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**STEERING COMMITTEE FOR HUMAN RIGHTS  
(CDDH)**

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**Analysis of the relevant jurisprudence of the European Court of Human Rights and other Council of Europe instruments to provide additional guidance on how to reconcile freedom of expression with other rights and freedoms, in particular in culturally diverse societies**

*(as adopted by the CDDH at its 87<sup>th</sup> meeting, 6-9 June 2017)*

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## I. Introduction

### A. Brief presentation of the following issues

#### i. Recent developments in Europe

1. Freedom of expression is a fundamental right upon which many other freedoms are based. It holds a prominent place in democratic societies as according to the European Court of Human Rights (hereinafter, the Court):

“Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), 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 the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".”

2. Freedom of expression is the foundation of open and inclusive societies as it promotes knowledge and understanding in culturally diverse societies such as those in Europe today. However the abuse or misuse of freedom of expression may place these societies in danger. This may also occur when this freedom is censored or silenced.
3. Recent events such as the murder of *Charlie Hebdo* journalists committed in Paris on 7 January 2015 raise questions with regard to the implementation of freedom of expression in democratic societies. Several issues are raised in this context. These include addressing not only the safety of journalists which is necessary to ensure democracy, but also the non-permissible hate speech on which various bodies of the Council of Europe have already firmly expressed their condemnation. Finally, it also raises questions regarding the limits to freedom of expression in contemporary European societies in which the enjoyment of one’s freedoms seems more than ever, due to the diversity of cultures which coexist, to affect the freedom of others. The central issue in this analysis is the link between freedom of expression and other human rights such as the right to private life, freedom of thought, conscience and religion, freedom of assembly and association and finally the prohibition of discrimination.

#### ii. Mandate

4. At their 1241<sup>st</sup> meeting in November 2015, the Ministers' Deputies adopted terms of reference of intergovernmental structures for the period 2016-2017. Regarding the Steering Committee for Human Rights (CDDH), the Deputies assigned the CDDH the following mandate (see "Development and promotion of human rights"):

"Freedom of expression and links to other human rights

- (i) Following the work already carried out by the CDDH in promoting pluralism and tolerance and contributing to maintaining cohesive societies, conduct an analysis of the relevant jurisprudence of the European Court of Human Rights and other Council of Europe instruments to provide additional guidance on how to reconcile freedom of expression with other rights and freedoms, in particular in culturally diverse societies (deadline: 31 December 2016).
- (ii) On this basis, prepare a guide to good national practices on reconciling the various rights and freedoms concerned (deadline: 30 June 2017). If necessary, a draft recommendation of the Committee of Ministers on "cyber security and human rights" is prepared (deadline: 31 December 2017)."

5. Ms. Kristīne LĪCIS (Latvia) was appointed by the CDDH as Rapporteur on freedom of expression and links to other human rights. The CDDH furthermore determined the composition of the Drafting Group on freedom of expression and links to other human rights (CDDH-EXP) and appointed Mr Hans-Jörg BEHRENS (Germany) as chairperson of the Group.

iii. International legal context

6. A number of international instruments protect freedom of expression: Article 19 of the Universal Declaration of Human Rights;<sup>1</sup> Article 19 of the International Covenant on Civil and Political Rights (ICCPR);<sup>2</sup> Article 5.d.viii of the International Convention on the elimination of all forms of racial discrimination (ICERD);<sup>3</sup> Article 13 of the American Convention on human rights;<sup>4</sup> Article 9 of the African Charter on human and peoples' rights;<sup>5</sup> Article 11 of the Charter of Fundamental Rights the European Union;<sup>6</sup> etc. To these can be added specific texts whose very existence highlights the importance of this fundamental freedom in democratic societies: General Comment No. 10 on Freedom of expression<sup>7</sup> updated by General Comment No. 34<sup>8</sup> and the General Comment No. 11 on the prohibition of propaganda for war and incitement to national hatred, racial or religious grounds<sup>9</sup> prepared by the UN Human Rights Committee; the Declaration of principles on freedom of expression adopted in part by the Organisation of American States and by the African Union;<sup>10</sup> the Amsterdam Recommendations on Freedom of the Media and the Internet<sup>11</sup> prepared by the Organisation for Security and Co-operation in Europe (OSCE) and the Bishkek Declaration on Media in multicultural and multilingual societies.<sup>12</sup>
7. Some instruments recognise that the right is not absolute in all its forms. Articles 20(1) and (2) of the ICCPR prohibit any propaganda for war and expression that would

<sup>1</sup> Adopted by the UN General Assembly on 10 December 1948.

<sup>2</sup> Adopted by the UN General Assembly on 16 December 1966.

<sup>3</sup> Adopted by the UN General Assembly on 21 December 1965.

<sup>4</sup> Adopted by the General Assembly of the Organization of American States on 22 November 1969.

<sup>5</sup> Adopted by the Assembly of Heads of State and Government of the Organization of African Unity on 28 June 1981.

<sup>6</sup> Adopted by the European Union on 7 December 2000.

<sup>7</sup> Adopted by the UN Human Rights Committee on 29 July 1983.

<sup>8</sup> Adopted by the UN Human Rights Committee on 29 July 2011.

<sup>9</sup> Adopted by the UN Human Rights Committee on 29 June 1983.

<sup>10</sup> Adopted by the African Commission on Human Rights and Peoples on 23 October 2002.

<sup>11</sup> Adopted on 14 June 2003.

<sup>12</sup> Adopted at the "Fifth Central Asia Media Conference," Media in Multi-Cultural and Multi-Lingual Societies "Bishkek 17-18 September 2003".

amount to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Article 4 of the ICERD similarly prohibits propaganda, the dissemination of ideas based on racial superiority or hatred, and the incitement to racial discrimination.

8. At the Council of Europe level, Article 10 of the European Convention on Human Rights (hereinafter, the Convention)<sup>13</sup> specifically protects freedom of expression. The European Social Charter also mentions specific aspects of this freedom, for example in terms of the right to be informed of health risks, of workers' right to information, or the right of migrant workers to receive training in their own language (Charter of 1961, additional Protocol to the 1961 Charter and revised Charter), while Articles 7 and 9 of the Framework Convention for the Protection of National Minorities guarantee the right of freedom of expression, and the enjoyment of this freedom in the minority language, to those belonging to national minorities.<sup>14</sup>
9. Additional legal instruments include declarations, recommendations and guidelines adopted by other bodies of the Council of Europe<sup>15</sup> which, although not legally binding, are an integral part of the Council of Europe standards.<sup>16</sup> Of particular importance are the Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies.<sup>17</sup> Also of relevance is the Declaration on freedom of communication on the Internet of 28 May 2003.
10. Furthermore, international courts and control mechanism bodies have dealt with the implementation of freedom of expression and its relationship with other rights. In addition, special procedures have been established within the United Nations Human Rights Council to report and advise on human rights from a thematic or country-specific perspective, namely the Special Rapporteur on the protection and promotion of the right to freedom of expression and opinion, but also the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on the right to peaceful assembly and association. Moreover the OSCE Representative on Freedom of the Media plays a role in observing media developments as part of an early warning function, and helping participating States abide by their commitments to freedom of expression and free media.

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<sup>13</sup> Signed on 4 November 1950 and entered into force on 3 September 1953.

<sup>14</sup> Adopted by the Committee of Ministers on 10 November 1994.

<sup>15</sup> Committee of Ministers, Parliamentary Assembly and other institutions such as the Congress of Local and Regional Authorities, the Commissioner for Human Rights and the European Commission for Democracy through Law (Venice Commission).

<sup>16</sup> See document SG (2014) 1 Final. Report of the Secretary General of the Council of Europe on the situation of democracy, human rights and the rule of law in Europe, Summary, "Setting standards".

<sup>17</sup> Adopted by the Committee of Ministers on 2 March 2016, §§19-22.

11. The [\*Human Rights Guidelines on Freedom of Expression Online and Offline\*](#)<sup>18</sup> of the European Union explain the international human rights standards on freedom of opinion and expression and provide political and operational guidance to officials and staff of the EU institutions and EU member States for their work in third countries and in multilateral fora as well as in contacts with international organisations, civil society and other stakeholders.

## **B. Method/approach**

12. This document provides an overview of existing standards in the Council of Europe and beyond, as well as the case law of the European Court of Human Rights - not only judgments in which the Court found a violation of Article 10, but also instances when no violation was found - and the decisional practice of the supervisory bodies on the issue of freedom of expression and its links with other fundamental rights.
13. A combined reading of these documents is intended to clarify the links between freedom of expression and other human rights and to provide States with tools enabling them to reconcile the various fundamental rights in culturally diverse societies.

## **II. General principles and definitions**

14. Article 10 of the Convention reads as follows:

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

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

15. The structure of Article 10 of the Convention is very close to that of Articles 8, 9 and 11 of the Convention in that the first and second sentence of §1 define the freedoms that are protected by this provision, while the third sentence in §1, and entire §2 describe the circumstances in which the State may interfere with the exercise of the freedom of expression. The present chapter follows this structure and first of all examines the concept of the freedom of expression, its role in a democratic society, as well as the scope of the protection offered by Article 10 §1. It then looks into the nature of the State's obligations under Article 10, and into the concept of "duties and responsibilities" related to the exercise of the freedom of expression. Finally, this chapter outlines the requirements that must be observed for an interference with the

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<sup>18</sup> Council of the European Union, Foreign Affairs, *EU Human Rights Guidelines on Freedom of Expression Online and Offline*, Brussels 12 May 2014.

freedom of expression to be compatible with the Convention, and the margin of appreciation the States enjoy.

### **a. Freedom of expression and its role in a democratic society**

16. Freedom of expression is considered as having a “constitutional” importance,<sup>19</sup> since it is not only a right in itself, but also plays an important role in the protection of other rights under the Convention, for example, the freedom of thought, conscience and religion. Even more importantly, the freedom of expression protects the very ideals of democracy highlighted in the Preamble to the Convention: “Without a broad guarantee of the right to freedom of expression protected by independent and impartial courts, there is no free country, there is no democracy”.<sup>20</sup> In almost every case where it examines a complaint under Article 10 of the Convention, the Court reiterates that “the freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment”.<sup>21</sup>
17. This approach has led the Court to two important observations. Firstly, the protection offered by Article 10 applies not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.<sup>22</sup> In this regard the Court has further stressed that “such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’”.<sup>23</sup> The second observation is directly linked to the first, namely, that every “formality”, “condition”, “restriction” or “penalty” imposed on the freedom of expression must be construed strictly, and the need for any restrictions must be established convincingly.<sup>24</sup> The Court has consistently held that the adjective “necessary” in Article 10 §2 implies the existence of a pressing social need and that even though the States have a margin of appreciation in assessing whether such a need to interfere with the freedom of expression exists, this margin of appreciation goes hand in hand with European supervision, “embracing both the law and the decisions that apply it, even those given by independent courts”.<sup>25</sup>
18. The two observations mentioned above must be borne in mind when seeking to balance freedom of expression with other rights, for example, when deciding on the permissible interferences with the freedom of expression to protect the right to fair

<sup>19</sup> Harris, O’Boyle, and Warbick, *Law of the European Convention on Human Rights*, Third edition, Oxford University Press 2014, p.613.

<sup>20</sup> Jochen Abr. Frowein, “Freedom of expression under the European Convention on Human Rights”, in Monitor/Inf (97) 3, Council of Europe, available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2436634&SecMode=1&DocId=584134&Usage=2>

<sup>21</sup> *Handyside v. the United Kingdom* (application no.5493/72), judgment of 7 December 1972, §49; *Palomo Sánchez and Others v. Spain* (applications nos. 28955/06, 28957/06, 28959/06 and 28964/06), Grand Chamber judgment of 12 September 2011, §53; *Perinçek v. Switzerland* (application no.27510/08), Grand Chamber judgment of 15 October 2015, §196.

<sup>22</sup> *Handyside v. the United Kingdom* (application no.5493/72), judgment of 7 December 1972, §49.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Palomo Sánchez and Others v. Spain* (applications nos. 28955/06, 28957/06, 28959/06 and 28964/06), Grand Chamber judgment of 12 September 2011, §53.

