

Freedom of Expression:

A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights

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Introduction

The *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention or ECHR),¹ adopted in Rome on 4 November 1950, was a groundbreaking achievement in terms of advancing human rights, not only for Europe, but for the whole world. The European Convention was not the first international proclamation of human rights. The United Nations had adopted the *Universal Declaration on Human Rights* (UDHR) two years early, in December 1948,² and the preamble to the ECHR claims as its purpose the taking of “steps for the collective enforcement of certain of the rights stated in the Universal Declaration”.

But the European Convention advanced protection for human rights in two key ways. It was the first legally binding treaty on human rights, and Contracting States are formally required to respect its provisions. Even more importantly, it established an important implementation mechanism in the form of the European Court of Human Rights (European Court or ECtHR).³ In the over 50 years of its existence,⁴ the Court has played an absolutely central role in the implementation of the human rights scheme established through the European Convention.

The European Convention protects a wide range of basic human rights and freedoms, including such staples as the right to life and liberty and to a fair trial, freedom from torture and discrimination, and the freedoms of religion, belief, association, assembly and expression. While there is no formal hierarchy among the protected rights, the European Court has repeatedly referred to the overriding importance of freedom of expression as a key underpinning of democracy, and in this way as essential for the protection of all of the rights and freedoms set out in the Convention:

¹ Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953.

² UN General Assembly Resolution 217A(III), 10 December 1948.

³ The ECHR originally established both the European Commission of Human Rights and the European Court on Human Rights but Protocol No.11 brought about major institutional reforms, including by abolishing the European Commission.

⁴ The first members of the Court were elected on 21 January 1959.

*Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual's self-fulfilment.*⁵

The Convention places an initial and primary obligation on Contracting States to protect the rights that it guarantees; Article 1 states:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

This approach is not only in conformity with the wider body of international law, but also reflects the practical realities of giving effect to human rights. As the European Court stated in one of the first cases it decided on freedom of expression:

*The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. [references omitted]*⁶

The Convention does not prescribe particular modalities by which this should be done. States are free to protect rights however they wish, in accordance with their domestic legal systems, history, political environment, cultural heritage and even economic situation. The protection must, however, be effective; the Convention establishes a minimum set of standards regarding human rights which must be secured to those within the jurisdiction of each Contracting State.

The right to freedom of expression, protected in Article 10 of the European Convention, is not an absolute right. The basic approach taken in Article 10 is to define freedom of expression very broadly, so as to include almost every form of expressive activity, and also to define very broadly what constitutes an interference with the enjoyment of this right, thus casting an extremely wide *prima facie* net of protection. Certain interferences with this right are justifiable under Article 10, so that Contracting States may legitimately impose restrictions on the right, for example to protect other rights or overriding interests, such as national security.

The test for such restrictions, set out in Article 10(2), is strict, and is applied rigorously by the Court. At the same time, the Court has recognised that Contracting States enjoy a certain margin of appreciation in deciding how they limit freedom of expression, based on factors such as their culture and history, as well as their legal system. The Court has described its role in reviewing national restrictions on freedom of expression as follows:

⁵ See, for example, *Lingens v. Austria*, 1986, *Sener v. Turkey*, 2000, *Thoma v. Luxembourg*, 2001, *Maronek v. Slovakia*, 2001, and *Dichand and others v. Austria*, 2002.

⁶ *Handyside v. the United Kingdom*, 1976, § 48.

The Contracting States have a certain margin of appreciation in assessing whether such a need [to restrict freedom of expression] exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.

The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation.... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts.⁷

In other words, the Court will limit itself to a review of whether or not the approach taken at the national level gives effect to the right to freedom of expression. It will not, as a result, enter into an interpretation of local law or assessment of how it has been applied beyond what is required for the Article 10 assessment.

The European Court first considered the right to freedom of expression in the case of *De Becker v. Belgium*, decided in 1962.⁸ In the 50 years since then, the Court has decided in the region of 1000 cases under Article 10, often along with other articles of the Convention. This impressive body of jurisprudence reflects a dynamic and evolving appreciation of the scope and nature of freedom of expression by the Court. Through the Court's jurisprudence, the Convention is a living instrument, interpreted in the light of present day conditions and understandings.

It is a fair assessment of the work of the European Court to say that the scope of protection afforded to freedom of expression has, in general, expanded during those 50 years, both due to its treatment of new freedom of expression issues and due to a more robust understanding of the nature of this right. A good example of this is the Court's approach to the right to information, or the right to access information held by public bodies. While earlier decisions declined to recognise such a right,⁹ the Court has more recently broadened its understanding of Article 10, which now encompasses this right.¹⁰ A similar progression may be seen in relation to restrictions which aim to protect religious sensitivities, with earlier cases giving more weight to such sensitivities,¹¹ while recent cases are more reflective of the

⁷ *Hertel v. Switzerland*, 1998, § 46.

⁸ The case was ultimately struck off the list as the matter had been resolved.

⁹ See, for example, *Leander v. Sweden*, 1987, and *Gaskin v. the United Kingdom*, 1989.

¹⁰ See *Társaság A Szabadságjogokért v. Hungary*, 2009.

¹¹ See, for example, *Otto-Preminger-Institut v. Austria*, 1987, and *Wingrove v. the United Kingdom*, 1996.

diversity of beliefs, including non-religious beliefs, held in society, the importance of debate about these issues and the need to allow for criticism of religious institutions.¹²

A large majority of Contracting States have incorporated the European Convention directly into their national legal system, so that it is part of their internal legal rules and in that way directly binding. In those States, the text of the Convention, or its incorporating legislation, and the case-law of the European Court may be invoked directly in national review procedures, including before the courts. Almost all European States also have overriding constitutional protection for freedom of expression. The wording of these constitutional guarantees varies and is often different from that of Article 10 of the European Convention. At the same time, State authorities, including courts, are under an obligation to interpret and apply constitutional protections, so far as is reasonable, in a manner which best gives effect to their international legal obligations. This is an important way in which concordance between national and international legal systems is promoted.

This Handbook is designed to provide guidance to a range of different stakeholders. Journalists and other media workers are a key target group, but other groups – including civil society actors, legal professionals, officials, academics, members of parliament and other national decision makers – will also be able to make use of it. The Handbook describes the way in which the European Court has interpreted Article 10 of the European Convention. It is hoped that this will be useful to the different stakeholders in terms of enabling them to take the standards developed by the Court more fully into account in their various activities.

1. General Considerations

Importance of Freedom of Expression

Article 10(1) of the European Convention guarantees the right to freedom of expression in the following terms:

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

As noted above, the Court has consistently treated freedom of expression as a fundamental human right, emphasising its importance not only directly, but also as a core underpinning of democracy and other human rights. This is reflected in the quote above about freedom of expression being an essential foundation of a

¹² See, for example, *Giniewski v. France*, 2006.

democratic society. It is also reflected in the following quotations, which the Court has often repeated:

*More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.*¹³

And:

*Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.*¹⁴

The Court has also repeatedly referred to the important role played by the media in terms of making freedom of expression a reality:

*The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”. [references omitted]*¹⁵

The Court has placed special emphasis on the protection of statements of a political nature, as well as statements on wider issues of legitimate public concern. In cases too numerous to list, the Court has upheld the right to strong and open criticism and reporting in relation to wrongdoing, political debate and statements promoting government accountability.

Scope of the Right

Article 10 protects not only individuals but also legal entities.¹⁶ Indeed, the very first case in which the Court found a breach of the right to freedom of expression, *Sunday Times (No. 1) v. the United Kingdom*, 1979, involved a newspaper publisher, *Times Newspapers Limited*, a corporate entity, as well as various individual journalists. The protections extend not only to the content of expressions but also to the means of disseminating them. As the Court has stated: “[A]ny restriction imposed on the

¹³ See, for example, *Lingens v. Austria*, 1986, § 42.

¹⁴ See, for example, *Handyside v. the United Kingdom*, 1976, § 49.

¹⁵ See, for example, *Thoma v. Luxembourg*, 2001, § 5.

¹⁶ *Autronic AG v. Switzerland*, 1990, § 47.

means [of transmission] necessarily interferes with the right to receive and impart information".¹⁷ The case-law of the Court has protected various dissemination systems including orally,¹⁸ in printed form,¹⁹ radio broadcasts,²⁰ paintings,²¹ through symbols,²² leaflets,²³ demonstrations,²⁴ films²⁵ and electronic information systems.²⁶

As noted above, the right covers not only information and ideas which are widely held but also minority viewpoints and views that many people might find offensive. Indeed, it is in relation to precisely this speech that the right is arguably most important. The right also covers commercial speech.²⁷

The actions of all organs which are part of the State apparatus engage the State's responsibility to respect Article 10, and the Court has found breaches of the right in cases involving parliament (legislation), the government, the courts, the police, regulatory and disciplinary bodies, and even State-owned media outlets.²⁸ It is up to individual States to determine how their international obligations will be met. But all State actors are bound to respect rights, regardless of internal constitutional arrangements such as division of powers in a federal State or constitutional protection for the independence of bodies such as courts and election commissions.

On the other hand, private bodies are not covered. This also applies to the private media, as reflected in the following quote:

The Court reiterates that, as a general rule, privately owned newspapers must be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals or even by their own staff reporters and journalists. The State's obligation to ensure the individual's freedom of expression does not give private citizens or organisations an unfettered right of access to the media in order to put forward opinions. [references omitted]²⁹

The Court has also held that the rights recognised by Article 10 of the Convention apply "regardless of frontiers".³⁰

¹⁷ *Autronic AG v. Switzerland*, 1990, § 47. See also *Oberschlick v. Austria* (No. 1), 1991, §57.

¹⁸ *Schöpfer v. Switzerland*, 1998.

¹⁹ *Handyside v. the United Kingdom*, 1976.

²⁰ *Groppera Radio AG and others v. Switzerland*, 1990.

²¹ *Müller and others v. Switzerland*, 1988.

²² *Fáber v. Hungary*, 2012.

²³ *Chorherr v. Austria*, 1993.

²⁴ *Piermont v. France*, 1995.

²⁵ *Otto-Preminger Institut v. Austria*, 1994.

²⁶ *Times Newspapers Ltd v. the United Kingdom* (nos. 1 and 2), 2009.

²⁷ *Casado Coca v. Spain*, 1994.

²⁸ On the last point, see *Saliyev v. Russia*, 2010.

²⁹ *Saliyev v. Russia*, 2010, § 52.

³⁰ *Ekin Association v. France*, 2001, § 62.

Article 10 protects not only the right to freedom of expression, but also the right to hold opinions. Under international law, for example as reflected in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),³¹ the right to hold opinions is absolute. It is not clear whether this is the case under Article 10 of the European Convention; indeed, it would appear not to be the case, since Article 10(2), providing for restrictions, refers to the “exercise of these freedoms”, apparently covering all of the freedoms protected in Article 10(1).

An obligation to offer an apology is arguably a breach of the right to hold an opinion, because one is being forced to say something one may not believe. In *Kazakov v. Russia*, 2008, a former military officer had been fined 500 roubles and ordered to make an apology for a statement which had been held to be defamatory. The Court accepted the fine as a sanction, but in relation to the apology it stated:

*In its view, to make someone retract his or her own opinion by acknowledging his or her own wrongness is a doubtful form of redress and does not appear to be “necessary”.*³²

The right to freedom of expression also encompasses a right not to speak. In the case of *K. v. Austria*, 1993, the applicant had been imprisoned for refusing to testify at his criminal trial. The European Commission on Human Rights found a breach of the right to freedom of expression based on the applicant’s right to remain silent, even though it had not found a breach of the right to a fair trial.³³

Key Attributes of the Right to Freedom of Expression

The vast majority of cases before the European Court involving freedom of expression involve interferences with that right. Protection of Article 10 rights in these cases is sometimes referred to as being a negative obligation of the State, because in these cases Article 10 limits what the State may do (i.e. by limiting the scope of restrictions that States may impose on the right). Examples of this are laws prohibiting certain kinds of expressions, or measures taken by State authorities to limit the right, such as dismissing a public employee or refusing to licence a newspaper.

³¹ UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

³² *Kazakov v. Russia*, 2008, § 30. In other cases, however, the Court appears to approve the idea of an apology. In *Cihan Öztürk V. Turkey*, 2009, the Court stated: “The national courts might instead have considered other sanctions, such as the issuance of an apology or publication of their judgment finding the statements to be defamatory.”

³³ *K. v. Austria*, 1993, § 11. The Court ultimately struck the case off of the list because the respondent State, Austria, had introduced reforms to its penal procedures. See also *Gillberg v. Sweden*, 2012, where the Court did not rule out a negative right to not speak, but also decided that the issue should be decided in an appropriate case.

The right to freedom of expression also, however, imposes a positive obligation on States to protect the right in certain circumstances. In the case of *Özgür Gündem v. Turkey*, 2000, the applicant newspaper was subjected to such serious attacks and harassment that it was eventually forced to close. The Court held the State directly responsible for certain acts of harassment. It also recognised that under certain circumstances, States have a positive obligation to protect freedom of expression, stating:

The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. 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 interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities. [references omitted]³⁴

The right to freedom of expression is also most commonly understood as applying to the right to impart information and ideas, i.e. to express oneself. This is certainly a very central aspect of the right. But the guarantee under Article 10 also includes the right to receive information and ideas. For example, in *Autronic AG v. Switzerland*, 1990, the issue was whether the freedom of expression rights of the applicant company had been interfered with when the State regulator had refused to authorise it to receive a broadcast transmission from abroad. The Court easily found an interference with freedom of expression through the limit on the applicant's ability to receive information and ideas. Similarly, in *Khurshid Mustafa and Tarzibachi v. Sweden*, 2008, the Court found an interference with the right to freedom of expression based on the refusal of a landlord, upheld by the Swedish courts, to allow a tenant to install a satellite dish outside of their apartment, again on the basis that this obstructed their right to receive information.

The issue in *Open Door Counselling Ltd and Dublin Well Woman Centre Ltd v. Ireland*, 1992, was the dissemination of information from the applicants to pregnant women about abortion facilities outside of Ireland. The applicants included, in addition to the two main organisations, two women, Mrs X and Ms Geraghty, who claimed that their right to receive information had been breached. The Court had no

³⁴ *Özgür Gündem v. Turkey*, 2000, § 43. See also *Appleby v. the United Kingdom*, 2003, § 39 and *Fuentes Bobo v. Spain*, 2000, § 38.

problem agreeing with that proposition, and finding a separate interference with those applicants' right to freedom of expression on that ground.³⁵

Another feature of the right to freedom of expression is its very close relationship with the right to freedom of assembly. In *Éva Molnár v. Hungary*, 2008, the Court stated:

*The Court also emphasises that one of the aims of freedom of assembly is to secure a forum for public debate and the open expression of protest. The protection of the expression of personal opinions, secured by Article 10, is one of the objectives of the freedom of peaceful assembly enshrined in Article 11.*³⁶

In *Ezelin v. France*, 1991,³⁷ the Court went even further, suggesting that the right to freedom of expression, at least in the circumstances of that case, was a “lex generalis in relation to Article 11”, which guarantees the right to freedom of assembly, and that Article 11 was, in turn, a *lex specialis*.

Unprotected Speech

As noted above, Article 10 of the European Convention permits States to impose limited restrictions on freedom of expression to protect overriding interests. Beyond this, however, there are some cases where speech does not warrant even *prima facie* protection under Article 10. Article 17 of the Convention 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.

Expressive activity falling within the scope of Article 17 is not protected by Article 10. As a result, in such cases, the Court does not need to engage in an analysis of whether the limitation on freedom of expression applied by the respondent State is justified under Article 10(2).

The Court has applied Article 17 mainly in the context of racist speech which it deems to undermine fundamental Convention values such as tolerance and non-discrimination. The case of *Pavel Ivanov v. Russia*, 2007, is typical. It involved the criminal conviction of the applicant for publishing a series of articles portraying the Jews as a source of evil in Russia. The Court rejected the application as inadmissible, stating:

³⁵ *Open Door Counselling Ltd and Dublin Well Woman Centre Ltd v. Ireland*, 1992, § 55.

³⁶ *Éva Molnár V. Hungary*, 2008, § 42. See also *Fáber v. Hungary*, 2012.

³⁷ *Ezelin v. France*, 1991, § 35.

The Court has no doubt as to the markedly anti-Semitic tenor of the applicant's views and it agrees with the assessment made by the domestic courts that he sought through his publications to incite hatred towards the Jewish people. Such a general and vehement attack on one ethnic group is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination. Consequently, the Court finds that, by reason of Article 17 of the Convention, the applicant may not benefit from the protection afforded by Article 10 of the Convention.

Although instances of racist speech involving Jews dominate the Article 17/expressive activity interface, the Court has also applied this rule to other types of racist speech. For example, *Norwood v. the United Kingdom*, 2004, involved a poster depicting the Twin Towers which were destroyed in the attacks of 11 September 2001 in flames and with the caption "Islam out of Britain – Protect the British People". The Court held that the poster did not enjoy the protection of Article 10 because it fell within the ambit of Article 17, stating:

[T]he words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant's display of the poster in his window constituted an act within the meaning of Article 17.

The Court has also applied Article 17 to cases of Holocaust denial. In the case of *Garaudy v. France*, 2003, the Court held that a book minimising the Holocaust fell within the scope of Article 17. Among other things, the Court stated:

There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth.... Such acts are incompatible with democracy and human rights because they infringe the rights of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.

Finally, Article 17 has also been used to deny the protection of Article 10 to an individual who wanted to revive the Nazi party in Germany.³⁸

Pursuant to Article 15 of the Convention, States may also derogate from rights during "war or other public emergency threatening the life of the nation", but only "to the extent strictly required by the exigencies of the situation". The extent to

³⁸ *Kühnen v. Germany*, 1988.

which Article 15 may justify restrictions on freedom of expression has not yet been fully tested.

2. Special Protection

Debate on Matters of Public Interest

The European Court has, over the years, placed enormous emphasis on the idea that restrictions on freedom of expression that affect speech on matters of public interest, understood broadly, must be subject to special justification. In this vein, the Court has stated: "There is little scope ... for restrictions on political speech or debates on questions of public interest."³⁹ This ties in closely with the statements by the Court about the importance of freedom of expression as an underpinning of democracy and of the importance of the media to the effective realisation of freedom of expression.

Statements about politicians can be restricted only when this is absolutely necessary. In its first case on defamation, the Court stated:

*The limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance.*⁴⁰

The Court has held that governments must tolerate even more criticism than politicians:

*The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion.*⁴¹

Although the earliest cases involved politicians, the Court has subsequently made it clear that enhanced protection also applies to officials. In the case of *Thoma v. Luxembourg*, 2001, the Court stated that debate about officials, acting in their official capacity, is also covered by the heightened protection standard:

*Civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals.*⁴²

³⁹ See, for example, *Dichand and others v. Austria*, 2002, § 38.

⁴⁰ *Lingens v. Austria*, 1986, § 42.

⁴¹ *Castells v. Spain*, 1992, § 46.

⁴² *Thoma v. Luxembourg*, 2001, § 47.

