the process of distribution emerges as privileged because of the way in which the whole ecosystem operates. This in turn drives developments in all other processes with very ambiguous results for journalism.

3.1. Producing journalism

Changes here can be discussed in terms of the revenue sources of journalism and in terms of journalistic labour and practices. The changes in the media ecosystem have affected the whole business model of journalism, understood as “an architecture for the product, service and information flows, including a description of the various business actors and their roles; and a description of the potential benefits for the various business actors; and a description of the sources of revenues” (Timmers 1998: 2). While it is difficult to separate the economic from the social components of journalism, this definition provides a useful heuristic by which we can trace the differences from the early, mass-media model of journalism to the current digital and social one. This section assumes a historical perspective, looking at the evolution of journalism and its transition from an industrial to a digital model.

3.1.1. The evolution of industrial journalism²

In his account of the public sphere, Habermas (1991) traces three stages in the development of journalism: from selling news, to selling opinions, to selling advertising space. In its early stages, journalism was merely the trade in news. Following Bücher's analysis (1926, cited in Habermas 1991), Habermas argues that journalism began as a system of private correspondences, which were then collected and collated by a publisher to be sold to interested readers. At this stage, journalism was primarily the trade in “pure” news. This kind of journalism met the literary journalism of the “men of letters”, which was about opinion and criticism, leading to a new kind of journalism where news as information became secondary to editorial views and opinions. This kind of journalism, argues Habermas, was not commercially successful and survived only because it was “the hobby horse of the money-aristocracy” in the UK and the outcome of personal initiative and involvement of literary men on the continent (Habermas 1991: 182). At this stage, the commercial operation of the press was not as important as the assertion of the public's critical function. As Bucher put it, journalism here changed from “a merchant of news to being a dealer in public opinion” (Bucher (1926), cited in Habermas 1991: 182). However, a series of developments around the middle of the 19th century, including the repeal of taxes levied on printing, the increase in running costs and the lower cover prices (Curran and Seaton 2003), led to a need for larger media enterprises with better finances. Curran and Seaton found that in 1830 it only took £690 to found *Northern Star*, a national weekly paper in the UK, and this amount could be recouped by selling about 6 200 copies, a circulation that was achieved in its first month. By 1918, *Sunday Express* required an investment of over £2 million, which could only be recouped with a circulation of above 250 000. Circulation or selling copy was no longer enough. Newspapers turned to advertising, selling advertising space not merely as a subsidy for selling copy but increasingly as their main source of revenue.

This reliance on advertising has had a significant impact on the ways in which journalism was organised and produced. The main business strategy was no longer to sell

2. The term “industrial journalism” is borrowed from Anderson et al. (2012).

news to readers but audiences to advertisers. This put increasing pressure on journalism to appeal to more or to specific kinds of audiences sought after by advertisers. According to Dallas Smythe (1981: 241) “for newspapers and magazines, advertisers pay the great bulk of the cost – typically from 70% to 90%. Audience subscription and newsstand purchase payments cover approximately only the delivery cost of the newspapers and magazines.” Dallas Smythe’s (1981) main argument is that the audience is the commodity that the media subsequently sell to advertisers. Additionally, because of the monopolistic or oligopolistic control of the media market, the media are then able to set up their price system for this commodity; for example, national audiences or readers fetch higher prices than local readers or readers for classifieds.

Given that the audience was the main commodity for journalism to sell to advertisers, the main objective for journalism to survive became the quest for audiences or readers. Newspapers specialised in terms of the kind of readership they sought to sell to advertisers. For example, Curran and Seaton (2003) show how in the 1930s, the British newspaper *The Daily Herald* was selling working class readers to advertisers, while *The Daily Mirror* in 1938 “mounted a promotion campaign in the advertising trade press boasting of its upper-class ‘A’ readership” (Curran and Seaton 2003: 51). When the *Mirror* sought to reinvent itself as a working class newspaper, it cut by half the proportion of its news that dealt with politics, economic and social issues, in favour of crime, sex and human interest stories that were thought to appeal to women and young people.

While the example of the *Mirror* shows how publishers targeted specific readers in order to address specific advertisers, other techniques include bundling, whereby journalism bundles different content together thereby addressing wider audiences with a single product (van der Wurff 2012). Bundling provided a more efficient way of targeting broader audiences and hence ensuring more advertising income from a variety of sources. An example of bundling is the inclusion of supplements in today’s newspapers, with the “pink” business pages, sports or property pull-outs and magazines. In this manner, they address a larger portion of the audience, ensuring income from various kinds of adverts. Bundling, combined with the ability to use journalism to sell both to publics and then publics to advertisers, allowed publishers to achieve economies of scale and subsequently to strengthen and consolidate their position through increasing concentration, vertical and horizontal integration, and higher entry barriers for newcomers.

This monopoly or oligopoly of the media led to the dominant media model of a large media market essentially controlled by a handful of very large conglomerates. In their political economy of the media, Golding and Murdock (1991) suggest four interrelated historical processes that can help explain the production of journalism. These are: the growth of the media sector; the rise of media corporations; commodification; and the changing role of government regulation. As the media sector industrialised, it moved on to consolidate its gains and to safeguard itself from market crises. This was primarily accomplished through mergers and acquisitions, that is, through processes of integration. Such integration could be vertical, when a media company acquires other companies at different levels, and horizontal, when a media company acquires other companies at the same level. For example, horizontal integration occurs when News Corp acquires a number of media titles, such as *The Times*, *Wall Street Journal*,

Fox News Network, BSkyB, HarperCollins and so on, while vertical integration is when it acquires holdings in media production and distribution. This kind of global vertical and horizontal integration has been made possible because of changes in media policy, and specifically through the increasing deregulation model associated with neoliberalism. Such changes allowed large media corporations to expand and consolidate their control of the market.

Journalistic labour under the traditional, “industrial” model of journalism was similar to that of other labourers within industrial societies. Specifically, journalists operated as waged labourers, and journalistic work was hierarchically structured, fragmented and divided into discrete tasks, with built-in controls. Applying the labour process model to journalism, Örnebring (2010) points to the gradual introduction of a hierarchical model of organisation of journalistic work, and to the increasing differentiation and specialisation within the profession. The former arose out of the gradual separation between “the conception (planning the contents, deciding what to print, taking steps to gather that material, and contracting writers) and execution (the actual writing and gathering of information)” of journalism (Örnebring 2010: 61-62). In essence this corresponds to the way in which journalism as news gathering became separate from writing, printing and distributing the news. All these processes, argues Örnebring, were performed by the same person in early journalism. As Schudson (1978: 65) put it, until the 19th century newspapers were mainly “one-man bands”; it was only when they became businesses, as we saw above, that the actual labour of journalism changed, and the conception and execution of journalism became distinct processes with rigid boundaries. Conception became the domain of management and execution the domain of the journalist-as-employee. A relatively rigid hierarchy emerged, with editors at the top, followed by lead writers, sub-editors, reporters and so on (Örnebring 2010). Notwithstanding this hierarchical structure, it was not uncommon for editors to side with journalists rather than publishers in disputes, as they rose primarily from the ranks of journalists, and their ethos and professional identity would be shared with those of the “rank-and-file” journalists.

Secondly, the separation between the conception and execution of journalism was associated with an increasing differentiation of the various aspects of the work of journalism. The “one-man bands” became more and more differentiated, and people working on one side of journalism, for example printing, would have no idea about reporting. At one stage, reporters themselves would be highly specialised in news-gathering techniques but not writing, which was the job of the sub-editor back at the office. In more recent years, the differentiation acquired the form of the “beat”, whereby a journalist would specialise in one form of news, for example the political correspondents, or those covering the courts or sports. Additionally, the emergence of “support staff”, such as photo-reporters or picture editors, points to this kind of differentiation of the profession (Örnebring 2010). This differentiation prioritised journalism, in other words the collection and collation of news as well as storytelling, whereas those with the technical skills (photographers, sound technicians, cameramen and so on) were seen as auxiliary.

Summarising the, until recently, dominant model of journalistic production through the lens of the business model, we can see that this corresponds to the industrial production of commodities, with some unique characteristics. The first is that the

“industrial” media business model served two markets – advertisers and readers; the second is that the growth of the media sector gave rise to an oligopolistic structure, with high levels of concentration and integration; thirdly, the division of labour in the media sector was hierarchical, with divisions between managers and workers, but it still prioritised journalism (that is news gathering and storytelling), at least in so far as the managers were themselves journalists. The value added in this model comes from its capacity to serve both advertisers and readers, making it not only sustainable but quite profitable. Despite the many critiques of this model, especially those that focus on the commodification of news (McManus 1994) and the commodification of audiences (Dallas Smythe 1981), the shift from journalism to public relations (Habermas 1991) and the oligopolistic media industry (Golding and Murdock 1973), this model managed to keep a certain level of journalistic production going for over a century.

3.1.2. Digital disruption of production

This model of journalistic production and circulation was disrupted by the rise of the Internet and this intensified with the proliferation of social media. This disruption has affected journalistic production at the level of revenue generation and at the level of journalistic labour. To some extent, these changes follow broader societal shifts associated with the turn towards a neoliberal model of capitalist organisation, and cannot be seen as the direct effect of new technologies. At the same time, as Örnebring (2010) has shown, new technologies have always disrupted journalism, although journalism has been able to absorb these disruptions. It is important, however, to show that by the time the Internet arrived, journalism had already undergone a series of changes in organisation and production, changes associated with digitisation and the increasing use of computers in the workplace. Moreover, these changes took place alongside other important changes in the organisation of work, specifically the weakening of the unions and increased managerialism.

Perhaps the most paradigmatic change here has been News International (the UK branch of News Corp) and its decision to move production to Wapping in the 1980s. The move of production from the historical Fleet Street to Wapping in the Docklands in London signalled a move against the unions of printers and journalists and, secondly, the introduction of computers in the production of journalism. This was done with the explicit purpose of increasing investment and profitability (Marjoribanks 2000). The move was controversial and confrontational, with a rigid management supported by the then Prime Minister, Margaret Thatcher. In his account of the move, Marjoribanks (2000) offers details of how News International management, within the context of a very supportive government and state apparatus, used technological innovation to remove unions and craft workers from the production of journalism, ultimately sacking some 5 500 workers. The new workforce would be trained on the job using News International’s specialised computer systems. The example of News International was soon followed by other newspapers in the UK and in the rest of the world, albeit to a different extent and in a less acrimonious manner.