<sup>25</sup> *Palomo Sánchez and Others v. Spain* (applications nos. 28955/06, 28957/06, 28959/06 and 28964/06), Grand Chamber judgment of 12 September 2011, §55; *Perinçek v. Switzerland* (application no.27510/08), Grand Chamber judgment of 15 October 2015, §196.

trial and the presumption of innocence, the right to private life, and others. When faced with such conflicting interests, the Court has sought to establish a pre-eminence of one right over another in light of the facts specific to the individual case. In order to decide the extent to which a particular form of expression should be protected, the Court therefore examines, among others, the type of expression (political, commercial, artistic, etc.), the means by which the expression is disseminated (personal, written media, television, etc.), and its audience (adults, children, the entire public, a particular group, etc.).<sup>26</sup>

### **b. The protection offered by Article 10**

19. Article 10 §1 explicitly refers to three elements included in the freedom of expression. First, it is the freedom to hold opinions, which is a prior condition to the other freedoms guaranteed by Article 10, and enjoys an absolute protection in the sense that the possible restrictions set forth in 10 §2 are inapplicable to it.<sup>27</sup> This element of the freedom of expression in substance means that the State must not try to indoctrinate its citizens and that the State may not make distinction between those holding specific opinions and others.
20. The second element in the freedom of expression is the freedom to receive information and ideas. Even if Article 10 cannot be read as guaranteeing a general right of access to information, the Court has consistently recognised that the public has a right to receive information of general interest and that particularly strong reasons must be provided for any measure limiting access to information which the public may receive.<sup>28</sup> For example, in the case of *Kalda v. Estonia* the Court examined a complaint that concerned a particular means of accessing the information in question: namely that the applicant, as a prisoner, wished to be granted access – specifically via the Internet – to information published on the websites of the Council of Europe Information Office in Tallinn, the Chancellor of Justice, and the Parliament, which according to the Court, predominantly contained legal information and information related to fundamental rights, including the rights of prisoners. The Court noted that under the Estonian domestic law prisoners have been granted limited access to the Internet via computers specially adapted for that purpose and under the supervision of the prison authorities, but that the domestic courts undertook no detailed analysis as to the security risks allegedly emerging from the access to the three additional websites in question, particularly having regard to the fact that these were websites of State authorities and of an international organisation. The Court concluded that the interference with the applicant’s right to receive information, in the specific circumstances of the case, could not be regarded as having been necessary in a democratic society.<sup>29</sup>

<sup>26</sup> Monica Macovei, *Freedom of Expression*, Human rights handbook, No.2, Council of Europe, 2004, page 7.

<sup>27</sup> *Ibid.*, page 8.

<sup>28</sup> *Guseva v. Bulgaria* (application no.6987/07), judgment of 17 February 2015, §§36-37 with further references.

<sup>29</sup> *Kalda v. Estonia* (application no.17429/10), judgment of 19 January 2016, §53. See also *Jankovskis v. Lithuania* (application no. 21575/08), judgment of 17 January 2017.



21. The case of *Magyar Helsinki Bizottság v. Hungary*<sup>30</sup> marked an important development in the Court's case-law regarding the right of access to information, and, more specifically, the right of access to State-held information. The applicant, a Hungarian non-governmental organisation (NGO), relied on Article 10 of the Convention and claimed that the refusal of the Hungarian courts to order the disclosure of names of public defenders and the number of their appointments – information that the applicant NGO sought in relation to a survey it was conducting – amounted to a breach of applicant NGO's right to freedom of expression. The Court examined the question of whether Article 10 of the Convention could be interpreted as guaranteeing the applicant NGO a right of access to information held by public authorities, and consequently whether the denial of the applicant's request for information resulted, in the circumstances of the case, in an interference with its right to receive and impart information as guaranteed by Article 10 of the Convention.<sup>31</sup> In light of the national legislation in the majority of Contracting States, as well as taking into account a high degree of consensus that had emerged at the international level, the Court did not consider that it was prevented from interpreting Article 10 § 1 as including a right of access to information.<sup>32</sup> The Court recalled that the right to receive information could not be constructed as imposing positive obligations on a State to collect and disseminate information of its own motion and Article 10 did not confer on the individual a right of access to information held by a public authority or oblige the Government to impart such information to the individual. However, such a right or obligation could arise, firstly, where disclosure of the information had been imposed by a judicial order which had gained legal force and, secondly, in circumstances where access to the information was instrumental for the individual's exercise of his or her right to freedom of expression, in particular the freedom to receive and impart information and where its denial constituted an interference with that right.<sup>33</sup> Whether and to what extent the denial of access to information constituted an interference with an applicant's freedom of expression had to be assessed in each individual case and in the light of its particular circumstances including: (i) the purpose of the information requested; (ii) the nature of the information sought; (iii) the role of the applicant; and (iv) whether the information was ready and available.<sup>34</sup> Applying these principles to the facts of the case, the Court ruled that there had been an interference with the applicant NGO's right, and that there had not been a reasonable relationship of proportionality between the measure complained of and the legitimate aim pursued.

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<sup>30</sup> *Magyar Helsinki Bizottság v. Hungary* (application no.18030/11), judgment of 8 November 2016.

<sup>31</sup> *Ibid.*, §71.

<sup>32</sup> *Ibid.*, §149.

<sup>33</sup> *Ibid.*, §156.

<sup>34</sup> *Ibid.*, §§157-180.

22. Within the field of freedom to receive information and ideas the Court has developed extensive case-law in relation to press freedom, the purpose of which is to impart information and ideas on matters of public interest. The Court has pointed out that in cases where the applicant was an individual journalist and human rights defender, the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom, and that obstacles created in order to hinder access to information which is of public interest may discourage those working in the media, or related fields, from pursuing such matters. As a result, they may no longer be able to play their vital role as “public watchdogs” and their ability to provide accurate and reliable information may be adversely affected.<sup>35</sup> Thus in the case of *Dammann v. Switzerland* the Court found that a criminal conviction of an investigating journalist for having obtained, in breach of official secrecy laws, information about previous convictions of private persons, to in breach of Article 10 of the Convention. The Court noted that the information had been of a kind that raised matters of public interest in that it had concerned a very spectacular break-in that had been widely reported in the media. The Court further noted that no damage had been done to the rights of the persons concerned – while there might have been a risk, at a particular time, of interference with other persons’ rights, the risk had disappeared once the applicant had himself decided not to publish the information in question. The Court underlined that conviction of the applicant, even if the penalty imposed was not very harsh, had nonetheless amounted to a kind of censorship which was likely to discourage him from undertaking research, inherent in his job, with a view to preparing an informed press article on a topical subject.<sup>36</sup>
23. The Court has also found that the function of creating forums for public debate is not limited to the press. That function may also be exercised by NGOs, the activities of which are an essential element of informed public debate and that in such a situation the NGO is exercising a role as a public watchdog of similar importance to that of the press.<sup>37</sup> For example, in the case of *Guseva v. Bulgaria* the applicant, a member and representative of an association active in the area of animal rights protection, complained before the Court that the mayor of a town failed to comply with three final Supreme Administrative Court’s judgments requiring the mayor to provide the applicant with information relating to the treatment of stray animals found on the streets of the town over which he officiated. The Court found that the applicant had sought access to information about the treatment of animals in order to exercise her role of informing the public on this matter of general interest and to contribute to public debate, and that the existence of her right of access to such information had been recognised both in the domestic legislation and in three final Supreme Administrative Court judgments. The Court further found that applicable domestic legislation provided no clear time-frame for enforcement of the judgments, thus creating unpredictability as to the likely time of enforcement, which, in the applicant’s case, never materialised. The Court therefore concluded that the domestic law lacked the requisite foreseeability resulting in the interference with the applicant’s Article 10 rights not being “prescribed by law”.<sup>38</sup>
24. Furthermore, the Court has held that the right to receive information also prohibits a Government from preventing a person from receiving information that others wished

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<sup>35</sup> *Shapovalov v. Ukraine* (application no.45835/05), judgment of 31 July 2012, §68.

<sup>36</sup> *Dammann v. Switzerland* (application no.77551/01), judgment of 24 April 2006.

<sup>37</sup> *Guseva v. Bulgaria* (application no.6987/07), judgment of 17 February 2015, §38 with further references.

<sup>38</sup> *Ibid.*, §§58-60

or were willing to impart.<sup>39</sup> For example, in the case of *Autronic AG v. Switzerland* the Court examined a complaint that the granting of permission to receive uncoded television broadcasts for general use from a telecommunications satellite had been made subject to the consent of the broadcasting State and thus constituted an infringement of the right to receive information. In this case the Court held that the reception of television programmes by means of a dish or other aerial comes within the right laid down in the first two sentences of Article 10 §1, without it being necessary to ascertain the reason and purpose for which the right is to be exercised. As the administrative and judicial decisions complained of prevented the applicant from lawfully receiving transmissions from a Soviet telecommunications satellite, they therefore amounted to "interference by public authority" on the exercise of freedom of expression.<sup>40</sup> In a comparable case of *Khurshid Mustafa and Tarzibachi v. Sweden* the Court found a violation of Article 10 under the head of "freedom to receive information" due to the decisions of the domestic courts not to prolong private tenancy agreement owing to refusal by immigrant tenants to remove satellite dish used to receive television programmes from their country of origin.<sup>41</sup>

25. Thirdly, freedom of expression includes the freedom to impart information and ideas, which is of the greatest importance for the political life and the democratic structure of a country, considering, for example, that meaningful free elections are not possible in the absence of this freedom, and that the exercise of this freedom allows for a free criticism of the government, which is among the main indicators of democracy.<sup>42</sup> For example, in the case of *Şener v. Turkey* the Court underlined that "[i]n 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 public opinion".<sup>43</sup>
26. As regards whistleblowers, the Court considers, inter alia, that the penalties imposed on employees who have criticised the operation of a service or disclosed conduct or illegal acts found at their place of work may constitute a violation of their right to freedom of expression within the meaning of Article 10 (1) of the Convention.<sup>44</sup>
27. It follows from the structure of Article 10, the Court's case-law and principles defined therein (see §17 above), that there is a strong general presumption towards protection, meaning that the burden to prove that restrictions to the exercise of the freedom of expression were justified lies with the State. However, there are situations where the threshold for overturning this presumption is lower; conversely, there also are situations where this threshold is higher. The following paragraphs will outline these various situations and the relevant conclusions from the jurisprudence of the Court that introduce certain nuances depending on the facts of the specific case.
28. First of all, in exceptional situations there are content-based restrictions on the exercise of the freedom of expression, and these restrictions are applicable to the dissemination of ideas promoting racism and the Nazi ideology, incitement to hatred and racial discrimination, and the glorification of violence.

<sup>39</sup> *Kalda v. Estonia* (application no.17429/10), judgment of 19 January 2016, §§41-42 with further references.

<sup>40</sup> *Autronic AG v. Switzerland* (application no.12726/87), judgment of 22 May 1990, §47.

<sup>41</sup> *Khurshid Mustafa and Tarzibachi v. Sweden* (application no.23883/06), judgment of 16 December 2008.

<sup>42</sup> Monica Macovei, *Freedom of Expression*, Human rights handbook, No.2, Council of Europe, 2004, page 8.

<sup>43</sup> *Şener v. Turkey* (application no.26680/95), judgment of 18 July 2000, §40.

<sup>44</sup> *Guja v. Moldova* (application no.14277/04), Grand Chamber judgment of 12 February 2008.

29. There are two approaches used by the Court in dealing with incitement to hatred and freedom of expression. The first approach is an exclusion from the protection of the convention based on Article 17, and will be covered in more detail later in the document (see §§ 47-52 below).
30. The second approach is adopted where the speech in question, although it is hate speech, is not apt to destroy the fundamental values of the Convention, and therefore instead of excluding it entirely from the protection of the Convention, the protection is restricted under Article 10 §1. For example, in the case of *Soulas and Others v. France* the Court examined a complaint concerning criminal proceedings brought against the applicants following the publication of a book entitled “The colonisation of Europe”, with the subtitle “Truthful remarks about immigration and Islam”. The proceedings resulted in their conviction for inciting hatred and violence against Muslim communities from northern and central Africa. The Court observed that the disputed passages in the book were not sufficiently serious to justify the application of Article 17 (prohibition of abuse of rights) of the Convention in the applicants’ case, at the same time holding that there had been no violation of Article 10 of the Convention, because the grounds put forward in support of the applicants’ conviction had been sufficient and relevant.<sup>45</sup>
31. Sufficient protection of freedom to impart information and ideas also requires making a clear distinction between information (facts) and opinions (value judgments), as the dissemination of the former enjoy very strong protection. The case of *Lingens v. Austria* was the first occasion where the Court stated that “the existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof”, therefore provisions of the domestic law that require proof of all statements, even those containing opinions, are impossible of fulfilment and thus infringe freedom of opinion itself.<sup>46</sup> The classification of a statement as a fact or as a value judgment is a matter which in the first place falls within the margin of appreciation of the national authorities, in particular the domestic courts. However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive.<sup>47</sup> As regards value judgments which have been found by the national courts to be of a defamatory character, the Court has assessed the national court’s findings on the question of whether the language used in the statement was of an excessive or dispassionate nature, whether an intention of defaming or stigmatising the opponent was disclosed, and if the statement had a sufficient factual basis.<sup>48</sup>
32. Distinction must also be made between criticism and insult. In the case *Palomo Sánchez and Others v. Spain* the Court analysed the difference between these two concepts in the context of the application of six employees of a private company who had been dismissed because of the publication in a newsletter of a cartoon and two articles with offensive, injurious and vexatious content against other employees. The Court held that insulting language may, in principle, justify an appropriate sanction,

<sup>45</sup> *Soulas and Others v. France* (application no.15948/03), judgment of 10 July 2008

<sup>46</sup> *Lingens v. Austria* (application no.9815/82), judgment of 8 July 1986, §46.