The Court has made it clear that this heightened degree of protection does not just apply to political debate, but extends to all matters of public interest, stating that there is “no warrant” for distinguishing between the two.⁴³

In *Cihan Öztürk v. Turkey*, 2009, the applicant had published critical remarks about the protection of an historic building, in which he himself had worked as a manager, focusing on the secretive and wasteful spending of public money in what was ultimately an unsuccessful restoration project which resulted in the partial collapse of the building. The Court came out in favour of very strong protection for statements which expose official wrongdoing or corruption:

*In this context, the Court observes that, while paragraph 2 of Article 10 of the Convention recognises that freedom of speech may be restricted in order to protect the reputation of others, defamation laws or 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.*⁴⁴

Large corporations must also tolerate a strong degree of criticism:

*[L]arge public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies.*⁴⁵

Political debate and debate about matters of current interest are the most common forms of discussion on matters of public interest that the Court has had to address, but it has also emphasised the importance of historical debate. In *Fatullayev v. Azerbaijan*, 2010, the applicant had been convicted of criminal defamation for presenting a view of the events of the Nagorno-Karabakh war which differed from the official version and which were held by the domestic courts to be defamatory of soldiers in the Azerbaijani Army and, in particular, two individual plaintiffs. The Court stated:

*[T]he Court notes that it is an integral part of freedom of expression to seek historical truth. At the same time, it is not the Court's role to arbitrate the underlying historical issues which are part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation.*⁴⁶

⁴³ *Thorgeir Thorgeirson v. Iceland*, 1992, § 64.

⁴⁴ *Cihan Öztürk v. Turkey*, 2009, § 32.

⁴⁵ *Steel and Morris v. the United Kingdom*, 2005, § 94.

⁴⁶ *Fatullayev v. Azerbaijan*, 2010, § 87.

Most of the cases cited above involve complaints brought by applicants claiming that their Article 10 rights have been breached through the imposition on them of sanctions for having disseminated defamatory statements. The concept of a “debate of general interest” has also, however, been applied in the context of complaints that the respondent State had failed to provide sufficient protection to the privacy of the applicant, in light of intrusive media reporting. In *Von Hannover v. Germany* (No. 2), 2012, the Von Hannovers complained that German law failed to provide adequate protection for their privacy, in particular by failing to grant an injunction against further publication of various photos of them. The Court provided a very detailed analysis of how to balance the rights to freedom of expression and privacy in such cases, setting out a number of factors to be taken into account, of which the first was as follows:

An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest. The definition of what constitutes a subject of general interest will depend on the circumstances of the case. The Court nevertheless considers it useful to point out that it has recognised the existence of such an interest not only where the publication concerned political issues or crimes, but also where it concerned sporting issues or performing artists. [references omitted]⁴⁷

In another case, the Court stated:

In the cases in which the Court has had to balance the protection of private life against freedom of expression, it has stressed the contribution made by photos or articles in the press to a debate of general interest.⁴⁸

The Role of the Media

Article 10 of the European Convention does not explicitly mention the press, media or journalists but, as noted above, the Court has frequently recognised the important role of the media in fostering public debate, in providing the public with access to important public interest information, and in exposing official incompetence and wrongdoing. As the Court stated in one of its earliest cases, in a quotation which has been repeated frequently since that time: “Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.”⁴⁹

As a result, the Court has been willing to grant a large measure of protection under Article 10 to media activities:

⁴⁷ *Von Hannover v. Germany* (No. 2), 2012, § 109.

⁴⁸ *Eerikäinen and others v. Finland*, 2009, § 62.

⁴⁹ *Lingens v. Austria*, 1986, § 42.

In cases concerning the press, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10, whether the restriction was proportionate to the legitimate aim pursued.⁵⁰

There are a number of different aspects to this heightened protection. First, the media are permitted, at least in some contexts, to use strong terms when reporting:

Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.⁵¹

Second, the need for the media to get the news out in a timely fashion should be taken into account when balancing this against countervailing interests:

[N]ews is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.⁵²

Finally, the media cannot necessarily be held liable for statements made by other people which they help to disseminate. While they may bear some liability, for example if they adopt or appear to endorse the statements, in general, holding them liable for the statements of others is not justifiable:

The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.⁵³

Although the Court generally used the term ‘press’ in these cases, the public interest role it identified, and the special protection under Article 10 that flows from it, is not limited to the print media. In *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, 2012, the context was a television broadcasting environment which was dominated by a duopoly of the State broadcaster and the channels of Berlusconi’s Mediaset. The case involved a refusal by the relevant ministry to grant the applicant, a television broadcaster, the frequencies which it needed to go on air, even though it had obtained a broadcasting licence. The European Court reiterated its oft stated message about the importance of the media in informing the public, adding:

The audiovisual media, such as radio and television, have a particularly important role in this respect. Because of their power to convey messages

⁵⁰ *Thoma v. Luxembourg*, 2001, § 48.

⁵¹ *Prager and Oberschlick v. Austria*, 1995, § 38.

⁵² *Observer and Guardian v. the United Kingdom*, 1991, § 60.

⁵³ *Jersild v. Denmark*, 1994, § 35.

*through sound and images, such media have a more immediate and powerful effect than print. The function of television and radio as familiar sources of entertainment in the intimacy of the listener's or viewer's home further reinforces their impact.*⁵⁴

Media freedom is not, however, absolute. It is, in particular, “subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism”.⁵⁵ In essence, this means that journalists should be protected under Article 10, as long as they act in accordance with professional standards, even if they engage in strong (and even inaccurate) criticism.

The last sentence of Article 10(1) explicitly authorises the licensing of certain means of expression, notably broadcasting, stating: “This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.” The provision was included at an advanced stage of the preparatory work on the Convention, mainly for technical reasons relating to the allocation of licences. The Court has made it clear that while this may allow for the imposition of technical constraints which do not strictly meet the standards of Article 10(2), regarding restrictions on freedom of expression, in other respects licensing systems must meet those standards:

*[T]he purpose of the third sentence of Article 10 § 1 (art. 10-1) of the Convention is to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2 (art. 10-2), for that would lead to a result contrary to the object and purpose of Article 10 (art. 10) taken as a whole.*⁵⁶

Technical advances in the more than 20 years since this judgment was adopted, in particular the further proliferation of cable and satellite distribution systems, and the advent of digital television, have substantially changed the nature of licensing systems, in particular because they have mitigated the erstwhile scarcity that characterised broadcast distribution systems. There remains, however, a need to regulate broadcasting to ensure diversity (see below).

While heightened protection for freedom of expression is most often found in cases involving the media, it is certainly not restricted to such cases. Thus, *Steel and Morris*, 2005, involved criticism of the food chain giant McDonalds by a small, unincorporated non-profit group, London Greenpeace. Rejecting claims by the

⁵⁴ *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, 2012, § 132.

⁵⁵ *Bladet Tromsø and Stensaas v. Norway*, 1999, § 65.

⁵⁶ *Groppera Radio AG and others v. Switzerland*, 1990, § 61.

respondent State that, since they were not journalists, the applicants did not deserve the higher level of protection extended to the media, the Court stated:

The Court considers, however, that in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that 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 interest such as health and the environment.⁵⁷

Társaság A Szabadságjogokért v. Hungary, 2009, involved a refusal by the Hungarian Constitutional Court to give a human rights organisation access to an application for review of certain provisions of the Criminal Code, which had been lodged with the Court by a member of parliament. The European Court stressed the role of civil society in fostering open public debate, likening it to the role of the media:

In the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The purpose of the applicant's activities can therefore be said to have been an essential element of informed public debate. The Court has repeatedly recognised civil society's important contribution to the discussion of public. The applicant is an association involved in human rights litigation with various objectives, including the protection of freedom of information. It may therefore be characterised, like the press, as a social "watchdog". [references omitted]⁵⁸

In a case involving the conviction of a Spanish senator representing the Herri Batasuna political group, which supported independence for the Basque Country, for very strong criticism of government, the Court also noted the importance of protecting the freedom of expression of elected representatives:

While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court.⁵⁹

⁵⁷ Steel and Morris v. the United Kingdom, 2005, § 89. See also Women on Waves v. Portugal, 2007, Hertel v. Switzerland, 1998, and Open Door Counselling Ltd and Dublin Well Woman Centre Ltd v. Ireland, 1992.

⁵⁸ Társaság A Szabadságjogokért v. Hungary, 2009, § 27.

⁵⁹ Castells v. Spain, 1992, § 42.

The comments in the case above were made outside of parliament, but in other cases the Court has upheld the principle of absolute privilege for speech in parliament.⁶⁰

3. Special Duties

The second paragraph of Article 10, dealing with restrictions on freedom of expression, refers to “duties and responsibilities” associated with the exercise of that right. For the most part, the Court has restricted itself to assessing the legitimacy of a restriction based on the context. At the same time, and as noted above, certain social actors – most obviously the media but also others who report in the public interest – receive special protection under Article 10 because of the importance of such protection for democracy. In other cases, the Court has had to address the question of whether it may be legitimate to impose greater limitations on the Article 10 rights of certain individuals, due to their particular positions in society.

In one of its earliest cases, *Engel and others v. the Netherlands*, 1976, the Court had to assess the legitimacy of a ban on the publication and distribution by soldiers of a paper criticising certain senior officers. There is little question that a ban on similar speech on the part of ordinary citizens would have breached the right to freedom of expression. However, the Court did not find a breach in that case, given that they were soldiers, noting:

*In these circumstances the Supreme Military Court may have had well-founded reasons for considering that they had attempted to undermine military discipline and that it was necessary for the prevention of disorder to impose the penalty inflicted.*⁶¹

In *Hadjianastassiou v. Greece*, 1992, an officer was convicted for having provided detailed technical information on a weapon to a private company in exchange for money. In holding that this was not a breach of his right to freedom of expression, the Court stated:

*It is ... necessary to take into account the special conditions attaching to military life and the specific “duties” and “responsibilities” incumbent on the members of the armed forces. The applicant, as an officer at the KETA in charge of an experimental missile programme, was bound by an obligation of discretion in relation to anything concerning the performance of his duties. [references omitted]*⁶²

⁶⁰ See, for example, *A. v. the United Kingdom*, 2003.

⁶¹ *Engel and others v. the Netherlands*, 1976, § 101.

⁶² *Hadjianastassiou v. Greece*, 1992, § 46.

The Court reached a different conclusion in the case of *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, 1994, which involved the refusal of the Austrian military authorities to circulate a certain publication to conscripts, although they did circulate other publications, and subsequently an order to one of the applicants to stop distributing the publication. In finding a breach of the right to freedom of expression even in the refusal to distribute the publication, the Court stressed that the discussion of ideas must be tolerated in the army as in other areas of democratic life. The publication did not incite soldiers to illegal behaviour or even disobedience but, rather, called on them to use legal systems for complaints to address their concerns:

None of the issues of der Igel submitted in evidence recommend disobedience or violence, or even question the usefulness of the army. Admittedly, most of the issues set out complaints, put forward proposals for reforms or encourage the readers to institute legal complaints or appeals proceedings. However, despite their often polemical tenor, it does not appear that they overstepped the bounds of what is permissible in the context of a mere discussion of ideas, which must be tolerated in the army of a democratic State just as it must be in the society that such an army serves.⁶³

The issue of special obligations of civil servants has come before the Court in a number of cases. In *Kosiek v. Germany*, 1986, the issue was whether it was legitimate to refuse to employ as a civil servant someone who was a prominent member of a left-leaning political party. The government held that the political party had “aims which were inimical to the Constitution”, and so the applicant did not meet the conditions for being a civil servant, one of which was loyalty to the constitution. In a somewhat unsatisfactory conclusion, the Court held that there was no breach of the right to freedom of expression because the government’s assessment of political activities was done simply to ascertain whether or not the applicant met the conditions for being a civil servant.

In a subsequent case, *Vogt v. Germany*, 1995, a Grand Chamber of the Court appeared to reverse its earlier position. *Vogt* was fired from the school where she taught because of doubt about her respect for the duty of political loyalty, which requires all civil servants to “dissociate themselves unequivocally from groups that attack and cast aspersions on the State and the existing constitutional system”. This was based on the fact that she was an activist in the German Communist Party, from which she had refused to dissociate herself. The Court accepted that democracies are entitled to demand loyalty from civil servants.

It also noted the absolute nature of the duty under German law, and the fact that such a duty was not imposed in other European democracies:

⁶³ *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, 1994, § 38.

[The duty] is owed equally by every civil servant, regardless of his or her function and rank. It implies that every civil servant, whatever his or her own opinion on the matter, must unambiguously renounce all groups and movements which the competent authorities hold to be inimical to the Constitution. It does not allow for distinctions between service and private life; the duty is always owed, in every context.⁶⁴

In finding a breach of the right to freedom of expression in the case before it, the Court noted that Vogt's position did not involve security, that she was not accused of seeking to influence her students based on her political ideas, that she believed that her political views were consistent with the constitution, and that the measure had an extremely severe effect on her.

An analogous issue arose in *Rekvényi v. Hungary*, 1999, also decided by a Grand Chamber of the Court. At issue in that case was a constitutional amendment which prohibited members of the armed forces, the police and the security services from joining any political party and from engaging in any political activity. The Court noted that it was legitimate in a democracy to expect the police force to be politically neutral, taking into account, "the role of the police in society". In upholding the restriction, the Court placed some emphasis on Hungary's recent political history, in which police and military staff had been expected to be members of the party that ruled the country for 40 years. Although the Court did not explicitly distinguish Vogt, it would seem that the differences in the outcomes between the two cases was primarily based on the relative proximity of Hungary's undemocratic past, as well as the nature of the civil service function in issue.⁶⁵

Special duties, albeit subject to limits, may also be legitimate for certain professions. In *Frankowicz v. Poland*, 2008, the applicant medical doctor had published research referring to a specific case and discredited the doctors who had been treating the patient in question. Under the prevailing rules, doctors were prohibited from criticising other doctors. The Court recognised the need for some degree of discretion among certain types of professionals:

[I]n the context of lawyers, members of the Bar, that the special nature of the profession practised by an applicant must be considered in assessing whether the restriction on the applicant's right answered any pressing need. Medical practitioners also enjoy a special relationship with patients based on trust, confidentiality and confidence that the former will use all available knowledge and means for ensuring the well-being of the latter. That can imply a need to preserve solidarity among members of the profession. On the other hand, the Court considers that a patient has a right to consult another doctor in order to obtain a second opinion about the

⁶⁴ *Vogt v. Germany*, 1995, § 59.

⁶⁵ See also *Otto v. Germany*, 2005.

*treatment he has received and to expect a fair and objective evaluation of his doctor's actions.*⁶⁶

However, the absolute nature of the prohibition, regardless of its political neutrality and motivation, rendered it illegitimate:

*Such a strict interpretation by the disciplinary courts of the domestic law as to ban any critical expression in the medical profession is not consonant with the right to freedom of expression (see Stambuk, cited above, § 50). This approach to the matter of expressing a critical opinion of a colleague, even in the context of the medical profession, risks discouraging medical practitioners from providing their patients with an objective view of their state of health and treatment received, which in turn could jeopardise the ultimate goal of the doctor's profession - that is to protect the health and life of patients.*⁶⁷

The case of *Wille v. Liechtenstein*, 2009, involved an assessment of the rights of judges to express themselves. In that case, the applicant, a senior judge, elaborated in a lecture on his view that the Constitutional Court was competent to decide on the "interpretation of the Constitution in case of disagreement between the Prince (government) and the Diet". In response, the Prince published an open letter stating that he would not reappoint the applicant to any public office. The Court recognised that,

*it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question.*⁶⁸

The Court also noted:

*The Court accepts that the applicant's lecture, since it dealt with matters of constitutional law and more specifically with the issue of whether one of the sovereigns of the State was subject to the jurisdiction of a constitutional court, inevitably had political implications. It considers that questions of constitutional law, by their very nature, have political implications. It cannot find, however, that this element alone should have prevented the applicant from making any statement on this matter.*⁶⁹

The Court also noted that the applicant's view was not untenable, among other things because it was widely held. Furthermore, there was no suggestion that the

⁶⁶ *Frankowicz v. Poland*, 2008, § 49. See also *Heinisch v. Germany*, 2011.

⁶⁷ *Frankowicz v. Poland*, 2008, § 51.

⁶⁸ *Wille v. Liechtenstein*, 2009, § 64.

⁶⁹ *Wille v. Liechtenstein*, 2009, § 67.

applicant's view had any bearing on his performance as a judge, or that he had otherwise acted in an objectionable way in relation to any of his duties. As a result, the restriction was not justified.⁷⁰

4. Positive Obligations

As noted above, the right to freedom of expression as guaranteed under Article 10 of the European Convention does not only place limits on the restrictions that States may put on the exercise of this right (negative guarantees), but it also, in some cases, calls on States to take positive measures to protect the right. The Court has referred most explicitly to positive obligations in the context of States' responsibility to prevent attacks on journalists and others exercising their right to freedom of expression. But there are a number of other circumstances in which the Court has, explicitly or implicitly, recognised positive obligations for States.

The Right to Information

The European Court has issued a number of decisions and judgments on the right to access information held by public bodies, or the right to information.⁷¹ In its earlier cases, the Court consistently refused to grant access to information on the basis of the right to freedom of expression, as guaranteed by Article 10. The following interpretation of the scope of Article 10 from *Leander v. Sweden*, 1987, either features directly or is referenced in all of these cases:

*[T]he right to 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. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access... nor does it embody an obligation on the Government to impart... information to the individual.*⁷²

By using the words, "in circumstances such as those of the present case", the Court did not absolutely rule out the possibility of a right to information under Article 10. However, these cases involve a wide range of different fact patterns so that, taken together, the rejection of an Article 10 right to access information in all of them seemed to represent a high barrier to such a claim.

The Court did not, however, refuse to recognise a right of access to information in all of these cases. In some of them it found that to deny access to the information in question was a violation of the right to private and/or family life, guaranteed by

⁷⁰ See also *Albayrak v. Turkey*, 2008.

⁷¹ See, for example, *Leander v. Sweden*, 1987, *Gaskin v. the United Kingdom*, 1989, *Guerra and others v. Italy*, 1998, *McGinley and Egan v. the United Kingdom*, 1998, *Odièvre v. France*, 2003, and *Sîrbu and others v. Moldova*, 2004.

⁷² *Leander v. Sweden*, 1987, § 74.

Article 8 of the Convention. In most of these cases, the Court held that there was no *interference* with the right to respect for private and family life, but that Article 8 imposed a *positive obligation* on States to ensure respect for such rights:

[A]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary interference by 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 effective respect for private or family life.⁷³

This positive obligation included granting access to information in some of these cases.

In a 2006 decision, *Sdružení Jihočeské Matky v. Czech Republic*, the Court signalled that it might be ready to change its approach. In that case, the Court held that a refusal to provide access to information did represent an interference with the right to freedom of expression as protected by Article 10. The Court ultimately rejected the application as inadmissible, because non-disclosure of the information was clearly justified under Article 10(2).

The Court completed the transition that started in *Matky* in the 2009 case of *Társaság A Szabadságjogokért v. Hungary*. Interestingly, the respondent State in the case, Hungary, did not even contest the claim that Article 10 requires States to provide access to information held by public authorities, and instead limited itself to arguing that withholding the information was a justifiable restriction on freedom of expression in accordance with Article 10(2).

The case involved a request by an NGO for access to an application by a member of parliament for a review by the Constitutional Court of certain amendments to the Criminal Code. The Constitutional Court refused to provide the information, and when the refusal was challenged in the domestic courts, it was upheld, even though by that time the Constitutional Court had decided the matter and published a summary of the application along with its assessment of the provisions.

The reasoning in the case was somewhat indirect in terms of recognising a right to information. The Court advanced a theory to the effect that the State's monopoly over this information meant that to refuse to disclose it to an NGO working in the public interest was analogous to imposing indirect prior censorship on the media, specifically in the form of obstacles to the ability of the press to gather information. The Court stated:

It considers that the present case essentially concerns an interference – by virtue of the censorial power of an information monopoly – with the

⁷³ *Guerra and others v. Italy*, 1998, § 58.