These important changes – the effective dismantling of the unions, the rise of managerialism and computerisation of journalistic labour – had already taken place when

some 15 years later the rise of the Internet presented a new series of challenges, no longer only to journalists themselves and their practices, but to large corporations such as News International. When newspapers moved online in the early days of the World Wide Web, their remit was, once again, to increase profitability through new technologies. Derek Bishton, the editor of *The Daily Telegraph* and responsible for the launch of the Electronic Telegraph, the first UK online newspaper, recounts how the then proprietor of *The Telegraph*, Conrad Black, told him: “You’re going to have to work very hard to convince me that something we give away free is something I should invest money in” (Bishton 2001: non-paginated). But the die was cast: after *The Telegraph*, other newspapers followed suit, all posting their print contents online for free. Although still interested in the commercial possibilities of the new medium, the evolution of online journalism, alongside the evolution of the Internet, had the exact opposite effect – to dismantle the business model of journalism. This was done in two ways: firstly, because of the freely available online contents and, secondly, because of the fragmentation of online audiences and the resulting loss of the mass audiences that could be sold to advertisers. Online journalism cannot therefore rely any longer on serving the dual market of advertisers and readers.

3.1.3. Installing paywalls

Specifically, the first approach to online news took the form of reposting print content online. While in subsequent years this was accompanied by Web-only news and comments, and increasing levels of interactivity, the basic idea of posting news online for free remained unchanged, notwithstanding efforts to install paywalls or subscription-only news. Arrese (2015) has identified four stages in the way in which online journalism has tried to monetise the Web: firstly, in the early years (1994-2000), the pioneering and experimenting stage, in which different online newspapers were experimenting with different models, including a subscription-only model. However, this did not work, as these newspapers failed to attract subscribers, and this stage ended with an almost Catholic shift to free content, as online newspapers hoped that this would be sufficient to attract large audiences and hence advertisers. The only exception here was *The Wall Street Journal*, which had assumed a paid-only strategy and stuck to it. In the second stage (2001-2007), which Arrese describes as the “frenzy of failed trials”, online news providers tried and tested multiple models, for example micropayments, premium content for subscribers and selling pdf versions of print, but none of these was met with any kind of durable success.

The third stage (2008-2010) was spearheaded by Rupert Murdoch’s conversion from a free-content disciple to a paid-content advocate. As News Corp began feeling the pinch of falling circulations and advertising revenues, as more and more of the online advertising revenues were diverted towards Google, and as the 2008 financial crisis made conditions more difficult even for large corporations, Murdoch started pushing for a paid-content model for most of the News Corp online publications, including popular tabloids such as *The Sun*. The change in the business model was summarised very clearly by Murdoch himself in a column in *The Wall Street Journal*: “Quality content is not free. In the future, good journalism will depend on the ability of a news organisation to attract customers by providing news and information they

are willing to pay for. The old business model based mainly on advertising is dead” (Murdoch 2009, A21, cited in Arrese 2015: 9). In other words, journalism would now serve only one master, the readers, with quality content that they would be willing to pay for. A number of online publications followed suit, notably *The Economist*, the German publisher Springer and its flagship publications *Die Welt* and *Bild*, the French publications *Le Monde* and *Libération*, and many others, who stated that they would begin charging for content (Arrese 2015). Two main charging plans emerged, the freemium and metered versions: the former refers to offering some content for free but charging for the rest, and the latter refers to offering a certain number of articles for free and charging for more access. Despite, however, such calls, major news publishers remained unconvinced, with *The Guardian* and *The Huffington Post* staying loyal to a free-content model.

The final and current stage, argues Arrese (2015), was inaugurated by the decision of *The New York Times* to implement a porous paywall, following the metered model. This became a tipping point for the (re)adoption of a paying-for-news model by a number of publishers across the globe. The reality of survival has pushed a lot of important players to seek a clear source of revenue and paywalls, porous or not, may prove necessary. At the same time, as Arrese points out, there is still a lot of experimentation going on, with publishers seeking to balance advertising income with income from readers. Others, for example the Dutch *De Correspondent*, which set a crowdfunding record in journalism, collecting 1 million euros from 15 000 subscribers in eight days, operate on a subscription model only, while another Dutch start-up, *Blendle*, operates as a platform aggregating content for people to pay per article. Both *De Correspondent* and *Blendle* have been proved sustainable so far.

However, there are a host of factors that continue to put pressure on the viability of paywalled journalism: firstly, there are still important and influential news producers that offer free content and are unlikely to change, such as public service broadcasters like the BBC, or publishers committed to open journalism, like *The Guardian*. Other categories here include newcomers who want to build their readership by offering free content. The bottom line is that, at this point in time, there is still a lot of free content online and people may be unwilling to pay for content just yet. This reluctance may also be a cultural factor. For example, in southern Europe, Italy, Greece, Spain and Portugal, paywalls have been even less successful than in northern Europe and the US, pointing to a cultural factor at play. The role of users in producing, consuming and thereby changing journalism should not be underestimated. Users and user practices will be discussed in more detail in the following sections. A third factor casting doubt on the success of the paywall model is the increasingly important role of social media corporations in the distribution of news. More and more people rely on social media such as Facebook for news and enjoy the sharing culture of social media, thereby not seeing any value in paying for a subscription to a single news publisher whose content they cannot share. In addition, there are several ways or “hacks” that allow users to bypass paywalls, accessing content without having to pay. For example, the use of proxy servers can bypass the metered model, while through a Google search on the basis of the title of, say, a *Wall Street Journal* article, one can access its full content (see Smith 2015). Finally, those publishers who rely on advertising have to deal with the increasing

use of ad blockers, used as add-ons to block ads for those users who install them on their browsers. This makes advertisers more and more reluctant to pay for banner ads. These are important challenges that journalism needs to address in its quest for a viable business and revenue model.

3.1.4. The labour of digital journalism

Digital disruption, however, did not only occur at the level of revenue generation. It also significantly affected journalistic work and labour. Three main aspects of journalistic labour have been more directly affected: firstly, the way in which journalistic labour is organised has been drastically changed, because of the compression of time and the production of multiplatform journalism. Secondly, the involvement of new technologies in journalism has affected the skill set required in order to practise journalism. And thirdly, the relationship between management and journalists has been significantly altered, with journalists working as freelancers on precarious temporary contracts.

Unpacking these developments further, the rise of the 24/7 news cycle was in fact ushered in by satellite television and news channels such as CNN (see Cushion and Lewis 2010), but the Internet intensified this further. While print news required that journalists collect and report the news once or twice a day, and while broadcast news equally relied on news collection once or twice for the lunch-time and evening news broadcasts, the Internet requires continuous updates. In other words, for the most part, print and broadcast journalists operated on the basis of the deadline; stories and news should be collected and reported by a certain deadline. Online, however, there are no deadlines: there is a need for constant updates, with news posted as soon as it breaks, and often, with the requirement to update even if there are no new developments, in order to attract the attention of readers. Paulussen (2012) reports that online journalists understand their job as involving constant and real-time news delivery, while Schmitz Weiss and de Macedo Higgins Joyce (2009: 599) observe that news production is now taking place “across a compressed time dimension”. Similarly, Örnebring (2010: 65) discusses the discourse of speed, which is associated with the introduction of new technologies in the newsroom, arguing that the “prime function of any new technology is to speed up the news process”. Moreover, more and more journalists are required to produce news not only for the web but also for print and often for broadcast (television or radio) too. This has considerably increased their workload – Lee-Wright, Philips and Witchge (2011) report that 15-hour shifts are not atypical – putting even more time pressures on journalists.

New technologies have also affected the skill set possessed by journalists. There appears to be wide agreement on the requirement of multi-skilling and the acquisition of technological skills for journalists (Ursell 2001; Garcia-Aviles et al. 2004; Örnebring 2010; Paulussen 2012). There is little doubt that the skill set required of journalists today is very different from that required 25 years ago, but of importance here is that the technological skills required are considered as additional to the skill sets that traditional, “industrial” journalists were meant to have. Tasks such as taking and posting photos, editing mobile phone footage, writing blogs, driving and commenting on stories as Jane Singer (2010: 105) put it “all come on top of the newswork

expected of earlier generations of journalists". The so-called backpack journalist, a multi-skilled multimedia professional who can produce journalism through the equipment in his/her backpack, is here to stay (Stevens 2002). In this respect, new technologies seem to be bridging the internal divides and differentiation within journalism as "support" and "core" staff are merged into one.

On the other hand, as we shall see in section 3.2 on form and content, new forms of journalist, such as data journalism, immersive and mobile journalism, require specialised knowledge and understanding of specific technologies and applications. Perhaps more than the other forms, data journalism requires an in-depth knowledge of data analysis, as well as new techniques of presentation, such as visualisation techniques, data maps or infographics. It seems likely therefore that at least in this area there is a different dynamic at play which reverts back to the specialisation and "forking" of journalism into sub-specialisms.

Parallel to the technical skills required, there is another set of skills that has emerged as significant for journalism. These are the social skills of managing and interacting with readers. This is the affective component of journalism, which, especially in social media, is vital and perhaps more important than news reporting. The affective labour of journalism concerns the building and management of networks of readers and the forming of bonds between journalists and the publics/networks they serve (Siapera and Iliadi 2015). Lewis et al. (2014) refer to this as reciprocal journalism and consider it unequivocally positive, as it contributes to the building of trust, connectedness and social capital. Siapera and Iliadi (2015), however, find this element of journalistic labour to be profoundly ambiguous in so far as it includes an unresolved tension between the commodification of social relationships and the potential to establish new social bonds and new journalistic subjectivities. This is discussed further in section 3.4.3.

In addition to affecting time and the skill sets, digital disruption has further re-organised the relationship between management and journalists. The main characteristic of this re-organisation is the rise of precarious employment and freelancing. Deuze (2009) has gone as far as to refer to publishers as "the people formerly known as the employers" paraphrasing Jay Rosen's (2006) notion of the public as "the people formerly known as the audience". There are, in short, several indicators that show that journalism has followed broader trends in labour and employment that have moved beyond long-term permanent employment with a set employer towards flexible forms of short-term and project-based work. As Castells (2000) put it, this shift concerns the individualisation of the relationship between labour and capital so that, in terms of journalism, this is no longer governed by unions or collective agreements but by individual agreements between journalists and publishers/media corporations. The so-called "atypical work" understood as freelance, part-time contract work (Waters, Warren and Dobbie 2006; Deuze and Fortunati 2010) is becoming more and more typical for journalists.

