

JOURNALISM WORTHY OF THE NAME

FREEDOM WITHIN THE PRESS AND THE AFFIRMATIVE SIDE
OF ARTICLE 10 OF THE EUROPEAN CONVENTION ON
HUMAN RIGHTS

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FREEDOM WITHIN THE PRESS AND THE AFFIRMATIVE SIDE
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BY

HERDÍS THORGEIRSDÓTTIR

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For Herdís, María Elísabet, Gunnar Thorgeir and Hördur Tryggvi
With all my heart

FOREWORD

I took part as an opponent in the successful public defence of the thesis on which this book is based. I am pleased now to have the opportunity to welcome its publication. You will find here an innovative and impassioned treatment of a central problem of our time. Will the media for the future continue to fulfil its central role in democratic society, that of the public's watch dog on power, or is the future one in which the commercial imperatives of the media's ever more concentrated ownership subordinate its public democratic function?

The international standards on freedom of expression and media freedom were adopted on assumptions that no longer reflect the reality of publishing and journalism in Europe, North America and many other parts of the world. The concern of these standards, as expressed for example in the European Convention on Human Rights, is with the abuse of power by the state through state censorship and the repression of criticism. But the problem now is no longer the state as such but the supposed disciplines of the market. Throughout Europe and North America choice in newspapers and electronic media is being diminished and self-censorship in journalism is endemic. Editors and journalists are now less likely to be locked up if they displease the government. But they are very much more likely to face the sack if they displease their commercial employers.

The defence of freedom of expression and publication from state control remains of course a vital purpose of international and national human rights guarantees. It should not be forgotten that orthodox methods of censorship and suppression still afflict much of the world. In China, not a word is published, not an image transmitted which is not subject to the veto of the Chinese Communist Party. But in societies, which have achieved democracy, private power in an era of globalising media has generated a potentially similar threat to the independence and freedom of journalism.

Can the existing international legal standards, in particular those developed through the Council of Europe and its European Court of Human Rights respond effectively to defend the indispensable role of pluralist local media? The European Court has emphasised that media has not only a right to inform the public and to hold power holders – whether elected politicians or business leaders – to account, but that media have a duty to do so. But can the Court be brought to require member states and media organizations to take the positive action needed to ensure that media fulfil such duties?

The author seeks to establish the case for an affirmative interpretation of Article 10 freedoms under the European Convention. Her extended argument subjects the corpus of freedom of expression jurisprudence of the European Court to the most comprehensive analysis yet published. Not all her ideas will be welcomed by journalists although few will fault her diagnosis of the dire state of 'freedom within the press'. But lawyers and journalists as well as all those concerned with the health of the press at national and European level will find in this important book insights and policy options that can provide a basis for fighting back.

Kevin Boyle

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ACKNOWLEDGEMENTS

This book, which is based on my doctoral thesis from the Faculty of Law at Lund University in Sweden in 2003, is occasioned by personal experience in publishing and journalism in Iceland. It is an affirmative reading of Article 10 of the European Convention on Human Rights; not merely asking ‘what’ the law says about freedom of expression and of the press. The central idea of self-censorship within the press as a potential breach of the state’s positive obligation under the European Convention on Human Rights was met with resistance when I started exploring this topic in the mid-nineties. Editorial independence is not only threatened by shameless rulers but also by new challenges where corporate elites have the same objective as the former; i.e. to use the media for their own agenda. A situation where the elected authorities have joined forces with the business world renders the protection of a responsible press more difficult. Even in the oldest democratic states it is increasingly recognized that journalists resort to self-censorship in order to keep their jobs. Such a situation makes a mockery of the idea of an ‘effective political democracy’ visualized by the writers of the European Convention on Human Rights more than half a century ago. However, it was not easy when I started my research to convince other academics and experts in the field of human rights and constitutional law that the internalization of critical and anti-establishment opinions among journalists was of direct concern from the perspective of public law.

