

EUROPEAN STANDARDS ON FREEDOM OF EXPRESSION AND JOURNALISTS SAFETY

ARTICLE 10, EUROPEAN CONVENTION ON HUMAN RIGHTS

(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.

ARTICLE 10, EUROPEAN CONVENTION ON HUMAN RIGHTS

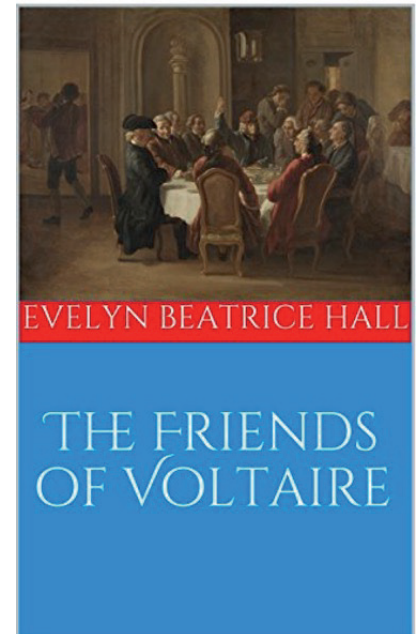
(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public 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.

THE IMPORTANCE OF FREEDOM OF EXPRESSION

THE IMPORTANCE OF THE RIGHT TO FREEDOM OF EXPRESSION

“I disapprove of what you say, but I will defend
to the death your right to say it”

Evelyn Beatrice Hall, The Friends of Voltaire



THE IMPORTANCE OF FREEDOM OF EXPRESSION

The right to freedom of expression is a cornerstone of democratic society and plays a central role in the protection of other rights.

“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.”

[Handyside v. the United Kingdom](#), 7 December 1976

THE IMPORTANCE OF FREEDOM OF EXPRESSION

“Democracy thrives on freedom of expression. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.”

[Manole and Others v. Moldova](#), 17 September 2009

THE IMPORTANCE OF FREEDOM OF EXPRESSION

The right to freedom of expression protects all forms of expression. In practice, the Court has distinguished between political speech, discussion on matters of public importance, artistic expression, information of a commercial nature, and entertainment such as music.

Political expression and debate on matters of public importance is especially protected:

“freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention” ([Lingens v. Austria](#), 8 July 1986)

THE IMPORTANCE OF FREEDOM OF EXPRESSION

A high level of protection is afforded to discussion of all matters of public importance:

- ▶ Discussion of historical genocides ([Perinçek v. Switzerland](#), 15 October 2015)
- ▶ Criticism of the actions of the police ([Savva Terentyev v. Russia](#), 28 August 2018)
- ▶ Criticism of disproportionate pay increases for the director of a large car manufacturer ([Fressoz and Roire v. France](#), 21 January 1999)

THE IMPORTANCE OF FREEDOM OF EXPRESSION

A high level of protection is afforded to discussion of all matters of public importance (continued from previous slide):

- ▶ Discussion on the privatization of a major national insurance provider ([Radio Twist a.s. v. Slovakia](#), 19 December 2006)
- ▶ Allegations of mis-selling of insurance products ([Haldimann v. Switzerland](#), 24 February 2015)
- ▶ Discussion on employment law and policy, aimed at professionals in the human resources sector ([Herbai v. Hungary](#), 5 November 2019)

THE IMPORTANCE OF FREEDOM OF EXPRESSION

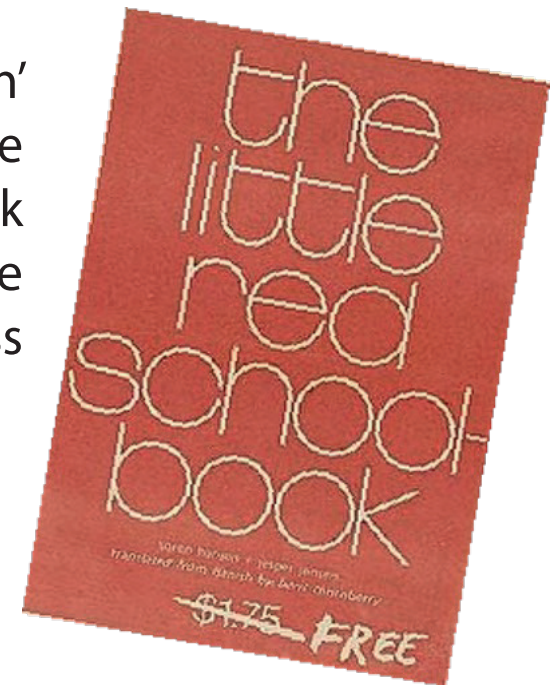
Freedom of expression applies to words that shock, offend or disturb.