The exact impact that this has on journalism practice is hard to gauge. It is, however, safe to say that these developments are ambiguous. On the one hand, freelancing affords greater freedom and autonomy for journalists, thereby enhancing their job satisfaction and creativity (Massey and Elmore 2011). On the other hand, a recent study of journalists in South-East Europe and Italy points to the greater vulnerability

of freelancers and precarious contract workers to pressures from publishers and media owners, compromising journalistic autonomy (Siapera 2015). At the same time, the lack of stable and continuous employment for journalists is feeding into a trend for entrepreneurialism in journalism (Jarvis 2010), whereby journalists are encouraged to think of new journalistic start-ups but also to think of themselves as a brand which they manage and sell. Bruns (2012) reports that Australian journalists on Twitter can operate as “personal brands”, retweeting news articles they have compiled for news organisations under their personal accounts. In more structural terms, Siapera and Spyridou (2012) consider the networks that journalists build in social media platforms as a form of social capital, which can in certain circumstances become transformed into other forms of capital. In building and maintaining a large network of friends and followers on Facebook and Twitter, journalists can improve their position in the field. The trajectory of Andrew Sullivan is a good illustration of this point. Sullivan was one of the first political bloggers in the US in the early 2000s, blogging in *The Dish*. Off the back of his blogging prominence and success, he was offered an editorial position in the *Atlantic Monthly*, where he is said to have contributed to a traffic increase of about 30% (Perez-Pena 2008). While not all social media journalists enjoy such prominence and high visibility, building and maintaining a network of followers constitutes an increasingly important part of their job, and often provides a source of stability in an otherwise turbulent environment of precarious and short-term employment.

Entrepreneurial initiatives, despite the hype, have not performed very well for journalism. Although entrepreneurialism appears to offer a possible avenue for journalism, all is not what it seems. For thinkers such as Jeff Jarvis (2009), the future of journalism is entrepreneurial not institutional; as he put it: “I believe journalists must become entrepreneurs. ... They need to sense and serve the market. They need to work with innovators. They need to see a future for journalism that looks different – better, even – than its past”. As we discussed earlier, hierarchical structures and rigid newsbeat routines prioritise a limited world view and limit journalistic autonomy. Moreover, precariousness and job insecurity mean that journalists must be more aware of business opportunities for themselves. Entrepreneurialism also seems to be compatible with the spirit of the age: “Don’t hate the media, be the media”, it seems to be saying.

However, Jarvis’ manifesto for entrepreneurial journalism focuses on profit not on journalistic quality or on journalism as a public service. Furthermore, the criticisms that Jarvis and others within this field level against the state of journalism today seem to be unfairly targeting journalists themselves rather than identifying the broader parameters that shape what journalists do. But perhaps one of the most problematic aspects of ‘journalpreneurialism’ (Pein 2014) is that journalists will have to look after all aspects of the business, seek venture capital and be accountable to investors, all while practising “innovative journalism”. The pressure on an already very stressful occupation is immense. For other commentators, the problems are even deeper. Dean Starkman (2011) refers to the “future of news” (FON) consensus, spearheaded by Jarvis, Shirky and others, which champions entrepreneurialism at the expense of journalism. The core value of journalism is serving the public interest but, in its quest for profits and in pushing for more engagement with readers, entrepreneurialism loses sight of this. In some ways, entrepreneurial journalism

appears to be a shorthand for neoliberal capitalism, and innovation is less oriented towards serving society and more towards private profits. Journalism becomes just another service, another commodity to be bought and sold between individuals, and no longer mediates between those in power and citizens. From this point of view, entrepreneurialism does not offer a solution for the viability of journalism. As Pein (2014, non-paginated) puts it, tech-oriented enterprises are not about journalism or journalists: "Their agenda is automation, standardization and de-professionalization; let the robots do it all, and whatever the robots can't handle, leave to the Redditors."

A pragmatic look at how various entrepreneurial initiatives have fared shows a mixed picture. There are some bona fide successes, most notably the Dutch *De Correspondent*, but for the most part successful journalistic enterprises have been successful because they were backed by powerful corporations. For example, Ezra Klein – the former editor of *The Washington Post* – launched *Vox*, a journalistic start-up focusing on "innovative journalism". *Vox* is reasonably successful, with loyal readers and social network followers, but it is backed up by Vox Media who also own SB Nation (sport), the Verge (tech), Polygon (games), Curbed (real estate), Eater (food and drink) and Racked (shopping/lifestyle). Vox Media raised \$70 million for their venture and count Comcast and Accel Partners among their investors. In other words, we are talking about a considerable investment by funders who will look for a considerable return. An interesting development is that Vox Media is one of the launch partners for Apple News, a "native reader app" (Warren 2015), in another synergy between news and Internet corporations. It looks like Internet billionaires are swiftly moving into the news business, with Pierre Omidyear of Ebay and Jeff Bezos of Amazon having invested in Glenn Greenwald's *The Intercept* and *The Washington Post* respectively. Storyful, founded as a start up by the former RTE (Ireland) journalist Mark Little, has enjoyed considerable prominence and has built a considerable reputation as a digital news agency. But around 2012 it got into financial difficulties, operating at a loss until it was bought by News Corp in December 2013 (Byrne 2014). The involvement of large corporations in the domain of digital journalism shows that the romantic ideas of small-time entrepreneurs with great ideas for striking it big are very far removed from reality. Ventures that have been successful have relied on the know-how and reputation of established journalists with backing from corporate money. It seems that in the domain of the Internet, news is returning to business as usual.

In concluding the section on the production of journalism, it is clear that a lot has changed and the production of journalism faces a number of important challenges. Chief among them are: finding a new business and revenue model that ensures the viability of journalism without compromising its values and ethics; secondly, reaching a new *acquis* between journalists and publishers that clearly states the rights and obligations of each side to the other, protecting journalistic integrity regardless of employment status.

3.2. Form and content

This section is concerned with the challenges of the Internet for the form and content of journalism. To begin with, the term "form" is used here to refer to the ways in which content is organised, while "content" refers to the actual subjects and substance of

journalism and their qualitative properties. Content precedes form, because they are the constitutive parts of it. According to Adorno (2013 [1970]), form is sedimented content extracted from reality. Meaning is conveyed through form itself, in other words through the specific arrangement of content. This is a necessary distinction because it shows that form and content co-exist in tension: form is a constant as it is the same across different settings. For example, news reports, editorials and analysis all exist as forms in different newspapers. On the other hand, content is different. For example, one newspaper's editorial is different from another's even if they write on the same topic. In other words, meaning is derived by the stability of form and the novelty of content: a (formal) way of organising content allows people to understand what they are reading. The tension is found in the tendency of crystallised content to become new forms. This is productive/creative and necessary for journalism or any other way of content production to remain relevant. One of the challenges for journalism in the age of social media is to reconcile the new forms that have emerged with the content that constitutes journalism and news. Additionally, as we shall see, the increasingly central role assumed by social media platforms in disseminating content, and hence in imposing a single form on them, has important implications for the meaning and significance of this content. The discussion here is organised in the following terms. The first part is concerned with the content, the substance of journalism, focusing on two sets of factors that may affect them: organisational and media-related factors. These are used heuristically, in order to guide the discussion, and do not correspond to distinct categories with clear boundaries. Indeed, organisations have evolved to address specific media-technological factors, while media factors cannot operate outside organisational contexts. Nevertheless, the distinction here is useful in highlighting the varying impacts of different factors. The second part is concerned with new forms of journalism, focusing specifically on data journalism. The final part will identify some of the tensions and challenges arising.

3.2.1. Organisational factors

Organisational factors affecting content refer primarily to the impact, potential and actual, that changes in the production of journalism may have on the substance of journalism. These follow from the above analysis and include the intensification of the news cycle and the constant quest for revenue and revenue models.

As we saw above, the 24/7 news cycle is putting journalists under considerable pressure to produce news continuously. However, this continuous pressure for publication does not necessarily lead to more news gathering. Moreover, the time pressure means that journalists are no longer able to verify what they are publishing. The intense news cycle, coupled with large numbers of lay-offs and increasing reliance on freelance labour, mean that fact checking and news quality control have suffered in the new news regime. But perhaps one of the most pernicious developments in terms of content is the rise of "churnalism". According to Harcup (2015: 8), the term was first used by the BBC journalist Wasseem Zakir, who used it to refer to the lack of original reporting and the prevalence of PR. As Zakir put it, journalists "get copy coming in on the wires and reporters churn it out, processing stuff and maybe adding the local quote" (in Harcup, 2015: 8). While Zakir was referring primarily to

the influence of press releases, churnalism has considerably expanded in the era of social media, leading to a copy-and-paste kind of uniform journalism, repeating the same stories over and over.

Research seems to confirm this. Redden and Witschge (2009) found that news organisations covered stories in a very similar manner. They found high levels of homogeneity, same pictures, same quotes, same descriptions across most of the UK's newspapers and online outlets. They also found high levels of internal recycling, with small changes in the headlines or text. Redden and Witschge attribute this to the pressure on journalists to produce content for multiple platforms, and to the increasing reliance on news wires and PR agencies. In some instances, this repetition of content can be attributed to a contradiction between the nature of the news, which often consists of a one-off event with developments unfolding slowly and over days/months, and the nature of the 24/7 news cycles and demand for continuous content. Additionally, lay-offs and reliance on freelancers paid by the piece mean that there are fewer journalists looking for stories, and that more stories are more expensive.

This implies that the content we see online is not always original. However, this is not necessarily a new phenomenon. The problem is that the marriage of journalism with the Internet was supposed to democratise journalism (Gillmor 2004), to innovate and upset established news values and diversify the kinds of stories to be published. Instead, we get churnalism and stories so lacking in originality that a machine can write them. In fact, there are already robots writing stories. The following story, which appeared in the *Los Angeles Times* in October 2014, was written by "Quakebot", an algorithm written by Ken Schwencke, a journalist and programmer:

A shallow magnitude 3.0 earthquake was reported Thursday afternoon one mile from Brea, according to the U.S. Geological Survey. The temblor occurred at 3:35 p.m. Pacific time at a depth of 0.6 miles.

According to the USGS, the epicenter was two miles from La Habra, two miles from Rowland Heights, and four miles from Placentia.

In the last 10 days, there have been no earthquakes of 3.0 or greater centered nearby. This information comes from the USGS Earthquake Notification Service and this post was created by an algorithm written by the author (Quakebot 2014).

Schwencke reports that the whole process took three minutes (Oremus 2014). The main idea here is that algorithms can take over the churning and journalists can free some time to deal with the more demanding news stories. However, the likelihood is that algorithms will be used to write more and more stories, for example automatically adapting press releases and agency information to be published, but this may not necessarily lead to more stories written by journalists. Although robots are unlikely to replace journalists and original reporting, they are likely to churn out contents, thereby flooding the web with unoriginal content that becomes occasionally embellished with graphics or pictures and finds its way to readers. The more the churn the less likely readers are to distinguish between content, what is true and what is not, what is original and what copy, and so on. This in turn poses serious challenges to the credibility of journalism and, paradoxically, the more it raises the importance of journalism, understood as original and accurate reporting.