*exercise of the functions of a social watchdog, like the press, rather than a denial of a general right of access to official documents.*⁷⁴

In a subsequent case, *Kenedi v. Hungary*, 2009, the Court dealt only briefly with the issue of whether Article 10 guarantees a right to access information held by public authorities in deciding that there had been an interference, suggesting it has moved to accept that freedom of expression does encompass the right to information:

*The Court emphasises 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.*⁷⁵

It remains to be seen how the Court will develop its jurisprudence on the right to information. However, this is clearly one of the positive State obligations under Article 10, although the Court has not used this term when deciding these cases. Giving proper effect to this right requires States to adopt dedicated right to information legislation, and to put in place internal systems to ensure the timely provision of information to requesters, as well as the proactive disclosure of information.

Protection of Sources

The right of journalists to protect their confidential sources of information is an important aspect of the right to freedom of expression. Although the case-law of the Court on this does not refer to positive obligations, in practice States need to put in place special rules and procedures to protect source confidentiality, so it can properly be described as a positive obligation.

The leading European Court case on protection of sources is *Goodwin v. the United Kingdom*, 1996. In 1989, Goodwin attempted to publish a story based on confidential information he received from a reliable source concerning the financial difficulties of a particular company. The information was derived from the company's confidential financial plan, and was presumably stolen. Fearing a loss of confidence on the part of the company's creditors, suppliers and customers, the company obtained an injunction restraining publication. The order also required Goodwin to disclose the anonymous source to the company, "in the interests of justice", based on the stated interest of the company in bringing legal action against the source.

Before the European Court, Goodwin argued that a journalist should only be forced to reveal confidential sources in "exceptional" circumstances where "vital" public or individual interests were at stake. In that case, since the company already had an injunction preventing publication, Goodwin argued that no such circumstances

⁷⁴ *Társaság A Szabadságjogokért v. Hungary*, 2009, § 36.

⁷⁵ *Kenedi v. Hungary*, 2009, § 43.

existed. The Court essentially agreed with Goodwin, focusing on the importance of affording safeguards to the press generally and to journalists' sources in particular:

Protection of journalistic sources is one of the basic conditions for press freedom.... 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.⁷⁶

Subsequent case-law has extended this protection beyond direct orders to reveal sources to include searches and confiscation of material by the police which may lead to the identification of a confidential source. At issue in *Roemen and Schmit v. Luxembourg*, 2003, was an article about a minister based on a leaked confidential document. As part of the investigation into the leak, police searched the applicants' homes and workplaces, but found no evidence regarding the alleged source. The Court had no problem finding an interference with the right to freedom of expression, as the searches were undertaken specifically to identify the source. In deciding that the interference was not justified, the Court noted, among other things, that other possible avenues for finding the information had not been exhausted. The Court also noted the particular severity of this sort of action:

The Court considers that, even if unproductive, a search conducted with a view to uncover a journalist's source is a more drastic measure than an order to divulge the source's identity. This is because investigators who raid a journalist's workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist.⁷⁷

In *Nordisk Film & TV A/S v. Denmark*, 2005, the applicant had made undercover recordings about paedophiles in Denmark to which the police sought access to assist them in the prosecution of an individual ("Mogens") whom they had charged with paedophilia. The Danish courts granted the order, but limited its scope to material directly linked to the prosecution of "Mogens". The European Court distinguished this case from its previous cases, noting that in this case there had been no cooperation from "Mogens", who had been filmed surreptitiously. As a result, the fact that the applicant might subsequently be required to provide the information to

⁷⁶ *Goodwin v. the United Kingdom*, 1996, § 39.

⁷⁷ *Roemen and Schmit v. Luxembourg*, 2003, § 57. See also *Ernst and others v. Belgium*, 2003, and *Tillak v. Belgium*, 2007.

the police would not have affected his ability to collect the information in the first place, unlike with confidential sources. The Court accepted that there may be cases where an activity like this would engage the protection of Article 10, but this was not such a case and the application was hence deemed inadmissible.

Voskuil v. the Netherlands, 2007, is another case on source disclosure. In that case, the applicant had been given information by a confidential police source that cast doubt on official police claims about how an investigation, which led to criminal convictions being entered against third parties, had been conducted. The Dutch courts ordered the applicant to reveal his source, on the basis that the interests of justice, and of the third party, as well as the State's interest in determining whether or not the allegations were true, outweighed the freedom of expression interest in the case. The European Court dismissed the State's claim on the basis of the interests of justice, noting that the State had managed to convict the accused (but seemingly glossing over the possibility that the truth might have invalidated the convictions). Regarding the other interest raised in the case, the Court stated:

On the one hand the Court understands the Government's concern about the possible effects of any suggestion of foul play on the part of public authority, especially if it is false. On the other hand, however, it takes the view that in a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public have the right to be informed.⁷⁸

A recent case on protection of sources, decided by a Grand Chamber of the Court, is Sanoma Uitgevers B.V. v. the Netherlands, 2010. In that case, journalists working for the applicant company had taken pictures of an illegal street race, allegedly on an undertaking that they would not reveal the identities of any of the participants. The police managed, under threat of conducting a search, to obtain a CD-ROM from the applicant containing the pictures. The CD-ROM was later returned, but a request to have all copies of the CD-ROM remaining in police hands destroyed, and for the evidence not to be used, was rejected. The European Court found that even though there was no search, the case involved an activity which was analogous to mandatory source disclosure, so there had been an interference with freedom of expression. The case was ultimately decided on the ground that the approach used by the police to obtain the CD-ROM did not allow for an independent assessment of whether or not the disclosure should have been made, in breach of the requirement that restrictions on freedom of expression must be prescribed by law.

Overall, the jurisprudence demonstrates a very strong pattern of respect on the part of the Court for the right of journalists to protect their confidential sources of information.

⁷⁸ Voskuil v. the Netherlands, 2007, § 70.

Media Diversity

The European Court has often recognised the importance of media diversity to satisfying the public's right to receive information, which depends on the public having access to a range of information and ideas. As the Court stated in *Informationsverein Lentia and others v. Austria*, 1993:

The Court has frequently stressed 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. 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. [references omitted]⁷⁹

More recently, in *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, 2012, a Grand Chamber of the Court elaborated in more detail on this idea:

129. The Court considers it appropriate at the outset to recapitulate the general principles established in its case-law concerning pluralism in the audiovisual media. As it has often noted, there can be no democracy without pluralism. Democracy thrives on freedom of expression. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.

130. In this connection, the Court observes that to ensure 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 audiovisual market. It is necessary in 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.

133. A situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. This is true also where the position of dominance is held by a State or public broadcaster. Thus, the Court has held that, because of its restrictive nature,

⁷⁹ *Informationsverein Lentia and others v. Austria*, 1993, § 38.

a licensing regime which allows the public broadcaster a monopoly over the available frequencies cannot be justified unless it can be demonstrated that there is a pressing need for it.

134. The Court observes that in such a sensitive sector as the audiovisual 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 (see paragraph 130 above). This is especially desirable when, as in the present case, the national audiovisual system is characterised by a duopoly.

With this in mind, it should be noted that in Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content (see paragraph 72 above) the Committee of Ministers reaffirmed that “in order to protect and actively promote the pluralistic expressions of ideas and opinions as well as cultural diversity, member states should adapt the existing regulatory frameworks, particularly with regard to media ownership, and adopt any regulatory and financial measures called for in order to guarantee media transparency and structural pluralism as well as diversity of the content distributed”. [references omitted]

That case was motivated by a refusal on the part of the government to grant a licensed broadcaster the frequencies it needed to go on air with the result that it could not do so for a period of over ten years. The wider context was a television market which was dominated by the State broadcaster and the channels of Berlusconi's Mediaset.

This principle of diversity was also elaborated on in the case of *Manole and others v. Moldova*, 2009:

The Court considers that, in the field of audiovisual broadcasting, the above principles place a duty on the State to ensure, first, 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, secondly, that journalists and other professionals working in the audiovisual media are not prevented from imparting this information and comment. The choice of the means by which to achieve these aims must vary according to local conditions and, therefore, falls within the State's margin of appreciation.⁸⁰

In discharging its positive obligation to promote pluralism and diversity in the media, the State must establish certain regulatory systems, such as creating a licensing regime for broadcasters and ensuring that diversity is a key criterion for allocating broadcasting licences. Viewed in one way, this can be seen as imposing

⁸⁰ *Manole and others v. Moldova*, 2009, § 100.

limits on the freedom of broadcasters – aspiring or existing – to impart information and ideas. To this extent, pursuing diversity objectives may juxtapose the freedom of listeners and viewers to receive information and ideas and the rights of owners to impart them. It is important to note that this is a question of balancing two different aspects of the right to freedom of expression, one positive and one negative, and not a question of assessing a restriction on that right. In such cases, it is not appropriate to apply the three-part test for restrictions, as the ‘direction’ in which this were applied, and hence the outcome of the case, would depend on who had brought the case (i.e. the listeners and viewers or the owners). This would clearly be inappropriate.

At issue in the *Informationsverein Lentia and others v. Austria*, 1993, case was Austria’s claim that the public broadcasting monopoly which remained in place in the country was not a restriction on freedom of expression contrary to Article 10. The Court quickly dismissed the government’s claim that the third sentence of Article 10, on licensing, granted it complete freedom to establish a public monopoly as a system of licensing, making it clear that the licensing system itself would need to pass muster as a restriction on freedom of expression. Responding to the State’s claim that a public monopoly was the only way to promote important values in broadcasting, including “objectivity and impartiality of reporting, the diversity of opinions, balanced programming and the independence of persons and bodies responsible for programmes”, the Court stressed the importance of diversity (in the quote mentioned above) and then stated:

Of all the means of ensuring that these values are respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station.⁸¹

The consequences of this were that Austria had to put in place a system for the licensing of private broadcasters.⁸²

The European Court has decided just a few cases touching on the nature of the licensing system for private broadcasters. In the *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, 2012, case, noted above, the Court set out in some detail the guiding principles which should govern the promotion of diversity. However, it actually decided the case on the rather technical grounds that the law in this area was not sufficiently precise to enable the applicant to foresee “the point at which it might be allocated the frequencies and be able to start performing the activity for which it had been granted a licence”.⁸³

⁸¹ *Informationsverein Lentia and others v. Austria*, 1993, § 39.

⁸² See also *Radio ABC v. Austria*, 1997, and *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, 2000.

⁸³ *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, 2012, § 154.

In the case of *Glas Nadezhda Eood and Elenkov v. Bulgaria*, 2007, the applicant made an application for a local radio licence in response to a call for applications from the broadcast regulator. Its application was refused, without reasons being provided, although the decision did reference the criteria which the regulator deemed the application did not “correspond to”; points were allocated against these criteria when the regulator assessed licence applications. The European Court held that the criteria themselves passed the prescribed by law part of the test. However, because the hearings were held in secret, and the applicant had not been given reasons for the rejection of its licence application, the process failed to provide “sufficient guarantees against arbitrariness” and hence did not meet the prescribed by law standard.⁸⁴

At issue in the case of *Manole and others v. Moldova*, 2009, was the independence of the public broadcaster, and complaints by the applicants that they had been dismissed from or demoted in their positions at the public broadcaster due to political interference. The Court considered that it was not necessarily mandatory for States to create public broadcasters, but:

*Where a State does decide to create a public broadcasting system, it follows from the principles outlined above that domestic law and practice must guarantee that the system provides a pluralistic service. Particularly where private stations are still too weak to offer a genuine alternative and the public or State organisation is therefore the sole or the dominant broadcaster within a country or region, it is indispensable for the proper functioning of democracy that it transmits impartial, independent and balanced news, information and comment and in addition provides a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed.*⁸⁵

The Court also referred extensively to the Council of Europe’s Recommendation No. R(96)10 on “The Guarantee of the Independence of Public Service Broadcasting” which, as the name implies, sets out principles to protect the independence of public broadcasters. The Court concluded:

*In summary, therefore, in the light in particular of the virtual monopoly enjoyed by TRM over audiovisual broadcasting in Moldova, the Court finds that the State authorities failed to comply with their positive obligation. The legislative framework throughout the period in question was flawed, in that it did not provide sufficient safeguards against the control of TRM’s senior management, and thus its editorial policy, by the political organ of the Government.*⁸⁶

⁸⁴ See also *Meltex Ltd and Mesrop Movsesyan v. Armenia*, 2008.

⁸⁵ *Manole and others v. Moldova*, 2009, § 101.

⁸⁶ *Manole and others v. Moldova*, 2009, § 111.

This case has very important implications for public service broadcasting, inasmuch as it affirms the claim, often made by authoritative sources, that they are required by human rights law to be independent of government.

Attacks

In a number of cases, the European Court has held that States have a positive obligation to provide protection to those who are at risk of physical and other attacks for exercising their right to freedom of expression. The leading case on this is *Özgür Gündem v. Turkey*, 2000. In that case, despite numerous very serious attacks on the applicant newspaper, and its constant pleas to the State for protection, the Court could only identify one instance in which such protection was forthcoming. Various individual prosecutors had taken steps to investigate some of the attacks, but the Court held that that was not sufficient, which was clearly correct as the attacks had ultimately forced the newspaper to close. The Court also rejected the State's justification of its actions based on its claim that the newspaper supported terrorism:

The Court has noted the Government's submissions concerning its strongly held conviction that Özgür Gündem and its staff supported the PKK and acted as its propaganda tool. This does not, even if true, provide a justification for failing to take steps effectively to investigate and, where necessary, provide protection against unlawful acts involving violence.⁸⁷

Another case, *Dink v. Turkey*, 2010, involved the murder of the famous author, Fırat Dink, known under the pen name of Hrant Dink, at a time when proceedings against him for denigration of Turkishness, originally requested by a nationalist group, were ongoing in the courts. The Court held that the ongoing proceedings against Dink, combined with the lack of protection afforded to him, represented an interference with his right to freedom of expression.⁸⁸

Other Positive Obligations

The Court has recognised a number of other positive obligations under Article 10. In the case of *Steel and Morris v. the United Kingdom*, 2005, the applicants had engaged in trenchant criticism of the food chain giant McDonalds, which had successfully sued them for defamation in the British courts. The European Court did not go so far as to rule out defamation cases by large companies:

The Court further does not consider that the fact that the plaintiff in the present case was a large multinational company should in principle deprive it of a right to defend itself against defamatory allegations or entail

⁸⁷ *Özgür Gündem v. Turkey*, 2000, § 45.

⁸⁸ *Dink v. Turkey*, 2010, § 108.

*that the applicants should not have been required to prove the truth of the statements made.*⁸⁹

However, if such remedies were provided, there was a need to protect space for public debate about the operations of these companies. Given the complexity of defamation law in the United Kingdom, this effectively required the State to provide legal aid to the applicants:

*If, however, a State decides to provide such a remedy 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.... The inequality of arms and the difficulties under which the applicants laboured are also significant in assessing the proportionality of the interference under Article 10.... The lack of procedural fairness and equality therefore gave rise to a breach of Article 10 in the present case.*⁹⁰

In *Fuentes Bobo v. Spain*, 2000, the Court was confronted with a situation where a television programme director had been dismissed from his job for having made remarks considered to be offensive to some of the managers of the television station. The government argued that this was a matter of private law as between the applicant and the television station. The Court rejected that argument, noting that there could be positive obligations on the State to provide protection to rights as between private parties, and holding that the dismissal was an interference with freedom of expression within the meaning of Article 10 of the European Convention.

The Court has also refused claims of positive obligations. In *Appleby v. the United Kingdom*, 2003, the applicants argued that the State had a positive obligation to protect their right to distribute leaflets in a private shopping mall. The Court declined to find such an obligation, noting that they could still approach individual store owners to distribute leaflets in their shops and that 3,200 people had submitted a petition supporting their case, suggesting that they had been quite effective in getting their message out.⁹¹

5. Restrictions – General Considerations

The general approach to protecting freedom of expression under the European Convention is to provide very wide protection for all expressive activities. The Court has also forged a very broad understanding of what constitutes an interference with freedom of expression. The approach of the Court has essentially been to find any

⁸⁹ *Steel and Morris v. the United Kingdom*, 2005, § 94.

⁹⁰ *Steel and Morris v. the United Kingdom*, 2005, § 95.

⁹¹ *Appleby v. the United Kingdom*, 2003, § 48.

State activity which has the effect, directly or indirectly, of limiting, impeding or burdening an expressive activity as an interference.

In line with this approach, the Court has found an interference not only where a law establishes civil or criminal limits on what may be said, but also in cases involving disciplinary sanctions,⁹² the banning of books⁹³ or a refusal to authorise videos for commercial release,⁹⁴ the imposition of injunctions on publication,⁹⁵ the dismissal of an employee⁹⁶ and even the Head of State making a statement that he would not appoint an individual,⁹⁷ the expulsion of someone from a territory,⁹⁸ a refusal to licence a broadcaster⁹⁹ or to issue it with frequencies, once licensed,¹⁰⁰ a refusal to protect journalists' confidential sources¹⁰¹ or the conduct of a search which might lead to the identification of such sources,¹⁰² a refusal to grant nationality,¹⁰³ a refusal to allow a protest vessel into territorial waters,¹⁰⁴ and even, in one case, failing to enable a journalist to gain access to Davos during the World Economic Forum.¹⁰⁵

At the same time, Article 10 does permit limited restrictions on freedom of expression to protect certain overriding interests. Article 10(2) of the Convention sets out the parameters for legitimate restrictions:

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(2) authorises States to impose restrictions in accordance with its provisions, but it does not require them to. States therefore have a measure of discretion as to whether and to what extent they impose restrictions to protect the various interests listed in Article 10(2). Although there is a measure of

⁹² Engel and others v. the Netherlands, 1976.

⁹³ Handyside v. the United Kingdom, 1976.

⁹⁴ Wingrove v. the United Kingdom, 1996.

⁹⁵ Sunday Times (No. 1) v. the United Kingdom, 1979.

⁹⁶ Vogt v. Germany, 1995.

⁹⁷ Wille v. Liechtenstein, 1999.

⁹⁸ Piermont v. France, 1995.

⁹⁹ Informationsverein Lentia and others v. Austria, 1993.

¹⁰⁰ Centro Europa 7 S.R.L. and Di Stefano v. Italy, 2012.

¹⁰¹ Goodwin v. the United Kingdom, 1996.

¹⁰² Roemen and Schmit v. Luxembourg, 2003.

¹⁰³ Petropavlovskis v. Latvia, 2008.

¹⁰⁴ Women on Waves and others v. Portugal, 2009.

¹⁰⁵ Gsell v. Switzerland, 2009.

commonality, in practice, among European States in this area, there are also significant differences, especially in areas like the protection of morals. States also enjoy a measure of prosecutorial discretion in deciding whether and when to apply national legal restrictions on freedom of expression. In many countries, for example, the authorities tend to ignore expressions of hate speech, on the basis that prosecuting those responsible would actually do more harm than good, for example by providing a wider platform for the dissemination of racist speech.

Article 10(2) establishes a three-part test for assessing restrictions on freedom of expression, as follows:

1. The restriction must be prescribed by law.
2. The restriction must protect one of the interests listed in Article 10(2).
3. The restriction must be “necessary in a democratic society” to protect that interest.

The Court has made frequent statements about the need to interpret these rules narrowly, in the sense of permitting only clearly justifiable restrictions on freedom of expression, often stating:

Freedom of expression, as enshrined in Article 10 (art. 10), is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.¹⁰⁶

Pursuant to the three-part test, the State must show that any restriction on freedom of expression meets all three parts of the test. Failure on one part invalidates the restriction. On many occasions, the Court has skipped over certain parts of the test, and only focused on the part which a given restriction most clearly fails to meet. In other cases, the Court, having found a failure to meet one part of the test, declines to consider the following parts, on the grounds that this is unnecessary.