It is hence important to thank those who supported my work from the very beginning. In that respect I am most indebted to Professor Gudmundur Alfredsson, the director of the Raoul Wallenberg Institute, for having faith in my idea from the start and for his supervision and support. His constructive criticism, level-headed approach, patience and constant encouragement are deeply appreciated. I would not have embarked on this journey without his encouragement.

Although this book, as others of its kind, is the effort of solitary research over many years, the personal experiences and the people that have helped me and crossed my path on the way to obtaining this goal seem an integral part of this project – when I am at last parting with it.

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Reykjavik, February 2005

INTRODUCTION

I SUBJECT AND TERMINOLOGY*

The press is an institution in society like no other.¹ It is a private body with a significant public character recognized widely in constitutions as well as in public international law. Press freedom is an instrumental value since the press is seen as a key pillar on which an effectively functioning democracy rests. Democracy does not preserve itself, as it is dependent on the active participation of the public. The media has the vital function to inform and enlighten the citizenry, to promote social cohesion by consolidating the public around central issues and to stimulate individual perspectives to mature in community with others. The news media imparts information and ideas and is in theory expected to interpret facts and set them into context in order to enable the citizens to orientate themselves with the complex reality of modernity. Conducting investigative journalism is the essence of a responsible press in a democratic society. In the case-law of the European Convention on Human Rights,² the press is termed the Public Watchdog³ due to its vital role in society. Apart from licensing requirements of broadcasting it remains widely the case that the legally recognized public function of the press is *de facto* in the hands of private corporations, which are subject to the economic logic of the market. These media firms are key actors in the political process, even on the global scene. The press is the public sphere, which everyone gazes at for getting a glimpse of the outside world for news and analysis of current events, be it motives of terrorists, scandals in high places, the corruption of big business, recent catastrophes or important discoveries that people unite in rejoicing over. Journalistic conduct is in other words the most popular mental sustenance there is. Neither curriculum at any level of the education system, nor any form of entertainment can replace the news media when course of events calls upon the public to keep track of what is happening. The significance of journalism is augmented by the faster pace of modern communication and enhanced forms of recreation – not least in the process of globalization.

* Where gender specific words and phrases cannot be used, the pronoun 'he' is used, and is to be understood as including female gender as well.

¹ The term press is used in a comprehensive manner throughout this study. It is used interchangeably with the term media. Both terms encompass all forms of news media, where the basic criterion is the political role of the medium in the democratic process. The word does not distinguish between different forms of media unless so specified. Printed press covers newspapers and magazines; broadcasting refers to television and radio. The Internet does not belong to the category of broadcasting law. The focus is not on the Internet in this study but its existence and impact is taken into account whenever it is relevant.

² Hereinafter the Convention, unless there is need to distinguish it from other instruments by referring to the European Convention on Human Rights.

³ The concept is capitalized to accentuate the role of the press in Convention jurisprudence.

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The problem is that the media is not capable of measuring up to the great expectations made of it. Journalism is dependent on an affirmative appraisal by the market. Dissident opinions are generally not favourably received by power holders, be they in business or politics. Journalism is in praxis conditioned by the economic logic of the media as a corporation. When confronting this problem we are faced with the most important power-alliance that exists in any modern society. The prior restraints impeding the realization of effective journalism are exercised in such an insidious way that no one can be held accountable. The intersection of public and private spheres in modern capitalist societies has produced a grey sphere where corporations in the marketplace, due to their co-dependence with elected authorities are no longer clearly separable from the *de facto* power holders. Corporate political activity complicates the analysis of media responsibility, as these corporations are active participants in the political process that promulgates the regulatory policies that affect them.⁴

The subject of this study is 'freedom within the press', the nature and limits of the protection warranted to journalists to carry out the purported mission of the press. The operation of media in society is conditioned by legal regulation, market regulation and self-regulation.⁵ Legal regulation does not adequately presuppose the impact of market regulation and self-regulation within the media. It is based on the assumption that press freedom is mainly a negative liberty to be free from interference by public authorities unless the press oversteps the bounds set forth to protect other legal interests. It does not presume that market regulation and self-regulation may actively be impeding the press in carrying out its positive duties. Focusing merely on legal regulation is disregarding several factors that have a significant impact on the operation of the media in modern societies.