“What is freedom of expression? Without the freedom to offend, it ceases to exist.” –
Salman Rushdie

THE IMPORTANCE OF FREEDOM OF EXPRESSION

“Freedom of expression ... is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’”

[Handyside v. the United Kingdom](#), 7 December 1976



BUT IS IT WISE TO BE RUDE AND OFFENSIVE?

Just because you have the right to offend someone, does not mean that is the most effective way to communicate.

Freedom of expression does not protect:

- ▶ gratuitous insults
- ▶ hate speech



[Rujak v. Croatia](#),
"Fuck your Ustaše mother!"

THE ROLE OF THE MEDIA, NGOS, AND OTHER 'MEDIA ACTORS'

THE ESSENTIAL ROLE OF THE MEDIA

The media play a particularly important role in relation to the right to freedom of expression. Whether online, through radio or television or in print, they are the means through which the vast majority of people receive news and information on issues of public interest.

“Although the press must not overstep certain bounds, regarding in particular the protection of the reputation and rights of others, its duty is nevertheless to impart - in a manner consistent with its obligations and responsibilities - information and ideas on all matters of public interest.

THE ESSENTIAL ROLE OF THE MEDIA

Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog.'" - [Pedersen and Baadsgaard v. Denmark](#), 17 December 2004

THE ESSENTIAL ROLE OF THE MEDIA (CONTINUED)

This applies to online media, bloggers and particularly popular social media users as well as to 'traditional' media:

"Given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information, the function of bloggers and popular users of the social media may be also assimilated to that of "public watchdogs" in so far as the protection afforded by Article 10 is concerned."

- [Magyar Helsinki Bizottság v. Hungary](#), 8 November 2016

THE ESSENTIAL ROLE OF THE MEDIA (CONTINUED)

'Journalist':

"the term "journalist" means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication."

- Council of Europe Recommendation No. R (2000)7, on the right of journalists not to disclose their sources of information

NGOS AND OTHER 'WATCHDOGS'

NGOs inform the public and alert them to issues of public interest. Like the media, they are therefore also considered 'public watchdogs' with an important role in society:

"The function of creating forums for public debate is not limited to the press. That function may also be exercised by non-governmental organisations, the activities of which are an essential element of informed public debate. The Court has therefore accepted that non-governmental organisations, like the press, may be characterised as social "watchdogs". In that connection their activities warrant similar Convention protection to that afforded to the press ..."

- [Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria](#),
28 November 2013

THE DUTIES ON THE STATE

DUTIES ON THE STATE

1. 'negative' (because, do not interfere) duty: do not interfere with freedom of expression unless as prescribed by law and as necessary in a democratic society for the protection of a legitimate aim

1. positive (because, state action is required) duty: take steps for the effective realisation of the right to freedom of expression and the protection of the safety of journalists

THE 'NEGATIVE' DUTY

NEGATIVE DUTY

Interferences with freedom of expression not permitted unless in accordance with the three part test, based on Article 10(2) ECHR:

1. The restriction has must have been prescribed by law;
2. The restriction must have been imposed in pursuit of a legitimate aim; and
3. The restriction must be demonstrated to have been 'necessary in a democratic society'.

PRESCRIBED BY LAW

In applying the 'prescribed by law' test, the Court uses a substantive test. It considers that the term 'law' includes legal provisions passed by parliament, but also ministerial regulations and similar norms, as well as judicial interpretations of the law.

PRESCRIBED BY LAW

Further requirements include:

The legal measure on which the restriction is based must be 'adequately accessible'. Unpublished internal regulations cannot provide a basis for a restriction.