Prescribed by Law

The requirement that restrictions on freedom of expression be prescribed by law reflects the importance of the right and the idea that only the legislature, as a democratically elected body, should have the power to put in place measures that limit this fundamental right. Primary legislation clearly satisfies the rule, and the Court has held that secondary legislation which is authorised by primary legislation meets the required standard. The Court has recognised that rules of international law may also be relied on to satisfy this part of the test.¹⁰⁷

In its very early jurisprudence, the Court recognised that common law rules could also satisfy the prescribed by law requirement. The Court was clearly conscious of the serious implications of not recognising this, noting that, for countries that rely

¹⁰⁶ *Observer and Guardian v. the United Kingdom*, 1991, § 59.

¹⁰⁷ *Groppera Radio AG and others v. Switzerland*, 1990, § 68.

on the common law, non-recognition would “strike at the very roots of that State’s legal system”.¹⁰⁸ In *Glas Nadezhda Eood and Elenkov v. Bulgaria*, 2007, the law complained of consisted of a set of criteria for assessing competing broadcast licence applications, which had been put in place by the broadcast regulator, and against which points were awarded. The system was, however, provided for by primary legislation, and the Court did not question that this type of instrument qualified as a law.

The Court summed up its jurisprudence on this matter neatly in *Sanoma Uitgevers B.V. v. the Netherlands*, 2010, as follows:

[A]s regards the words “in accordance with the law” and “prescribed by law” which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term “law” in its “substantive” sense, not its “formal” one; it has included both “written law”, encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. “Law” must be understood to include both statutory law and judge-made “law”. In sum, the “law” is the provision in force as the competent courts have interpreted it. [references omitted]¹⁰⁹

The prescribed by law criterion has implications beyond simply requiring that a restriction be set out in law. The law must also meet certain qualitative standards. These have been developed through the jurisprudence of the Court and were encapsulated well in the recent Grand Chamber decision in *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, 2012, as follows:

141. One of the requirements flowing from the expression “prescribed by law” is foreseeability. Thus, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable citizens to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Such consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice

142. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable

¹⁰⁸ *Sunday Times (No. 1) v. the United Kingdom*, 1979, § 47.

¹⁰⁹ *Sanoma Uitgevers B.V. v. the Netherlands*, 2010, § 83.

degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed.

143. In particular, a rule is “foreseeable” when it affords a measure of protection against arbitrary interferences by the public authorities and against the extensive application of a restriction to any party’s detriment. [references omitted]

In the *Sunday Times (No. 1) v. the United Kingdom*, 1979, the Court followed its general conclusion that common law rules could in principle satisfy the prescribed by law part of the test by assessing whether, in fact, the rules which were applicable in that case did meet the foreseeability criterion. It held that they did, in particular because they had been the subject of relatively extensive judicial interpretation.¹¹⁰

The case of *Rekvényi v. Hungary*, 1999, involved a challenge to constitutional provisions which provided that the armed forces, police officers and certain other security forces shall “not engage in any political activity”. The European Court held that: “Because of the general nature of constitutional provisions, the level of precision required of them may be lower than for other legislation.”¹¹¹ Given that there was a more detailed domestic legal framework for interpreting these provisions, they met the requirement of being prescribed by law.

In *Gaweda v. Poland*, 2002, the national courts had refused to register two periodicals, on the basis that their titles were “in conflict with reality”. The two titles were *The Social and Political Monthly – A European Moral Tribune* and *Germany – a Thousand-year-old Enemy of Poland*. They relied on a provision in the law which prohibited registration if this was inconsistent with the regulations in force or “with the real state of affairs”. The European Court noted that the national courts,

have inferred from the notion of “in conflict with reality” ... a power to refuse registration where they consider that a title does not satisfy the test of truth, i.e. that the proposed titles of the periodicals convey an essentially false picture.... [This] is, firstly, inappropriate from the standpoint of freedom of the press. A title of a periodical is not a statement as such, since its function essentially is to identify the given periodical on the press market for its actual and prospective readers. Secondly, such interpretation would require a legislative provision which clearly authorised the courts to do so. In short, the interpretation given by the courts induced new criteria, which could not be foreseen on the basis of the text specifying situations in which the registration of a title can be refused.¹¹²

¹¹⁰ *Sunday Times (No. 1) v. the United Kingdom*, 1979, §§ 50-53.

¹¹¹ *Rekvényi v. Hungary*, 1999, § 34.

¹¹² *Gaweda v. Poland*, 2002, § 43.

As a result, the restriction did not meet the prescribed by law part of the test and was hence not legitimate (the Court did not go on to consider the other parts of the test in that case).

The need to constrain the discretion of officials in the application of the law, hinted at in the above quotation from *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, 2012, is based on fairly obvious considerations. In particular, if officials have too much discretion in applying the law, the rules will not be foreseeable. Furthermore, providing them with undue discretion essentially grants officials a quasi-legislative competence, which is not appropriate when restricting freedom of expression. In *Glas Nadezhda Eood and Elenkov v. Bulgaria*, 2007, the European Court elaborated in some detail on this aspect of the prescribed by law part of the test:

Domestic law must also afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise. It must furthermore provide adequate and effective safeguards against abuse, which may in certain cases include procedures for effective scrutiny by the courts. [references omitted]¹¹³

In that case, the Court held that although some of the criteria used by the regulator to assess competing broadcast licence applications were “highly subjective”, they were sufficiently accessible and precise to qualify as prescribed by law, given that it was necessary to allow some discretion to the regulator in this area. However, a key tool for preventing arbitrary application of these rules was the possibility of effective review by the national courts of the exercise by the regulator of its discretion. Given that the regulator had failed to provide the applicant access to the decision-making process, which had been conducted in secret, or substantive reasons as to why its application for a licence had not been successful, the possibility of effective review had not been sufficiently enabled, and so the prescribed by law part of the test was not met.

In *Sanoma Uitgevers B.V. v. the Netherlands*, 2010, the issue was the seizure by the police of material that had an analogous effect to exposing a confidential source of the applicant media group. The European Court focused on the need for an independent review to be conducted before such a seizure was authorised:

The Court is well aware that it may be impracticable for the prosecuting authorities to state elaborate reasons for urgent orders or requests. In such situations an independent review carried out at the very least prior to the

¹¹³ *Glas Nadezhda Eood and Elenkov v. Bulgaria*, 2007, § 46.

*access and use of obtained materials should be sufficient to determine whether any issue of confidentiality arises, and if so, whether in the particular circumstances of the case the public interest invoked by the investigating or prosecuting authorities outweighs the general public interest of source protection. It is clear, in the Court's view, that the exercise of any independent review that only takes place subsequently to the handing over of material capable of revealing such sources would undermine the very essence of the right to confidentiality.*¹¹⁴

In that case, the prosecutor had in fact asked for a judicial opinion on the matter. However, this procedure was discretionary and the judge did not have the power to prevent the seizure because his or her opinion was merely advisory. In such a situation, the Court held that the rules failed to meet the standard of prescribed by law.

Legitimate Aims

The second part of the test for restrictions on freedom of expression is that the restriction must pursue a legitimate aim or interest. It is clear, both from the wording of Article 10(2) and the jurisprudence of the Court, that the list of interests found in Article 10(2) is exclusive, in the sense that no others are considered appropriate.

The specific interests listed in Article 10(2) can be broken down as follows:

- national security and territorial integrity;
- public safety and the prevention of disorder or crime;
- the protection of health;
- the protection of morals;
- the protection of the reputation or rights of others;
- preventing the disclosure of information received in confidence; and
- maintaining the authority and impartiality of the judiciary.

It may be noted that this is an extremely broad list of interests; the rights of others, for example, covers a vast range of potential interests. Furthermore, the Court has tended to interpret the scope of these interests broadly. For example, in *Engel and others v. the Netherlands*, 1976, the Court held that the concept of “public order” covered a range of situations:

The concept of ‘order’ refers not only to public order or ‘ordre public’ ... [I]t also covers the order that must prevail within the confines of a specific special group. This is so, for example, when, as in the case of armed forces,

¹¹⁴ *Sanoma Uitgevers B.V. v. the Netherlands*, 2010, § 91.

*disorder in that group can have repercussions on order in society as a whole.*¹¹⁵

The Court has decided very few Article 10 cases on the basis of this part of the test, which has arguably not fulfilled its intended role as a means of limiting the scope of permissible restrictions on freedom of expression. An example of this is the case of *Casado Coca v. Spain*, 1994, which involved a prohibition on lawyers posting advertisements for their work. In assessing whether the restriction served a legitimate aim, the Court stated:

*The Court does not have any reason to doubt that the Bar rules complained of were designed to protect the interests of the public while ensuring respect for members of the Bar. In this connection, the special nature of the profession practised by members of the Bar must be considered; in their capacity as officers of the court they benefit from an exclusive right of audience and immunity from legal process in respect of their oral presentation of cases in court, but their conduct must be discreet, honest and dignified.*¹¹⁶

The Court refers to various interests but fails either to link those interests properly to the issue under consideration in the case (by spelling out, for example, how advertising would undermine the honesty of lawyers) or to show how these fit into the list of aims set out in Article 10(2) (for there is a difference between “the interests of the public” and what is protected under Article 10(2), namely the “rights of others”).

Necessary in a Democratic Society

In practice, the vast majority of cases decided by the European Court are decided on the basis of the third part of the test for restrictions, namely through a consideration of whether, taking into account all of the circumstances, the restriction is necessary in a democratic society.

The Court now includes some version of the following principles governing its assessment of necessity, which derive from its very early jurisprudence, in most of its judgments:

*The Court has noted that, whilst the adjective “necessary”, within the meaning of Article 10 (2) (art. 10-2), is not synonymous with “indispensable”, neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable” and that it implies the existence of a “pressing social need”.*¹¹⁷

¹¹⁵ *Engel and others v. the Netherlands*, 1976, § 98.

¹¹⁶ *Casado Coca v. Spain*, 1994, § 46.

¹¹⁷ See, for example, *Sunday Times (No. 1) v. the United Kingdom*, 1979, § 59.

In terms of assessing whether the measures were necessary to address a 'pressing social need', the Court has frequently stated:

In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were 'relevant and sufficient' and whether the measure taken was 'proportionate to the legitimate aims pursued'.... In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10. [references omitted]¹¹⁸

The term 'relevant' is normally used to assess the extent to which the reasons logically justify the restriction, while 'sufficient' is used to assess whether they are weighty enough to do so. Finally, the requirement of 'proportionality' is used to assess whether the measures taken, and in particular the sanctions or remedy imposed, corresponds in degree to the harm done to freedom of expression.

Beyond these useful, but ultimately rather general statements, the question of what qualifies as necessary in a democratic society largely depends on all of the circumstances of the case. The detail on this is best dealt with through a consideration of the different areas of restriction on freedom of expression, as outlined below.

Margin of Appreciation

Closely related to the issue of necessity is the doctrine of a margin of appreciation developed by the European Court. As noted earlier, this doctrine allocates to States a certain degree of discretion in determining whether or not a pressing social need exists and, if so, the measures they take to address it. The Court developed this doctrine in its very early case-law. Thus, in *Handyside v. the United Kingdom*, 1976, which dealt with the moral issue of charges of obscenity, the Court stated:

Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force. [references omitted]¹¹⁹

The doctrine serves a number of purposes, including to recognise that, at least in relation to certain legitimate aims under Article 10(2), most notably morals, European States have different underlying values which justify differential treatment. The doctrine also takes into account the very different legal systems in

¹¹⁸ *Cumpăna and Mazăre v. Romania*, 2004, § 90

¹¹⁹ *Handyside v. the United Kingdom*, 1976, § 48.

European countries, as well as the different approaches to addressing issues that may be taken even in States with the same legal system.

A key rationale for the margin of appreciation is that, at least in cases which do not involve political speech, national authorities are better placed to decide on what constitutes an appropriate response to speech deemed to be harmful:

In such cases, the national authorities are in principle, by reason of their direct and continuous contact with the vital forces of their countries, in a better position than the international judge to give an opinion on the “necessity” of a “restriction” or “penalty” intended to fulfil the legitimate aims pursued thereby. [references omitted]¹²⁰

The challenge for the Court has been to strike the right balance between its role in ensuring that States meet their Article 10 obligations, while taking local considerations into account:

Nevertheless, Article 10 para. 2 (art. 10-2) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States’ engagements (Article 19) (art. 19), is empowered to give the final ruling on whether a “restriction” or “penalty” is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision.¹²¹

And:

This does not mean that the Court’s supervision is limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith. Even a Contracting State so acting remains subject to the Court’s control as regards the compatibility of its conduct with the engagements it has undertaken under the Convention.¹²²

The Court decided very early on that the scope of the margin of appreciation is larger in some areas and smaller in others. Thus, *Sunday Times (No. 1) v. the United Kingdom*, 1979, involving proceedings for contempt of court, was based on a newspaper having reported on the issue of thalidomide babies while the matter was being litigated before the British courts. The European Court stated:

*Again, the scope of the domestic power of appreciation is not identical as regards each of the aims listed in Article 10 (2) (art. 10-2). The *Handyside* case concerned the “protection of morals”. The view taken by the*

¹²⁰ *Mouvement raëlien suisse v. Switzerland*, 2012, § 63.

¹²¹ *Handyside v. the United Kingdom*, 1976, § 49.

¹²² *Sunday Times (No. 1) v. the United Kingdom*, 1979, § 59.

Contracting States of the “requirements of morals”, observed the Court, “varies from time to time and from place to place, especially in our era”, and “State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements” (p. 22, para. 48). Precisely the same cannot be said of the far more objective notion of the “authority” of the judiciary. The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area. This is reflected in a number of provisions of the Convention, including Article 6 (art. 6), which have no equivalent as far as “morals” are concerned. Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation.¹²³

The Court has consistently granted States a wider margin of appreciation in the areas of protection of morals and religious sensitivities. Thus, in *Wingrove v. the United Kingdom*, 1996, the Court upheld a ban on a short video that was deemed to offend Christians, stating: “[A] wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.”¹²⁴ The Court has also found a wider margin of appreciation in relation to commercial speech. The case of *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, 1989, involved an injunction preventing the applicant trade magazine from repeating its allegations against a certain company. In upholding the ban, the Court referred to the margin of appreciation as follows:

Such a margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition.¹²⁵

Finally, the Court has recognised that States must have some flexibility to assess the level of damages in cases involving speech that may legitimately be sanctioned in accordance with Article 10:

The competent national authorities are better placed than the European Court to assess the matter and should therefore enjoy a wide margin of appreciation in this respect.¹²⁶

On the other hand, the Court has kept the margin of appreciation circumscribed in cases like *Sunday Times (No. 1) v. the United Kingdom*, 1979, which involved discussion on matters of public interest. In the case of *Giniewski v. France*, 2006, the Court was faced with a claim of defamation against a group of people based on their

¹²³ *Sunday Times (No. 1) v. the United Kingdom*, 1979, § 59.

¹²⁴ *Wingrove v. the United Kingdom*, 1996, § 58. See also *Otto-Preminger-Institut v. Austria*, 1994.

¹²⁵ *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, 1989, § 33.

¹²⁶ *Tolstoy Miloslavsky v. the United Kingdom*, 1995, § 48.

religion. The European Court accepted that the case dealt with religious sensitivities, and was hence subject to a wider margin of appreciation. At the same time:

By considering the detrimental effects of a particular doctrine, the article in question contributed to a discussion of the various possible reasons behind the extermination of the Jews in Europe, a question of indisputable public interest in a democratic society. In such matters, restrictions on freedom of expression are to be strictly construed. Although the issue raised in the present case concerns a doctrine upheld by the Catholic Church, and hence a religious matter, an analysis of the article in question shows that it does not contain attacks on religious beliefs as such, but a view which the applicant wishes to express as a journalist and historian. In that connection, the Court considers it essential in a democratic society that a debate on the causes of acts of particular gravity amounting to crimes against humanity should be able to take place freely.¹²⁷

In other words, in that case, the need for open debate about matters of public interest dominated religious sensitivities in terms of assessing the scope of the margin of appreciation.

An interesting discussion about the scope of the margin of appreciation is found in *TV Vest As & Rogaland Pensjonistparti v. Norway*, 2008, which involved a ban on paid political television advertisements, an issue on which there is significant divergence in practice among Europe States. Because it involved a political advertisement, the Court held that it was not covered by the wider margin that normally applies in commercial speech cases. The Court rejected the government's claim that it enjoyed a margin of appreciation in deciding how to balance freedom of expression and the proper conduct of elections, noting that the ban applied both during and outside of election periods. The Court did recognise that the varied European practice on this militated in favour of a wider margin of appreciation, but it also stated:

*[T]he Court is unable to share the opinion held by the Supreme Court's majority that the present case was more akin to *Murphy* than *Vgt* (see paragraphs 60-61 of the Supreme Court's judgment, cited at paragraph 20 above). On the contrary, it agrees with the minority (see paragraphs 80-81 of the Supreme Court's judgment, cited at paragraph 21 above) that the political nature of the advertisements that were prohibited calls for strict scrutiny on the part of the Court and a correspondingly circumscribed national margin of appreciation with regard to the necessity of the restrictions. [references omitted]¹²⁸*

¹²⁷ *Giniewski v. France*, 2006, § 51.

¹²⁸ *TV Vest As & Rogaland Pensjonistparti v. Norway*, 2008, § 64.

It is difficult to draw very precise conclusions on the way the Court has used the margin of appreciation doctrine, apart from noting the areas where it is deemed to be larger and smaller. It sometimes seems as though the Court uses the doctrine rather flexibly depending on what decision it wishes to reach in a given case.

Sanctions

The European Court has long held that excessive sanctions alone, even where speech may legitimately be sanctioned in accordance with Article 10(2), may breach the right to freedom of expression, in part because of the chilling effect of such sanctions. The case of *Tolstoy Miloslavsky v. the United Kingdom*, 1995, involved a very serious defamation which led to the imposition of damages of £1,500,000, three times the highest previous award. Although it accepted that some sort of sanction was appropriate, the Court easily held that “the award of damages and the injunction clearly constitute an interference with the exercise [of the] right to freedom of expression.”¹²⁹ As a result, they needed to be justified pursuant to the three-part test for such restrictions.

Consistently with its long-standing approach to the necessity analysis, the Court held that any sanction imposed for defamation must bear a “reasonable relationship of proportionality to the injury to reputation suffered” and that this should be specified in national defamation laws.¹³⁰ The Court found that the award did not meet the standard of necessity, despite the wide margin of appreciation enjoyed by the respondent State, both due to the entirely excessive nature of the actual damage award and the fact that the local legal system lacked mechanisms to address excessive awards.¹³¹

The European Commission on Human Rights has held that the right of reply is an appropriate and limited response to defamatory statements.¹³² This right is provided for in European standards¹³³ and can be seen as a relatively non-intrusive and direct way of addressing defamatory statements. The Court has gone even further, holding that in certain circumstances individuals are entitled to a right of reply as part of their own right to freedom of expression:

The Court considers that in the present case a positive obligation arose for the State to protect the applicant’s right to freedom of expression by ensuring, firstly, that he had a reasonable opportunity to exercise his right

¹²⁹ *Tolstoy Miloslavsky v. the United Kingdom*, 1995, § 35.

¹³⁰ *Tolstoy Miloslavsky v. the United Kingdom*, 1995, § 49.

¹³¹ Contrast *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, 2005, decided just after the *Miloslavsky* case, in which the European Court held that an award of IRE300,000 was not a breach of the right to freedom of expression, in part due to the different level of appellate control over the size of the award.

¹³² See, for example, *Ediciones Tiempo S.A. v. Spain*, 1989.