<sup>47</sup> *Mustafa Erdoğan and Others v. Turkey* (applications nos.346/04 and 39779/04), judgment of 27 May 2014, §36.

<sup>48</sup> See, among others, *Lindon, Otchakovsky-Laurens and July v. France* (applications nos.21279/02 and 36448/02), Grand Chamber judgment of 22 October 2007, §§56-57; and *Aurelian Oprea v. Romania* (application no.12138/08), judgment of 19 January 2016, §71.

which would not constitute a violation of Article 10 of the Convention when the limits of acceptable criticism are overstepped.<sup>49</sup> When language amounts to wanton denigration and its sole intent is to insult, it falls outside the protection of Article 10 of the Convention.<sup>50</sup>

33. It should be further emphasised that Article 10 protects not only the *substance of the ideas and information* expressed but also the *form* in which they are conveyed,<sup>51</sup> meaning that persons exercising the right to freedom of expression are entitled to choose the modality, free from state interference, which they consider most effective in reaching the widest possible audience.<sup>52</sup> The term “expression” extends also to non-verbal forms,<sup>53</sup> and Article 10 protection therefore extends also to conduct intended to convey a particular message, artistic work and display of symbols. In its practice the Court has found that Article 10 applies to, for example, handing out leaflets and showing a poster above a demonstrator’s rucksack,<sup>54</sup> a puppet show,<sup>55</sup> use of a historic flag,<sup>56</sup> a painting,<sup>57</sup> a political performance,<sup>58</sup> and a workshop on women’s reproductive rights to be held on a boat in territorial waters.<sup>59</sup>
34. Finally, Article 10 by implication also guarantees a “negative right” not to be compelled to express oneself, that is to say, the right to remain silent.<sup>60</sup> This “negative right” is closely linked with the right not to incriminate oneself, as well as the presumption of innocence.

- *Press freedom*

35. Even though press is not explicitly mentioned in the text of Article 10, the case-law of the Court clearly grants the press a special status in the enjoyment of the freedom of expression (see also §22 above), which is reflected in three principles. Firstly, in the *Lingens* case mentioned above the Court highlighted the special role of the press as public watchdog and held that freedom of the press “affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention”.<sup>61</sup> The Court has further held that the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information; and is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.<sup>62</sup>

<sup>49</sup> *Palomo Sánchez and Others v. Spain* (applications nos. 28955/06, 28957/06, 28959/06 and 28964/06), Grand Chamber judgment of 12 September 2011, §67.

<sup>50</sup> *Rujak v. Croatia* (application no. 57942/10), decision of inadmissibility of 2 October 2012, §30.

<sup>51</sup> *Palomo Sánchez and Others v. Spain*, (applications nos. 28955/06, 28957/06, 28959/06 and 28964/06), Grand Chamber judgment of 12 September 2011, §53.

<sup>52</sup> *Women on Waves and Others v. Portugal* (application no.31276/05), judgment of 3 February 2009, §39.

<sup>53</sup> Lech Garlicki, “Symbolic speech”, in “*Freedom of Expression. Essays in Honour of Nicolas Bratza*”, pp.331-348, Wolf Legal Publishers, September 2012.

<sup>54</sup> *Chorherr v. Austria* (application no.13308/87), judgment of 25 August 1993.

<sup>55</sup> *Alves da Silva v. Portugal* (application no.41665/07), judgment of 20 October 2009.

<sup>56</sup> *Faber v. Hungary* (application no.40721/08), judgment of 24 July 2012.

<sup>57</sup> *Vereinigung Bildender Künstler v. Austria* (68354/01), judgment of 25 January 2007.

<sup>58</sup> *Tatar and Faber v. Hungary* (applications nos.26005/08 and 26160/08), judgment of 12 June 2012.

<sup>59</sup> *Women on Waves and Others v. Portugal* (application no.31276/05), judgment of 3 February 2009.

<sup>60</sup> *Strohal v. Austria* (application no.20871/92), Commission decision of 7 April 1994, §2.

<sup>61</sup> *Lingens v. Austria* (application no.9815/82), judgment of 8 July 1986, §42.

<sup>62</sup> *Dalban v. Romania* (application no.28114/95), Grand Chamber judgment of 28 September 1999, §49.

36. The second principle relates to the dissemination in the media of statements made by other persons and requires stronger protection of the journalists. Thus in the case of *Jersild v. Denmark* the applicant – a journalist – complained that his conviction and sentence for having aided and abetted the dissemination of racist remarks violated his right to freedom of expression within the meaning of Article 10. In its judgment the Court underlined that news reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of “public watchdog” and 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.<sup>63</sup> In its finding of a violation of Article 10 of the Convention the Court in particular noted that taken as a whole, the disputed feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas; instead, in the Court’s view, the feature clearly sought – by means of an interview – to expose, analyse and explain the particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that was of great public concern.<sup>64</sup> It is important to underline that the remarks of those interviewed by the applicant in the feature were more than insulting to members of the targeted groups and, in the light of Article 17 of the Convention, did not enjoy the protection of Article 10,<sup>65</sup> but this “exclusion of protection”<sup>66</sup> did not extend to the applicant in view of the aims and context of the disputed feature.
37. Third, journalistic sources are also protected under Article 10. The Court’s understanding of the concept of journalistic “source” is that it includes “any person who provides information to a journalist”; and the Court understands “information identifying a source” to include, as far as they are likely to lead to the identification of a source, both “the factual circumstances of acquiring information from a source by a journalist” and “the unpublished content of the information provided by a source to a journalist”.<sup>67</sup> The Court further views the protection of the journalistic sources as one of the basic conditions of press freedom. For instance, in the *Goodwin* case the Court argued that without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest.<sup>68</sup> The Court has also emphasised that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources.<sup>69</sup> 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.
- *Human rights defenders*
38. Even though not explicitly mentioned in Article 10, a set of international instruments refer explicitly to protection of freedom of expression of human rights defenders. At

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<sup>63</sup> *Jersild v. Denmark* (application no.15890/89), Grand Chamber judgment of 23 September 1994, §35.

<sup>64</sup> *Ibid.*, §33.

<sup>65</sup> *Ibid.*, §35.

<sup>66</sup> For further discussion of Article 17 see the “Prohibition of abuse of rights” subchapter e. below.

<sup>67</sup> *Nagla v. Latvia* (application no.73469/10), judgment of 16 July 2013, §81.

<sup>68</sup> *Goodwin v. the United Kingdom* (application no.17488/90), Grand Chamber judgment of 27 March 1996, §39.

<sup>69</sup> *Nagla v. Latvia* (application no.73469/10), judgment of 16 July 2013, §82.

the level of Council of Europe, the Committee of Ministers<sup>70</sup>, the Parliamentary Assembly<sup>71</sup> and the Human Rights Commissioner<sup>72</sup> have called to ensure the protection of human rights defenders. The UN Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, also known as “the Declaration on human rights defenders” was adopted in 1998 and its preamble recognises the right and the responsibility of individuals, groups and associations to promote respect for and foster knowledge of human rights and fundamental freedoms at the national and international levels.<sup>73</sup> This has been supported by other regional European instruments such as the EU Guidelines on Human Rights Defenders<sup>74</sup> and OSCE/ODIHR Guidelines on the protection of human rights defenders<sup>75</sup>.

39. Article 6 of the UN Declaration also states that everyone has the right, individually and in association with others (a) to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems; (b) as provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms; (c) to study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.
40. As already noted in the present study (see §23 above), the function of creating forums for public debate is not limited to the press and may also be exercised by NGOs. In light of the above-mentioned Declaration, and considering the general principles developed by the Court with respect to Article 10, in particular the strong protection of the freedom to receive and impart information on issues of general importance and the narrow margin of appreciation the States have in limiting political speech, activities of NGOs, NHRIs,<sup>76</sup> and individuals related to matters of public interest therefore warrant similar protection to that afforded to the press.<sup>77</sup>

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<sup>70</sup> *Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities* (2008), *Recommendation CM/Rec(2007)14 of Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe* (2007).

<sup>71</sup> *PACE Resolution 2095 (2016) on Strengthening the protection and role of human rights defenders in Council of Europe member States*

<sup>72</sup> As part of the support for the work of human rights defenders, their protection and the development of an enabling environment for their activities, the Commissioner has also intervened before the European Court of Human Rights in a number of cases concerning human rights defenders. See for example *Rasul Jafarov v. Azerbaijan* (application no.69981/14) judgment of 17 March 2016. With regard to alleged violation of Article 18 of the Convention, taken in conjunction with Article 5, the Court considered that a combination of factors supported the argument that the actual purpose of the measures against applicant had been to silence and to punish him for his activities as a human rights defender, §162.

<sup>73</sup> UN General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, adopted by resolution of the General Assembly, 8 March 1999, A/RES/53/144

<sup>74</sup> *Ensuring protection – European Union Guidelines on Human Rights Defenders*.

<sup>75</sup> [OSCE/ODIHR Guidelines on the protection of human rights defenders](#),

<sup>76</sup> Report of the UN Special Rapporteur on Human rights Defenders of 13 January 2013, A/HRC/22/47 and OSCE Guidelines on the Protection of Human Rights Defenders 2014, p 25, §7

<sup>77</sup> *Youth Initiative for Human Rights v. Serbia* (application no.48135/06), judgment of 25 June 2013, §20.

### **c. Obligations of States under Article 10**

41. Article 1 of the Convention imposes a general obligation on the Contracting Parties to the Convention to “secure to everyone within their jurisdiction the rights and freedoms” defined in the Convention. This means that the States must refrain from any action that disproportionately interferes with the Convention rights.
42. However, on a number of occasions the Court has held that in addition to this primarily negative undertaking of a State to abstain from interference in the rights guaranteed by the Convention, there may be positive obligations inherent in those rights, and the State must act to protect them. This is also the case for freedom of expression, as the genuine and effective exercise of this right 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.<sup>78</sup> 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.<sup>79</sup> Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. The Court has also stressed that States are required to create a favourable environment for participation in public debate by all persons concerned, enabling them to express their opinions and ideas without fear.<sup>80</sup>

### **d. “Duties and responsibilities” related to the exercise of freedom of expression**

43. Unlike other Articles of the Convention, Article 10 in its text explicitly recognises that the freedom of expression “carries with it duties and responsibilities”. The Court has admitted that “people exercising freedom of expression, including journalists, undertake ‘duties and responsibilities’ the scope of which depends on their situation and the technical means they use”.<sup>81</sup>
44. However, this text cannot be interpreted as a separate circumstance automatically limiting the freedom of expression of individuals belonging to certain professional categories that may carry with it “duties and responsibilities”. And if at first the Court’s approach was to leave the States more chances to invoke this provision in justifying an interference with the freedom of expression,<sup>82</sup> then the current jurisprudence of the Court leaves the States little discretion, and even where the existence of a category of civil servants with special “duties and responsibilities” is accepted, the restrictions applied on their right to freedom of expression must be

<sup>78</sup> *Palomo Sánchez and Others v. Spain* (applications nos. 28955/06, 28957/06, 28959/06 and 28964/06), Grand Chamber judgment of 12 September 2011, §§58-59.

<sup>79</sup> See, for example, *mutatis mutandis*, *Observer and Guardian v. the United Kingdom* (application no.13585/88), judgment of 26 November 1991, §59.

<sup>80</sup> *Dink v. Turkey* (applications nos.2668/07, 6102/08, 30079/08, 7072/09 and 7124/09), judgment of 14 September 2010, §137.

<sup>81</sup> *Fressoz and Roire v. France* (application no.29183/95), judgment of 21 January 1999, §52.