While churnalism must to an extent be attributed to the time pressure element of the 24/7 news cycle, the quest for revenue has proven more pernicious for journalistic content, giving rise to writing for search engine optimisation, clickbait and native advertising. The overabundance of content in online environments fed into the rise of search engines and search engine-based algorithms which return results on a given basis and order them according to a certain order of rank or importance. Specifically, Google's algorithm, PageRank, is based on an algorithm that calculates the importance of a website based on the number of links that it receives from other sites, while the rank of these sites is also taken into account. When users therefore search for a term, Google presents the results on the basis of the importance or rank of the website where this term appears (although also taking into account a host of other factors, such as location, previous search history and so on). PageRank has evolved into an enormously complex algorithm whose exact structure is secret and protected through patents. From the point of view of journalists and news sites, the need to drive traffic to their websites, in order to attract advertising, put them under pressure to write in ways that address the search engine algorithms.

Search engine optimisation (SEO) includes four main elements: keyword research, search engine indexing, on-page optimisation and off-page optimisation (Malaga 2008). In a UK-based ethnographic study, Dick (2011) found that SEO is becoming an increasingly important aspect of online news, with impact on the content of the stories chosen for publication and on the way in which they are structured. For example, one such technique would be to insert trending keywords into the headlines or in general to rewrite stories using search-friendly terms, these being terms that users may use when searching for a story. Dick (2011: 475) concludes that SEO is changing journalistic standards "in the interests of a third-party commercial arbiter in online distribution: Google. A new conformity in the language and 'aboutness' of news online is emerging, mediated by Google. Google stands between those terms used by the reading public and journalist alike, implicitly regulating the 'market place of ideas' as it goes". This is a significant critique and has to be taken into account.

Competition of revenue in the online context which is shaped by, effectively, Google and the other main social media corporations, namely Facebook and Twitter, has also led to the rise of so-called clickbait journalism. This practice refers to writing headlines in ways that entice people to click through and share the article. One of the best-known examples of clickbait journalism was Samantha Brick's article in the *Daily Mail*, entitled "There are downsides to looking this pretty: Why women hate me for being beautiful". Brick's article is a perfect example of clickbait, because it is vacuous and controversial at the same time – likely to provoke outrage against its writer, though not controversial enough to provoke criticism of the *Daily Mail* for hosting it. At its peak, the article was receiving four comments per minute and within days it had amassed 6 million views. Revenue estimates vary, ranging between £37 500 and £100 000 (Smith 2012). More importantly, it helped establish the *Daily Mail* as a possible source of viral content, hence potentially increasing its ad value.

Clickbait is also used extensively by online news and commentary outlets such as Upworthy. A typical way of distinguishing clickbait is the use of the forward referencing as a lure (Blom and Hansen 2015). This example from Upworthy illustrates this clearly: "Calling them 'girls' was their first mistake. What happened next is a great moment in fierceness"; or "His first 4 sentences are interesting. The 5th blew my mind." The

headlines are seeking to catch the readers' attention and make them click through to find out more. In clicking through they are registered as traffic hence adding value to the website. However, there is an increasing backlash against clickbait, with readers feeling frustrated and manipulated by such headlines, while in other cases they feel that news deserves a more serious and less sensationalist treatment. For example, in January 2014, CNN Breaking News tweeted the following headline: "14-year-old girl stabbed her little sister 40 times, police say. The reason why will shock you." The Twitter backlash that followed revolved around CNN's identity as a legitimate news organisation, which undermined itself and its credibility, and secondly around the ethics of serious journalism that ought to treat people with respect and not sensationalise. Recently, Facebook decided to take measures against clickbait because it did not want clickbait to "drown out content from friends and pages that people really care about" (Chowdhry 2014), by tweaking its algorithm. What is important to note here regarding clickbait is that it represents a specific kind of adaptation of news and media organisations to the social media environment. While news media have a history of wanting to attract readers through attention-grabbing headlines, clickbait and SEO techniques show a specific adaptation of content to social media requirements. And, as Dick (2011) pointed out, this is not done in the interests of publics or journalism itself but in order to cope with the new ecosystem increasingly controlled by social media corporations and their algorithms. The challenge involved here for journalism is to reconcile the social media cultures with its own ethics and values.

However, the ever-present quest for survival within this environment often leads to questionable practices and decisions. One of these is "native advertising". This refers to the practice whereby an advertisement becomes embedded into the news website, using its format, in ways that disguise the fact that this is paid promotional content. Again, this practice has a history beyond and outside the online environment, but it has acquired new relevance online. One of the main reasons for this is the well-documented tendency of readers to avoid advertisements. Banner ads have notoriously low click-through rates (Volpe 2013), while the popularity of ad blockers is posing unprecedented challenges to advertisers. Native adverts therefore represent a means by which to sidestep these problems, and this is why they are becoming increasingly popular and are found across a large number of online news outlets. *Buzzfeed*, *the Atlantic*, *MailOnline*, *The New York Times* and many others are using them. Native adverts have been controversial because they trick readers into accepting them as bona fide journalism. EMarketer (2014) reports on a market research study showing that in the US about 31% of readers cannot distinguish between journalism and native advertising, while in the UK 49% readers find native advertising articles misleading. In the long run, the scepticism of readers might expand to all content, thereby severely compromising the credibility of journalism. Native advertising represents another adaptation of content to the current media ecosystem, but one with potentially very damaging effects.

3.2.2. Media-related factors

While churnalism may be the result of organisational adaptations to the intensified competition for readers and the continuous need for more content, in this section the focus is on the characteristics of the new media, which affect content in specific

ways. These characteristics can be understood as “affordances”, that is, as specific properties of specific media which enable or circumscribe use for specific users. The concept of affordances comes from perceptual psychology and has been used as a means by which to understand how people perceive, understand and use the environment around them (Gibson 2014 [1979]). Hutchby (2001) found the concept as useful correction to the tendency towards technological determinism, arguing that affordances point to the mutual shaping of technologies and people. Specifically, he defined technological affordances as the “functional and relational aspects which frame, while not determining, the possibilities for agentic action in relation to an object” (2001:444). Affordances are located somewhere in between objects and the perceiver/user: they are functional properties of technologies but unless they are taken on board and used by users, they become dormant and eventually atrophy. To give some examples of affordances, we can say that mobile phones afford mobility and communication; the Internet affords global connectivity; Twitter affords brief and immediate communication with multiple others. We may also have nested affordances: for example, Twitter’s mobile app and reliance on the Internet means that it carries their affordances as well. Given the mediating position between technologies and users, it is likely that different categories of users perceive different affordances: a journalist perceives different affordances compared to a politician, a teacher, a marketing executive or a teenager.

Lister et al. (2009) refer to a set of characteristics of the new media, which can then become a starting point for thinking of affordances. These include (i) digitality, where all media content is now encoded in the same manner and hence can be readily transposed from one media platform to another – this has fed directly into the convergence of all media; (ii) multimodality, where journalists now write stories that include audio, video and text; (iii) interactivity, or the possibility of a more or less immediate two-way communication, which has fed into the rise of comments and the involvement of readers in the news content; (iv) hypertextuality, which refers to the ability to introduce links into the text, taking readers further into the topics they are reading – this introduces dynamism into the content, which can now be extended almost infinitely; (v) and finally, connectivity, where users can connect to one another and become part of the same network, forming communities of readers. All these have had a significant impact on journalistic content, which now must operate under very different conditions. Multimodality, interactivity and hypertextuality have featured heavily in the literature, pointing to new ways of writing and relating content to users, making it much more dynamic and combining text with visual and aural information, while also offering readers the opportunity to participate. Perhaps one of the most significant pieces of journalism that has emerged in recent years as a paradigm of excellence, showing what is achievable in the new media domain, is John Branch’s “Snow fall: the avalanche of Tunnel Creek” (2012) published on *The New York Times* website. The story was awarded the 2013 Pulitzer Prize for feature writing, as it made readers “feel the snow and taste the panic” that gripped the skiers caught in the avalanche. The feature seamlessly integrates text, video, images and graphics to tell not only the story of the specific avalanche but also the physics of avalanches. It received both critical acclaim and reader comments and appreciation and it was hailed by some as the future of journalism (Greenfield 2012). Apparently “to snowfall” is now a verb, used in various newsrooms as shorthand for effective multimedia storytelling.

The snow fall feature was an exceptional case, in which technological affordances merge organically with journalistic elements of storytelling but, for the most part, there is a need for considerable adaptation and attention paid to specific media platform affordances. Looking for example at Twitter's main affordances, brevity, immediacy, connectivity and hashtags, we can see the kind of journalism emerging. Tweets can be continuous but must convey the message in 140 characters. It forces journalists to write in a more or less continuous headline form. But in addition to this, Twitter's affordances and user practices have led to a specific kind of Twitter journalistic practice: Lasorsa et al. (2012) found that US mainstream media journalists tend to tweet more opinions and to provide some measure of accountability and transparency on their practices through linking to and sharing/retweeting other content. Hermida (2013) refers to early practices of automated headline tweets by legacy news, which did not work, as these kinds of tweets received little interest by users. Evidently, for journalistic practices to work on Twitter, they must conform to the medium's culture, which has emerged out of this meshing of technological affordances and user practices. Some of these practices that emerge and which have affected content in a more or less direct manner include the rise of affective news (Papacharissi and Oliveira 2012), which refers to the combination of news with views and opinions. There is also personalisation, which is the assumption of a first person perspective, and discussion and engagement, referring to the idea that it is not enough to write and expect others merely to read. Journalists now are required to respond, to share/retweet, comment and reply to their readers and others. They further need to connect with others, to follow them and finally to use hashtags that point to and connect to the broader story. A final important aspect regarding content on Twitter and other social media refers to the outcome of the pressure to break news immediately. One way of dealing with this is to share the uncertainty and make the news-making process accountable. This is the strategy followed by NPR's Andy Carvin, who pioneered this through posting tweets on new developments and asking users on the ground to verify them (Hermida et al. 2014). As Hermida et al. (2014) have argued, Twitter journalism emerges as a practice of authentication and interpretation of "social awareness streams".

To conclude the discussion on content, the main challenges involved here for journalism include first, the mutual adaptation of organisational routines to social media practices and requirements, and secondly, the mutual adaptation of journalistic content and technological affordances. These are likely to lead to tensions but as the snow fall feature and Andy Carvin's cases have proven, there is a lot of positive potential as well.