Freedom within the press may be defined as the degree of freedom from restraint to adhere to the positive requirements of the Public Watchdog in sustaining an 'uninhibited, robust, and wide open' political debate, which in theory is not conditioned on economic or political interests.⁶ It is preposterous, however, to imagine that such interests can ever be wholly excluded and maybe not even desirable. Of major concern here are the insidious restraints imposed on the media by the obscure power arising from intertwined interests of corporate conduct and politics. This is termed market regulation as opposed to the alleged legal regulation of the press, which basically boils down to a hands off policy of the state. Supervision of the positive duties that the Public Watchdog is expected to perform tend to be *pro forma* left to self-regulation within the media. The negative

⁴ Cf. S. R. Bowman, *The Modern Corporation and American Political Thought*. Law, power and ideology, 1996 Pennsylvania State University Press, p. 142.

⁵ Cf. D. Voorhoof, 'From Governmental Regulation to Market Regulation? Press and the Meaning of Article 10 of the European Human Rights Convention', in K. Nordenstreng & W. Kleinwächter (eds.), *CSCE and Information, Proceedings of a seminar of experts*, Tampere, 24–27 April 1992, University of Tampere, p. 19.

⁶ *New York Times v. Sullivan*, 376 U.S. 254, (1964). The opinion of the Court was delivered by Justice William Brennan.

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requirements of the press are, in most legal systems, not to overstep certain bounds set forth to protect national security, the rights of others to privacy, reputation, and fair trial and so forth. The press is accountable in the sense of being liable to sanction if found to have acted in breach of some of the countervailing rights limiting absolute freedom of expression. When such a situation arises it is obvious and contestable in a court of law. If, however, the press fails in its positive obligations of being democratically accountable, providing sufficient information to the public, even on activity that may affect its own business interests as a corporation, it becomes hard to prove its breach of the vital role it *de jure* has.⁷ The democratic legitimacy of the press originates in the rights of others to be informed. The whole idea underlying the constitutional protection that the press widely enjoys stems from its democratic significance, where rights of others are paramount but not the publisher's privileged position. The concept of positive requirements refers to the mandatory obligations that the European Court of Human Rights has ascribed to the press in congruity with the duties and responsibilities inherent in freedom of expression.⁸

The main paradigm of an effective freedom within the press is editorial independence in professional discretion *via* institutional protection. Underlying the concept is the hope that with their autonomy sufficiently ensured, journalists will have, as well as use, increased possibilities to adhere to their professional obligations in complete unison with their code of ethics.⁹ Journalistic autonomy, however, is not to be equated with the unrestricted rights of co-determination for employees within the media enterprise. The journalists' basic rights to freedom of expression and professional duties and responsibilities are not to be confused with the set-up of the editorial offices or the structure of the personnel. Editorial independence and responsible journalism are terms used interchangeably to reveal the same notion of journalism devoid of external pressures trying to sway it from its objectives. When speaking of journalistic freedoms, editorial independence is therein included albeit the editor-in-chief may *de facto* be serving the owners or advertisers or other parties trying to influence the information flow. Freedom within the press presupposes that the interests of the editor-in-chief and the journalists are the same in avoiding interference in their professional discretion.

Freedom within the press is not an autonomous legal concept. It is traceable in the soft law of the Council of Europe, in the form of recommendations and resolutions of its Committee of Ministers and Parliamentary Assembly as well as in domestic usage. The term freedom within the press is not only useful in indicating the preferred conditions. It has a broader reference as it appeals to freedom as a means to an end, not only an end in itself. Thus when speaking of freedom within

⁷ Cf. M. Feintuck, *Media Regulation, Public Interest and the Law*, 1999 Edinburgh University Press, p. 120.