<sup>82</sup> See, for example, *Engel and Others v. the Netherlands* (applications nos.5100/71; 5101/71; 5102/71; 5354/72; 5370/72), judgment of 8 June 1976.



examined on the same criteria as the restriction applied to others' freedom of expression.<sup>83</sup>

45. Furthermore, as attested by the *Observer and Guardian* case,<sup>84</sup> under the “duties and responsibilities” approach, the Court also argued that the fact that a person belongs to a particular category is a basis for limiting rather than increasing the public authorities' powers to restrict the exercise of that person's rights. Editors and journalists would fall into this category. In this regard in the case of *Fressoz and Roire v. France* the Court stated that by reason of the “duties and responsibilities” inherent in the exercise of freedom of expression, the protection of journalists under Article 10 is subject to the proviso that they “are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism”.<sup>85</sup> Politicians also have a duty or responsibility to refrain from advocating racial discrimination and to avoid using words or attitudes which are vexatious or humiliating. Such behaviour risks fostering reactions among the public which are incompatible with a peaceful social climate and could erode the confidence in democratic institutions.<sup>86</sup> In their public discourse it is crucially important for politicians to avoid expression that are likely to foster intolerance.<sup>87</sup>

#### **e. Prohibition of abuse of rights**

46. The most tangible manifestation of “duties and responsibilities” in the exercise of freedom of expression is enshrined in Article 17 of the Convention that prohibits abuse of the rights.
47. Article 17 of the Convention states that “*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*”. This approach in fact is an “exclusion from the protection of the Convention” of those comments and statements that amount to hate speech and negate the fundamental values of the Convention. For example, in the case of *Kühnen v. Germany*<sup>88</sup> the former Commission held that freedom of expression may not be used in order to lead to the destruction of the rights and freedoms granted by the Convention, while in the case of *Seurot v. France* the Court concluded that “there is no doubt that any remark directed against the Convention's underlying values would be removed from the protection of Article 10 by Article 17 [prohibition of abuse of rights]”.<sup>89</sup> Other examples of such speech examined by the Court under Article 17 have included statements denying the Holocaust, justifying a pro-Nazi policy, linking all Muslims with a grave act of terrorism, or portraying the Jews as the source of evil in Russia.<sup>90</sup>

<sup>83</sup> Monica Macovei, *Freedom of Expression*, Human rights handbook, No.2, Council of Europe, 2004, page 22; *Sürek v. Turkey (No.1)*, (application no.26682/95), Grand Chamber judgment of 8 June 1999, §§63-64.

<sup>84</sup> *Observer and Guardian v. the United Kingdom* (application no.13585/88), judgment of 26 November 1991.

<sup>85</sup> *Fressoz and Roire v. France* (application no.29183/95), judgment of 21 January 1999, §54.

<sup>86</sup> *Féret v. Belgium* (application no. 15615/07), judgment of 16 July 2009, §77.

<sup>87</sup> *Erbakan v. Turkey*, (application no. 59405/00), judgment of 6 July 2006, §64.

<sup>88</sup> *Kühnen v. the Federal Republic of Germany* (application 12194/86), Commission decision of 12 May 1988.

<sup>89</sup> *Seurot v. France* (application no.57383/00) decision on the admissibility of 18 May 2004.

<sup>90</sup> *Delfi v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §136.

48. In *Gündüz v. Turkey*<sup>91</sup> the Court declared inadmissible the application of the leader of an Islamic sect who had been convicted of incitement to commit an offence and incitement to religious hatred on account of statements reported in the press. The Court considered the applicant's statements as amounting to hate speech promoting the glorification of violence and therefore could not be regarded as compatible with the values of justice and peace set forth in the Preamble to the Convention. The Court considered that the severity of the penalty (4 years and 2 months imprisonment and a fine) was not disproportionate, in so far as it had a deterrent effect which could have been necessary to prevent public incitement to commit offences. However under this approach, when statements do not encourage violence, armed resistance or insurrection, do not glorify any crime, they are protected.<sup>92</sup>
49. In *Leroy v. France*<sup>93</sup> a drawing representing the 9/11 attack on the World Trade Centre with a caption "We have all dreamt of it... Hamas did it" - was published in a Basque weekly newspaper. The domestic court ordered the cartoonist to pay a fine for "condoning terrorism". The Strasbourg Court upheld the measure imposed, finding that the applicant glorified terrorism. In the Court's opinion, the date of publication was such as to increase the cartoonist's responsibility in his account of, and even support for, a tragic event, whether considered from an artistic or a journalistic perspective. Also the impact of such a message in a politically sensitive region, namely the Basque Country, was not to be overlooked. According to the Court, the cartoon had provoked a certain public reaction, capable of stirring up violence and demonstrating a plausible impact on public order in the region. The Court considered that the grounds put forward by the domestic courts in convicting Mr. Leroy had been "relevant and sufficient". Having regard to the modest nature of the fine and the context in which the impugned drawing had been published, the Court found that the measure imposed on the cartoonist was not disproportionate.
50. In a recent inadmissibility decision, the Court has applied this approach in a case concerning a comedy performance. The Court concluded that "this was a demonstration of hatred and anti-Semitism, supportive of Holocaust denial. It is unable to accept that the expression of an ideology which is at odds with the basic values of the Convention, as expressed in its Preamble, namely justice and peace, can be assimilated to a form of entertainment, however satirical or provocative, which would be afforded protection by Article 10 of the Convention. In addition, the Court emphasises that while Article 17 of the Convention has, in principle, always been applied to explicit and direct remarks not requiring any interpretation, it is convinced that the blatant display of a hateful and anti-Semitic position disguised as an artistic production is as dangerous as a fully-fledged and sharp attack (...). It thus does not warrant protection under Article 10 of the Convention".<sup>94</sup>
51. Such decisions apply the theory of the paradox of tolerance: an absolute tolerance may lead to the tolerance of the ideas promoting intolerance, and the latter could then destroy tolerance.<sup>95</sup> As a rule, the Court will declare inadmissible, on grounds of

<sup>91</sup> *Gündüz v. Turkey* (application no. 59745/00), decision of inadmissibility, 13 November 2003.

<sup>92</sup> See *Dicle v. Turkey (no.2)* (application no. 46733/99), judgment 11 April 2006; *Erdal Taş v. Turkey* (application no. 77650/01), judgment 19 December 2006; *Faruk Temel v. Turkey* (no. 16853/05), judgment of 1 February 2011; *Önal v. Turkey* (application nos. 41445/04 and 41453/04), judgment of 2 October 2012.

<sup>93</sup> *Leroy v. France* (application no. 36109/03), judgment of 2 October 2008.

<sup>94</sup> *M'Bala M'Bala v. France* (application no. 25239/13) §§39–40.

<sup>95</sup> Monica Macovei, *Freedom of Expression*, Human rights handbook, No.2, Council of Europe, 2004, page 7.

incompatibility with the values of the Convention, applications which are inspired by totalitarian doctrine or which express ideas that represent a threat to the democratic order and are liable to lead to the restoration of a totalitarian regime.<sup>96</sup>

#### **f. Possible interferences (formalities, conditions, restrictions or sanctions)**

- “*existence of an interference*”

52. Before examining the validity of an interference under Article 10 §2, the Court examines whether such an interference has actually taken place. In other words, it must first be ascertained whether the disputed measure amounted to interference with the exercise of freedom of expression, in the form, for example, of a “formality, condition, restriction or penalty”.<sup>97</sup> Criminal sanctions<sup>98</sup> and fines in defamation proceedings<sup>99</sup> imposed on the applicants, an injunction prohibiting publication of a specific article,<sup>100</sup> clearly interfere with the exercise of the freedom of expression, as can a search at the journalist’s home.<sup>101</sup> On the other hand, in the case of *Petropavlovskis v. Latvia* the Court did not agree with the applicant that the refusal to grant Latvian citizenship to the applicant had prevented him from expressing his disagreement with government policies or from participating in meetings or movements, as on the contrary, his views on the education reform had been widely reported in the media and he had remained politically active even after his application for naturalisation was refused.<sup>102</sup> It can thus be concluded that the existence of an interference within the meaning of the Convention to a large extent depends on specific facts of the case, in particular on whether or not the person concerned could have (could have reasonable been expected) to continue to express his or her opinion in the wake of the measure complained.

53. Any interference with the right to freedom of expression needs to comply with three cumulative criteria, namely, the interference needs to be prescribed by law, it must pursue a legitimate aim, and is necessary in a democratic society. As already noted (see §17 above), these criteria are to be interpreted strictly, while “[s]trict interpretation means that no other criteria than those mentioned in the exception clause itself may be at the basis of any restrictions, and these criteria, in turn, must be understood in such a way that the language is not extended beyond its ordinary meaning”.<sup>103</sup> In other words, the Court established a legal standard that in any borderline case, the freedom of the individual must be favourably weighted against the State’s claim of overriding interest.<sup>104</sup>

<sup>96</sup> See, among others, *B.H, M.W, H.P and G.K. v. Austria* (application no.12774/87), Commission decision of 12 October 1989; *Nachtmann v. Austria* (application no.36773/97), Commission decision of 9 September 1998; *Schimanek v. Austria* (application no.32307/96), decision on the admissibility of 1 February 2000.

<sup>97</sup> *Glasevich v. Germany* (application no. 9228/80), judgment of 28 August 1986, §50.

<sup>98</sup> *Vajnai v. Hungary* (application no.33629/06), judgment of 8 July 2008, §29.

<sup>99</sup> *Delfi v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §118.

<sup>100</sup> *Observer and Guardian v. the United Kingdom* (application no.13585/88), judgment of 26 November 1991, §49.

<sup>101</sup> *Nagla v. Latvia* (application no.73469/10), judgment of 16 July 2013, §84, §101.

<sup>102</sup> *Petropavlovskis v. Latvia* (application no.44230/06), judgment of 13 January 2015.

<sup>103</sup> *The Sunday Times v. the United Kingdom* (no.1) (application no.6538/74), Commission report of 18 May 1977, §194.

<sup>104</sup> Monica Macovei, *Freedom of Expression*, Human rights handbook, No.2, Council of Europe, 2004, page 30 with further references.

- “prescribed by law”

54. The expression “prescribed by law” requires firstly that the impugned measure should have some basis in domestic law.<sup>105</sup> According to the Court, 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.<sup>106</sup>
55. The concept of “prescribed by law” refers not only to the mere existence of a legal provision, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects.<sup>107</sup>
56. “Accessibility” usually means that the law has been duly announced and its text, including, where appropriate, case-law on its interpretation and application, are available to the person concerned.<sup>108</sup>
57. As regards “foreseeability” as one of the requirements inherent in the phrase “prescribed by law” in Article 10 § 2 of the Convention, the Court has underlined that “[a] norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen - 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”.<sup>109</sup> This does not however mean that every legal provision must be formulated with absolute precision, or that the consequences need to be foreseeable with absolute certainty. The Court has recognised the impossibility of such a presumption, particularly in fields in which the situation changes according to the prevailing views of society.<sup>110</sup> In this regard the Court has noted that there is a need to avoid excessive rigidity and to keep pace with changing circumstances, which in turn means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. The level of precision required of domestic legislation depends to a considerable 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. The Court has found that persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation, can on this account be expected to take special care in assessing the risks that such activity entails.<sup>111</sup>
58. An aspect that is relevant for the assessment of the quality of the law is the existence of legal safeguards. In other words, the law in question must afford a measure of legal

<sup>105</sup> *Ahmet Yildirim v. Turkey* (application no.3111/10), judgment of 18 December 2012, §57; *Delfi v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §120.

<sup>106</sup> *Sanoma Uitgevers B.V. v. the Netherlands* (application no.38224/03), judgment of 14 September 2010, §83 with further references.

<sup>107</sup> *Delfi v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §120.

<sup>108</sup> See, *mutatis mutandis*, *Oliveira v. the Netherlands* (application no.33129/96), judgment of 4 June 2002, §51, *Volokhy v. Ukraine* (application no.23543/02), judgment of 2 November 2006, §48.

<sup>109</sup> *Gaweda v. Poland* (application no.26229/95), judgment of 14 March 2002, §39.

<sup>110</sup> *Müller and Others v. Switzerland* (application no.10737/84), judgment of 24 May 1988, §29.

<sup>111</sup> *Delfi v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §122 with further references.

protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. The Court has held that 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 conferred on the competent authorities and the manner of its exercise.<sup>112</sup> For example, in the case of *Sanoma Uitgevers B.V. v. the Netherlands* the Court stated that, for the protection of journalistic sources and of information that could lead to their identification, the first and foremost safeguard is the guarantee of review by a judge or other independent and impartial decision-making body.<sup>113</sup> In this particular case the Court found a violation of Article 10 because the power to order disclosure had been entrusted to the public prosecutor, rather than to an independent judge. Although bound by the requirements of basic integrity, in procedural terms the prosecutor was a “party” defending interests potentially incompatible with the protection of journalistic sources and could hardly be seen as objective and impartial. The Court concluded that the quality of the law in question had been deficient in the absence of a procedure attended by adequate legal safeguards enabling an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources.

59. In the case of *Ahmet Yildirim v. Turkey* the Court also examined the quality of the domestic law from the perspective of the legal safeguards, and found that the judicial-review procedures concerning the blocking of Internet sites were insufficient to meet the criteria for avoiding abuses; domestic law did not provide for any safeguards to ensure that a blocking order concerning a specified site was not used as a means of blocking access in general.<sup>114</sup>

- “legitimate aim”

60. According to Article 10 §2, an interference will comply with the “legitimate aim” criterion if it is aimed at protecting one or more of the following interests or values: national security; territorial integrity; public safety; prevention of disorder or crime; protection of health; morals; reputation or rights of others; preventing the disclosure of information received in confidence; and maintaining the authority and impartiality of the judiciary. This list is exhaustive, and needs to be interpreted narrowly.