¹³³ See Resolution (74) 26 of the Committee of Ministers of the Council of Europe on the right of reply - position of the individual in relation to the press, adopted 2 July 1974.

of reply by submitting a response to the newspaper for publication and, secondly, that he had an opportunity to contest the newspaper's refusal (see "Relevant international and domestic law" above).¹³⁴

The value of a right of reply and analogous remedies was emphasised in the case of *Hachette Filipacchi v. France*, 2007, which involved the publication by a magazine of the picture of the corpse of a murder victim. The European Court upheld the decision of the French courts, which had required a magazine to publish a statement to the effect that the picture had been published without the consent of the family of the victim, and that the family considered this to have been an intrusion into their private life. In doing so, the Court specifically noted that this was a far less intrusive remedy than the one originally sought by the family in the case, namely the seizure of all copies of the newspaper.

The criminal law is potentially one of the more intrusive post-expression means of addressing harmful speech, both inherently and because of the possibility of it resulting in penal sanctions. In the case of *Castells v. Spain*, 1992, the applicant, at the time a senator for the Herri Batasuna political group which supported independence for the Basque Country, had published a newspaper article containing strong criticism of the Spanish Government. He was sentenced to a term in prison, albeit stayed by the Supreme Court. On the issue of the penal sanction, the European Court stated:

[T]he dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries in the media.¹³⁵

In *Lingens*, another defamation case, the criminal penalty consisted of a relatively small fine, but the Court noted that even this sort of penalty could exert a chilling effect on freedom of expression:

[A]lthough the penalty imposed on the author did not strictly speaking prevent him from expressing himself, it nonetheless amounted to a kind of censure, which would be likely to discourage him from making criticism of that kind again in future.... In the context of the political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its tasks as purveyor of information and public watchdog.¹³⁶

¹³⁴ *Melnychuk v. Ukraine*, 2005.

¹³⁵ *Castells v. Spain*, 1992, § 46.

¹³⁶ *Lingens v. Austria*, 1986, § 44. See also *Barthold v. the Federal Republic of Germany*, 1985.

In a 2004 case decided by a Grand Chamber, the Court placed even more stringent limitations on the imposition of penal sanctions, stating:

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.¹³⁷

In a similar vein, in the case of Cumpănă and Mazăre v. Romania, 2004, which involved a conviction for defamation, the Court stated:

The circumstances of the instant case – a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest – present no justification whatsoever for the imposition of a prison sentence.¹³⁸

In the case of Obukhova v. Russia, 2009, the issue was an injunction against publication of any information relating to a car accident involving a judge and the applicant journalist, as well as any information about the legal case which had ensued. The judge had brought defamation proceedings against the applicant based on her published allegations of improper judicial influence in the case. The Court held that while there might be some argument for restricting further comment on the particular issue of influence, which was before the courts, there was no warrant for imposing such a broad restriction on any reporting about either the accident or the proceedings.

The Court has long held that the imposition of prior restraints on publication, while not entirely ruled out by Article 10, must be treated with the greatest suspicion:

[T]he Court has emphasised that while Article 10 does not prohibit the imposition of prior restraints on publication, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.¹³⁹

Prior authorisation regimes for establishing periodicals are not acceptable in a democracy, and it is hard to imagine that such a regime could be deemed compatible with Article 10. The same is even truer of regimes which require media outlets – print or broadcast – to submit material to a censor before they may publish it.

¹³⁷ Cumpănă and Mazăre v. Romania, 2004, § 115.

¹³⁸ Cumpănă and Mazăre v. Romania, 2004, § 116.

¹³⁹ Mosley v. the United Kingdom, 2011, § 117.

The case of *Gaweda v. Poland*, 2002, as noted above, involved a refusal to register two periodicals based on their proposed titles. In holding that the rule was not provided by law, the Court noted that the refusal to register the titles essentially constituted a form of prior censorship, stating:

The Court considers that, although Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publications (see paragraph 35 above), the relevant law must provide a clear indication of the circumstances when such restraints are permissible and, a fortiori, when the consequences of the restraint are to block publication of a periodical completely, as in the present case. This is so because of the potential threat that such prior restraints, by their very nature, pose to the freedom of expression guaranteed by Article 10.¹⁴⁰

In other words, in that case, the Court applied the higher standard of scrutiny regarding prior restraint to the prescribed by law part of the test for restrictions on freedom of expression.

In *Cumpănă and Mazăre v. Romania*, 2004, involving a conviction for defamation, the local courts imposed a prison sentence on the applicants (see the quote on this from the European Court above) and also banned the applicants from working as journalists for one year. The Court appeared to rule out entirely this sort of sanction, which it saw as a type of prior restraint, stating:

The Court considers that by prohibiting the applicants from working as journalists as a preventive measure of general scope, albeit subject to a time-limit, the domestic courts contravened the principle that the press must be able to perform the role of a public watchdog in a democratic society.¹⁴¹

In the case of *Ekin Association v. France*, 2001, the Court was faced with a broad power, exercised by a minister, to impose a ban throughout France on the circulation of any foreign document, which he had applied to a book published by the applicant association. The Court held that this was a violation of Article 10, noting that there was nothing in the content of the book which would justify such an action. In coming to this conclusion, the Court placed some emphasis on the need for control over the exercise of such discretion, stating that for it to be legitimate, “a legal framework is required, ensuring both tight control over the scope of bans and effective judicial review to prevent any abuse of power.”¹⁴² In that case, since the judicial review was *ex post facto*, was not automatic and took an extremely long time

¹⁴⁰ *Gaweda v. Poland*, 2002, § 40.

¹⁴¹ *Cumpănă and Mazăre v. Romania*, 2004, § 119.

¹⁴² *Ekin Association v. France*, 2001, § 58.

(nine years in the case at hand), it was not deemed to constitute effective control over the exercise of the discretion.

In another case, *Éditions Plon v. France*, 2004, the issue was a book which had been produced by a journalist and someone who had served as former French President Mitterand's physician, *Le Grand Secret*, dealing with Mitterand's health problems, a matter of some debate in France after his death. The Court held that a temporary injunction against further publication, along with civil damages, were legitimate. A permanent injunction was, however, excessive:

[O]nce the duty of confidentiality has been breached, giving rise to criminal (and disciplinary) sanctions against the person responsible, the passage of time must be taken into account in assessing whether such a serious measure as banning a book – a measure which in the instant case was likewise general and absolute – was compatible with freedom of expression.¹⁴³

Thus, the passage of time came to invalidate the ban on further publication, in particular taking into account the public interest nature of the content of the book.

6. Restrictions – Specific Interests

The necessity part of the test is, as noted above, where most of the cases regarding restrictions on freedom of expression are decided. Despite this, the section above on necessity is the shortest from among those focusing on the three-part test. The reason for this is that, apart from some very general statements about how the necessity analysis should be conducted, the main necessity analysis is done on a case-by-case basis. This section outlines how the Court has dealt with the different types of interests which may justify restrictions on freedom of expression, as set out in Article 10(2).

National Security

The first interest listed in Article 10(2) which may justify a restriction on freedom of expression is national security. National security is a difficult area, because if security really is threatened, so is our whole way of life, including democracy and human rights. On the other hand, national security has historically been roundly abused by governments as a justification for limiting free speech. It is also very difficult for courts to assess threats to national security, which largely fall outside of their area of knowledge and expertise. This is further compounded by the fact that courts tend to be very careful in this area, because they wish to avoid creating any risk to national security. This has generally resulted in a high level of deference on

¹⁴³ *Éditions Plon v. France*, 2004, § 53.

the part of courts towards official claims in this area. Despite this, the European Court has exercised clear oversight over government claims of threats to national security in its jurisprudence.

The vast majority of the cases involving national security decided by the Court come from Turkey and, in the vast majority of these, the Court has found a violation of the right to freedom of expression. However, a number of cases have also come from other countries. One of the first cases involving national security decided by the Court was *Observer and Guardian v. the United Kingdom*, 1991. The two applicant newspapers announced that they intended to publish extracts from *Spycatcher*, a book by Peter Wright, a retired intelligence agent, which included an account of alleged unlawful activities by the British intelligence service and its agents. The British Attorney General went to court to seek permanent injunctions against publication of extracts from the book. In July 1986, the courts granted temporary injunctions to prohibit publication until the issue of the permanent injunctions had been finally decided. In July 1987, the book was published in the United States, and copies became available in the United Kingdom. The temporary injunction against publication remained in force in the United Kingdom until October 1988, when the British courts refused to grant the permanent injunctions.

The European Court held that the injunctions were justified prior to publication in the United States but that once the book became generally available, there was no justification in maintaining them. The Court was particularly suspicious of the change in the government's claims regarding the need for the injunctions:

[T]he Court observes that in this respect the Attorney General's case underwent, to adopt the words of Mr Justice Scott, "a curious metamorphosis" [T]he purpose of the injunctions had thus become confined to the promotion of the efficiency and reputation of the Security Service, notably by: preserving confidence in that Service on the part of third parties; making it clear that the unauthorised publication of memoirs by its former members would not be countenanced; and deterring others who might be tempted to follow in Mr Wright's footsteps.

The Court does not regard these objectives as sufficient to justify the continuation of the interference complained of.¹⁴⁴

The case stands for the sensible proposition that even if the disclosure of certain information may harm national security, the extant risk to national security no longer pertains after the information has become available.

A similar situation arose in the case of *Vereniging Weekblad Bluf! v. the Netherlands*, 1995, which involved the seizure of a weekly newspaper containing a six-year old confidential report by the Dutch security services on internal matters,

¹⁴⁴ *Observer and Guardian v. the United Kingdom*, 1991, § 69.

referring to the activities of the communist party and anti-nuclear movement, among other things. The chief of the relevant service admitted that, taken alone, the items covered by the report did not constitute State secrets, but that taken together they would expose the service's activities and operational methods. The newspaper had reprinted copies surreptitiously and circulated them the day after the original print run had been seized.

The Court was not convinced that this sort of material needed to be kept secret in the first place, stating:

[I]t is open to question whether the information in the report was sufficiently sensitive to justify preventing its distribution. The document in question was six years old at the time of the seizure. Further, it was of a fairly general nature, the head of the security service having himself admitted that in 1987 the various items of information, taken separately, were no longer State secrets (see paragraph 9 above). Lastly, the report was marked simply "Confidential", which represents a low degree of secrecy.¹⁴⁵

In any case, the fact that large numbers of copies had already been circulated meant that the information no longer retained its sensitive nature.

In the case of *Leroy v. France*, 2008, a cartoonist had been criminally convicted for condoning terrorism through a cartoon, which depicted the attacks of 11 September 2001, published only days after they had occurred, under the caption "We all dreamed of it ... Hamas did it" (in French: "Nous en avons tous rêvé ... le Hamas l'a fait"). The Court assessed the conviction in light of the activities of the French authorities in their fight against terrorism, as well as the need for particular care when assessing artistic expression. The Court took into account the timing of the cartoon, which meant that it could have stirred up violence and thereby undermined public order, in holding that the conviction was not a breach of Article 10.

As noted above, the vast majority of the national security cases against Turkey resulted in a finding of a breach of the right to freedom of expression. Most of these cases involved convictions under Turkish law for disseminating separatist propaganda or propaganda against the indivisibility of the State, for propagating hate speech (usually for activities like espousing Kurdish solidarity or culture) or for promoting illegal organisations. Some involve other types of convictions, such as for incitement to avoid military service.¹⁴⁶

The Court has highlighted a number of key factors in the cases in which it has found a violation of the right to freedom of expression. In several cases, the Court has stressed that the impugned speech did not constitute incitement to violence. The

¹⁴⁵ *Vereniging Weekblad Bluf! v. the Netherlands*, 1995, § 41.

¹⁴⁶ See, for example, *Ergin v. Turkey* (No. 6), 2006.

quotations that follow are taken from cases which involved harsher types of statements:

It is true also that the impugned interview (see paragraph 13 above) contained hard-hitting criticism of the Turkish authorities such as the statement that “the real terrorist is the Republic of Turkey”. For the Court, however, this is more a reflection of the hardened attitude of one side to the conflict, rather than a call to violence. ... On the whole, the content of the articles cannot be construed as being capable of inciting to further violence.¹⁴⁷

And:

[E]ven though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation.¹⁴⁸

The Court has taken into account a number of factors when deciding that the impugned statements in these cases do not incite to violence. These include the actual language of the statements, the apparent intent of the author, the forum in which the statements were distributed (such as books versus orally in front of a crowd), the form the statements took (such as poetry), whether or not the statements related to a matter of public interest and who was distributing them (the primary author, who might wish to incite violence, or a media outlet, which has a responsibility to report to the public).

In several cases, the Court has stressed that the media have a right both to interview members of terrorist groups and to present their views, and indeed that the public has a right to receive this information. Thus *Sürek and Özdemir v. Turkey*, 1999, involved an interview with a leader of the Kurdistan Workers’ Party (the PKK), an illegal organisation. The Court reiterated that the limits of acceptable criticism are wide in relation to the government and that it must exercise restraint in resorting to criminal measures to restrict speech. The Court also stressed that it was acceptable to interview a member of the PKK:

[The Court] notes in the first place that the fact that the impugned interviews were given by a leading member of a proscribed organisation cannot in itself justify an interference with the applicants’ right to freedom of expression; equally so the fact that the interviews contained hard-hitting criticism of official policy and communicated a one-sided view of the origin of and responsibility for the disturbances in south-east Turkey. While it is

¹⁴⁷ *Sürek v. Turkey* (No. 4), 1999, § 58.

¹⁴⁸ *Karataş v. Turkey*, 1999, § 52.

clear from the words used in the interviews that the message was one of intransigence and a refusal to compromise with the authorities as long as the objectives of the PKK had not been secured, the texts taken as a whole cannot be considered to incite to violence or hatred....[T]he interviews had a newsworthy content which allowed the public both to have an insight into the psychology of those who are the driving force behind the opposition to official policy in south-east Turkey and to assess the stakes involved in the conflict. [T]he domestic authorities in the instant case failed to have sufficient regard to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them.¹⁴⁹

In other cases, the Court has upheld criminal convictions on national security grounds in the Turkish context. In the case of *Zana v. Turkey*, 1997, the applicant had expressed his support for the “PKK national liberation movement” and stated that although he was not in favour of massacres, “Anyone can make mistakes, and the PKK kill women and children by mistake.” The Court held that there had been no breach of the right to freedom of expression stating:

In those circumstances the support given to the PKK – described as a “national liberation movement” – by the former mayor of Diyarbakır, the most important city in south-east Turkey, in an interview published in a major national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region.¹⁵⁰

Similarly, in *Sürek v. Turkey* (No. 3), 1999, the Court noted that the article associated itself with the PKK and included a direct call to resort to armed force to promote the independence of Kurdistan. Furthermore, the article was published in south-east Turkey, where there was a very high incidence of separatist inspired violence, so that it should be seen as capable of inciting further violence:

Indeed the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor.... The Court reiterates that the mere fact that “information” or “ideas” offend, shock or disturb does not suffice to justify that interference (see paragraph 36 above). What is in issue in the instant case, however, is incitement to violence.¹⁵¹

The fact that the applicant did not personally associate himself with the views expressed was not enough to invalidate his criminal conviction.

¹⁴⁹ *Sürek and Özdemir v. Turkey*, 1999, § 61.

¹⁵⁰ *Zana v. Turkey*, 1997, § 60.

¹⁵¹ *Sürek v. Turkey* (No. 3), 1999, § 40.

The most important difference between the cases where the Court has found a violation and those where it has not seems to be the Court's assessment of the intent of the applicant. Where this has been to protest against injustice, even in a strong or intemperate way, or to inform the public about the situation, the Court has found a breach of the right to freedom of expression. Where, in contrast, the intention seems to have been to incite others to violence, the Court has not found such a breach.

Public Order

The Court has addressed the issue of freedom of expression in the context of demonstrations on a number of occasions. In *Chorherr v. Austria*, 1993, the applicant was distributing leaflets calling for a referendum on the purchase of fighter jets and carrying a large sign along the same lines during a ceremony to commemorate the 50th and 40th anniversaries, respectively, of the end of World War Two and Austrian neutrality and to sign up new conscripts. The sign carried by the applicant blocked the view of some spectators and resulted in a commotion being caused. The police arrested the applicant and then, after questioning, released him. The applicant argued that a less restrictive approach would have been to ask him simply to remove the sign. The Court, however, elected to show deference to the means chosen by the authorities in this case and held that there had been no breach of the right to freedom of expression.

The Court took a stronger position in the later cases of *Vajnai v. Hungary*, 2008 and *Yılmaz and Kılıç v. Turkey*, 2008, finding a violation in both. In the first case, the applicant was ordered to remove a five-pointed red star, which was a prohibited symbol of the international workers' movement, which he did. He was, however, subsequently convicted of the offence of displaying a totalitarian symbol. In finding a breach of Article 10, the Court distinguished the case of *Rekvényi v. Hungary*, 1999, (see above) on the basis that the applicant was a politician and not a police officer and the fact that the passage of time had led to a strengthening of Hungarian democracy, along with membership in the European Union.

The Court was not impressed with the public order claims of the government:

As regards the aim of preventing disorder, the Court observes that the Government have not referred to any instance where an actual or even remote danger of disorder triggered by the public display of the red star had arisen in Hungary. In the Court's view, the containment of a mere speculative danger, as a preventive measure for the protection of democracy, cannot be seen as a "pressing social need". In any event, apart from the ban in question, there are a number of offences sanctioned by Hungarian law which aim to suppress public disturbances even if they were to be provoked by the use of the red star (see paragraph 15 above).¹⁵²

¹⁵² *Vajnai v. Hungary*, 2008, § 55.

The Court was also not convinced of the need to suppress symbols even of totalitarianism:

As to the link between the prohibition of the red star and its offensive, underlying, totalitarian ideology, the Court stresses that the potential propagation of that ideology, obnoxious as it may be, cannot be the sole reason to limit it by way of a criminal sanction.¹⁵³

Finally, the Court did not agree that the sentiments of others towards the display would justify its banning:

The Court is of course aware that the systematic terror applied to consolidate Communist rule in several countries, including Hungary, remains a serious scar in the mind and heart of Europe. It accepts that the display of a symbol which was ubiquitous during the reign of those regimes may create uneasiness amongst past victims and their relatives, who may rightly find such displays disrespectful. It nevertheless considers that such sentiments, however understandable, cannot alone set the limits of freedom of expression.¹⁵⁴

In the *Yılmaz and Kılıç v. Turkey*, 2008, case, the Court held that the criminal convictions of the applicants, who were given long prison sentences for having participated in an illegal demonstration and expressed support for an illegal organisation, the PKK, could not be justified. There had been no violence at the demonstration, there was nothing to suggest that the activities of the applicants had undermined public order and, as a result, the harsh sentences given out could not be justified.

Janowski v. Poland, 1999, involved an altercation between the applicant and the police. When he witnessed police officers ordering vendors to leave an area on the basis that vending was not permitted there, the applicant intervened, arguing that there was no legal basis for this. He was later convicted of insulting police officers by calling them 'oafs' and 'dumb'. The Court held that since the remarks had been made in a square and were witnessed only by bystanders, it was not part of a discussion on a matter of public interest. The Court also noted the need for public confidence in the actions of police officers, and concluded that the interference was justified.

In *Orban and others v. France*, 2009, the Court held that the banning of a book which included third party claims that the torture and summary executions practised in the Algerian war were legitimate, indeed inevitable, was a violation of the right to freedom of expression. The subject dealt with a matter of clear public interest and to

¹⁵³ *Vajnai v. Hungary*, 2008, § 56.

¹⁵⁴ *Vajnai v. Hungary*, 2008, § 57.

sanction the dissemination of the views of a third party witness to historical events would seriously undermine the discussion of matters of general interest.¹⁵⁵

Public Morals

The Court has decided relatively few cases on grounds of public morals, which is perhaps surprising given that is an issue which might be expected to generate strong sentiments. As noted above, the Court has generally allocated a wider margin of appreciate to States in this area than in cases involving political speech. For example, in *Handyside v. the United Kingdom*, 1976, at issue was a publication which discussed in very frank and open terms issues such as sex and drugs, and which appeared to be aimed at a young audience. The Court noted that the publication could have the effect of convincing very young children to engage in activities that might be harmful to them, and so accepted as the aim the protection of the morals of young people. It accepted that the measures, which included the seizure and banning of the book, were necessary, even though the book circulated freely in many other European countries.