⁸ Referred to in this study as the Court, unless discussed in relation to other courts and there is need to distinguish between them by referring to the European Court of Human Rights.

⁹ Cf. W. Hoffman-Riem, *Regulating Media, The Licensing and supervision of broadcasting in six countries*, 1996 Guildford Press, p. 132.

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the press we are referring not only to the condition of editorial independence but also taking into account the operative element of the freedom. Yet, there are some shortcomings or imperfections inclinable to this usage, even such as indicating completely the opposite of independence from private restraints, namely freedom of the press to increase its commercial scope. Evidently there is an overlap when discussing freedom within the press and freedom of the press. Freedom within the press is a part of freedom of the press. Freedom within the press is a necessary prerequisite for press freedom in general. The focus is geared towards the behavioural aspects that affect press freedom rather than the structural environment such as the number of media outlets. Press freedom and the free and unhindered exercise of journalism within the media go hand in hand.

Even though all these concepts indicate the need for independence from external constraints, the term autonomy does not necessarily reflect an aim of responsibility. It may even be misleading, referring to the goals of the press to enjoy protection for its own sake, for example to be rid of the long arm of the state to prosper as a commercial enterprise, independent of any duties or responsibilities. The term autonomy is slightly deceptive, as it may imply privileges for the press, being exempt from legal regulation but not the market forces here in question. The reason for this is historical. The printed press over the last centuries has pulled away from government interference and political party affiliations, while the pull of the market has not been seen as shackling until recently. Of course this is a debatable interpretation of the term autonomy or independence but as the law provides for freedom of the press it may be more useful to use the latter concept if only to clarify what is meant by freedom. The concept is not used analogously to 'individual liberty' due to the significant mission the press has in society. The term independence albeit, used by journalists to cover the same phenomenon is not written in the legal provisions, which will be looked into, although it may appear elsewhere in Council of Europe material.

With the advent of international human rights instruments protecting freedom of expression, freedom of opinion and the right to impart and to receive, a new dimension is added to this freedom, which emphasizes the role of the media in protecting the public interest by staving off impediments to the information flow. The media gains a significant, positive role in the operation of a 20th century notion of democratic society in the wake of two world wars. Article 19 of the Universal Declaration of Human Rights, preceding the parallel Article 19 of the legally binding International Covenant on Civil and Political Rights and Article 10 of the European Convention on Human Rights symbolize the structural role of the press in protecting and promoting other human rights in a collective effort to establish a world of democratic societies on the basis of international and regional organizations. The structure of the provisions, with their respective restriction clauses, shows that the intent is not only to protect the individual freedom of expression but also to protect meaningful journalism by acknowledging the importance of the two way flow of information. There were compromises made during the drafting of these provisions, in particular of Article 10 of the Convention,

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which is the main framework of this study. The problem of privately owned media was not considered to the extent of warranting legal protection to guarantee the democratic information flow. The drafters procrastinated in dealing with the impact of private manipulation of public opinion, as is the tendency with arduous problems.

Exploitation by media owners is a recognized problem as exemplified in a submission to the United Nations Commission on Human Rights by the International Federation of Journalists in 1998.¹⁰ Interference from owners or affiliated interests that disregard duties of journalistic responsibility in imparting matters of legitimate public concern is seriously impeding the operation of a responsible press.¹¹ It is, however, extremely problematic to insist that the owner of a private firm, despite its paramount significance for the future of democracy, must succumb to some abstract notion of serving the public interest if it thwarts the potentiality of the medium to survive on the market. This means that market forces, which hence determine what view of the world is presented to the citizenry, may enslave journalism. The fundamental rights of unsuspecting readers and audiences to receive are curbed by denying journalists their rights and accompanying responsibilities. Such infringement is, however, not exercised on legal premises and hence cannot be solved within the legal framework. The determinant factor ought not to be who is the perpetrator in violating the freedoms essential to a democratic press, but how such a breach can be precluded to render freedom of the press effective and practical. The result of this obscure oppression leads to self-censorship within the media. Out of fear of losing their jobs journalists disguise their opinions and even withhold information in order not to jolt the 'establishment'.¹² This is what John Stuart Mill called 'mental slavery'.¹³ Individuals may censor themselves due to the intolerance in society, which has the tendency to impose, by other means than civil penalties, its own ideas and practices on those who dissent. Fear and timidity within the media renders the vital role of the Public Watchdog almost an unachievable task. The Public Watchdog should be a relentless adversary of the powerful as the lifeline of democracy hinges on that type of media conduct. Journalism true to this notion has the responsibility to address large questions of economic and social structure, the distribution of wealth, and other establishment sensitive issues. Such journalistic conduct may reduce the market value of the press as a property. The owners of the organized business called the press most likely consider it to be in conflict with both their property rights and individual expression rights to be ordained to serve the public interest. Here comes a vital point however: Nobody holds the press accountable if it ignores its positive duties.