61. The requirement that the interference needs to pursue a legitimate aim usually elicits little comment from the Court, as in most cases the States have been able to show how the purpose of the interference falls within one of the aims listed in Article 10 §2. For example, in the case of *Karácsony and others v. Hungary* the Court accepted that a fine imposed on the Members of Parliament for their conduct in Parliament pursued two legitimate aims within the meaning of Article 10 §2 of the Convention. Firstly, it was aimed at preventing disruption to the work of Parliament so as to ensure its effective operation and thus pursued the legitimate aim of the “prevention of disorder”. Secondly, it was intended to protect the rights of other members of

<sup>112</sup> *Sanoma Uitgevers B.V. v. the Netherlands* (application no.38224/03), judgment of 14 September 2010, §82, with further references.

<sup>113</sup> *Sanoma Uitgevers B.V. v. the Netherlands* (application no.38224/03), judgment of 14 September 2010, §§88-89.

<sup>114</sup> *Ahmet Yildirim v. Turkey* (application no.3111/10), judgment of 18 December 2012, §68.

parliament, and thus pursued the aim of the “protection of the rights of others”.<sup>115</sup> In the case of *Bédát v. Switzerland* the Court likewise accepted that a fine imposed on the applicant in criminal proceedings for having published information covered by the secrecy of criminal investigations pursued legitimate aims, namely preventing “the disclosure of information received in confidence”, maintaining “the authority and impartiality of the judiciary” and protecting “the reputation [and] rights of others”.<sup>116</sup>

62. With regard to the aim of preventing disturbance to public order, the Court places the burden on the government to show that statements are capable of “leading or actually led to disorder.” Where the government fails to present any specific evidence showing that statements are capable of leading to public disturbance or unrest the Court holds that the government’s interference is not properly intended to protect such objective.<sup>117</sup>

63. In the case of *Baka v. Hungary* the Court concluded that the termination of the applicant’s mandate as President of the Supreme Court was aimed at maintaining the authority and impartiality of the judiciary within the meaning of Article 10 §2. The Court took the view, however, that a State Party cannot legitimately invoke the independence of the judiciary in order to justify a measure such as the premature termination of the mandate of a court president for reasons that had not been established by law and which did not relate to any grounds of professional incompetence or misconduct. The Court considered that this measure could not serve the aim of increasing the independence of the judiciary, since it was simultaneously a consequence of the previous exercise of the right to freedom of expression by the applicant, who was the highest office-holder in the judiciary. In these circumstances, rather than serving the aim of maintaining the independence of the judiciary, the premature termination of the applicant’s mandate as President of the Supreme Court appeared to be incompatible with that aim.<sup>118</sup>

- “necessary in a democratic society”

64. As the Court stated in the case of *Observer and Guardian v. the United Kingdom*, “the adjective “necessary”, within the meaning of Article 10 §2, implies the existence of a ‘pressing social need’”. The Court has also held that as a matter of general principle, the “necessity” for any restriction on freedom of expression must be convincingly established,<sup>119</sup> which means that in evaluating the measure complained of the Court looks at the alleged interference in the light of the case as a whole and determines whether the reasons adduced by the national authorities to justify the interference were “relevant and sufficient”, and whether the interference was “proportionate to the legitimate aim pursued.”<sup>120</sup>

65. A number of factors are taken into account by the Court in assessing the proportionality and thus the necessity of the alleged interference, including the nature

<sup>115</sup> *Karácsony and Others v. Hungary* (application nos.42461/13 and 44257/13), Grand chamber judgment of 17 May 2016, §129; *Szanyi v. Hungary* (application no. 35492/13) judgment of 8 November 2016, §28.

<sup>116</sup> *Bédát v. Switzerland* (application no.56925/08), Grand Chamber judgment of 29 March 2016, §46.

<sup>117</sup> *Perinçek v. Switzerland* (application no.27510/08), Grand Chamber judgment of 15 October 2015, §152.

<sup>118</sup> *Baka v. Hungary* (application no.20261/12), Grand Chamber judgment of 23 June 2016, §156.

<sup>119</sup> *Fressoz and Roire v. France* (application no.29183/95), judgment of 21 January 1999, §45.

<sup>120</sup> *Lindon, Otchakovsky-Laurens and July v. France* (application nos.21279/02 and 36448/02), Grand Chamber judgment of 22 October 2007, §45 with further references.

and severity of the sanctions imposed.<sup>121</sup> Chapter IV will examine in more detail the relevant case-law of the Court on the interpretation and application of the “necessity” criteria in specific areas relevant to the present study.

### **g. Margin of appreciation**

66. In general terms margin of appreciation means that the State is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative and judicial action in the area of a Convention right.<sup>122</sup> The case of *Handyside v. the United Kingdom* was the first occasion where the Court concluded that “[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them [and] /./ it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of “necessity” in this context. Consequently, Article 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”.<sup>123</sup>
67. The doctrine of the margin of appreciation is used to assess the State’s compliance with both obligations, negative and positive, that derive from the Convention.<sup>124</sup>
68. With regard to freedom of expression it is relevant to recall that the margin of appreciation granted to the States differs according to the context, in particular the historic, demographic and cultural context.<sup>125</sup> For example, in *Soulas and Others v. France* the Court mentioned the particular problem regarding the social integration of immigrants and emphasised the public need for a wide margin of appreciation in relation to this delicate issue. It also differs depending on the aims pursued, for example the protection of morals is an area where national authorities are usually granted a wide margin of appreciation.<sup>126</sup> In economic matters domestic authorities similarly enjoy a broader margin of appreciation, for example, as regards the necessity of restraining commercial advertising by the audio-visual media.<sup>127</sup> Conversely, political debate by the press enjoys very strong protection under Article 10, as does debates on other matters of public interest, and the Court constantly reiterates that there is little scope under Article 10 §2 of the Convention for restrictions on political speech or on debate on matters of public interest<sup>128</sup> and that the national margin of appreciation is circumscribed by the interest of democratic society in enabling the

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<sup>121</sup> *Baka v. Hungary* (application no.20261/12), Grand Chamber judgment of 23 June 2016, §160.

<sup>122</sup> Harris, O’Boyle, and Warbick, *Law of the European Convention on Human Rights*, Third edition, Oxford University Press 2014, p.14.

<sup>123</sup> *Handyside v. the United Kingdom* (application no.5493/72), judgment of 7 December 1972, §48.

<sup>124</sup> *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (applications nos.9214/80, 9473/81 and 9474/81), judgment of 28 May 1985, §67.

<sup>125</sup> *Soulas and Others v. France*, (application no. 15948/03), judgment of 10 July 2008, §38.

<sup>126</sup> *Handyside v. the United Kingdom* (application no.5493/72), judgment of 7 December 1972, §57.

<sup>127</sup> *Markt Intern Verlag GMBH and Klaus Beermann v. Germany* (application no.10572/83), judgment of 20 November 1989, §33.

<sup>128</sup> *Baka v. Hungary* (application no.20261/12), Grand Chamber judgment of 23 June 2016, §159 with further references.

press to exercise its rightful role of “public watchdog” in imparting information of serious public concern.<sup>129</sup>

69. In the *Baka* case the Court noted that the remarks on the functioning of the judiciary are accorded high level of protection of freedom of expression, with the authorities thus having a narrow margin of appreciation.<sup>130</sup> More detailed examination of the margin of appreciation in the area of freedom of expression is contained in Chapter IV of the present study.

### III. Freedom of expression in the “digital world”

70. The development of information and communication technologies and their increasing presence is clearly evident in the cases examined by the Court. As it noted in the cases of *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, “[i]n the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information in general”.<sup>131</sup> Internet publications thus fall within the scope of Article 10 and its general principles examined in Chapter II of the present study.
71. The potential of Internet and digital media as a tool for accessing information, debate and political participation has been reiterated in a number of the Court’s rulings. However, the Court has also recognised the challenges it creates for the protection of human rights, particularly for the protection of private life and in the prevention of hate speech. As it noted in the *Delfi* case, “user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression, but alongside these benefits, certain dangers may also arise, for example, defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online”.<sup>132</sup>
72. These unique features of Internet have led the Court towards developing case-law specifically with respect to this medium, reflecting both the potential and challenges it creates. First of all, bearing in mind the positive role played by Internet in facilitating the exchange of information, including in the context of political debate, the Court examines whether the domestic authorities have exercised sufficient caution in ensuring that the interference with the general access to Internet resources is kept to the minimum. Thus in the case of *Ahmet Yildirim v. Turkey* the Court found that a blocking of a website as a preventive measure in the context of criminal proceedings also affected the applicant, who owns and runs a website which was set up using the Google Sites website creation and hosting service and on which he publishes material including his academic work. The Court further found that subsequent blocking of all access to Google Sites had rendered large amounts of information inaccessible, thus

<sup>129</sup> *Bladet Tromsø and Stensaas v. Norway* (application no.21980/93), Grand Chamber judgment of 20 May 1999, §59.

<sup>130</sup> *Baka v. Hungary* (application no.20261/12), Grand Chamber judgment of 23 June 2016, §171.

<sup>131</sup> *Times Newspapers Ltd v. the United Kingdom (nos.1 and 2)* (applications nos.3002/03 and 23676/03), judgment of 10 March 2009, §27.

<sup>132</sup> *Delfi v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §110.



substantially restricting the rights of Internet users and having a significant collateral effect, and that his “collateral effect” was the crux of the case under Article 10.<sup>133</sup>

73. Another aspect of the above-mentioned principle relates to the protection of persons using information available on Internet. In the case of *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* the Court, for the first time, acknowledged that Article 10 of the Convention had to be interpreted as imposing on States a positive obligation to create an appropriate regulatory framework to ensure effective protection of journalists’ freedom of expression on the Internet. In that case the applicants had been ordered to pay damages for republishing an anonymous text, which was objectively defamatory, that they had downloaded from the Internet (accompanying it with an editorial indicating the source and distancing themselves from the text). They had also been ordered to publish a retraction and an apology – even though the latter was not provided for by law. Examining the case under Article 10 of the Convention, the Court found that the interference complained of had not been “*prescribed by law*”, as required by the second paragraph of that Article, because at the time, in Ukrainian law, there had been no statutory protection for journalists republishing content from the Internet. In addition, the domestic courts had refused to transpose to that situation the provisions that protected the print media.<sup>134</sup>
74. The availability of information on Internet has allowed the Court to justify restrictions on the freedom to impart information or ideas via the printed media. Thus in the case of *Mouvement raëlien Suisse v. Switzerland* the prohibition of an association’s public poster campaign was found to be in conformity with the Convention, in part because the association’s Internet site remained accessible.<sup>135</sup> Along the same line of argument, in the case of *Editions Plon v. France* the availability on Internet of the content of a book revealing confidential information was considered by the Court as rendering the ban on the sale of the book illegitimate, as confidentiality could no longer constitute an overriding requirement.<sup>136</sup>
75. As regards the challenges posed by Internet, in the case of *Perrin v. the United Kingdom* ease of access to Internet was one of the reasons justifying the necessity to interfere with the applicant’s freedom of expression. The Court noted that the web page that contained photographs considered obscene by the domestic authorities and in respect of which the applicant was convicted, was freely available to anyone surfing the internet and that, in any event, the material was, as pointed out by the Court of Appeal, the very type of material which might be sought out by young persons whom the national authorities were trying to protect.<sup>137</sup> In conclusion the Court was satisfied that the applicant’s criminal conviction could be regarded as necessary in a democratic society in the interests of the protection of morals and/or the rights of others, and therefore rejected the complaint as manifestly ill-founded.
76. Another important aspect of the Court’s case-law regarding the Internet was highlighted in the *Delfi* case, which was the first occasion when the Court was called upon to rule on a complaint concerning the liability of a company running an Internet

<sup>133</sup> *Ahmet Yildirim v. Turkey* (application no.3111/10), judgment of 18 December 2012, §52.

<sup>134</sup> *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* (application no.33014/05), judgment of 5 May 2011.

<sup>135</sup> *Mouvement raëlien Suisse v. Switzerland* (application no.16354/06), Grand Chamber judgment of 13 July 2012, §75.

<sup>136</sup> *Editions Plon v. France* (application no.58148/00), judgment of 18 May 2004, §53.