3.3. Form

As mentioned earlier, new forms of journalism have evolved out of a productive tension between new content and old form. From this point of view, they have also emerged because new media have allowed the production and circulation of new kinds of content in new ways, so old forms of journalism had to adapt as a result. In understanding the shifts involved, and the tensions and challenges these may present, the approach here is based on case studies. Identifying and mapping

new forms is very difficult especially since most forms are likely to be hybrid forms, meaning that new forms “borrow” and “steal” from one another. The heuristic that we have used here to identify and analyse new forms is the following: how new forms produce and arrange the various constitutive elements, and how they engage with the public. The discussion will revolve around two case studies, live blogging and data journalism as two influential new forms of journalism.

3.3.1. Live blogging

Live blogging is increasingly becoming the default form for covering live events, sports events and breaking news stories. It has been defined as a “single blog post on a specific topic to which time-stamped content is progressively added for a finite period – anywhere between half an hour and 24 hours” (Thurman and Walters 2013: 83). It has been around since 1999, when it was introduced by *The Guardian*, but it was mostly used for sports events. Live blogging further incorporates multimedia elements and hyperlinks. Live blogging is a form that suits different kinds of content and has proved a success with users, who appreciate its ongoing, evolving narrative, which also matches user habits in terms of how they read online news.

A paradox concerning live blogging is that in fact most of it does not take place in the field. As journalists in Thurman and Walters (2013) put it: it is easier to blog in the office, with a television and other media feeds and your reliable Wi-Fi, than in the field, with only your laptop and dodgy Internet. On the other hand, as mobile use spreads, a lot of live tweeting is taking place in the field, documenting the story as it unfolds. Live blogging taking place in the office is better understood as mediation or curation rather than original reporting while live tweeting from the field can be seen as proto-reporting, covering events in an unprocessed manner.

The narrative elements of live tweeting include an ongoing story, evolving as time goes by, and it is narrated from multiple angles and perspectives. Live blogging is meant to be conversational and often includes unverified news with caveats. In this respect, it is a freer and more transparent kind of journalism. Live blogging conveys the real-time and messiness of news and evolving events and the timeliness of news, showing how messy reality is and often exposing the decisions that journalists make in terms of what is deemed newsworthy and what not. In this manner, live blogging removes journalists from the pedestal of the expert, the all-seeing, all-knowing source of information. It also represents an adaptation to the fast paced, hyperlinked social media environment; Beckett (2010) has referred to live blogging as the new first page.

One the other hand, live blogging has been accused of being responsible for the “death of journalism” (Symes 2011) because it involves a mismatch of relevant and irrelevant information, with no sorting of any kind apart from timeliness: the newest first. The kind of expertise that journalists can bring into the story, by sorting out the important from the non-important and clearing out the information clutter, is lost in live blogging. Anderson (2011) points to this, holding that live blogging is causing information overload through “rivers of news” (Anderson 2011). In the end, readers may become more confused and less informed by live blogging. Moreover, by blogging information as it emerges, live blogging may be lowering established

standards of verification (Petrie 2011), notwithstanding the caveats and disclaimers posted by live blogging journalists. The main question regarding live blogging (and live tweeting) remains: is this journalism? Anderson (2011) suggests that it could possibly be considered journalism, if it involved not only the collection of relevant information but also provided context and curation, in other words if it involved more processing of information instead of merely listing it.

Taking on board the criticisms levelled against this form of journalism, we can see how it adapts to the fast pace and dynamic environment of social media. At the same time, it still faces the challenge of successfully adapting journalistic norms and values to the practice of live blogging or live tweeting.

3.3.2. Data journalism

Data journalism refers to the use of data for writing stories and understanding developments. This is a hybrid form that encompasses statistical analysis, computer science, visualisation and web design, and reporting (Coddington 2015). Data journalism is considered a key development in journalism, as it is seen as adding considerable value to journalism (Lorenz 2012). Data journalism is not about breaking news stories but making sense of the broader context through using raw information and number crunching. In contrast with live blogging, which can more or less be done by anyone, data journalism requires expertise in statistics, coupled with data visualisation techniques. In this sense, this new form of journalism reintroduces expertise but this is no longer expertise in writing or news gathering, but in number crunching, maths and data science. Data journalism is one of the most promising new forms because it combines the logics of journalism (importance, newsworthiness, analysis) with the logics of the new media (information, big data, but also open source).

There are several types of data journalism, and Mark Coddington (2015) has developed a typology for the use of data in journalism. One is CAR (computer-assisted reporting), which is the predecessor of data journalism, and it consisted of early applications of statistical and visual techniques for reporting. Second is data journalism proper, which is the most widely used term these days but also the prototypical way of combining data with journalism. Third is computational journalism, referring to the BuzzFeed/Vox or algorithmic model, which relies on algorithms that determine trends or the importance of certain stories for certain publics and then produces relevant stories. But it also more broadly refers to “practices or services built around computational tools in the service of journalistic ends” (Coddington 2015: 336).

Data journalism relies on data (rather than news) gathering, so primarily the emphasis is on where and how to locate accurate and reliable data. Often, data journalism relies on official statistics or on datasets provided by reliable partners. For example, Twitter donated a dataset of two million tweets on the London riots of 2012 to *The Guardian*, which subsequently produced one of the most memorable pieces of data journalism. Secondly, data journalism, because of the complexities of data processing and high level of expertise required, relies on collaboration. It inevitably needs a team where the “technician meets the wordsmith” (Gray et

al. 2012), where data scientists, journalists and graphic designers come together to produce cutting edge journalism. Finally, data journalism is or can be open source: in a prototypical case on the MPs' expenses, *The Guardian* relied on users to sift through their allocated part of data and report back to the reporter coordinator. This allowed, firstly, the direct participation of readers in producing the story and, secondly, it made more manageable the processing of very large chunks of information.

Data journalism stories tend to be very rich and dense in terms of information. They include text, visuals and interactive/customised parts. Occasionally, the information is packed into the form of infographics, which simplify and reduce the complexity into a set of key points. Data journalism stories tend to be complex and multi-part stories that help convey the complexity of the world. Unexpected links, developments and connections are found, revealing underlying dynamics, occasionally of wrong doing as in the Lux Leaks, and contributing to a more in-depth understanding of the world. In terms of presentation, data journalism signals a shift towards visually engaging forms which allow readers to visually apprehend connections and links. Because in data journalism the emphasis is on data and fact-based interpretations and analyses, as opposed to subjective, op-ed kinds of journalism, it is often considered a more accurate and less biased form of journalism.

On the other hand, data journalism is a labour-intensive form of journalism and as such may not be properly supported by already pressurised news organisations. But perhaps more of a problem is that data journalism gives an impression of facticity. However, data is not and does not represent the "truth". This focus on data obscures the politics of it, the potential biases involved in the collection, compilation and even publication of data. For example, Pielke (2015) discusses the way in which data journalism got it wrong in the 2015 UK elections. Nate Silver of *FiveThirtyEight*, a data-based journalistic start-up, consistently reported that no single party would enjoy a parliamentary majority in the elections, setting the pace for other reports on the matter. Pielke reports that Sylvation, a UK pollster, did come up with a more accurate prediction but did not publish because of the dominance of no-majority polls and the pressure exerted by well-known media such as *FiveThirtyEight*. Because if, after all, data never lies, then this leaves little room for dissenting data and interpretations. For Pielke (2015, non-paginated), the role of data journalists: "should not be to limit public discourse, either intentionally or unintentionally by weight of influence, but rather to open it up. This means going beyond the numbers and into all the messiness of policy and politics. Punditry absent rigorous evidence and data is impoverished. But data and evidence absent political and policy context is impoverished too." In short, in data journalism stories are only as good as the data, but at the same time, stories are only as good as journalists' interpretation of the data.

An additional issue for data journalism is that although one of the gains of the new media for the public has been the removal of the distance between journalists and the public, the reliance on data scientists and experts introduces new divides. These create tensions between data scientists who know the data but not the journalism, and journalists who do not know the data or how it was produced but have the task of interpretation. Finally, we have little evidence on how these new

forms of journalism are received by audiences/publics. Do they represent a simple way of telling complex stories or are they seen as obfuscating and unnecessarily complicating stories?

To conclude, the challenge of data journalism involves the reconciliation of data processing with a journalistic sense of importance and analysis, prioritising peer-to-peer collaboration rather than the elevation of data scientists onto the expert pedestal previously occupied by journalists. Moreover, the challenge here is not to assume that data always equate truth but to develop new and creative ways of delving into the politics of data. More broadly, all new forms of journalism have positive contributions to make but also serious drawbacks. Perhaps the key is the concurrent existence of all these forms together. To the question as to whether these new forms are good for journalism, the answer must be unequivocally yes. This is because while for the ideal type of journalism, the public is knowledgeable, rational, critical and always interested in the news, reality is messier. Different forms of journalism engage with different publics or with the same publics in different ways. They bring to them a renewed tension between form and content and therefore new meanings. They may not replace the classic forms of the inverted pyramid or the op-eds but they will offer readers new experiences, thereby gaining new readers in the process and revealing hitherto unexplored parts of reality.

3.4. Readers, users, publics, audiences

A discussion on readers completes the circuit of communication in journalism. The terms above reflect the complex set of relationships established between journalism and its publics. Although there are intense debates surrounding each of these terms, we are using them here interchangeably in a rather loose manner, to reflect on past and current relationships (readers and users), on the public role of journalism (publics) and on the different ways different media – especially broadcast – position their “audiences”. One of the main questions and challenges presented to journalism is that of the vanishing readers. The well-documented fall in newspaper circulations, coupled with the intense competition for attention in the new media environment, contributes to a rising concern over the disappearing publics of journalism. But is this indeed the case? Or have these publics merely changed their consumption habits? This will be explored in the first part of this section. Secondly, the very identity of the consumers of journalism, typically understood as passive readers or audiences, have drastically changed, with theorists such as Bruns (2006) referring to them as “producers”. This change, alongside the challenges of user-generated content, will be discussed in the second part of this section. Finally, this section will conclude with a consideration of how journalists themselves perceive their publics and the extent to which this may feed into broader changes in journalism.

3.4.1. The vanishing readers and changing habits

In recent years, there has been a well-documented decline in newspaper circulations. For example, Pew in the US and ADC surveys in the UK point to circulation drops

in the daily newspaper market and this is typical for most of Europe (Pew Research Center 2015; Greenslade 2014). Does this mean that readers are no longer interested in the news? A closer look reveals two dominant trends: fewer people are in fact consuming the news, with younger people less likely to read the news, while the news platforms and media have also changed, with younger generations preferring online to television or print. Table 3.1 shows that “Millennials” are spending less time following the news, while both Millennials and “Generation Xers” are more likely to consume news online (43% and 49% respectively). Both, however, spell bad news for journalism: there is a vanishing “customer base” with new platforms/distribution models, especially social media platforms, undermining dominant business models, as we saw in earlier sections (Silents: 1925-1945, Boomers: 1946-1964, Generation X: 1965-1980, Millennials: 1981-1997 (Fry 2015)).