As this study reveals there are countervailing claims that arise in the social relations concerning the press. It may impose an unfair burden on a private corporation to attend to the entitlement of the public 'to hear all sides'. Such

¹⁰ Submission to the United Nations Commission on Human Rights 16 March to 24 April 1998. The IFJ represents more than 450,000 journalists in more than 90 countries.

¹¹ *Bladet Tromsø and Stensaas v. Norway* [GC], 20 May 1999, RJD 1999-III, p. 289.

¹² A synonym describing the alliance between political power and corporate power.

¹³ J. S. Mill, *On Liberty*, 1993 Bantam, p. 40.

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revelations may harm the media company's interests. Journalists are expected to be the active conscience of society and take on the Herculean task of scrutinizing the acts of the powerful. It is their *de jure* role as the Public Watchdog: A task prescribed by law. Yet, they have *de facto* no protection. As the system works now, in most cases it is less rewarding to be a critical journalist than a conformist journalist. How can we speak of press freedom as a right when there is no judicial remedy to a serious curtailment of that right?

The alleged private restraints that prevent the press from carrying out its positive duties infringe on the rights of journalists in the imparting process and constitute a violation of the corollary right of the public to receive matters of legitimate concern. The problem is that these violations, albeit widespread, are not justiciable since the violators are not operating within a legal framework. The law does not extend to the actual threat that journalism has to cope with which affects the corollary interest of the public's right to receive. The Convention was adopted to protect individuals from state violations fifty years ago. Now large corporations, through the process of privatization and globalization, have replaced authorities with regard to the impact they have on individual life in society.¹⁴

II METHOD

It seems almost improper to scrutinize the behaviour of a private corporation and furthermore 'from within' under public international law. Since the law of the European Convention of Human Rights concerns human rights and press freedom is one of the rights that all other rights hinge on, it becomes excusable to deal with the exercise of such a right, although the perspective may *prima facie* contradict the classical notion of protecting the individual against the state. Furthermore, as the Convention is one of the most advanced international legal processes, it meets the growing demand of human rights, as the 'ethics of the 21st century', to attack new frontiers and question the extent of the protection, which can be expected from this domain. The Convention reflects the common heritage of political traditions that resulted in its creation. Its enforcement mechanisms have succeeded in enhancing its significance within the member states as it represents a kind of European *ius commune*.¹⁵ The focus of this study is on the protection of the press deriving from the Convention due to its legal and political impact within the member states.

¹⁴ The UN Agenda for Democratization (GA A 51/761 20 Dec 1996) states in § 96: 'Business and industry today has more power over the future of the global economy and the environment than any government or organization of governments. Transnational or multinational corporations in particular, which are today estimated to be 40,000 in number, controlling some 250,000 foreign affiliates worth approximately USD 2.6 trillion in book value and accounting for some one-third of world private-sector assets are playing an extremely important role in economic development.'

¹⁵ J. A. Carillo Salcedo, 'The Place of the European Convention in International Law', in MacDonald, Matscher and Petzold (eds.), *The European System for the Protection of Human Rights*, 1993 Kluwer Law International, p. 19.