<sup>137</sup> *Perrin v. the United Kingdom* (application no.5446/03), decision on admissibility of 18 October 2005.

news portal because of comments posted on the portal by its users. In other words, the question was not whether the rights of the authors of the comments to freedom of expression had been infringed, but whether finding the applicant company *Delfi* liable for these third-party comments had infringed its right to impart information. The Court examined the case under the head of “duties and responsibilities”, and concluded that “because of the particular nature of the Internet, the “duties and responsibilities” that are to be conferred on an Internet news portal for the purposes of Article 10 may differ to some degree from those of a traditional publisher”.<sup>138</sup> Considering that the case concerned a major professionally and commercially operated Internet news portal publishing news articles written by its staff on which users were invited to comment, and that the comments posted by users were clearly unlawful, the Court held that the commercial operator of an Internet news portal may be held accountable for offensive comments posted on the portal by users. However, the Court pointed out that the *Delfi* case did not concern other types Internet fora where third-party comments could be posted,<sup>139</sup> which in turn means that the conclusions of the *Delfi* case cannot be automatically applied to, for example, Internet discussion groups, bulletin boards or certain social media platforms.

77. The Court considered differently in *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*.<sup>140</sup> Although offensive and vulgar, the incriminated comments did not, in contrast to *Delfi AS*, constitute clearly unlawful speech; and they certainly did not amount to hate speech or incitement to violence.<sup>141</sup> In this case when examining the Internet portals’ liability for third-party comments, the Court considered that such liability may have foreseeable negative consequences on the comment environment of an Internet portal. These consequences may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet which could be particularly detrimental for a non-commercial website such as one of those in question.<sup>142</sup> The Court also emphasises in this regard that there is a difference between the commercial reputational interests of a company and the reputation of an individual concerning his or her social status.<sup>143</sup> Furthermore, in *Pihl v. Sweden*<sup>144</sup> the Court attached importance to the fact that the comment, although offensive, did not amount to hate speech or incitement to violence and was posted on a small blog run by a non-profit association which took it down the day after the applicant’s request and nine days after it had been posted<sup>145</sup>

78. Finally, it is interesting to note that the Court has stated its views on the influence of the Internet compared with the other, more traditional, broadcast media, and for the time being has considered this impact to be less strong. For example, in the case of *Animal Defenders International v. the United Kingdom* the Court examined a complaint concerning the refusal of permission for a NGO to place a television advert owing to statutory prohibition of political advertising, and concluded that it was coherent to limit a ban on political advertising to certain specific media (radio and television), because of the “particular influence” of those traditional media. The Court

<sup>138</sup> *Delfi v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §113.

<sup>139</sup> *Ibid.*, §116.

<sup>140</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (application no. 22947/13), judgment of 2 February 2016.

<sup>141</sup> *Ibid.*, §64.

<sup>142</sup> *Ibid.*, §86

<sup>143</sup> *Ibid.*, §84

<sup>144</sup> *Pihl v. Sweden* (application no.74742/14) decision on admissibility of 9 March 2017.

<sup>145</sup> *Ibid.*, §37.

stated that it “recognises the immediate and powerful effect of the broadcast media, an impact reinforced by the continuing function of radio and television as familiar sources of entertainment in the intimacy of the home (...) In addition, the choices inherent in the use of the Internet and social media mean that the information emerging therefrom does not have the same synchronicity or impact as broadcasted information. Notwithstanding therefore the significant development of the Internet and social media in recent years, there is no evidence of a sufficiently serious shift in the respective influences of the new and of the broadcast media (...) to undermine the need for special measures for the latter”.<sup>146</sup>

#### **IV. Freedom of expression and links to other Human Rights: Seeking balance between the rights at stake**

79. The present chapter examines the links between the freedom of expression and other human rights, particularly in situations where the exercise of this freedom comes into conflict with other rights.

##### **1. Freedom of expression and right to private life**

80. One of the most obvious situations where the question of balancing the right to freedom of expression with other rights arises when the exercise of this freedom by one person affects another person’s right to private life as guaranteed by Article 8 of the Convention. It is well-established in the Court’s case-law that the right to protection of reputation and honour is included in Article 8 of the Convention as part of the right to respect for private life,<sup>147</sup> and that under Article 8 the State has also positive obligations which may involve the adoption of measures designed to secure respect for private and family life, even in the sphere of the relations of individuals between themselves.<sup>148</sup> The issue of defamation has been the subject of considerable Court’s case-law.

81. The Court has formulated several principles that are applicable when a balance between freedom of expression and the right to private life is sought. First of all, the Court has noted that for the State to have an obligation to seek the balance, in other words for Article 8 to come into play, “an attack on a person’s reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life”.<sup>149</sup> The Court also consistently recalls the general principles regarding the freedom of expression, that is to say, that freedom of expression constitutes one of the essential foundations of a democratic society, that 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, and that any exceptions to freedom of expression must be construed strictly and the need for any restrictions must be established convincingly.<sup>150</sup>

<sup>146</sup> *Animal Defenders International v. the United Kingdom* (application no.48876/08), Grand Chamber judgment of 22 April 2013, §119.

<sup>147</sup> *A. v. Norway* (application no.28070/06), judgment of 9 April 2009, §64; *Delfi AS v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §137.

<sup>148</sup> *Von Hannover v. Germany* (application no.59320/00), judgment of 24 June 2004, §57; *Mitkus v. Latvia* (application no.7259/03), judgment of 2 October 2012, §125; *Ion Cârstea v. Romania* (application no.20531/06), judgment of 28 October 2014, §30.

<sup>149</sup> *Delfi AS v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §137.

<sup>150</sup> *Axel Springer AG v. Germany* (application no.39954/08), Grand Chamber judgment of 7 February 2012, §78.

82. However establishing the balance between conflicting values, namely the right to freedom of expression and the right to protection of the honor and reputation of others, is not always clear and unambiguous. In particular, where a political figure is involved, the limits permitted often raise difficulties and can result in divergences of analysis and conclusions both between the domestic courts and the Court, and between the judges of the Court.<sup>151</sup>
83. The subsequent paragraphs will first examine the practice of the Court as regards the balancing of private life and the freedom of expression of mass media, and will then look into other situations, for example, those concerning restrictions on the freedom of expression of NGOs, authors and publishers of books. An in-depth analysis of the Court's relevant jurisprudence is available in a recently published study "Freedom of expression and defamation".<sup>152</sup>

### *Mass media and private life*

84. When balancing the freedom of expression of the press and the right to private life, the general principles concerning the essential functions that the press fulfils in a democratic society must be born in mind (see §§ 34-36 above), including the principle that the journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.<sup>153</sup>
85. Once the Court establishes that Article 8 is indeed relevant, it uses the following criteria in evaluating the compliance with the requirements of Article 10, particularly the "necessity" and "proportionality" requirements:<sup>154</sup>
- a. The extent to which the article, photos or feature contributed to a debate of general interest, the definition of what constitutes a subject of general interest depending on the circumstances of the case; the existence of such an interest is not limited to publications on political issues or crimes;<sup>155</sup>
  - b. The degree of fame of the person whose private life interests are the reason for the balancing exercise, namely, his/her role or function, and the nature of the activities that are the subject of the report; the Court has established that whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures; furthermore distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions.<sup>156</sup> However,

<sup>151</sup> See, *Jimenez Losantos v. Spain* (application no. 53421/10), judgment of 14 June 2016, as well as the dissenting opinion of Judge Lozano Cutanda.

<sup>152</sup> Available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ac95b>

<sup>153</sup> *Delfi AS v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §132.

<sup>154</sup> *Von Hannover v. Germany (no.2)* (applications nos.40660/08 and 60641/08), Grand Chamber judgment of 7 February 2012, §§109-113.

<sup>155</sup> *Axel Springer AG v. Germany* (application no.39954/08), Grand Chamber judgment of 7 February 2012, §90 with further references.

<sup>156</sup> *Von Hannover v. Germany* (application no.59320/00), judgment of 24 June 2004, §63.

this criteria needs to be considered in light of the contribution to the debate of general interest. Thus in the first *Von Hannover* case, where the Court examined the complaint from the eldest daughter of Prince Rainier III of Monaco that the German courts have failed to protect her right to private life in that they have not prevented the publication of photos of her, the Court held that “the publication of the photos and articles in question, the sole purpose of which was to satisfy the curiosity of a particular readership regarding the details of the applicant’s private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public”,<sup>157</sup>

- c. The prior conduct of the person concerned, including whether or not respective information has already appeared in an earlier publication. For example, in the case of *Shabanov and Tren v. Russia* the Court recalled that it has been the constant approach by the Convention organs that the claim to respect for private life is automatically reduced to the extent that an individual brings his private life into contact with public life. Thus, communication of statements made during public proceedings was not considered as giving rise to an interference with private life. The Court stated that “when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor. It is also relevant whether the individual voluntarily supplied the information and whether he could reasonably anticipate the later use made of the material.”<sup>158</sup> However, the mere fact of having cooperated with the press on previous occasions cannot serve as an argument for depriving the party concerned of all protection against publication of the report or photo at issue;<sup>159</sup>
- d. The journalist’s method of obtaining the information and its veracity, namely whether the journalist was acting in good faith and on an accurate factual basis, providing “reliable and precise” information in accordance with the ethics of journalism.<sup>160</sup> In the case of *Von Hannover v. Germany* the method of obtaining the disputed photos – they were taken secretly at a distance of several hundred metres – was one of the factors that compelled the Court to decide in favour of protecting private life of the applicant;<sup>161</sup>
- e. The content and form of the publication, involving an assessment of the way in which the report was published, the manner in which the person concerned was represented, as well as the extent to which the publication was disseminated (for example, whether the newspaper was national or local).<sup>162</sup> For example, in the case of *Axel Springer AG v. Germany* the Court’s finding that the disputed articles contained factual information about a person’s arrest, (the) sentence imposed by the court and (the) legal assessment of the seriousness of the offence, and that the articles did not reveal details about the person’s private

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<sup>157</sup> *Ibid.*, §65.

<sup>158</sup> *Shabanov and Tren v. Russia* (application no.5433/02), judgment of 14 December 2006, §46.

<sup>159</sup> *Axel Springer AG v. Germany* (application no.39954/08), Grand Chamber judgment of 7 February 2012, §92.

<sup>160</sup> *Ibid.*, §93.

<sup>161</sup> *Von Hannover v. Germany* (application no.59320/00), judgment of 24 June 2004, §68.

<sup>162</sup> *Axel Springer AG v. Germany* (application no.39954/08), Grand Chamber judgment of 7 February 2012, §94 with further references.

life, and that they contained no disparaging expression or unsubstantiated allegation,<sup>163</sup> contributed to the conclusion that the criminal sanction imposed on the applicant company – the publisher – was in violation of Article 10;

- f. Potential negative consequences the person concerned might have suffered after the publication, and whether these consequences attain the level of gravity justifying a restriction on the right to freedom of expression.<sup>164</sup> At the same time it must be recalled that the person cannot rely on Article 8 in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence;<sup>165</sup>
- g. The severity of the sanction imposed on the journalist or publisher, if any.<sup>166</sup>

86. The Court has also held that “diligent journalists ought to attempt to contact the subjects of their articles and to give those persons a possibility to comment on the contents of such articles”.<sup>167</sup> The distinction between statements of fact and value judgements likewise remains relevant.<sup>168</sup>

87. The application of the above-listed principles in the specific case will entirely depend on the individual facts of that case. Therefore, in cases which require the right to respect for private life to be balanced against the right to freedom of expression, 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 news report, or under Article 10 by the publisher.<sup>169</sup> For example, as noted above, in the case of *Von Hannover v. Germany* the complaint was brought before the Court under Article 8 and the right to respect for private life, while the analysis of the Court also employed principles regarding freedom of expression guaranteed by Article 10 of the Convention.

*Freedom of expression of private individuals and protection of the rights of others*

88. The need to balance two competing rights occurs not only in cases involving press and other forms of mass media, but also in cases where the disputed expression belongs to a private individual. In such cases the necessity of the measure interfering with the freedom of expression is assessed to a large extent on the basis of principles applicable to media cases. In such cases the margin of appreciation the States enjoy and the quality of legal reasoning given at the domestic level are of particular importance. Thus in the cases of *Ojala and Etukeno Oy v. Finland* and *Ruusunen v. Finland* the Court considered that there had been no violation of Article 10, since the restrictions on the exercise of the applicants' freedom of expression (the applicants – the publisher and the publishing company – wrote and published, together with the former girlfriend of the Finnish Prime Minister at the time, an autobiographical book about her relationship with the Prime Minister, but were subsequently convicted for

<sup>163</sup> *Ibid.*, §108.

<sup>164</sup> *Caragea v. Romania* (application no.51/06), judgment of 8 December 2015, §37.

<sup>165</sup> *Axel Springer AG v. Germany* (application no.39954/08), Grand Chamber judgment of 7 February 2012, §83.

<sup>166</sup> *Ibid.*, §95.

<sup>167</sup> *Mitkus v. Latvia* (application no.7259/03), judgment of 2 October 2012, §136.

<sup>168</sup> *Diena and Ozolins v. Latvia* (application no.16657/03), judgment of 12 July 2007, §79.