Müller and others v. Switzerland, 1988, concerned sexually explicit paintings being displayed at an exhibition which was open to the public, for free, and without age restriction. The Court noted that there was no uniform conception of what was morally appropriate within European countries and upheld the restriction, stating:

*[T]he Court does not find unreasonable the view taken by the Swiss courts that those paintings, with their emphasis on sexuality in some of its crudest forms, were “liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity” (see paragraph 18 above). In the circumstances, having regard to the margin of appreciation left to them under Article 10 § 2 (art. 10-2), the Swiss courts were entitled to consider it “necessary” for the protection of morals to impose a fine on the applicants for publishing obscene material.*¹⁵⁶

The Court came to a rather different conclusion in *Open Door Counselling Ltd and Dublin Well Woman Centre Ltd v. Ireland*, 1992, which involved the provision of information about abortion services abroad, a matter which the Court accepted involved morals. In finding a breach of the right to freedom of expression, the Court took into account several factors, including that it was not illegal to procure an abortion abroad and that an abortion could be crucial to the protection of a woman’s life. In this regard, the Court stated: “Limitations on information concerning activities which, notwithstanding their moral implications, have been and continue

¹⁵⁵ *Orban and others v. France*, 2009, § 52. French original: “Sanctionner un éditeur pour avoir aidé à la diffusion du témoignage d’un tiers sur des événements s’inscrivant dans l’histoire d’un pays entraverait gravement la contribution aux discussions de problèmes d’intérêt général et ne saurait se concevoir sans raisons particulièrement sérieuses.

¹⁵⁶ *Müller and others v. Switzerland*, 1988, § 36.

to be tolerated by national authorities, call for careful scrutiny by the Convention institutions as to their conformity with the tenets of a democratic society.”¹⁵⁷ The Court also adverted to the absolute nature of the prohibition, which prohibited the giving of advice on abortions regardless of the circumstances, as well as the facts that the applicants had not counselled in favour of abortion but had merely provided information on it, and that similar information could in practice be obtained from other sources.

A more recent case involving morals is *Mouvement raëlien suisse v. Switzerland*, 2012, where a Grand Chamber of the Court overturned the earlier Chamber decision, finding a breach of Article 10, albeit with a strong dissenting minority, among other things based on States’ margin of appreciation to protect morals. The case involved a group that believed, among other things, in contact with extraterrestrials. The group had sought and had been refused permission to run a poster campaign with a poster advertising a message purportedly from extraterrestrials. Several of the group’s beliefs were considered to be problematical, including the fact that they purported to offer cloning services to the public and that they believed in the superiority of people of higher intelligence. The Court also took into consideration allegations against some members of the group of sexual abuse of minors. The Court recognised that, taken alone, these might not justify the refusal, but held that the refusal was not a breach of the right to freedom of expression, given the margin of appreciation to be afforded to local decision makers in such cases.

Taken together, the jurisprudence of the Court in the area of protection of morals demonstrates an ongoing willingness to accord quite a large margin of appreciation to national authorities in this area.

Reputation

A large majority of the cases that come before the European Court from most countries involve protection of reputation, with the notable exception of Turkey, with its strong complement of national security cases. This reflects the role of freedom of expression, and in particular of the press, in promoting debate about difficult issues in a democracy, and the highly contested issue of what constitutes appropriate criticism.

Laws which have as their basis the protection of reputation go by a number of different descriptions in different countries. The terms ‘defamation’, ‘insult’, ‘libel’ and ‘slander’ are in common usage, but other terms are also used. All of these laws are dealt with here under the category of protection of reputation.

As has already been noted, the Court has provided strong protection to statements bearing on matters of public interest, including when these involve criticism of

¹⁵⁷ *Open Door Counselling Ltd and Dublin Well Woman Centre Ltd v. Ireland*, 1992, § 72.

politicians, government, officials or even ordinary members of society. The limits of criticism in such cases are broad, but not absolute.

In assessing these cases, the Court has established a number of principles, and has also highlighted a number of factors to be taken into account. These are outlined below. As a preliminary matter, it may be noted that the Court has placed some limits on when a case to protect reputation may legitimately be brought. In the case of *Dyuldin and Kislov v. Russia*, 2007, the charges were based on a statement that included the following phrase: “the regional authorities have started reprisals against the independent media”. The Court found a violation of the right to freedom of expression, among other things because this phrase was not capable of sustaining a defamation charge:

[The Court] reiterates that a fundamental requirement of the law of defamation is that in order to give rise to a cause of action the defamatory statement must refer to a particular person. If all State officials were allowed to sue in defamation in connection with any statement critical of administration of State affairs, even in situations where the official was not referred to by name or in an otherwise identifiable manner, journalists would be inundated with lawsuits. Not only would that result in an excessive and disproportionate burden being placed on the media, straining their resources and involving them in endless litigation, it would also inevitably have a chilling effect on the press in the performance of its task of purveyor of information and public watchdog.¹⁵⁸

Proof of Truth

The Court has developed an extensive jurisprudence around the issue of the proof of truth of statements deemed to be defamatory. In its very first case on defamation, *Lingens v. Austria*, 1986, the Court was faced with a situation where the applicant journalist had used certain strong expressions in criticising the Federal Chancellor – including by accusing him of the “basest opportunism”, and of “immoral” and “undignified” behaviour. The Austrian courts had convicted the applicant, among other things because he was unable to prove the truth of his statements.

The Court noted that there is a difference between statements of fact and statements of opinion, or value judgments:

In the Court’s view, a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof. ...

Under paragraph 3 of Article 111 of the Criminal Code, read in conjunction with paragraph 2, journalists in a case such as this cannot escape

¹⁵⁸ *Dyuldin and Kislov v. Russia*, 2007, § 43.

conviction for the matters specified in paragraph 1 unless they can prove the truth of their statements (see paragraph 20 above).

As regards value-judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (art. 10) of the Convention.¹⁵⁹

Similarly, in the case of *Dalban v. Romania*, 1999, which involved an article on a series of frauds, a Grand Chamber of the Court noted:

It would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth.¹⁶⁰

The Court has consistently stressed the need for national legal systems to distinguish between facts and opinions and not to require proof of truth of the latter. In the relatively recent case of *Gorelishvili v. Georgia*, 2007, the Court found a breach of the right to freedom of expression in a defamation case among other things because the local legal system “made no distinction between value-judgments and statements of fact, referring uniformly to ‘information’ (cnobebi), and required that the truth of any such ‘information’ be proved by the respondent party.”¹⁶¹

The Court’s general approach has been to define what constitutes an opinion or value judgment broadly, thereby reducing the onus on journalists to prove the truth of their statements. In a number of cases, the Court held that national courts had wrongly treated allegedly defamatory publications as statements of fact. For example, in *Feldek v. Slovakia*, 2001, the Court disagreed that the use by the applicant of the phrase “fascist past” should be understood as stating the fact that a person had participated in activities propagating particular fascist ideals. It explained that the term was a wide one, capable of encompassing different notions, one of which could be that a person participated as a member in a fascist organisation.

At the same time, defamation defendants should not be denied an opportunity to prove the truth of their statements of fact. This was at issue in the case of *Castells v. Spain*, 1992, where the domestic courts had refused to permit the applicant to try to establish the truth of his claim that the government had intentionally failed to investigate the murders of people accused of belonging to a separatist movement. While the Court recognised that the article included statements of opinion as well as fact, it focused on the fact that the domestic courts had precluded the applicant from offering any evidence as to the truth of his assertions:

¹⁵⁹ *Lingens v. Austria*, 1986, § 46. See also *Dichand and others v. Austria*, 2002, § 42.

¹⁶⁰ *Dalban v. Romania*, 1999, § 49.

¹⁶¹ *Gorelishvili v. Georgia*, 2007, § 38.

*It is impossible to state what the outcome of the proceedings would have been had the Supreme Court admitted the evidence which the applicant sought to adduce; but the Court attaches decisive importance to the fact that it declared such evidence inadmissible for the offence in question.*¹⁶²

Similarly, in the case of *Csánics v. Hungary*, 2009, the local courts had convicted the applicant on the basis that his statements had been expressed “in such a harsh and exaggerated manner that they had given rise to a violation of S.K.’s personality rights irrespective of whether they were true or false.”¹⁶³ The European Court rejected this approach, stating:

*[T]he Court considers that the domestic authorities should have provided the applicant with an opportunity to substantiate his statements. It would go against the very spirit of Article 10 to allow a restriction on the expression of substantiated statements solely on the basis of the manner in which they are voiced. In principle, it should be possible to make true declarations in public irrespective of their tone or negative consequences for those who are concerned by them.*¹⁶⁴

In the case of *Rumyana Ivanova v. Bulgaria*, 2008, the Court recognised that, in general, it was acceptable for the onus of proof to lie on those accused of making a defamatory statement:

*[A] requirement for defendants in defamation proceedings to prove to a reasonable standard that the allegations made by them were substantially true does not, as such, contravene the Convention. [references omitted]*¹⁶⁵

However, as noted below, this requirement is not a strict one, at least in cases involving statements on matters of public interest.

Reasonable Publication

National courts in many countries have developed doctrines which essentially allow for a defence for the media if they can show that they acted reasonably, or in accordance with professional ethics, in publishing critical statements. While the European Court has never explicitly referred to such a doctrine, it has developed analogous standards. In relation to statements of fact, the Court has accepted more relaxed rules than a strict requirement of proof of truth, leaving the media “a breathing space for error”. For example, in *Dalban v. Romania*, 1999, the Court noted:

¹⁶² *Castells v. Spain*, 1992, § 48.

¹⁶³ *Csánics v. Hungary*, 2009, § 38.

¹⁶⁴ *Csánics v. Hungary*, 2009, § 43.

¹⁶⁵ *Rumyana Ivanova v. Bulgaria*, 2008, § 39.

[T]here is no proof that the description of events given in the articles was totally untrue and was designed to fuel a defamation campaign against G.S. and Senator R.T. Mr Dalban did not write about aspects of R.T.'s private life, but about his behaviour and attitudes in his capacity as an elected representative of the people (see paragraphs 13 and 14 above).¹⁶⁶

In this regard, and as noted above, the Court has recognised the pressure on journalists to report in a timely fashion.¹⁶⁷

The Court has also accepted that journalists may, at least in certain circumstances, rely on rumours when reporting on matters of public interest in an otherwise acceptable manner:

In short, the applicant was essentially reporting what was being said by others about police brutality. He was convicted by the Reykjavik Criminal Court of an offence under Article 108 of the Penal Code partly because of failure to justify what it considered to be his own allegations, namely that unspecified members of the Reykjavik police had committed a number of acts of serious assault resulting in disablement of their victims, as well as forgery and other criminal offences (see paragraphs 9(9)-(10), 10(15) and 24 above). In so far as the applicant was required to establish the truth of his statements, he was, in the Court's opinion, faced with an unreasonable, if not impossible task.¹⁶⁸

In terms of value judgments, the Court has held that these must have some form of factual basis:

[E]ven where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive.¹⁶⁹

The Court has, however, applied this requirement rather leniently in practice. For example, in *Nilsen and Johnsen v. Norway*, 1999, it stated:

It remains, however, that at the time when the Norwegian courts adjudicated the applicants' case (see paragraphs 25 and 27 above) there was some factual basis for their statements to the effect that false and fabricated allegations of police brutality had been made.¹⁷⁰

¹⁶⁶ *Dalban v. Romania*, 1999, § 50.

¹⁶⁷ *Observer and Guardian v. the United Kingdom*, 1991, § 60.

¹⁶⁸ *Thorgeir Thorgeirson v. Iceland*, 1992, § 65.

¹⁶⁹ *Jerusalem v. Austria*, 2001, § 43.

¹⁷⁰ *Nilsen and Johnsen v. Norway*, 1999, § 51.

And in *Flux and Samson v. Moldova*, 2007, the Court stated:

*The Court considers that the phrases “a former State official builds himself castles” and “the ex-Minister of Construction G.C. decided to get rich off the back of the misery of others” are value-judgments, expressing as they did the newspaper’s opinion about the building activities of G.C. and their effects on his neighbours. These opinions were, moreover, based on facts which have not been shown to be untrue, some mentioned in the article itself (see paragraph 10 above) and some referred to during the proceedings (see paragraph 14 above). In such circumstances, the Court considers that the newspaper could not be expected to prove the truth of its value-judgments and that, moreover, its opinions were not without a factual foundation.*¹⁷¹

In the same case the Court, in holding that there had been a violation of the right to freedom of expression, noted that the newspaper had acted professionally:

*The Court also takes into account the balanced tone of the article. Having presented one party’s view, it also informed the reader of the other party’s story and referred to some documents which suggested that the second applicant had also breached certain legal obligations (see paragraph 10 above). In view of the above, the Court is satisfied of the newspaper’s good faith and that it had acted in consonance with principles of responsible journalism. [references omitted]*¹⁷²

In *Aquilina and others v. Malta*, 2011, the applicant had accused a lawyer of having been convicted of contempt of court when in fact he had not been convicted. In finding a breach of Article 10, the European Court noted that the proceedings in the local court were confusing and that the applicant had tried to verify the truth of her allegation, stating:

*For the Court, such a course of action would be entirely in line with best journalistic practices. In the circumstances of the present case, the second applicant could not reasonably have been expected to take any further steps*¹⁷³

The Court has also demonstrated a willingness to allow a measure of latitude to those reporting on matters of public interest in deciding how they wish to do this. The case of *Bladet Tromsø and Stensaas v. Norway*, 1999, for example, involved articles containing some serious allegations regarding seal hunting, including of potentially illegal behaviour. The applicants had relied in part on an official but

¹⁷¹ *Flux and Samson v. Moldova*, 2007, § 24.

¹⁷² *Flux and Samson v. Moldova*, 2007, § 26.

¹⁷³ *Aquilina and others v. Malta*, 2011, § 50.

unpublished report, and in part on other sources. In finding the conviction of the applicants to be a violation of their right to freedom of expression, the Court noted:

[T]he methods of objective and balanced reporting may vary considerably, depending among other things on the medium in question; it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists. [references omitted]¹⁷⁴

In that case, the Court held that the newspaper was entitled to make serious allegations against seal hunters, a matter of intense debate in Norway at the time, despite the fact that it did not even bother to obtain the views of the seal hunters.¹⁷⁵ Similarly, in *Krone Verlag GmbH & Co. KG v. Austria*, 2002, the Court noted that the applicant had not sought the views of the person who had been criticised in advance, but did not deem it to be decisive in the case.

In other cases, the Court has held that the media are entitled to rely on official reports without necessarily verifying their accuracy. For example, in *Colombani v. France*, 2002, the Court stated:

*In the view of the Court, the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the content of official reports without having to undertake independent research. Otherwise, the vital public-watchdog role of the press may be undermined. The Court thus finds that it was reasonable for *Le Monde* to rely on the OGD's report, without needing to check for itself the accuracy of the information it contained. [references omitted]¹⁷⁶*

The Court has also held that journalists should not automatically be held liable for repeating a potentially libellous allegation published by others. In the case of *Thoma v. Luxembourg*, 2001, a radio journalist had quoted from a newspaper article which alleged that of eighty forestry officials in Luxembourg, only one was not corrupt. The Court held that the applicant's conviction was a violation of his right to freedom of expression, noting:

[P]unishment of a journalist for assisting in the dissemination of statements made by another person ... would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so."¹⁷⁷

¹⁷⁴ *Bladet Tromsø and Stensaas v. Norway*, 1999, § 63.

¹⁷⁵ *Bladet Tromsø and Stensaas v. Norway*, 1999.

¹⁷⁶ *Colombani v. France*, 2002, § 65.

¹⁷⁷ *Thoma v. Luxembourg*, 2001, § 62.

The Court also dismissed the contention that the journalist should have formally distanced himself from the allegation, warning the public that he was quoting from a newspaper report:

*A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas.*¹⁷⁸

The Court has also accepted that even very strong language does not take criticism outside of the bounds of protection of Article 10. Thus, the Court has held:

*Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation. [references omitted]*¹⁷⁹

The media are free to use hyperbole, satire or colourful imagery to convey a particular message.¹⁸⁰ In *Oberschlick v. Austria (No. 2)*, 1997, the Court considered that calling a politician an idiot was a legitimate response to earlier, provocative statements by that same politician:

*In the Court's view, the applicant's article, and in particular the word Trotte [idiot], may certainly be considered polemical, but they did not on that account constitute a gratuitous personal attack as the author provided an objectively understandable explanation for them derived from Mr Haider's speech, which was itself provocative.*¹⁸¹

Similarly, in *Lopes Gomes da Silva v. Portugal*, 2000, the Court stated:

*[T]he opinions expressed by Mr Resende and reproduced alongside the impugned editorial are themselves worded incisively, provocatively and at the very least polemically. It is not unreasonable to conclude that the style of the applicant's article was influenced by that of Mr Resende.*¹⁸²

The choice as to the form of expression is up to the media. For example, the Court has accepted as legitimate a choice to voice criticism in the form of a satirical

¹⁷⁸ *Thoma v. Luxembourg*, 2001, § 64.

¹⁷⁹ *Dichand and others v. Austria*, 2002, § 41

¹⁸⁰ See *Karatas v. Turkey*, 1999, §§ 50-54.

¹⁸¹ *Oberschlick v. Austria (No. 2)*, 1997, § 33.

¹⁸² *Lopes Gomes da Silva v. Portugal*, 2000, § 35.

cartoon.¹⁸³ In *Bodrožić and Vujin v. Serbia*, 2009, the Court took into account the fact that the article was intended to be humorous in nature:

*The entirety of the second applicant's text being humorous in content and published under the newspaper's 'Amusement' column, cannot, in the Court's view, but be understood as a joke rather than a direct statement maliciously aimed at offending S.K.'s dignity.*¹⁸⁴

The Court has, of course, also held in many cases that defamatory statements were made without proper reference to the underlying facts and that, as a result, the sanctions imposed by the local authorities were justified.¹⁸⁵

Exemptions

The Court has recognised the importance of protecting free speech inside of legislative assemblies or parliaments, noting that the aim of such immunities is,

*to allow such members to engage in meaningful debate and to represent their constituents on matters of public interest without having to restrict their observations or edit their opinions because of the danger of being amenable to a court or other such authority.*¹⁸⁶

Because freedom of parliamentary debate is the every essence of modern-day democracies, statements made in parliament may justifiably attract absolute immunity. In *Jerusalem v. Austria*, 2001, the issue was statements made by a politician in a forum in which she enjoyed only limited immunity. In finding a violation, the Court stressed the importance of freedom of speech for elected representatives and noted that had the applicant made the statements in another forum, they would have enjoyed absolute immunity.

In the case of *Nikula v. Finland*, 2002, the Court held that statements made in the course of judicial proceedings should enjoy a similarly high degree of protection, stating:

*It is therefore only in exceptional cases that restriction – even by way of a lenient criminal penalty – of defence counsel's freedom of expression can be accepted as necessary in a democratic society.*¹⁸⁷

¹⁸³ See, for example, *Bladet Tromsø and Stensaas v. Norway*, 1999, § 63 and *Bergens Tidende and others v. Norway*, 2000, § 57.

¹⁸⁴ *Bodrožić and Vujin v. Serbia*, 2009, § 33.

¹⁸⁵ For a couple of recent examples, see *Gašior v. Poland*, 2012, and *Palomo Sánchez and others v. Spain*, 2011.

¹⁸⁶ *A. v. the United Kingdom*, 2002, § 75.

¹⁸⁷ *Nikula v. Finland*, 2002, § 55.