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Convention jurisprudence has not only influenced domestic courts but also legislators of member states. The Court's case-law is largely casuistic but when a large body of case-law has accumulated then the Convention institutions begin to produce statements capable of general application.¹⁶ With regard to cases concerning freedom of expression, which have been numerous, there are indications of an overall view on how the Convention organs determine the substantial rights concerning Article 10.

Convention jurisprudence with regard to the problem of freedom within the press suffers from the lack of a media theory that adequately reflects the values at issue. An organized and structured understanding of Article 10 is essential to arrive at a consensus on the subjective right based on the objective law and its relationship with political power. The fundamental rights enlisted in Article 10 of the Convention must be re-conceptualized within the present day framework in order to scrutinize how journalistic freedoms may best be protected to serve the public interest but not the antithetical interests of property owners. An outstanding characteristic of the market is that it is imperfect and cannot of 'itself preserve or protect the values of free expression in any of the media'.¹⁷ If this problem is left unsolved in the hands of the market and powerful financial groups succeed in exercising pressure on journalists, then the intention behind protecting this freedom becomes meaningless. Failure in theory can lead to a failure of inquiry as may be gradually unveiled in the journey ahead. One of the essential features of the Convention is that whenever it proclaims or enumerates the rights guaranteed, it abounds in vague notions and indeterminate and imprecise concepts.¹⁸ The rights are named and listed but the constituent elements are not defined. Whereas Article 10 proclaims the right to freedom of expression, including the freedom to impart and receive, evidently referring to the function of the media, it neither specifies nor defines the actual content or implications of the concept of freedom of the press. To insist that freedom of expression is protected without guaranteeing the fundamental principles governing the main forum of its exercise in the complex social fabric of modern society is preposterous. Media freedom as such has no existence, no meaning and no practical content save within the framework of a legally protected institution, within a legally protected process of imparting. Separating press freedom from the organ exercising it is a denial of the principle of freedom of the press.¹⁹

¹⁶ F. Matscher, 'Methods of Interpretation of the Convention', in McDonald, Matscher, Petzold (eds.), *The European System for the Protection of Human Rights*, 1993 Kluwer Law International, pp. 63–64.

¹⁷ As put by Lord McGregor of Durris, Report presented to the Sixth International Colloquy about the European Convention on Human Rights, Sevilla, 13–16 November 1985, *Human Rights Law Journal* [Vol. 6 No. 2–4, 1985] p. 393.

¹⁸ M. Melchior, 'Rights not covered by the Convention' in MacDonald, Matscher and Petzold (eds.), *The European System for the Protection of Human Rights*, 1993 Kluwer Law International.

¹⁹ A metaphor borrowed from Pierre-Henry Teitgen. Cf. Collected editions of the *Travaux Préparatoires*, Vol. IV. Official report of the Sixth Sitting Monday 14 August 1950, Council

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The components of the text of Article 10 are scrutinized in relation to the main theoretical basis for protection: Democracy and human dignity. These concepts are in fact essential to the analysis as determined to a large extent in interplay with the media. The ever-evolving standards concerning these concepts, which are far from being static rules, become apparent when the freedoms are scrutinized in the search for the subjective right that can be accumulated in the journey through the case-law.

For increased understanding of the problem the extensive United States Supreme Court case-law, in which the First Amendment is almost a brand name, is resorted to for broadening the scope of analysis. Other relevant external sources indicative of emerging international human rights standards are also referred to: Council of Europe materials, resolutions and recommendations of the Parliamentary Assembly and the Committee of Ministers (they do not have the same status as judgments but are from time to time referred to by the Court as useful guides to the direction in which the Court should go),²⁰ other international or regional treaty provisions such as the International Covenant on Civil and Political Rights,²¹ the American Convention of Human Rights,²² case-law of the European Court of Justice and the Inter-American Court of Human Rights, United Nations sources and constitutional law material within the relevant context. The laws applicable to the press and practices in Council of Europe member states are referred to when relevant and descriptive for the analysis, for example where domestic regulation exceeds the Convention in the protection it affords journalism.