The law must be foreseeable, meaning 'formulated with sufficient precision to enable the citizen to regulate their conduct' ([Sunday Times v. the United Kingdom](#), 26 April 1979). Journalists and other professionals are expected to take special care and, if necessary, to seek legal advice (see, in particular, [Delfi v. Estonia](#) (GC), 16 June 2015)

The law must afford protection against abuse and arbitrary or excessive use of the law ([Centro Europa 7 S.R.L. and Di Stefano v. Italy](#) (GC), 7 June 2012)

The law must provide for the possibility of judicial review ([Ahmet Yildirim v. Turkey](#), 18 December 2012)

LEGITIMATE AIM

There must be a realistic link between the expression that is restricted and the legitimate aim pursued; there cannot just be a hypothetical or uncertain possibility.

The legitimate aims are:

- ▶ National security: e.g. [Hadjianastassiou v. Greece](#) (16 December 1992): conviction of a military engineer who had sold classified military information to a private company pursued the legitimate aim of protecting national security.

LEGITIMATE AIM

- ▶ Territorial integrity or public safety: e.g. [Sürek v. Turkey](#) (No. 3) (8 July 1999): the publication of separatist propaganda which advocated recourse to violence could be legitimately restricted in order to protect territorial integrity and public safety
- ▶ The prevention of disorder or crime: e.g. [Rekvényi v. Hungary](#) (20 May 1999): political activities of police officers could be legitimately restricted in order to prevent disorder

LEGITIMATE AIM (CONTINUED)

- ▶ The protection of health or morals: e.g. [Müller and Others v. Switzerland](#) (24 May 1988): paintings showing explicit sex acts could be temporarily removed from a public gallery that was accessible to children
- ▶ The protection of the reputation or rights of others: e.g. [MGN v. the United Kingdom](#) (18 January 2011): a newspaper was found to have violated the right to privacy of a well-known model by publishing about her treatment for drug addition

LEGITIMATE AIM (CONTINUED)

- ▶ Preventing the disclosure of information received in confidence: e.g. [Stoll v. Switzerland](#) (10 December 2007): conviction for publishing “secret official deliberations” concerning compensation due to Holocaust victims for unclaimed assets justified to prevent the disclosure of information received in confidence
- ▶ Maintaining the authority and impartiality of the judiciary: e.g. [Worm v. Austria](#) (29 August 1997): conviction of a journalist who had written an article which was extremely critical of a defendant in a criminal trial, and which the Austrian courts had decided could influence the outcome of a criminal trial, was justified

NECESSARY IN A DEMOCRATIC SOCIETY

Exceptions to the right to freedom of expression “must be narrowly interpreted and the necessity for any restrictions must be convincingly established” ([Observer and Guardian v. the United Kingdom](#), 26 November 1991)

In the case of [Sunday Times v. the United Kingdom](#) (No. 1), (26 April 1979), the Court elaborated on the strict meaning of the word, “necessary”:

“[W]hilst the adjective ‘necessary’, within the meaning of Article 10 (2), is not synonymous with ‘indispensable’, neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’ ... it implies the existence of a ‘pressing social need.’”

NECESSARY IN A DEMOCRATIC SOCIETY (ELEMENTS OF THE TEST)

In determining whether there is a 'pressing social need' that would justify a restriction as being 'necessary in a democratic society', the Court requires that the following questions are addressed:

- ▶ Are the reasons given for the restriction 'relevant and sufficient'? As part of this, it needs to be assessed whether the authorities based themselves on an acceptable assessment of the relevant facts; and whether they applied standards that were in conformity with the principles embodied in Article 10?
- ▶ Is the restriction proportionate to the legitimate aim pursued?