<sup>169</sup> *Couderc and Hachette Filipacchi Associés v. France* (application no.40454/07), Grand Chamber judgment of 10 November 2015, § 91.

disseminating information violating personal privacy) were established convincingly by the domestic courts, taking into account the Court's case-law. The Court also recalled its case-law according to which the Court would require, in such circumstances, strong reasons to substitute its view for that of the domestic courts.<sup>170</sup>

## **2. Freedom of expression and freedom of thought, conscience and religion**

89. In the case of *Kokkinakis v. Greece*<sup>171</sup> the Court held that the freedom of thought, conscience and religion, which is safeguarded under Article 9 of the Convention, is one of the foundations of a “democratic society” within the meaning of the Convention. The interaction between the freedom of expression and the freedom of thought, conscience and religion usually appears in two situations. Firstly, such interaction appears in situations where these two freedoms come into conflict, and where the protection of the freedoms enshrined in Article 9 falls within concept of “the protection of the rights of others” as a legitimate aim in restricting the freedom of expression. Secondly, in certain situations exercise of the freedom of expression is a result of the freedom of thought, conscience and religion, for example, where a person or a group of persons wish to transmit their religious ideas and opinions which does not qualify as a “manifestation” of belief under Article 9. The following paragraphs will examine these two situations.

### *Competing interests of freedom of expression and freedom of thought, conscience and religion*

90. Intimate religious beliefs and convictions of persons may be offended by blasphemous expression in regard to object of veneration,<sup>172</sup> and the Court has therefore held that amongst the “duties and responsibilities” of those exercising freedom of expression – 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. In other words, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines.<sup>173</sup> For example, in the case of *Otto-Preminger-Institut v. Austria* the Court examined a complaint under Article 10 of the Convention about the seizure and subsequent forfeiture of the film “Das Liebeskonzil” which the domestic authorities regarded as ridiculing the beliefs of Roman Catholics. The Court agreed that the disputed measures had a basis in domestic law and pursued a legitimate aim, namely “the protection of the rights of others”. The Court also noted that the domestic courts had due regard to the freedom of artistic expression, but that they did not consider that its merit as a work of art or as a contribution to public debate in Austrian society outweighed those features which made it essentially offensive to the general public within their jurisdiction. The trial courts, after viewing the film, had noted the provocative portrayal of God the Father, the Virgin Mary and Jesus Christ. Finally, the

<sup>170</sup> *Ojala and Etukeno Oy v. Finland* (application no.69939/10), judgment of 14 January 2014, §57; *Ruusunen v. Finland* (application no. 73579/10), judgment of 14 January 2014, §52.

<sup>171</sup> *Kokkinakis v. Greece* (application no.14307/88), judgment of 25 May 1993, §31.

<sup>172</sup> Harris, O’Boyle, and Warbick, *Law of the European Convention on Human Rights*, Third edition, Oxford University Press 2014, p.669.

<sup>173</sup> *Otto-Preminger-Institut v. Austria* (application no.13470/87), judgment of 20 September 1994, §49.

Court stated that it could not disregard the fact that the Roman Catholic religion was the religion of the overwhelming majority of Tyroleans and that in seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. For these reasons the Court concluded that there had been no violation of Article 10 of the Convention.<sup>174</sup>

91. The Court has also been very clear that hate speech against a religious group is not protected under Article 10. Thus in the case of *Norwood v. the United Kingdom* the Court examined a complaint about a conviction of the applicant who, between November 2001 and 9 January 2002 had displayed in the window of his first-floor flat a large poster with a photograph of the Twin Towers in flame, the words “Islam out of Britain – Protect the British People” and a symbol of a crescent and star in a prohibition sign. The Court agreed with the assessment made by the domestic courts, namely that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. The Court went on to say that “[s]uch 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, which did not, therefore, enjoy the protection of Articles 10 or 14”.<sup>175</sup>
92. The denial of the Holocaust also is excluded from the protection of Article 10. For example, in the case of *D.I. v. Germany* the applicant, a historian, was fined for having made statements at a public meetings where he had denied the existence of the gas chambers in Auschwitz, stating that these gas chambers were fakes built up in the early post-war days and that the German tax-payers paid about 16 billion German marks for fakes. The former Commission found the complaint inadmissible, noting that the applicant's statements were contrary to the principles of peace and justice expressed in the Preamble to the Convention, and that they had advocated racial and religious discrimination.<sup>176</sup>
93. Also in the case of *Garaudy v. France* the Court held that the applicant, the author of a book entitled *The Founding Myths of Modern Israel*, who was convicted of the offences of disputing the existence of crimes against humanity, defamation in public of a group of persons (in this case the Jewish community), and incitement to racial hatred, was not entitled to rely on Article 10 of the Convention, and Article 17 of the Convention excluded the statements from the protection of the Convention, as the Court considered that the real purpose of the applicant's remarks was to rehabilitate the National Socialist regime and accuse the victims themselves of falsifying history.<sup>177</sup>
94. At the same time the Court has recognised that “those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs

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<sup>174</sup> *Ibid.*, §§52-56.

<sup>175</sup> *Norwood v. the United Kingdom* (application no.23131/03), admissibility decision of 16 November 2004.

<sup>176</sup> *D.I. v. Germany* (application no.26551/95), Commission decision on the admissibility of 26 June 1996.

<sup>177</sup> *Garaudy v. France* (application no.65831/01), decision on the admissibility of 24 June 2003.



and even the propagation by others of doctrines hostile to their faith”.<sup>178</sup> In the case of *Klein v. Slovakia*<sup>179</sup> the Court held that the conviction of a journalist for defamation of the highest representative of the Roman Catholic Church in Slovakia, thereby offending the members of that church, constituted a violation of Article 10 of the Convention. The journalist had written an article criticising the archbishop's attempts to prevent the distribution of Miloš Forman's film “The People vs. Larry Flynt”; the article also alluded to the archbishop's alleged co-operation with the former communist regime. The Court noted that the applicant's article had been a reaction to the Archbishop's statement, broadcast in the main evening news bulletin of a public TV station, and which he had considered to be contrary to the principles of a democratic society and, in particular, freedom of expression. The Court also felt that the fact that it was published in a weekly journal aimed at intellectually-oriented readers is in line with the applicant's explanation that he had meant the article to be a literary joke with ideas and associations to the film “The People vs. Larry Flynt” which he had not expected to be understood and appreciated by everyone. The journal was then published with a circulation of approximately 8,000 copies. The applicant's strongly worded pejorative opinion related exclusively to the person of a high representative of the Catholic Church in Slovakia. Contrary to the domestic courts' findings, the Court was not persuaded that by his statements the applicant discredited and disparaged a sector of the population on account of their Catholic faith, and therefore found a violation of Article 10.<sup>180</sup>

95. It has also been argued that in the Court's case-law on balancing the freedom of expression and freedoms protected by Article 9 of the Convention the emphasis has shifted from subjective feelings of followers of specific religious faith to a more “objective” evaluation of the public sentiments, and that the current approach favours an anti-conformist choice of individual persons.<sup>181</sup>

*Exercise of the freedom of expression based on the freedom of thought, conscience and religion*

96. In the early case of *Arrowsmith v. the United Kingdom* the former Commission noted that the term “manifestation of religion or belief” in Article 9 of the Convention does not cover “each act which is motivated or influenced by a religion or a belief”. In the *Arrowsmith* case the applicant, who was pacifist, had been convicted for handing out to soldiers leaflets where the applicant expressed criticism of government policy in respect to Northern Ireland. The Commission found that as the leaflets expressed not the applicant's own pacifist views, but her critical observations of government policy, the distribution of such leaflets could not be regarded as “manifestation” of belief under Article 9.<sup>182</sup> In a comparable case the Commission examined a complaint where the applicant submitted that the injunction prohibiting him from handing out leaflets and showing photographs, which aim at expressing the applicant's religiously inspired opinions about abortion, in the vicinity of an abortion clinic violates his rights to freedom of thought, conscience, religion, as well as the right to freedom of expression.

<sup>178</sup> *Otto-Preminger-Institut v. Austria* (application no.13470/87), judgment of 20 September 1994, §47.

<sup>179</sup> *Klein v. Slovakia* (application no.72208/01), judgment of 21 October 2006.

<sup>180</sup> *Ibid.*, §§45-55.

<sup>181</sup> Harris, O'Boyle, and Warbick, *Law of the European Convention on Human Rights*, Third edition, Oxford University Press 2014, p.670 with further references.

<sup>182</sup> *Arrowsmith v. the United Kingdom* (application no.7050/72), report of the Commission of 12 October 1978, §§71-72.

The Commission held that the activities at issue did not constitute the expression of a belief within the meaning of Article 9 of the Convention; turning to compatibility of the disputed measures the Commission found that the injunction against the applicant was granted for a limited duration and a specified, limited area, particularly noting that the injunction was not aimed at depriving the applicant of his rights under Article 10 of the Convention but merely at restricting them in order to protect the rights of others. Taking these factors together, the Commission found that the interference was proportionate to the legitimate aim pursued, and therefore declared the complaint under Article 10 of the Convention manifestly ill-founded.<sup>183</sup>

97. On the other hand, prohibitions on the wearing of religious symbols the Court examines exclusively under Article 9 of the Convention, as in the case of *Dahlab v. Switzerland*,<sup>184</sup> or, as in the case of *S.A.S. v. France*,<sup>185</sup> finds that no separate issue arises under Article 10 of the Convention.<sup>186</sup> In addition, the Court of Justice of the European Union (CJEU) recently issued a joint judgment on the interpretation of EU Equal Treatment Directive<sup>187</sup> in the cases<sup>188</sup> of two women, from France and Belgium, who were dismissed for refusing to remove headscarves.

### **3. Freedom of expression and freedom of assembly and association**

98. The purpose of the freedom of assembly and association protected by Article 11 of the Convention “is to allow individuals to come together for the expression and protection of their common interests, and where those interests are political in the widest sense, the function of the Article 11 freedoms is central to the effective working of the democratic system”,<sup>189</sup> The Court had ruled that the protection of personal opinions, as secured by Article 10, is one of the objectives of freedom of assembly and association as enshrined in Article 11.<sup>190</sup>

99. In cases where the applicants have complained about a measure that interferes both, with the freedom of assembly and association, and the freedom of expression, the Court, most recently in the case of *Kudrevičius and Others v. Lithuania*, finds that Article 10 is to be regarded as *a lex generalis* in relation to Article 11, which is a *lex*

<sup>183</sup> *Van den Dungen v. the Netherlands* (application no.22838/93), Commission decision on admissibility of 22 February 1995.

<sup>184</sup> *Dahlab v. Switzerland* (application no.42393/98), admissibility decision of 15 February 2001.

<sup>185</sup> *S.A.S. v. France* (application no.43835/11), Grand Chamber judgment of 1 July 2014.

<sup>186</sup> In connection with the debate in many European countries on the prohibition of religious clothing, such as the *burqa* and the *niqab*, the Commissioner for Human Rights referred to a general ban on such attire as constituting an ill-advised invasion of individual privacy. In his view the political challenge for Europe is to promote diversity and respect for the beliefs of others whilst at the same time protecting freedom of speech and expression. “If the wearing of a full-face veil is understood as an expression of a certain opinion, we are in fact talking here about the possible conflict between similar or identical rights – though seen from two entirely different angles.”, Viewpoint on “Burqa and privacy” published on 20 July 2011, see *Human rights in Europe: no grounds for complacency. Viewpoints by Thomas Hammarberg, Council of Europe Commissioner for Human Rights*, pages 39-43

<sup>187</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

<sup>188</sup> Cases C-157/15, *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV* and 188/15 *Bougnaoui and Association de défense des droits de l’homme (ADDH) v. Micropole Univers*, CJEU of 14 March 2017.

<sup>189</sup> Harris, O’Boyle, and Warbick, *Law of the European Convention on Human Rights*, Third edition, Oxford University Press 2014, p.710.

<sup>190</sup> *Ezelin v. France* (application no.11800/85), judgment of 26 April 1991, §37.

*specialis*, and subsequently examines the complaints under Article 11 alone.<sup>191</sup> However, in such situations the Court has repeatedly emphasised that notwithstanding its autonomous role and particular sphere of application, Article 11 must be considered in the light of Article 10, which in turn means that the conclusions of the Court in Article 11 cases can be of relevance also to Article 10 cases.

100. As regards the measures taken by States to combat terrorism, several official documents, declarations and guidelines, warn against the imposition of undue restrictions on the exercise of freedom of expression and assembly in situations of crisis.<sup>192</sup> The Court considered it “unacceptable from the standpoint of Article 11 of the Convention that an interference with the right to freedom of assembly could be justified simply on the basis of the authorities’ own view of the merits of a particular protest”.<sup>193</sup>

#### **4. Freedom of expression and prohibition of discrimination**

101. Article 20 §2, of the 1966 International Covenant on Civil and Political Rights states that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. As stressed by the UN Human Rights Committee in its General Comment no.11, this provision obliges the States to adopt the necessary legislative measures prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned. The UN Human Rights Committee further emphasises that for Article 20 to become fully effective “there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation”.<sup>194</sup>

102. Article 4 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination contains a comparable obligation of the States parties. As underlined by the UN Committee on the Elimination of Racial Discrimination, Article 4(a) requires States parties to penalise four categories of misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts.<sup>195</sup>

103. The Court has likewise held that even though tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society, “as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite,

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<sup>191</sup> *Kudrevičius and Others v. Lithuania* (application no.37553/05), Grand Chamber judgment of 15 October 2015, §85 with further references.