Table 3.1 – Gaps in news consumption

Generational Gaps in Time Spent Following the News				
<i>Average number of minutes per day following the news by age group*</i>				
	Silents	Boomers	Xers	Millennials:
2004	88	75	63	43
2006	80	71	63	45
2008	82	72	64	43
2010	83	79	71	45
2012	84	77	66	46

*On the day prior to survey.

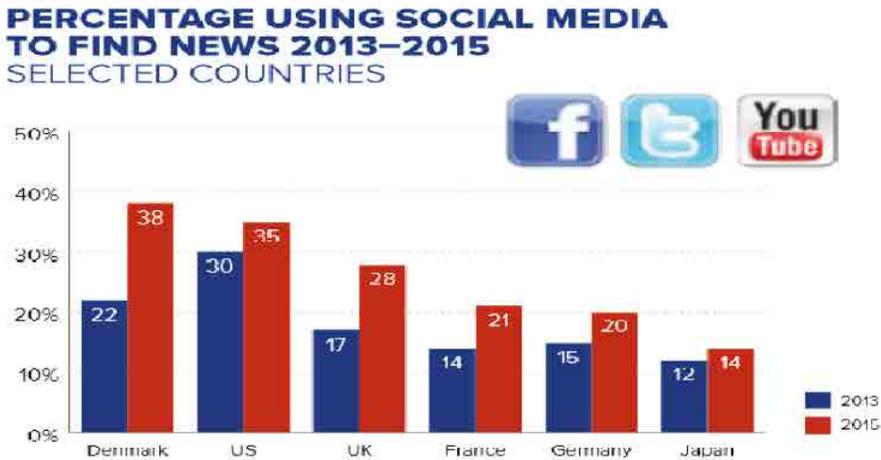
PEW RESEARCH CENTER

Source: Pew Research Center 2015.

Two questions arise here. Will younger readers increase their engagement with the news when they get older? Or will this increase if the platforms and/or the news content are more to their taste? If the latter is true, then this puts pressure on traditional journalism, which is still defined by print, to find new ways of appealing to audiences. BuzzFeed, Vice and Gawker are examples of the kind of news that Millennials seem to like, based on the amount of shares and likes these kinds of news get. Reuters has found it necessary to include a new news category – fun/weird news – in order to capture this kind of news content.

Understanding what audiences want requires understanding changing news consumption practices. One of the most important changes to occur in recent years concerns the social distribution of news. More simply put, more and more readers rely on social media for accessing news. As the 2015 Reuters report on digital news media shows (Figure 3.1), there is a steady increase in the number of people who use social media to access news.

Figure 3.1 – Accessing news via social media



Source: Reuters Institute 2015.

Within this context, two kinds of distribution have emerged: one is based on the new infomediaries (Rebillard and Smyrniotis, 2010), social media corporations which are the new mediators of news and information, and the other is a social distribution based on users' own networks. People tend to read what others have shared on their news feeds, and then they share it further, comment or like it. However, social sharing presupposes that we have come across a news item on our timelines. But more and more what we see there depends on how social media platforms order our newsfeeds, and this is performed by algorithms that sort and select information in specific ways.

This is crucial in the case of Facebook, which is emerging as the social distributor of news. Collectively, Facebook's algorithms, OpenGraph, EdgeRank and GraphRank, rely on data generated from people's passive participation (Bucher 2012). But it is not enough to collect data to identify trends and patterns; Facebook's algorithms and protocols are oriented towards, and anticipate, the future. Because anticipation is already written into algorithms they tend to become a self-fulfilling prophecy: they write the future as they anticipate it. In other words, if young Facebook users only like and share BuzzFeed-types of news then this is mainly what will appear in their newsfeeds. In doing so, Facebook diminishes and prevents alternative actions and futures, it diminishes the unpredictability of news and reproduces what is known as the filter bubble (Pariser 2012). The filter bubble refers to the kind of environment that is often created in social media, where people only ever like those similar to themselves, with similar opinions, likes and dislikes, and are unlikely to be ever exposed to anything else. The hyper-personalised newsfeeds, the result of a combination of Facebook's algorithms and the well-known tendency of networks towards homophily – the association with similar others – constitute a filter bubble, which filters out any kind of "dissident" information.

It is highly ironic that Eli Pariser, the author of *The filter bubble: what the Internet is hiding from you*, went on to create Upworthy, as a means by which to circulate relevant

information across and through people's filter bubbles by enticing them to share it. Upworthy is now referred to as an example of clickbait journalism. This sums up the challenge for journalism: to remain relevant, to elicit engagement, to be shared and liked so that it reaches more and more people, but without deteriorating into either clickbait or fun/weird news.

An important attribute and outcome of social media platform algorithms is that they seem to actually replace or replicate editorial decisions. But these are no longer taken on the basis of news values or newsworthiness, but based on each reader's already established patterns, likes and shares. However, this may lead to the liquidation of meaning, because virality or the degree of sharedness becomes the main criterion. In other words, the value and significance of the content is not taken into account: meaning is replaced by popularity (Siapera 2013). Popularity, which once was only a proxy for importance, has now become an end in itself. But it is not necessarily the most important or significant news that is more likely to be shared. More broadly, these changing patterns denote a power shift from traditional publishers to social media infomediaries, and the replacement of human editorial decisions with automated algorithmic ordering and agenda setting.

3.4.2. Users as producers

The challenge that the new infomediaries pose for journalism and news publishers is accompanied by another challenge, this time coming not from the consumption patterns of readers but according to their news production abilities. "Producersage", a term coined by Axel Bruns in 2007 to refer to the hybrid practices that emerged in shared environments, is, according to him, a practice beyond production. The main idea is that "anyone can edit", users become producers of content, while outcomes are no longer distinct products – they are temporary artefacts of a continuing process. Usage and production are increasingly, inextricably intertwined and strict distinctions between producers, distributors and consumers no longer apply. The new term is coined in order to point to the end of a passive consumption model and the beginning of a new era for the relationship between audiences and media.

What are the implications of all this for journalism and its publics? A lot of what users produce is not really accepted or acceptable by journalistic standards. Nevertheless, ignoring it has a high potential cost for journalism, which may be left behind. Audience participation is here to stay and this means journalism needs to adapt. But this is not an easy process. User participation is often anathema for journalists. Hermida and Thurman (2008), in a study of UK news editors, found that they felt compelled to include user content lest they get left behind. However, they were struggling with the tensions emerging from the need to control their brand; the need to control the conversation; and the cost of this control. Overall, it seems that journalists still want to retain their gatekeeper function and user content may undermine this. However, attitudes may be changing. Lewis argues in favour of a more adaptive, open kind of journalism, characterised by "a willingness to see audiences on a more peer level, to appreciate their contributions, and to find normative purpose in transparency and participation" (Lewis 2012: 851).

At the same time, given the nature of the news, which is unpredictable, (quasi) random and increasingly globalised, more and more news organisations find that they rely on user-generated content. This gives rise to important challenges, practical, ethical and legal. It is important to note that user-generated content (UGC) constitutes an integral part of today's news, from pictures/videos of breaking news to atrocity/propaganda videos produced by ISIS. Wardle et al. (2014) conducted a thorough study on UGC in newsrooms. Their key findings include the fact that UGC is more likely to be used when other footage is not available. One of the key issues surrounding UGC is labelling, with 72% of UGC not labelled or described as UGC. According to Wardle et al., only 16% of UGC on television included any credits to the amateurs that filmed it.

Wardle et al. (2014) call for the development of more systematic procedures to be used by news editors, in order for them to be able to credibly use and acknowledge UGC. An important legal issue that will inevitably arise concerns the licensing of this content. It is not unlikely that class action may be brought against user organisations for their use of UGC, so they need to be prepared for this. Additionally, there are ethical implications involved and, specifically, the potential for citizens to be exposed to harm in their quest to capture footage that is likely to be published or broadcast. Wardle et al. report that *The Guardian* has changed the terms they used: instead of "send us" your pictures they now use "share with us" as a minimum means by which to avoid exposing readers to danger. There is another potential ethical and psychological issue involved concerning journalists who are exposed to amateur videos of disasters and atrocities. News organisations need to take the psychological health of their workers seriously and avoid exposing them to unnecessary trauma.

3.4.3. Reconfiguring relationships

The shifts described above are slowly but surely feeding into the news production process. While in the era of print and broadcast journalism, journalists had little knowledge of their readers/audiences beyond what dripped in through letters to the editor, today there is detailed knowledge of reader practices, comments, likes and dislikes. Moreover, every editor now has at their disposal detailed metrics about audience practices. To what extent is this influencing editorial decisions? And to what extent should it?

Research tells us that such metrics are acquiring an increased importance for news publishers. Anderson (2011) found that journalists were confronted with traffic metrics and required to write stories with audience appeal. Similarly, Tien Vu (2013) found that editors were likely to prioritise stories with more traffic. Boczkowski and Mitchelstein (2013) found a consistent gap between what journalists/editors prioritise as newsworthy and what audiences click on.