Statements made in court by lawyers should, in particular, receive protection, because lawyers play an important role as “intermediaries between the public and the courts” and they must be free to defend their clients to the best of their ability:

[T]he threat of an ex post facto review of counsel’s criticism of another party to criminal proceedings – which the public prosecutor doubtless must be considered to be – is difficult to reconcile with defence counsel’s duty to defend their clients’ interests zealously. It follows that it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the potential ‘chilling effect’ of even a relatively light criminal sanction or an obligation to pay compensation for harm suffered or costs incurred.¹⁸⁸

In the case of *Juppala v. Finland*, 2008, the applicant had reported her suspicions of child abuse to a medical doctor, which ultimately led to her being convicted of defamation. The Court came down firmly in favour of protecting such speech, as long as it was made in good faith:

The possibility to voice a suspicion of child abuse, formed in good faith, in the context of an appropriate reporting procedure should be available to any individual without the potential “chilling effect” of a criminal conviction or an obligation to pay compensation for harm suffered or costs incurred.¹⁸⁹

Digital

The European Court has not had very many opportunities to examine the issue of defamation in the digital age, although the number of such cases can be expected to increase over time. One exception was the case of *Times Newspapers Ltd (Nos. 1 and 2) v. the United Kingdom*, 2009, where the Court was called upon to examine the issue of when publication takes place for purposes of defamation in relation to the Internet version of a newspaper. The British courts had held that a new cause of action arose every time the Internet version of a publication was accessed, which had defeated the applicant’s main defence in the case. The British courts had noted that attaching a notice to the material archived on the Internet to the effect that it had been determined to be defamatory would largely mitigate any liability.

The Court recognised the importance of Internet publication in terms of preserving archival material and enhancing access to information. There were also, however, countervailing considerations:

[T]he margin of appreciation afforded to States in striking the balance between the competing rights is likely to be greater where news archives of

¹⁸⁸ *Nikula v. Finland*, 2002, § 54.

¹⁸⁹ *Juppala v. Finland*, 2008, § 43.

*past events, rather than news reporting of current affairs, are concerned. In particular, the duty of the press to act in accordance with the principles of responsible journalism by ensuring the accuracy of historical, rather than perishable, information published is likely to be more stringent in the absence of any urgency in publishing the material.*¹⁹⁰

The Court also decided that the requirement to attach a notice to the Internet versions was not unduly onerous. Finally, the Court rejected the claimed problem of endless liability on the facts of that particular case, while potentially preserving it for another occasion:

*At the time the second action was filed, the legal proceedings in respect of the first action were still underway. There is no suggestion that the applicant was prejudiced in mounting its defence to the libel proceedings in respect of the Internet publication due to the passage of time. In these circumstances, the problems linked to ceaseless liability for libel do not arise. The Court would, however, emphasise that while an aggrieved applicant must be afforded a real opportunity to vindicate his right to reputation, libel proceedings brought against a newspaper after a significant lapse of time may well, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom under Article 10.*¹⁹¹

Rights of Others: Privacy

Unlike the other interests considered so far, privacy finds direct protection as a human right in Article 8 of the European Convention, which provides: "Everyone has the right to respect for his private and family life, his home and his correspondence." Restrictions on this right are envisaged along largely the same lines as restrictions on freedom of expression.

Despite this, relatively few cases have come before the court involving interferences with freedom of expression based primarily on the right to privacy. One reason for this is that many cases touching on private life are dealt with as matters of insult or defamation, which clearly has a close relationship to private life. The case of *Tammer v. Estonia*, 2001, is a good example. There, the applicant had used very critical terms to describe certain behaviour on the part an individual which the Court deemed to fall within the scope of her private life. The Court took that fact into account in finding that the statements did not relate to a matter of public interest and so the conviction of the applicant for insult did not constitute a breach of his right to freedom of expression.

¹⁹⁰ *Times Newspapers Ltd (Nos. 1 and 2) v. the United Kingdom*, 2009, § 45.

¹⁹¹ *Times Newspapers Ltd (Nos. 1 and 2) v. the United Kingdom*, 2009, § 48.

A central theme of all of the Court's jurisprudence on restrictions on freedom of expression to protect privacy is whether or not the impugned statements touched on a matter of (legitimate) public interest. Thus, the Tammer case may be contrasted with the judgment in *Éditions Plon v. France*, 2004, which concerned the publication of details about former French President Mitterand's health by his former physician. In holding that the restriction pursued a legitimate aim, the Court noted that it aimed to "protect the late President's honour, reputation and privacy, and that the national courts' assessment that these 'rights of others' were passed on to his family on his death does not appear in any way unreasonable or arbitrary."¹⁹²

The Court held that a temporary injunction against the publication of this information was legitimate, among other things because it was decided just ten days after his death, when publication, "could only have intensified the grief of the President's heirs following his very recent and painful death."¹⁹³ The permanent injunction which was issued later, however, was not proportionate. On the one hand, the pain of confronting the publication of this information could be expected to have diminished in the nine and one-half months since his death. On the other hand:

*Likewise, the more time that elapsed, the more the public interest in discussion of the history of President Mitterrand's two terms of office prevailed over the requirements of protecting the President's rights with regard to medical confidentiality.*¹⁹⁴

Two cases from Germany, involving the royal family of Monaco, *Von Hannover v. Germany*, 2004, and *Von Hannover v. Germany (No. 2)*, 2012 (decided by a Grand Chamber), set out in some detail the key balancing criteria to be taken into account when a conflict arises between freedom of expression and privacy. The first case involved a number of photos of Princess Caroline of Monaco, including of her riding on horseback, on a skiing holiday and tripping over something on a private beach. The photos were published in various magazines in Germany.

The German courts, for the most part, upheld the publication of the pictures (with the exception of certain pictures taken in places where the princess had a reasonable expectation of privacy and some pictures involving her children). The European Court, on the other hand, found that publication of the pictures represented a breach of the applicant's right to privacy. The Court once again highlighted the importance of freedom of expression, stating:

In the cases in which the Court has had to balance the protection of private life against the freedom of expression it has always stressed the

¹⁹² *Éditions Plon v. France*, 2004, § 34.

¹⁹³ *Éditions Plon v. France*, 2004, § 47.

¹⁹⁴ *Éditions Plon v. France*, 2004, § 53.

*contribution made by photos or articles in the press to a debate of general interest.*¹⁹⁵

The Court recognised that photos are a protected form of freedom of expression. Indeed, in *Eerikäinen and others v. Finland*, 2009, the Court noted:

*The publication of a photograph must, in the Court's view, in general be considered a more substantial interference with the right to respect for private life than the mere communication of the person's name.*¹⁹⁶

In distinguishing between public interest debate and protected private life in the Hannover case, the Court stipulated:

*The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions.*¹⁹⁷

The domestic courts had held that Princess Caroline was a figure of contemporary society “*par excellence*” and therefore had no right to privacy unless she was in a secluded place out of the public eye. The European Court held that this standard might be appropriate for politicians exercising official functions, but was not applicable in the present case. As the Court noted in relation to the applicant, “the interest of the general public and the press is based solely on her membership of a reigning family whereas she herself does not exercise any official functions.”¹⁹⁸

The situation was largely the same in the second case, with the exception that the photos in question focused mostly on the issue of the illness of the reigning Prince of Monaco, Prince Rainier, and the way his family were looking after him during his illness. The Court reiterated many of its basic principles concerning privacy, including its primary purpose:

[T]he concept of private life extends to aspects relating to personal identity, such as a person's name, photo, or physical and moral integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is thus a zone of interaction of a person with others, even in a public context, which

¹⁹⁵ *Von Hannover v. Germany*, 2004, § 60.

¹⁹⁶ *Eerikäinen and others v. Finland*, 2009, § 70. See also *Verlagsgruppe News GmbH v. Austria*, 2006, and *Österreichischer Rundfunk v. Austria*, 2006.

¹⁹⁷ *Von Hannover v. Germany*, 2004, § 63.

¹⁹⁸ *Von Hannover v. Germany*, 2004, § 72.

may fall within the scope of private life. Publication of a photo may thus intrude upon a person's private life even where that person is a public figure. [references omitted]¹⁹⁹

The Court also addressed the question of a possible hierarchy between the rights to freedom of expression and privacy, the different ways in which cases might come before the Court and how that might affect the margin of appreciation and the relative protection for each of these rights, stating:

In cases such as the present one, which require the right to respect for private life to be balanced against the right to freedom of expression, the Court considers that the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention, by the person who was the subject of the article, or under Article 10 by the publisher. Indeed, as a matter of principle these rights deserve equal respect. Accordingly, the margin of appreciation should in theory be the same in both cases. [references omitted]²⁰⁰

The Court elaborated a number of principles to be taken into account in balancing freedom of expression and the protection of privacy. The first of these was the extent to which the publication contributed to a matter of public interest. On this key issue the Court stated:

An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest (see Von Hannover, cited above, § 60; Leempoel & S.A. ED. Ciné Revue, cited above, § 68; and Standard Verlags GmbH, cited above, § 46). The definition of what constitutes a subject of general interest will depend on the circumstances of the case. The Court nevertheless considers it useful to point out that it has recognised the existence of such an interest not only where the publication concerned political issues or crimes (see White, cited above, § 29; Egeland and Hanseid v. Norway, no. 34438/04, § 58, 16 April 2009; and Leempoel & S.A. ED. Ciné Revue, cited above, § 72), but also where it concerned sporting issues or performing artists (see Nikowitz and Verlagsgruppe News GmbH v. Austria, no. 5266/03, § 25, 22 February 2007; Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v. Portugal, nos. 11182/03 and 11319/03, § 28, 26 April 2007; and Sapan v. Turkey, no.44102/04, § 34, 8 June 2010). However, the rumoured marital difficulties of a president of the Republic or the financial difficulties of a famous singer were not deemed to be matters of general interest (see Standard Verlags GmbH, cited above, § 52, and Hachette Filipacchi Associés (ICI PARIS), cited above, § 43). [references retained]²⁰¹

¹⁹⁹ Von Hannover v. Germany (No. 2), 2012, § 95.

²⁰⁰ Von Hannover v. Germany (No. 2), 2012, § 106.

²⁰¹ Von Hannover v. Germany (No. 2), 2012, § 109.

Other factors referred to by the Court, which largely appeared to be an elaboration of the first, public interest, criterion, included the following:

- the degree of fame of the person involved and the subject of the report (§ 110);
- the prior conduct of the persons involved (§ 111);
- the content, form and consequences of the publication (§ 112); and
- the circumstances in which the photos were taken (§ 113).

Reading between the lines, the Court appeared to be prepared to allow wide latitude to expressions, including in the form of photos, which made even a relatively minor contribution to debate on a matter of public interest. The fact that there was simply no such element in the first case – perhaps best exemplified by the photo of Princess Caroline tripping on the beach – led the Court to uphold the privacy claim. In the second case, in contrast, the Court held that “articles about the illness affecting Prince Rainier III, the reigning sovereign of the Principality of Monaco at the time, and the conduct of the members of his family during that illness” did bear on a matter of public concern.²⁰²

Very similar criteria were set out in the case of *Axel Springer AG v. Germany*, 2012, decided by a Grand Chamber the very same day as *Hannover No. 2*. The *Axel* case involved newspaper reporting on the arrest of a prominent actor for possession of drugs, following on from his earlier conviction for the same offence. The principles noted by the Court for balancing freedom of expression and privacy were as follows:

- contribution to a debate of general interest (§ 90);
- how well the person is known and the subject of the report (§ 91);
- the prior conduct of the persons involved (§ 92);
- the method of obtaining the information and its veracity (§ 93);
- the content, form and consequences of the publication (§ 94); and
- the severity of the sanctions (§ 95).

The Court recognised a general public interest in being informed about criminal proceedings:

The public do, in principle, have an interest in being informed – and in being able to inform themselves – about criminal proceedings, whilst strictly observing the presumption of innocence. That interest will vary in degree, however, as it may evolve during the course of the proceedings – from the time of the arrest – according to a number of different factors, such as the degree to which the person concerned is known, the circumstances of the case and any further developments arising during the proceedings. [references omitted]²⁰³

²⁰² *Von Hannover v. Germany* (No. 2), 2012, § 117.

²⁰³ *Axel Springer AG v. Germany*, 2012, § 96. See also *Verlagsgruppe News GmbH v. Austria*, 2006, and *Österreichischer Rundfunk v. Austria*, 2006.

The Court noted that the actor was a significant public figure, absent which the newspaper would not have published the information, and that “he had therefore actively sought the limelight, so that, having regard to the degree to which he was known to the public, his ‘legitimate expectation’ that his private life would be effectively protected was henceforth reduced”.²⁰⁴ Other considerations were that the information had been provided by officials and that it was also made available to other media outlets, that the articles were essentially factual, if designed to catch the public’s attention, and that the sanctions, although mild, might have a chilling effect on the applicant newspaper. The Court thus held that the sanctions imposed on the newspaper for invading the actor’s private life represented a breach of the right to freedom of expression.

In reaching a contrary decision in *MGN Limited v. the United Kingdom*, 2011, which involved newspaper reporting on a famous model’s drug addiction treatment, the Court did recognise a limited public interest in the issue, given that the model herself had discussed the issue in public, but it also noted:

*[T]he publication of the photographs and articles, the sole purpose of which is to satisfy the curiosity of a particular readership regarding the details of a public figure’s private life, cannot be deemed to contribute to any debate of general interest to society despite the person being known to the public.... Photographs appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution.*²⁰⁵

In finding that the British courts had not violated the applicant newspaper’s right to freedom of expression by holding it liable for breach of privacy, the Court noted that the information had been collected covertly using a long range lens, that this had harmed the model’s programme of treatment and that the photos were not required for the newspaper to be able to present the main story.

In the recent case of *Mosley v. the United Kingdom*, 2011, the Court comprehensively rejected as unacceptable a claim that the media should be required to provide prior notification to individuals whose privacy might be affected by an intended publication, stating:

[H]aving regard to the chilling effect to which a pre-notification requirement risks giving rise, to the significant doubts as to the effectiveness of any pre-notification requirement and to the wide margin of

²⁰⁴ *Axel Springer AG v. Germany*, 2012, § 101.

²⁰⁵ *MGN Limited v. the United Kingdom*, 2011, § 143.

*appreciation in this area, the Court is of the view that Article 8 does not require a legally binding pre-notification requirement.*²⁰⁶

Rights of Others: Hate Speech

In a number of cases involving sanctions for racist speech, the European Court has declined to find a breach of the right to freedom of expression. As noted above, one line of reasoning in such cases is that the speech in question is not protected under Article 10 because it falls within the scope of Article 17, regarding acts aimed at the destruction of the rights protected by the Convention. In other cases, the Court has not deemed the behaviour to be so extreme as to warrant the application of Article 17 but has, instead, found the restriction to be justifiable based on Article 10(2). In yet other cases, the Court has found these restrictions to represent a breach of the right to freedom of expression.

Balsytė-Lideikienė v. Lithuania, 2008, involved a fine and the seizure of the print run of a version of Lithuanian calendar that contained what the European Court described as material expressing “aggressive nationalism and ethnocentrism” and material “inciting hatred against the Poles and the Jews”. The European Court held that the restriction aimed to protect the rights of ethnic groups living in Lithuania, and that the calendar “hindered the consolidation of civil society and promoted national hatred”.²⁰⁷ The Court recognised that the speech was by nature political and that the government should display restraint when resorting to criminal measures to limit speech. The Court deemed the confiscation measure to be quite serious, but the fine to be less so. Overall, however, the Court accepted that the restriction was legitimate given the importance of the countervailing interests.

Willem v. France, 2009, is a case in which the Court held that a national conviction for hate speech did not breach Article 10. In that case, the mayor of a French town announced that he would boycott Israeli products in the municipality to protest against the policies of the Israeli government towards Palestinians. The European Court distinguished between political statements of the applicant (for example against the Israeli Prime Minister), which were protected, and the applicant’s statements on the boycott, which constituted incitement to discrimination against Israeli suppliers simply on the basis of their nationality. The Court also referred to the particular responsibilities of the applicant as mayor, and the need for him not to engage in discrimination in relation to the town’s budget.

The case of *Vejdeland v. Sweden*, 2012, involved the conviction of the applicant for distributing leaflets outside of a school which contained a harsh attack on homosexuals, and which resulted in a suspended sentence and a small fine. The Court recognised that the statements did not necessarily “recommend individuals to commit hateful acts” but that this was not the appropriate standard:

²⁰⁶ *Mosley v. the United Kingdom*, 2011, § 132.

²⁰⁷ *Balsytė-Lideikienė v. Lithuania*, 2008, § 80.

[T]he Court reiterates that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient.²⁰⁸

The Court also noted that the leaflets were directed at students at an impressionable and sensitive age, and that having been left in their lockers, to which the applicant did not have a right of access, they had been imposed on the students. Finally, taking into account the light sentences imposed, the Court held that there had been no breach of Article 10.

In other cases, the Court has held that convictions for racist speech did represent a violation of the right to freedom of expression. In a number of the Turkish cases, the applicants had been convicted under Turkish law for inciting hatred, even though there was little that could be considered hateful about their statements (although some did express pride in Kurdish culture). A good example of this is *Incal v. Turkey*, 1998, where the applicant had been convicted of inciting hatred for distributing a leaflet calling on Kurds to set up neighbourhood committees to defend themselves. In many of these cases, including *Incal*, the Court has held that the legitimate aim pursued was the prevention of disorder (rather than the rights of others). In most of these cases, the Court has found a breach of the right to freedom of expression.

An important racist speech case decided by the European Court is *Jersild v. Denmark*, 1994, which involved the racist speech conviction of a journalist for a television programme which included hate speech statements by racist extremists (the extremists had also been convicted separately).

In a Grand Chamber decision, the Court held that the applicant's conviction was a breach of his right to freedom of expression, even though he had assisted in the dissemination of racist comments. The Court took into account the fact that the statements were made in the context of a serious programme intended for an informed audience, and dealing with social and political issues. It also noted the importance of the purpose of the programme and, in particular whether this had been to promote racism, stating:

A significant feature of the present case is that the applicant did not make the objectionable statements himself but assisted in their dissemination in his capacity of television journalist responsible for a news programme of Danmarks Radio ... [A]n important factor in the Court's evaluation will be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas.²⁰⁹

²⁰⁸ *Vejdeland v. Sweden*, 2012, § 55.

²⁰⁹ *Jersild v. Denmark*, 1994, § 31.

The Court concluded that the purpose was quite clearly not to promote racism but, on the contrary, to expose and analyse it: “[I]t is moreover undisputed that the purpose of the applicant in compiling the broadcast in question was not racist.”²¹⁰

The Court did not place great reliance on the fact that the applicant had not refuted the statements, noting that he had clearly disassociated himself from those statements, even if he had not specifically refuted them. The Court also repeated its oft-stated view that:

*The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.*²¹¹

Another Grand Chamber decision in *Lehideux and Isorni v. France*, 1998, also found a conviction for hate speech to be a breach of the right to freedom of expression. The case involved the prosecution of the applicants for contesting the legitimacy of the conviction of the French leader Marshal Pétain for collusion with the enemy during the Second World War, a crime in France. The Court focused on the need for open public debate about historical matters, noting that the French courts had observed that that page of French history remained “very painful in the collective memory”, that the events had occurred more than 40 years previously and that to refrain from criminalising such speech was, “part of the efforts that every country must make to debate its own history openly and dispassionately.”²¹²

The Court also pointed out that the statements in question, did “not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17.”²¹³ The Court also stressed the fact that the aim of the statements had been to promote public debate and that they were not in fact racist and did not identify any particular group, even implicitly.