<sup>192</sup> See in particular the Berlin Declaration of 2004 of the International Commission of Jurists on upholding human rights and the rule of law in combating terrorism; United Nations Global Counter-Terrorism Strategy adopted by member states on 8 September 2006; Guidelines of the Committee of Ministers of the Council of Europe on the protection of freedom of expression and information in times of crisis, 26 September 2007; OSCE Manual on Countering Terrorism, Protecting Human Rights, 2007.

<sup>193</sup> *Hyde Park and Others v. Moldova (no. 1)* (application no. 33482/06, judgment of 31 March 2009, §26.

<sup>194</sup> United Nations Human Rights Committee, General comment No.11: Article 20, 1983.

<sup>195</sup> United Nations Committee on the Elimination of Racial Discrimination, General Recommendation No.15: Organized violence based on ethnic origin, 1993.

promote or justify hatred based on intolerance /./, provided that any ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued”.<sup>196</sup>

104. The Court in its case-law has made abundantly clear that hate speech is intolerable in a democratic society, whether it is directed against an ethnic or religious group, or homosexuals, or whether it concerns religious insult. Thus in the case of *Pavel Ivanov v. Russia* the Court declared incompatible *ratione materiae* with the Convention an application where the applicant, owner and editor of a newspaper, complained about his conviction of public incitement to ethnic, racial and religious hatred through the use of mass-media. The applicant had authored and published a series of articles portraying the Jews as the source of evil in Russia, calling for their exclusion from social life. He accused an entire ethnic group of plotting a conspiracy against the Russian people and ascribed Fascist ideology to the Jewish leadership. Both in his publications, and in his oral submissions at the trial, he consistently denied the Jews the right to national dignity, claiming that they did not form a nation. The Court had no doubt as to the markedly anti-Semitic tenor of the applicant’s views and agreed with the assessment made by the domestic courts that through his publications he had sought to incite hatred towards the Jewish people. Such a general, vehement attack on one ethnic group is directed against the Convention’s underlying values, notably tolerance, social peace and non-discrimination. Consequently, by reason of Article 17 of the Convention, the applicant could not benefit from the protection afforded by Article 10 of the Convention.<sup>197</sup> In the case of *Vejdeland and Others v. Sweden* the applicants’ complained about their conviction for distributing in an upper secondary school approximately 100 leaflets considered by the domestic courts to be offensive to homosexuals. The statements in the leaflets were, in particular, allegations that homosexuality was a “deviant sexual proclivity”, had “a morally destructive effect on the substance of society” and was responsible for the development of HIV and AIDS. The Court found that these statements had constituted serious and prejudicial allegations, even if they had not been a direct call to hateful act, and concluded that there had been no violation of Article 10 of the Convention, as the interference with the applicants’ exercise of their right to freedom of expression had reasonably been regarded by the Swedish authorities as necessary in a democratic society for the protection of the reputation and rights of others.<sup>198</sup>
105. Racist statements are likewise excluded from the protection of Article 10. For example, in the case of *Glimmerveen and Hagenbeek v. the Netherlands*, where the applicants complained about their conviction for possessing leaflets addressed to “White Dutch People”, the former Commission found that the policy advocated by the applicants had been inspired by the “overall aim to remove all non-white people from the Netherlands’ territory, in complete disregard of their nationality, time of residence, family ties, as well as social, economic, humanitarian or other considerations”.<sup>199</sup> The Commission considered that this policy was clearly containing elements of racial discrimination which is prohibited under the Convention and other international agreements. For these reasons the Commission declared the complaint inadmissible.

<sup>196</sup> *Erbakan v. Turkey* (application no.59405/00), judgment of 6 July 2006, §56

<sup>197</sup> *Pavel Ivanov v. Russia* (application no.35222/04), decision on admissibility of 20 February 2007.

<sup>198</sup> *Vejdeland and Others v. Sweden* (application no.1813/07), judgment of 9 February 2012.

<sup>199</sup> *Glimmerveen and Hagenbeek v. the Netherlands* (applications nos.8348/78 and 8406/78), Commission decision on the admissibility of 11 October 1979.

## **5. Freedom of expression and maintaining the authority and impartiality of the judiciary**

106. The need to maintain the authority and impartiality of the judiciary is recognised as one of the legitimate aims in Article 10 §2 that could be the reason for restricting the freedom of expression. However, the general principles remain relevant, in particular the principle that freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. As the Court noted in the case of *The Sunday Times v. the United Kingdom (no.1)*, “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”<sup>200</sup>.
107. In principle, the defamation of a judge by the press takes place as part of a debate on the malfunction of the judicial system or in the context of doubting the independence or impartiality of judges. Such issues are always important for the public and must not be left outside the public debate, which is why the national courts must weigh the values and interests involved in case where judges or other judicial actors are criticised, and must balance the honour of the judge in question against the freedom of the press to report on matters of public interest, and decide the priority in a democratic society.<sup>201</sup> For example, in the case of *De Haes and Gijssels v. Belgium* the Court examined a complaint from two journalists who in five articles had criticised in virulent terms the judges of a Court of Appeal who had decided, in a divorce case, that two children of the divorced family would live with their father, who was a well-known notary, and 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 two journalists and the newspaper, asking civil damages for defamatory statements. In the judgment the Court recognised that members of the judiciary must enjoy public trust and therefore they must be protected against destructive attacks lacking any factual basis. The Court also recognised that since they have a duty of discretion, judges cannot respond in public to various attacks, as, for instance, politicians are able to do. The Court then considered the articles and noted that many details were given, including experts opinions, proving that the journalists had carried out serious research before informing the public on this case. The articles were part of a large public debate on incest and on how the judiciary dealt with it. Giving due importance to the right of the public to be informed on an issue of public interest, the Court found that the national courts’ decision was not “necessary in a democratic society”, and that therefore Article 10 had been violated.<sup>202</sup>
108. Another situation where the freedom of expression becomes relevant in the administration of justice concerns statements that do not comply with the presumption

<sup>200</sup> *The Sunday Times v. the United Kingdom (no.1)* (application no.6538/74), judgment of 26 April 1979, §65.

<sup>201</sup> Monica Macovei, *Freedom of Expression*, Human rights handbook, No.2, Council of Europe, 2004, pages 138-139.

<sup>202</sup> *De Haes and Gijssels v. Belgium* (application no.19983/92), judgment of 24 February 1997, §§38-49.

of innocence guaranteed by Article 6 §2 of the Convention. Thus in the case of *Bédât v. Switzerland*, when deciding on the proportionality of the applicant's conviction for publishing in an article information covered by investigative secrecy in an ongoing criminal case, the Court also examined the impact on the disputed article on the criminal proceedings. In this regard the Court reiterated that it is legitimate for special protection to be afforded to the secrecy of a judicial investigation, in view of what is at stake in criminal proceedings, both for the administration of justice and for the right of persons under investigation to be presumed innocent. The Court further emphasised that the secrecy of investigations is geared to protecting, on the one hand, the interests of the criminal proceedings by anticipating risks of collusion and the danger of evidence being tampered with or destroyed and, on the other, the interests of the accused, notably from the angle of presumption of innocence, and more generally, his or her personal relations and interests.<sup>203</sup> The Court concluded that in the present case the impugned article was set out in such a way as to paint a highly negative picture of the accused, which was one of the elements in the Court's conclusion that Article 10 of the Convention had not been violated.

109. As concerns lawyers, relating to the performance of their duties in the courtroom, in *Steur v. the Netherlands* the Court stated that "In their capacity as officers of the court, they [the lawyers] are subject to restrictions on their conduct (...) but they also benefit from exclusive rights and privileges (...) among them, usually, a certain latitude regarding arguments used in court".<sup>204</sup> For remarks outside the courtroom the protection of Article 10 can still apply, so a lawyer should be able to draw the public's attention to potential shortcomings in the justice system.<sup>205</sup> However the Court noted that lawyers do not fulfil the same role as journalists, and cannot be equated as having a task of informing the public. Lawyers, for their part, are protagonists in the justice system, directly involved in its functioning and defence of the a party.<sup>206</sup> Moreover, the Court underlined "the importance, in a State governed by the rule of law and in a democratic society, of maintaining the authority of the judiciary", notably by ensuring "mutual respect between (...) judges and lawyers".<sup>207</sup>

## **6. Freedom of expression in political discourse**

110. The Court has held that "free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system",<sup>208</sup> and for this reason restrictions on political discussions call for stringent review.<sup>209</sup> In the case of *Willem v. France* the Court stated that whilst an individual taking part in a public debate on a matter of general concern is required not to overstep certain limits as regards – in particular – respect for the rights of others, he or she is allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements.<sup>210</sup> Thus in the case of *Süreç v. Turkey (no.1)* the Court held with respect to political speech that "the limits of permissible criticism are

<sup>203</sup> *Bédât v. Switzerland* (application no.56925/08), Grand Chamber judgment of 29 March 2016, §§68-69.

<sup>204</sup> *Steur v. the Netherlands* (application no. 39657/98), judgment of 28 October 2003 §38.

<sup>205</sup> *Morice v. France* (application no. 29369/10), Grand Chamber judgment of 23 April 2015, §167.

<sup>206</sup> *Ibid.*, §148.

<sup>207</sup> *Ibid.*, §170.

<sup>208</sup> *Bowman v. the United Kingdom* (application no.24839/94), Grand Chamber judgment of 19 February 1998, §42.

<sup>209</sup> Harris, O'Boyle, and Warbick, *Law of the European Convention on Human Rights*, Third edition, Oxford University Press 2014, p.630 with further references.

<sup>210</sup> *Willem v. France* (application no.10883), judgment of 16 July 2009, §33.

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 public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries”<sup>211</sup>.

## **7. Political statements that incite to violence or hatred**

111. Considering the key role that political leaders and political parties can and ought to play in combating racism, racial discrimination, xenophobia and related intolerance, it certainly remains open to the competent State authorities to adopt measures in reaction to political statements that incite to violence or hatred<sup>212</sup>. For example, in the case of *Féret v. Belgium*<sup>213</sup> the Court held that the conviction of the president of an extreme right-wing party for inciting the public to discrimination or racial hatred in leaflets distributed in electoral campaign did not constitute a violation of Article 10 of the Convention. The disputed leaflets presented non-European immigrant communities as criminally-minded and keen to exploit the benefits they derived from living in Belgium, and also sought to make fun of them, with the inevitable risk of arousing feelings of distrust, rejection or even hatred towards foreigners. The domestic court found that the leaflets contained passages that represented a clear and deliberate incitation to discrimination, segregation or hatred, and even violence, for reasons of race, colour or national or ethnic origin. In its judgment the Court held that political speech that stirred hatred based on religious, ethnic or cultural prejudices was a threat to social peace and political stability in democratic States and that it was crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance. It was their duty to defend democracy and its principles because their ultimate aim was to govern.

## **V. Conclusions**

112. The links between freedom of expression and other human rights are not rigid and the balance between the respective rights is likely to evolve according to national contexts and general circumstances, in particular by taking into account the notion of the public interest of the statements in question and of the context of peaceful inter-community relations. Be that as it may, in the context of increasingly diverse societies, emphasis is placed by international bodies on the importance of “living together”<sup>214</sup> and striking a balance between the various interests involved. In this regard, intergovernmental committees and monitoring bodies emphasise the need to combat hate speech so that freedom of speech does not encourage violence against others. Given the ever-increasing importance of new technologies, it is necessary to continue discussions on the development of a secure and free Internet.

<sup>211</sup> *Sürek v. Turkey (no. 1)* (application no.26682/95), Grand Chamber judgment of 8 July 1999, §61.

<sup>212</sup> *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies* §§38, 70; See also *Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, available at <http://www.un.org/WCAR/durban.pdf>

<sup>213</sup> *Féret v. Belgium* (application no.15615/07), judgment of 16 July 2009.

<sup>214</sup> *S.A.S v. France* (application number 43835/11) Grand Chamber judgment of 1 July 2014; *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, §7.

113. In order to complete the work assigned to the CDDH, it is necessary to consider the best ways of obtaining information from member States, with regard to the preparation of a Guide to good practice on how to reconcile freedom of expression with other rights and freedoms, in particular in culturally diverse societies. Also, it should be considered to what extent information available within other bodies of the Council of Europe could be useful in the work of the Group.