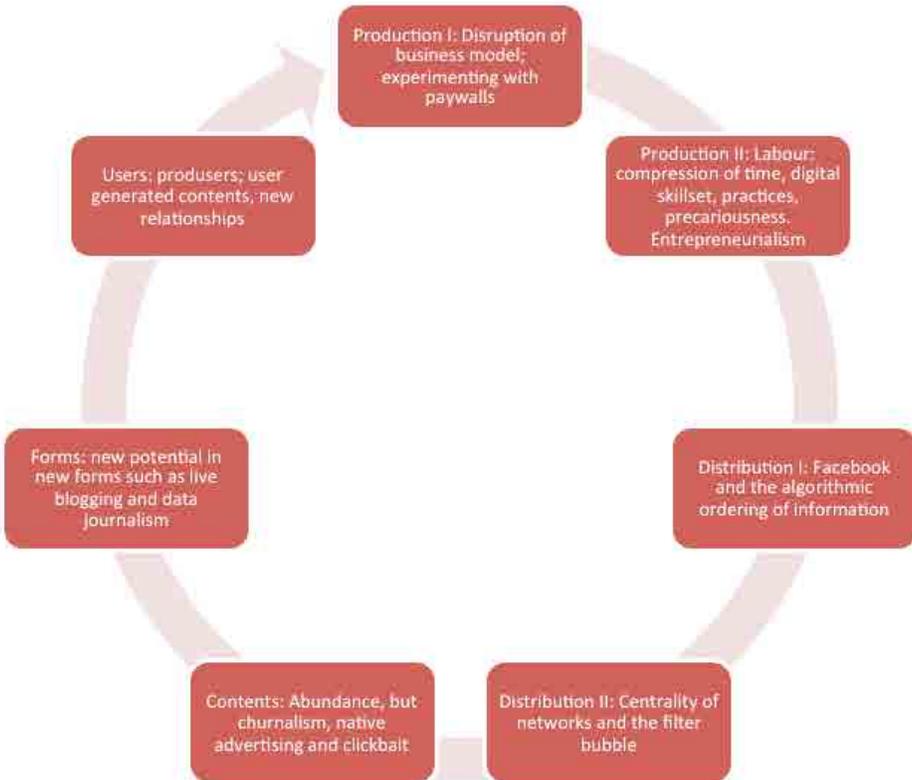
Given the emphasis on audience engagement, the onus now is placed on journalists to build and sustain relationships with their readers. Community building, which relies on affective labour, may be a potential means for building and sustaining relationships. As we saw earlier, affective labour refers to this part of journalists' work that is concerned with socialising with readers. This is not exactly journalism but an increasingly necessary aspect of it. The notion of reciprocal journalism (Lewis

et al. 2014) builds on the idea of embedding in journalism the notion of reciprocity with audiences. In other words, journalism is no longer about writing and publishing a story but about exploring it further with readers, engaging with their questions and comments, reflecting on their criticism and so on. However, this practice is fundamentally ambiguous, because it takes sociality and social exchange from a context of social relationships and makes it part of professional practice. It is one thing to have good “bed manners” and another to make “bed manners” your main selling point. In Siapera and Iliadi’s (2015) study on Twitter journalists, respondents were adamant that authenticity is crucial: one must relate to readers in terms of the person they are, and fakery will be found out and exposed. However, how many journalists can do this freely if they work for a brand? These tensions need to be addressed for journalism to be able to rebuild its relationship with its public.

4. CONCLUSIONS

This chapter began with a consideration of the process of communication understood in terms of a circuit comprising production, content and consumption or use. But throughout the chapter we encountered instances that complicate these processes and that point to the need to modify this circuit by taking into account recent changes. Figure 4.1 below constitutes such an attempt.

Figure 4.1 – The new circuit of digital journalism



To recapitulate the main arguments made above, in terms of production, the main challenge of journalism is to find a new source of revenue that does not repeat the problems of the previous model. The commodification of news, along with the commodification of audiences, was already a problem for journalism as a public service. The rise of entrepreneurialism does not solve but merely redirects the problem from publishers to journalists themselves. Precariousness and uncertainty certainly pose important problems for journalists, rendering them more vulnerable to exploitation and more prone to compromises that may end up compromising journalism more broadly.

Following the above analysis, and finding that it has an impact across all levels, we find it necessary to include a process that was assumed under the control of production and news production corporations – distribution. This is no longer the case: digital distribution is firmly in the hands of either social media platforms, such as Facebook or Twitter, or search engines such as Google. Moreover, distribution has acquired a singular importance in the ear of social media because of the overabundance of content and the need to reorder media visibility (c.f. Thompson 2005). But the algorithmic ordering of the domain of the visible is fraught with problems. Algorithmic decisions depend on users' previous online behaviour and are unlikely to expose them to new or unexpected information, thereby contributing to what Pariser has called a filter bubble. Following an algorithmic distribution of news, important but unpopular news may end up filtered out. From the point of view of journalism, the challenge involved is to reclaim its lost authority over the news agenda and its right to make editorial decisions based on newsworthiness rather than likes, shares and comments.

This context of production and distribution has had a clear impact on content. The rise of churnalism (the copy-and-paste of the same content), clickbait (the luring of readers to click) and native advertising (the quasi-deceitful means of getting readers to read advertisements) have almost overwhelmed the potential of the Internet to produce engaging and truly captivating journalism. The clear challenge involved here is to regenerate this potential and to invest in the cross-fertilisation of journalism with the technological affordances of the new media. This potential, as well as its ambiguity, is clearly encountered in considering the new forms of journalism, the new ways of ordering and organising content: live blogging and data journalism are but two of these new forms. Others, not discussed here, include mobile journalism and immersive journalism. Journalism needs to keep on experimenting with these forms, marrying the best of journalism with the best of the new media. The challenge is to find room for such productive experimentation.

The role of users has become much more important in the new media ecosystem. While, in earlier theorising, users' main activity was interpretation of media messages, they can now actively react to such messages, modify them, comment on them and even produce their own. This involves a considerable shift in power, but not enough to negate the need for and the value added by journalism. However, it clearly points to the need to take users into account at every step. In its negative form, this takes the guise of incessant obsessing about metrics, which may then feed back into the production of journalism, leading to more innocuous but perhaps less incisive and

less socially useful journalism. In its positive form, this may lead to a form of reciprocal journalism, with journalists acting as community builders. But within a context of journalism-as-commodity and journalists-as-employees this is profoundly ambiguous. At the same time, journalists need to find ways of reconciling user-generated content with journalistic values and understandings. The challenge involved here is to engage with readers/users and their content in a meaningful way that adds social value to journalism.

Where does all this leave journalism? Its position is precarious and paradoxical: while it is clear that the need for and value of journalism remain unchanged, and perhaps have become even more important than ever, it faces unprecedented and critical challenges, coming from all sides – from publishers, from labour practices, from social media corporations and from users. There are no easy answers to any of these challenges. However, there may be some points worth considering in addressing some of these challenges.

Given the importance and value of journalism, what is at stake here is the re-socialisation of journalism: the return of journalism to the society it is meant to be serving. The re-socialisation of journalism requires that it becomes removed from the market place. However, this does not necessarily mean state-subsidised journalism with all the baggage that this may carry. Rather we may begin considering different forms of socio-economic organising, such as the co-operative and the not-for-profit forms. This has considerable advantages, as it allows journalism to operate in an independent but sustainable manner, reinvesting its income in the co-operative itself and in wages for journalists. In this context, because journalists will be working for journalism and not for someone else's profit, the social aspects of community building, the biopower involved in the affective labour of journalism, producing subjectivities and producing communities, can be freed from commodification and allowed to fulfil its full potential.

Secondly, in terms of the question of distribution, journalists and users alike must exert pressure on Facebook and other social media platforms to offer more choices as to how their newsfeeds are ordered, perhaps developing a "journalistic" algorithm, which will operationalise journalistic criteria of newsworthiness and news values. This can co-exist with other kinds of algorithms based on sharedness, engagement, recency and so on. Facebook is already experimenting with media partners on instant articles, but this is another platform for news and does not really address the question of distribution and visibility (Reckhow 2015). Moreover, it may also privilege certain large corporations rather than smaller news outlets and journalistic initiatives. Unless Facebook and other social media platforms address the algorithmic distribution of news head on, popularity will trump importance.

As these challenges intensify and acquire momentum, it is likely that any solutions will emerge organically from the practices of the various actors themselves. However, in the absence of any form of social steering, of redirecting journalism firmly towards society, it is equally likely that these solutions may ultimately destroy journalism as a public service.

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Chapter 9

The Internet or the sudden emergence of the reader: the experience of Rue89

*Pierre Haski*¹

When Internet developments gave rise to what was termed “Web 2.0”, the concept spread like wildfire, without everyone actually knowing what they were talking about. *Libération*, the newspaper where I worked at the time, in the mid-2000s, hastened to declare itself the “first 2.0 site” in France, simply because it allowed its readers to post comments at the foot of articles. However, these comments were of no particular interest to the articles’ authors, as the articles had been written for the “paper” edition and were automatically published online in the middle of the night, in parallel with the newspaper’s printing and distribution to thousands of retail outlets across France.

But, in 2004, after more than three decades as a professional journalist, something quite amazing happened to me: I discovered the reader. Of course, I knew that there were women and men who bought and read the newspaper that employed me, and I regularly crossed the paths of some of them. However, in 2004 I started a blog on the *Libération* website as the newspaper’s correspondent in Beijing, where I had been posted four years earlier. That was how I joined the Washington correspondent, Pascal Riché, who had been the first to try blogging, which was still new among journalists. Before that, any journalist “worthy of the name” did not blog: blogs were the playground of teenagers, where they shared music with their friends, or blogs were solely written by “amateurs”, that is to say those without a press pass.

1. Co-founder of Rue89.

In 2004, *Libération* decided to experiment with this new genre, the journalist's blog, following the example of a number of American pioneers. Within a few weeks, my life as a journalist had changed completely, to the point where my colleagues in Paris had to remind me that I was "also" writing for the daily "paper", as the blog had become an obsession and devoured all my time and energy. So then, I discovered my readers who, not content with simply reading my articles, also took the liberty of giving their opinion on them or their subject matter. And not only did they have an opinion, but in many cases it was an informed opinion, drawn from the best sources, since they could be talking about their area of expertise, their hobby, or an event they might have witnessed. This confirmed what I had come to suspect: there are always readers who know more about the subject than the author of an article, especially in the non-specialist media.

The second shock was that, not only did my readers have an opinion which they could express in the split-second that followed the posting of a blog entry, but they rapidly entered into discussions which went beyond a mere exchange between author and readers, since they extended to the entire readership, sometimes even with no involvement of the author, who had long since been ignored or found himself out of his depth. The fact that a simple blog entry could generate additional information and/or a wide-ranging debate on an issue was simply staggering for me, a journalist who had become accustomed to conveying his message without really asking himself what would happen next or what reactions it would provoke. A few hours later, the original article had become "enriched" with new information and viewpoints and had been given a second lease of life, something unthinkable with the "paper" version or during the first phase of the Web, not yet referred to as "1.0".

The third shock was the realisation that, by merely answering a reader who questions him, or initiating a dialogue with someone in a position to enrich his information, or having a discussion with someone who contests his analysis or interpretation, a journalist breaks the cycle of suspicion and even distrust concerning journalists in our societies. For close to 30 years in France, an annual survey by the Catholic daily newspaper *La Croix* had shown this loss of trust among citizens towards the profession of journalism, which they assimilated with the dominant elite and no longer with a mythical "fourth estate" (e.g. *The Washington Post* and Watergate) defending society against the powerful. However, this trust is not dead, on condition the journalist actually does his work independently, or providing he steps down from his pedestal and engages in a conversation with his readers. In any case, that is what I discovered from my blog *My journal of China* and my subsequent experiences.