Rights of Others: Religion

In a number of earlier cases, the European Court held that restrictions on freedom of expression to protect religious sensitivities did not represent a breach of the right to freedom of expression. For example, *Otto-Preminger Institut v. Austria*, 1994, involved a movie which contained material which might be offensive to certain religious believers. After the applicant association announced that it intended to

²¹⁰ *Jersild v. Denmark*, 1994, § 36.

²¹¹ *Jersild v. Denmark*, 1994, § 35.

²¹² *Lehideux and Isorni v. France*, 1998, § 55.

²¹³ *Lehideux and Isorni v. France*, 1998, § 47.

show the movie, the local diocese of the Roman Catholic Church complained and a domestic court allowed the film to be seized, preventing it from being shown.

Before the Court, the government argued that the right to respect for religious feelings, as protected by Article 9 of the Convention, was breached by the film. The Court noted:

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.²¹⁴

At the same time:

[T]he manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them ... The respect for the religious feelings of believers as guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration.²¹⁵

In relation to the reference to duties and responsibilities in Article 10(2), the Court stated:

Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation 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.²¹⁶

In concluding that the seizure did not breach the right to freedom of expression, the Court held that it could not,

disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent

²¹⁴ Otto-Preminger Institut v. Austria, 1994, § 47.

²¹⁵ Otto-Preminger Institut v. Austria, 1994, § 47.

²¹⁶ Otto-Preminger Institut v. Austria, 1994, § 49.

*that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.*²¹⁷

The Court adopted a similar line of reasoning in its 1996 judgment in *Wingrove v. the United Kingdom*, which again concerned a film which might be considered offensive to some. The film was refused a classification in the United Kingdom on the grounds that its combination of sexual and religious imagery was blasphemous, a crime at the time.

The Court recognised that there were problems with blasphemy laws, but declined to rule them out as inconsistent with the right to freedom of expression:

*Strong arguments have been advanced in favour of the abolition of blasphemy laws, for example, that such laws may discriminate against different faiths or denominations – as put forward by the applicant – or that legal mechanisms are inadequate to deal with matters of faith or individual belief – as recognised by the Minister of State at the Home Department in his letter of 4 July 1989 (see paragraph 29 above). However, the fact remains that there is as yet not sufficient common ground in the legal and social orders of the member States of the Council of Europe to conclude that a system whereby a State can impose restrictions on the propagation of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and thus incompatible with the Convention. [references omitted]*²¹⁸

In upholding what it recognised was a very serious limitation on freedom of expression, the Court also referred to the wide margin of appreciation to be accorded to local decision-makers in such cases.

Some ten years later, in the case of *Giniewski v. France*, 2006, the Court took a different position. That case involved an article by the applicant criticising Catholic doctrine, among other things for containing the seeds of anti-Semitism that gave rise to the Holocaust. The article was held to defame Catholics and the applicant was ordered to pay a fine and to publish a statement about the case in a national newspaper. The Court held that the article contributed to a debate about a matter of public importance, without being needlessly offensive:

50. The Court considers, in particular, that the applicant sought primarily to develop an argument about the scope of a specific doctrine and its possible links with the origins of the Holocaust. In so doing he had made a contribution, which by definition was open to discussion, to a wide-ranging and ongoing debate (see paragraph 24 above), without sparking off any

²¹⁷ *Otto-Preminger Institut v. Austria*, 1994, § 56.

²¹⁸ *Wingrove v. the United Kingdom*, 1996, § 57.

controversy that was gratuitous or detached from the reality of contemporary thought.

51. By considering the detrimental effects of a particular doctrine, the article in question contributed to a discussion of the various possible reasons behind the extermination of the Jews in Europe, a question of indisputable public interest in a democratic society. ... Although the issue raised in the present case concerns a doctrine upheld by the Catholic Church, and hence a religious matter, an analysis of the article in question shows that it does not contain attacks on religious beliefs as such, but a view which the applicant wishes to express as a journalist and historian.²¹⁹

Clearly the facts of the *Giniewski* case are quite different from those of *Otto-Preminger Institut* and *Wingrove*. At the same time, there has been a distinct shift in European national practice during those intervening years and since. The offence of blasphemy upon which the *Wingrove* case was based has now been abolished in the United Kingdom, for example, and, in September 2011, the United Nations Human Rights Committee issued a General Comment on Article 19, which is the analogous provision to Article 10 in the ICCPR, stating:

Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. ... [I]t would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.²²⁰

Information Received in Confidence

Article 10(2) of the European Convention provides that restrictions on freedom of expression may be justified by reference to the need to prevent “the disclosure of information received in confidence”. In this respect it is unlike the ICCPR, which does not include an express reference to confidentiality, although this might in some cases be derived from other interests (such as the protection of national security).

An early case regarding this issue was *Fressoz and Roire v. France*, 1999, which involved the publication of a newspaper article based on confidential tax information relating to the Chair of Peugeot, which revealed significant increases in

²¹⁹ See also *Paturel v. France*, 2005, *Klein v. Slovakia*, 2006, and *Aydın Tatlav v. Turkey*, 2006, in all of which the Court found that national convictions for defaming religious persons or entities were a breach of Article 10.

²²⁰ General Comment No. 34, 12 September 2011, CCPR/C/GC/34, § 48.

his salary during a time of industrial unrest. The tax information had been posted anonymously to one of the applicants. The French courts convicted the applicants and ordered them to pay fines.

The European Court held that the article related to a matter of public interest, namely the ongoing industrial dispute. Furthermore, the Court noted that the French courts had held that the salaries of the heads of major companies could not be considered private. The Court also noted that the applicants knew that the material was confidential, and that “journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection”.²²¹ An important consideration for the Court was that information about the Chair’s salary was public and there were a number of ways of accessing this sort of information under French rules, although it was illegal to publish tax information. The applicants had published the tax information merely as a way to boost the credibility of their article, and not to engage in additional disclosures about the Chair. As a result, the conviction was not a legitimate restriction on freedom of expression.

The case of *Stoll v. Switzerland*, 2007, decided by a Grand Chamber, involved the publication of articles based on an illegally leaked report about the Swiss government’s strategy regarding negotiations between Swiss banks and the World Jewish Congress concerning compensation for Holocaust survivors regarding unclaimed assets held by Swiss banks. The applicant was criminally convicted and ordered to pay a small fine.

The Court highlighted the particular importance of the press in the circumstances of that case:

*Press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature.*²²²

The Court distinguished this case from earlier cases inasmuch as in this case the information had been entirely confidential prior to its publication by the applicants. The case also involved very important public interests, rather than simply a private interest:

[I]n the instant case, unlike other similar cases, the public’s interest in being informed of the ambassador’s views had to be weighed not against a private interest – since the report did not relate to the ambassador as a private individual – but against another public interest. Finding a satisfactory solution to the issue of unclaimed funds, in which considerable sums of money were at stake, was not only in the interests of the

²²¹ *Fressoz and Roire v. France*, 1999, § 52.

²²² *Stoll v. Switzerland*, 2007, § 110.

government and the Swiss banks but, since it related to compensation due to Holocaust victims, also affected the interests of survivors of the Second World War and their families and descendants. In addition to the substantial financial interests involved, therefore, the matter also had a significant moral dimension which meant that it was of interest even to the wider international community. [references omitted]²²³

The issue was, furthermore, a matter of great public concern in Switzerland, where it had divided public opinion and raised questions about Switzerland's wider role in the Second World War. At the same time, the Court recognised the strong public interest in protecting diplomatic confidentiality, particularly given the seniority of the diplomat concerned:

The Court agrees with the Government and the third-party interveners that it is vital to diplomatic services and the smooth functioning of international relations for diplomats to be able to exchange confidential or secret information.²²⁴

In this regard, the Court noted that the specific material was very sensitive, given the delicate negotiations in which the government was involved and the revealing nature of the report, which, for example, suggested that Switzerland's partners in the negotiations were not to be trusted. In contrast to this sensitive situation, the language of the article had been strong (described by some as 'bellicose'), and so had the potential to undermine the negotiations.

The Court also noted that the applicant was not responsible for the leak:

142. It should be noted in that regard that the applicant was apparently not the person responsible for leaking the document. In any event, no proceedings were instituted on that basis by the Swiss authorities.

143. Furthermore, it is primarily up to States to organise their services and train staff in such a way as to ensure that no confidential or secret information is disclosed. In that regard, the authorities could have opened an investigation with a view to prosecuting those responsible for the leak. [references omitted]

The Court was critical of the style of the articles, which sometimes quoted extracts from the report out of context, which implied that the author of the report was anti-Semitic, which presented the material in an inappropriate sensationalist manner, given their substance, and which were misleading inasmuch as they did not make the timing of events sufficiently clear.

²²³ Stoll v. Switzerland, 2007, § 115.

²²⁴ Stoll v. Switzerland, 2007, § 126.

Finally, the Court noted that the sanction imposed on the applicant had been small. For all of these reasons, it concluded that the restriction was not a violation of the right to freedom of expression.

In a number of other cases dealing with the publication of confidential information by the media, the Court has come down on both sides, sometimes finding a breach of the right to freedom of expression and sometimes not, depending on all of the circumstances.²²⁵

A very important case on confidentiality was the Grand Chamber's decision in *Guja v. Moldova*, 2008, which differed from the previous cases inasmuch as it involved a disclosure of information by an official, specifically the applicant who was at the time working in the prosecutor's office. The applicant had sent two letters, neither of which was marked confidential, to the press. The letters supported claims that there was political interference in the work of the prosecutor's office. The applicant was later dismissed from his position as a result of the disclosure.

The Court noted that this case raised a new issue for it, and accepted that the duty of confidentiality owed by civil servants is a strong one:

*Since the mission of civil servants in a democratic society is to assist the government in discharging its functions and since the public has a right to expect that they will help and not hinder the democratically elected government, the duty of loyalty and reserve assumes special significance for them. In addition, in view of the very nature of their position, civil servants often have access to information which the government, for various legitimate reasons, may have an interest in keeping confidential or secret. Therefore, the duty of discretion owed by civil servants will also generally be a strong one. [references omitted]*²²⁶

But as a countervailing interest, the Court also noted that there may be a strong public interest in accessing internal information:

*In this respect the Court notes that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgation or publication corresponds to a strong public interest. The Court thus considers that the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection.*²²⁷

²²⁵ Violations were, for example, found in the cases of *Dammann v. Switzerland*, 2006, and *Radio Twist a.s. v. Slovakia*, 2006, while no violation was found in *Leempoel & S.A. ED. Ciné Revue v. Belgium*. See also *Poyraz v. Turkey*, 2010.

²²⁶ *Guja v. Moldova*, 2008, § 71.

²²⁷ *Guja v. Moldova*, 2008, § 72.

As part of the balancing test here, the Court noted:

*In the light of the duty of discretion referred to above, disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public.*²²⁸

The Court also elaborated on a number of factors to be taken into account when assessing the relative importance of confidentiality versus disclosure, including the nature of the public interest involved, the authenticity of the information, the damage suffered by the public authority from the disclosure, the motive of the employee in disclosing the information, and the sanction imposed. In terms of the specific facts of the case, the Court noted that there did not appear to be any realistic internal means for the applicant to raise this issue, that the issue raised, namely the separation of powers, was of great public interest, that the information was fully authentic, that the public interest in knowing about inappropriate pressure on the prosecutor's office was greater than protecting the reputation of that office, that the applicant had acted in good faith, and that the sanction of dismissal was a very harsh measure. As a result, it represented a breach of the applicant's right to freedom of expression. The case highlights the strong stand the Court is willing to make when freedom of expression is used to expose official wrongdoing.

Authority and Impartiality of the Judiciary

The authority and impartiality of the judiciary is the last of the grounds listed in Article 10(2) which may justify a restriction on freedom of expression. It is clear that these are public interests of great importance and that, where they are truly under threat, it may be legitimate to limit freedom of expression. At the same time, there has historically been a tendency in many countries to provide undue protection to the judiciary, a public institution, against criticism, a situation which is exacerbated by the fact that it is judges themselves who police this issue. The cases in this category can largely be divided into two groups, those that seek to protect the impartiality of the administration of justice and those that seek to protect the authority of the judiciary, which often involve questions of criticism of judges.

The first case decided by the Court in this area, *Sunday Times v. the United Kingdom*, 1979, was also one of its earliest cases. In that case, the British courts had issued injunctions against the publication by a newspaper of an article about the use of the drug thalidomide, which had resulted in many children being born with severe deformities. Negotiations between parents and the company which had produced the drug were ongoing and required court approval and hence were still *sub judice*. The Court noted the importance of openness in relation to courts:

²²⁸ *Guja v. Moldova*, 2008, § 73.

There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them. [references omitted]²²⁹

The Court also referred to the undisputed public concern in the issue and the right of the families involved in the tragedy as well as the public at large to be informed about the matter. The Court recognised that the article might have had some impact on the legal position of the parties to the case, but held that the larger public interest was in open discussion about the issue.

A different conclusion was reached in *Worm v. Austria*, 1997, which involved an article by the applicant essentially expressing the opinion that a suspect in a criminal case was guilty. The Court noted that the domestic courts had found that the applicant sought to usurp the role of the judiciary in society, and that public figures are equally entitled to fair judicial proceedings as are other members of society. In finding there had been no violation of Article 10, the Court was of the view that the article might undermine public confidence in the courts:

[I]t cannot be excluded that the public's becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the determination of a person's guilt or innocence on a criminal charge.²³⁰

In its later cases about influencing court proceedings, the European Court has taken a more robust position in favour of freedom of expression. In *Foglia v. Switzerland*, 2007, the Court dealt with a case where a lawyer had been convicted for making available statements and trial documents about a case which was still pending. The disclosure was blamed for triggering a press campaign about the case. The local courts described the media campaign as a parallel process to the judicial one, which aimed to influence the outcome of the case. The European Court noted that the facts of the case, which involved the discovery of a murder victim who was known regionally and nationally, naturally inspired media interest. It also noted the limited nature of the applicant's communications with the press, as opposed to those of his client, for whom he was not responsible, and that the disclosure of the documents was not, *per se*, illegal under local law. The applicant was also not responsible for the

²²⁹ *Sunday Times v. the United Kingdom*, 1979, § 65.

²³⁰ *Worm v. Austria*, 1997, § 54.

use made of his statements, along with other material, by the press and, in particular, the widespread media campaign and the impact it might have on the case.²³¹

Cases involving criticism of judges also go back to the early days of the Court. In the case of *De Haes and Gijssels v. Belgium*, 1997, the applicant journalists had reported in a newspaper on a case pending before the courts, criticising in strong terms the judges of the Court of Appeal who had decided, in a divorce case, that the two children of the divorced family should live with their father. The father, a well-known notary, had previously been accused by his former wife and her parents of sexual abuse of the two children. Three judges and a prosecutor sued the applicants for defamation and the local courts convicted them, finding that they had cast strong doubts on the impartiality of the judges.

The Court recognised that members of the judiciary must enjoy public trust, stating:

*The courts - the guarantors of justice, whose role is fundamental in a State based on the rule of law - must enjoy public confidence. They must accordingly be protected from destructive attacks that are unfounded, especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying to criticism.*²³²

At the same time, the Court noted the detailed research that had gone into the articles, and the duty of the media to report on matters of public interest, which was high in the circumstances of the present case, given the allegations of child abuse. Interestingly, the Court did not dwell on the question of whether or not the authority of the local courts had been undermined, and instead dealt with the case largely as a matter of defamation law.

The case of *Kyprianou v. Cyprus*, 2005, decided by a Grand Chamber of the Court, involved a prison sentence imposed on a lawyer for contempt of court after he accused the judges of not listening to him and of passing pieces of paper among themselves. The Court reiterated its established principles in this area, noting the special role of lawyers in the administration of justice:

174. The special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein.

²³¹ See also *Dupius v. France*, 2007.

²³² *De Haes and Gijssels v. Belgium*, 1997, § 37.

175. While lawyers too are certainly entitled to comment in public on the administration of justice, their criticism must not overstep certain bounds. Moreover, a lawyer's freedom of expression in the courtroom is not unlimited and certain interests, such as the authority of the judiciary, are important enough to justify restrictions on this right. Nonetheless, even if in principle sentencing is a matter for the national courts, the Court refers to its case-law to the effect that it is only in exceptional circumstances that restriction – even by way of a lenient criminal penalty – of defence counsel's freedom of expression can be accepted as necessary in a democratic society. [references and parts of the quotation omitted]

Applying these principles to the case at hand, the Court found that the prison sentence imposed on the applicant was disproportionate, noting:

The applicant's conduct could be regarded as showing a certain disrespect for the judges of the Assize Court. Nonetheless, albeit discourteous, his comments were aimed at and limited to the manner in which the judges were trying the case, in particular concerning the cross-examination of a witness he was carrying out in the course of defending his client against a charge of murder.²³³

Steur v. the Netherlands, 2003, involved an accusation by the applicant that a police officer working on social security files had improperly pressured his client, which led to disciplinary proceedings being brought against him. The Court noted the relevant principles in such cases, including the following:

The Court has also previously pointed out that the special nature of the profession practised by members of the Bar must be considered. In their capacity as officers of the court, they are subject to restrictions on their conduct, which must be discreet, honest and dignified, but they also benefit from exclusive rights and privileges that may vary from one jurisdiction to another – among them, usually, a certain latitude regarding arguments used in court. [references omitted]²³⁴

The Court recognised that the allegation could affect the police officer, but it also noted that the purpose of making the allegation was to protect the applicant's client, from whom the applicant had received the information. Such statements warrant special protection:

The Court notes that the applicant's criticism during the trial was aimed at the manner in which evidence was obtained by an investigating officer exercising his powers to interrogate the applicant's client in a criminal case and while the latter was in custody. As the Court has noted with reference

²³³ Kyprianou v. Cyprus, 2005, § 179.

²³⁴ Steur v. the Netherlands, 2003, § 38.

to public prosecutors, the difference between the positions of an accused and an investigating officer calls for increased protection of statements whereby an accused criticises such an officer. This applies equally in this case, where the way in which such evidence was gathered was criticised in civil proceedings in which that evidence was to be used. [references omitted]²³⁵

In finding a violation of the right to freedom of expression, the Court noted that the disciplinary authorities attempted neither to assess the validity of the allegations nor to ascertain whether the applicant had acted in good faith.

The case of *Kudeshkina v. Russia, 2009*, is interesting as it involved statements by a candidate for elected office, which were based on her time as a judge, thereby raising potentially conflicting standards relating to freedom of expression. Regarding the specific statements in question, the Court stated:

The Court observes 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.²³⁶

Regarding the applicant's motivation for making the statements, the Court noted:

In so far as the applicant's motive for making the impugned statements may be relevant, the Court reiterates that an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection.²³⁷

Even though the statements had been made as part of an election campaign, the Court deemed them to be fair comment on a matter of great public importance. An important consideration for the Court was the problematical procedures involved in the case, whereby the same court that the applicant had criticised was responsible for hearing the disciplinary matter against her:

The Court considers that the applicant's fears as regards the impartiality of the Moscow City Court were justified on account of her allegations against

²³⁵ *Steur v. the Netherlands, 2003, § 39.*

²³⁶ *Kudeshkina v. Russia, 2009, § 94.*

²³⁷ *Kudeshkina v. Russia, 2009, § 95.*

*that Court's President. However, these arguments were not given consideration, and this failure constituted a grave procedural omission. Consequently, the Court finds that the manner in which the disciplinary sanction was imposed on the applicant fell short of securing important procedural guarantees.*²³⁸

This finding has important implications for contempt of court and related proceedings, which are often heard by the very courts, and sometimes the very judges, which have been criticised. Finally, in finding a breach of the right to freedom of expression, the Court noted that the applicant had been precluded from exercising her profession, a very serious sanction indeed.

²³⁸ Kudeshkina v. Russia, 2009, § 96.

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