NECESSARY IN A DEMOCRATIC SOCIETY (PROPORTIONALITY)

Various factors are taken into consideration to assess whether or not a restriction is proportionate to the aim pursued, including:

- ▶ The nature and severity of the restriction, and how long it was imposed for (see, for example, *Sunday Times v. United Kingdom* (No. 1))
- ▶ The position of the applicant and his/her role in the public debate
- ▶ The impact of the expression in question: how many individuals have read, seen or heard it (for example, in *Tamiz v. the United Kingdom* (19 September 2017) only a limited number of people had accessed an impugned blog post and so it had limited impact)

NECESSARY IN A DEMOCRATIC SOCIETY (PROPORTIONALITY)

- ▶ The right of the public to be informed on matters of general importance
- ▶ Whether the authorities have struck a fair balance between the right to freedom of expression and other rights (see, for example, [Cumpănaș and Mazăre v. Romania](#) (17 December 2004))
- ▶ Whether the authorities have applied the least restrictive means possible to achieve the legitimate aim (see, for example, [Ürper and Others v. Turkey](#) (20 October 2009))

THE 'POSITIVE' DUTY

WHAT STATES MUST DO TO PROTECT AND FACILITATE FREEDOM OF EXPRESSION AND THE SAFETY OF JOURNALISTS

States are under a strong duty to take measures to protect journalists and others who report or speak out on issues of public interest.

“States are obliged to put in place an effective system of protection for authors and journalists as part of their broader obligation to create a favourable environment for participation in public debate by everyone and to enable the expression of opinions and ideas without fear, even when they are contrary to those held by the authorities or by a significant section of public opinion and even if they are annoying or shocking for the latter.” (Dink v. Turkey, 14 September 2010)

IT IS NOT JUST ABOUT PROTECTING FREEDOM OF EXPRESSION, BUT ALSO...

- ▶ the right to life
- ▶ the right to physical integrity
- ▶ the right to respect for private life
- ▶ the right to be free from discrimination

In addition to protecting these rights, in recognition of its importance in democratic society, States must create an enabling environment for the exercise of the right to freedom of expression. Journalists and other media actors in particular should be able to speak out on matters of public importance without fear of retaliation or retribution.

WHAT STATES MUST DO TO PROTECT AND FACILITATE FREEDOM OF EXPRESSION (CONTINUED)

This entails three categories of obligations:

1. States must put in place effective criminal-law provisions to deter the commission of offences, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions;
2. where necessary, States must take preventive operational measures to protect an individual or individuals whose lives are at risk
3. When violent acts are committed, or threats are made, States are under a duty to investigate and bring those responsible to justice.

WHAT STATES MUST DO TO PROTECT AND FACILITATE FREEDOM OF EXPRESSION (CONTINUED)

An important consideration for law enforcement is whether there have been threats:

Özgür Gündem v. Turkey

the domestic authorities – which were aware of a series of violent actions against a newspaper and people associated with it – did not take any action to protect the newspaper and its journalists

Huseynova v. Azerbaijan

Neither the applicant's husband nor [the] magazine had been subjected to acts of violence. Moreover, as the Court has already found, it does not appear from the documents in the case file that the applicant's husband lodged any application or request for protection with the domestic authorities before his murder

WHAT STATES MUST DO TO PROTECT AND FACILITATE FREEDOM OF EXPRESSION (CONTINUED)

Dink v. Turkey

The European Court of Human Rights found that the Turkish Government violated Articles 2 (Right to Life), 10 (Freedom of Expression), and 13 (Right to an Effective Remedy) of the European Convention on Human Rights by failing to protect journalist Fırat Dink, leading to his murder. Dink, an outspoken Armenian minority member in Turkey, was killed due to his writings. Despite knowing of an assassination plot against Dink, Turkish authorities did not take action. Additionally, the court underscored that states have a positive obligation to create a favorable environment for participation in public debate.

WHAT STATES MUST DO TO PROTECT AND FACILITATE FREEDOM OF EXPRESSION (CONTINUED)

Always consider motive - was a threat or an attack linked to journalism or exercise of freedom of expression?

Khadija Ismayilova v. Azerbaijan

For high profile journalists, the link to journalism is presumed, unless it can be ruled out:

“In a situation where the applicant was well known in society specifically for her journalistic activity and for that activity only, it is difficult to discern any motive for threats of public humiliation received by her other than a motive connected to that activity.”

ELABORATION OF THE COURT'S PRINCIPLES

The principles discussed in the preceding slides have been elaborated upon by the Committee of Ministers, in particular in Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors.

This Recommendation will be discussed in detail in subsequent modules.