When, in 2006, *Libération*, the newspaper for which I had worked for a quarter of a century, was plunged into a crisis no one imagined that it was THE crisis, which has since been referred to as the "press crisis". It was not until 2007 and 2008, when the American press was badly hit, that people understood this was not a cyclical trough but a change of era caused by the expansion of digital technology and new ways of obtaining information and reading. Since then, the phenomenon which we had difficulty understanding and analysing, and to which the press responded too slowly, has continued to gather speed, sweeping up everything in its path. Although they have been around for only a few years, smartphones are in the process of dethroning computers, even before computers have completely evicted paper, and social

networking sites, in their infancy in the mid-2000s, have become one of readers' major entry points into the world of news and information. And it is not over yet ...

In 2006, a few of us at *Libération* were convinced that the salvation of our profession and of news production lay in the Internet. Arnaud Aubron, Laurent Mauriac, Pascal Riché and I had something in common: we had had experience of blogging, of interacting with our readers and of the generalised expression of opinions and ideas, thanks to technology, which was irreversible. The question was no longer whether the public – our readers – would speak out, but whether they would do so with us professional journalists, or in spite of us, or against us.

At the time, “trench warfare” was taking place between two groups:

- ▶ on one side professional journalists, who claimed that the possession of a press pass gave them the monopoly of the production of news and who denied their readers the right to express themselves through their media;
- ▶ on the other side, supporters of “citizen journalism”, who considered that, since technology enables everyone to express themselves, there was no longer any need for unnecessary intermediaries, namely professional journalists.

Based on our experience as bloggers, we felt that both were wrong, the first group who disregarded the intrusion of the reader due to the development of technology and the democratisation of digital devices, and the second group who had decided to ignore the professional and ethical rules of journalism, which remained fully valid on the Web so as to safeguard the dissemination of quality news, an essential prerequisite for any democratic society.

Our bet was that, instead of opposing these two rival worlds, we could make them work together. The idea thus emerged of launching a so-called “participatory” site whose contributors could be journalists as well as non-journalists. We called this idea “News with three inputs” (journalists, experts, Internet users); it was the founding concept of *Rue89*, launched on 6 May 2007, the first “pure play” media organisation (not backed by existing print, radio or television media) in France. It was of course followed by many others. Some disappeared after a few years because of the difficulty in identifying the right business model in a new environment; others survived and secured a place in the French media landscape, such as *Médiapart*, which was launched by the former director of the editorial board of *Le Monde*, Edwy Plenel.

In 2007, participatory journalism was still regarded as a heresy, and some of our colleagues bitterly reproached us for going over to the “other side”, what they saw as a real betrayal. Of course, less than ten years later, reader contributions have now become the norm and are accepted and widespread: today, all the “Old Media” have blogging platforms, participatory spaces, invitations to readers to “share their experience” and, naturally, a comments space that has become problematic, as we shall see.

When we set up *Rue89*, we decided on a rule, which we set out in our founding “manifesto”: while we drew no distinction between articles by journalists and non-journalists, everything would be screened according to professional rules: checked, prioritised and ethically questioned. Given the context at the time, we wondered whether our readers would challenge this decision which, once again, left the last word to journalists. The opposite happened, and the fact that we were committed to publishing

only articles that had been checked and validated according to our professional rules, while keeping the windows and doors of the site open to all, was taken as a guarantee against rumour-mongering, manipulations or, simply, inaccuracies.

The challenge lies in how to create open spaces where citizens are entirely free to express themselves, both to comment and to contribute to the “production of news”, without neglecting the quality of this news, particularly its verification. The self-publishing platforms that existed even before the conversion of the Old Media lost their souls due to this absence of checks, which allowed all sorts of crazy ideas to be expressed. In the name of absolute freedom, they let in those who in point of fact do not respect others’ freedom, scaring away respectable contributors, afraid of being associated with such scandalous neighbours.

Our approach was different: it was based on the idea that in the creative chaos of the Internet, where the best and the worst co-exist, readers/citizens need spaces they can rely on. Just as readers once knew how to locate, at a glance, in the profusion of a news kiosk, the papers to which they related and in which they could expect to find quality news to help them reach a verdict, they needed to be able to do the same on the Web. This is clear from the number of messages we have received over the years from readers asking us to validate a given piece of news they have read “somewhere”, a sign of their trust in us. It got to the point where we actually developed a method: if we received several messages with different wordings, and therefore not orchestrated, asking us to look into a subject, we did, since we were sure to be addressing a real concern that was not dealt with by the Old Media.

A few months before the 2012 presidential election in France, we received several requests to check a document which had circulated extensively on Facebook and which asserted, with an Excel table in support of the claim, that people were better off in France when they were dependent on state benefits than when they were working. One of our reporters checked everything with the best experts and reached the opposite conclusion, also with a supporting Excel table and links to sources. This “antidote” to such information fuelling the populist political agenda was shared hundreds of thousands of times on Facebook, the very place where the “poison” had originally circulated.

Participatory journalism can take many forms: a trade unionist working for the French national railways (SNCF) may create a temporary blog during a strike to dialogue with the public and explain his reasoning; more recently, a driver for the UberPop taxi app (aka UBER), which the French government has threatened to ban, not only posted a text explaining why he feels entitled to exist, but was also willing to answer the very numerous and sometimes hostile comments. Another example is French citizens revealing their incomes and spending habits under a heading entitled “Your wallet under the X-ray”, a series of articles which is very popular in these times of economic difficulty when people seek to compare themselves with others, trying to find solutions or wondering if they have made the right choices.

However, participation may also take the form of comments; as already mentioned, this was the first way in which “Web 2.0” came to the fore. Over the years, the comments spaces have become genuine battlefields. People use these spaces to confront one another, at least on the most sensitive issues of our time, such as immigration and

religion, or the most acute conflicts, such as those in the Middle East and Ukraine, and certain controversial political decisions. What amounted to an attempt to create a modern *agora*, a place of democratic debate, was torpedoed by pressure groups, active minorities, or simply individuals expressing their aggressiveness.

On some sites, comments are closed as soon as the debate becomes too “heated”, for example when Palestinians and Israelis confront one another, causing passionate reactions thousands of kilometres away from the Gaza Strip. At *Rue89*, we have never closed the comments because discussion is central to our editorial formula and it would be paradoxical – and depressing – to consider that some subjects have become impossible to discuss. Nonetheless, each debate must be well supervised. During the first Gaza war after the site’s creation, in 2008-2009, we chose to close dozens of accounts after three days of “fighting” in the threads where the authors had let themselves go and posted insults or intolerable remarks, and we published a warning stating that we would no longer accept this type of misconduct. We informed our readers that conflicting viewpoints were still possible, providing they respected one another. This “cleansing” of the comments was effective, and for the rest of the war our threads were more respectful.

Like most sites, we developed a comments charter, which applies to everyone. In addition, we have developed tools allowing us to enforce it. In particular, under each comment, there is a “notify” button, which allows any reader registered with the platform to alert us when a comment is in breach of the charter, allowing us to remove it and, if necessary, send a yellow card (warning) or red card (account block) to its author, depending on the degree of seriousness. Some readers misuse the system and may report a comment just because they disagree with its author, or because they want to harm them (some members of the Internet community can hold grudges for a long time...).

Management of conflicts arising in the comments space is made even more difficult by organised attacks. With our site management tools we are able to see, for example, that we have a mass arrival of links to a platform known for its racism and xenophobia. And when such links appear, it only takes a few minutes for sickening comments to flourish, aimed at “spoiling” the thread.

Almost every year, we have to change our comments mechanisms to prevent a system overload. However, we consider it important to maintain this space of freedom, a freedom which ends, as it should, where someone else’s begins. The discussions can be lively, or controversial, but they must not become insulting and, even less, upsetting. At the same time, comments spaces are merely a reflection of how difficult it is to discuss certain topics in our polarised society, another reason not to close this door, which would be a bad sign.

After eight years of experimentation and of ups and downs we deem it possible to draw some conclusions regarding public “participation” in a platform managed by a small team of professional journalists.

1. Not everyone wants to become a journalist, but (almost) everyone wants, and sometimes needs, to express themselves: to testify, to defend an idea, to share an analysis, a thought, to talk about their passions, their obsessions, to share with others.

One must learn to accept these odd stories which are sometimes very far removed from the traditional journalism model, but which have value and are definitely enlightening.

2. The need to “supervise” contributions is indisputable if the intention is to provide readers with verified and validated information; however, this “supervision” must be carried out according to rules that are known and understood by all, transparent and as non-arbitrary as possible. This is the price to pay if one wishes to generate trust and to obtain understanding and acceptance of the decision to publish or not publish a text, or of the to and fro with the authors so as to improve a text.

3. Trust is a valuable commodity that can be lost with the slightest false move. Unlike in the past with the Old Media, ongoing discussion with one’s readers is absolutely necessary. If a mistake is made, it must be acknowledged and responsibility has to be taken for it; if an article, photo or video shocks some readers, it has to be explained, discussed, and, there again, responsibility must be taken for it; if an advertisement upsets some readers (it happened to us with an ad for nuclear energy ...), again one needs to take responsibility for one’s choices instead of waiting for the “storm” to pass.

The eruption of the reader into the production of news highly irritates some journalists, accustomed to the comfort of not having to account for their stories. That era is over.

The new era is uncomfortable, challenging, unsettling and sometimes even exhausting; but it is also exciting and rewarding once one transforms something that may initially seem a constraint into a strength. To do this, journalists must learn to be humble, and those used to the traditional exercise of the profession are not exactly prepared for that.

However, I am deeply convinced that journalism in the digital age has to adapt to this new environment: journalists must learn to maintain their values and professionalism while accepting that readers are no longer content to be passive. This is the price to pay for the production of quality news, which is essential to a democratic society, and for journalists to regain the indispensable trust of their readers. That is no easy endeavour, given the complex economic, social and political environment in Europe, but it is nonetheless a necessary one.

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Is journalism under threat? The image of journalists, as helmeted war correspondents protected by bulletproof vests and armed only with cameras and microphones, springs to mind. Physical threats are only the most visible dangers, however. Journalists and journalism itself are facing other threats such as censorship, political and economic pressure, intimidation, job insecurity and attacks on the protection of journalists' sources. Social media and digital photography mean that anyone can now publish information, which is also upsetting the ethics of journalism.

How can these threats be tackled? What is the role of the Council of Europe, the European Court of Human Rights and national governments in protecting journalists and freedom of expression?

In this book, 10 experts from different backgrounds analyse the situation from various angles. At a time when high-quality, independent journalism is more necessary than ever – and yet when the profession is facing many different challenges – they explore the issues surrounding the role of journalism in democratic societies.

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

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