The premises of liberal thought these freedoms are rooted in – the ideas of John Milton, John Stuart Mill and John Locke – form a theoretical background. The contribution of various contemporary legal and political analysts, rights philosophers, constitutional scholars and media law experts is furthermore considered to reveal the controversies characterizing the legal debate on press freedom.

The first part of the study is an overhaul of the substantive guarantees of Article 10. The legal text and jurisprudence is examined in light of both the negative and positive requirements imposed on the press. The basic components of the rights and freedoms protected under Article 10 are scrutinized separately within the framework of the Convention's objective of effective political democracy and individual dignity: The significance of the right to receive for the public discourse and the democratic process (chapter 2); the freedom of opinion with regard to the forming of public opinion and the individual development in society (chapter 3); and the right to impart with regard to journalists (chapter 4). The evolving standards of these paradigms demand an effective and practical protection.

of Europe Confidential H (61) 4, p. 853. (Mr. Teitgen and Sir David Maxwell Fyfe prime movers in the preparatory work according to Mr. Rolin, Collected editions of the *Travaux Préparatoires*, Vol. IV, p. 926).

²⁰ *Z v. Finland*, 25 February 1997, RJD 1997-I, p. 323.

²¹ Referred to as the ICCPR.

²² Referred to as the ACHR.

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The subject matter of Part II is an exploration of the editorial process in the context of legal regulation, market regulation and self-regulation. It traces the legal as well as political and practical obstacles to the realization of a free press along with the paradoxes, which the law can address if the problem is explicitly identified. In the political marketplace every preference claims the status of right and it remains a puzzle whether it could ever be otherwise. The aim of Part II is to contest the 'marketplace of ideas' notion and demonstrate how its contours are determined by a lack of professional journalism and pressures from powerful financial groups. Self-regulation is widely perceived of as a solution to this problem where journalistic codes of ethics or advertising standards are seen as filling the legal gap. Part II is an attempt to show why market regulation and self-regulation do not achieve the democratic objectives and why the law cannot be silent *vis-à-vis* these problems. There are three areas that Part II focuses on in an attempt to create legal answers to the dilemmas on the bases of the Convention. The first is the journalistic profession (chapter 5), which the Court recognizes to an extent as having a special status within the meaning of Article 10. The second dilemma is the position of proprietors within the media (chapter 6) and the conflicting values of property rights and Article 10 duties. A pivotal question concerns the possibility of imposing on private enterprises obligations that require actual sacrifices but not merely an abstention from acting. The political nature of advertising is addressed as a legal problem in chapter 7. What can be done to prevent those with a competitive, financial advantage from skewing the political debate? Is self-regulation within the media a credible answer to the internal pressures? Are there grounds to believe that the staff of private enterprises can fend off such efforts without risking their own existence (chapter 8)? The legal paradoxes dealt with are mostly taking place in the relations between private parties, but undeniably in the forum of the public sphere. The question of state responsibility is a recurring theme throughout the study.

The research reveals the lack of realization of the positive obligations expected of press performance. The substantive guarantee offered by the Convention is uncertain and open-ended. The main principles concerning Article 10 are promising but may have less value in reality due to the lack of justiciability of self-censorship muzzling the Public Watchdog. Secondly, the divergent legal treatment of broadcasting on the one hand (sentence three of Article 10 § 1), which is subject to licensing law and the reliance on self-regulation within the press render the applicability of the general (and generous) principles developed in the Convention's case-law merely hypothetical. The press' positive obligations are fixed in the case-law but in reality are not achievable. Press freedom is a term requiring its own definition, setting it apart from the individual freedom of speech. The Public Watchdog cannot be treated on the same legal footing as an individual due to the press' democratic mission. In order to render the right to press freedom effective, the interplay between rights and interests within the press needs detailed analysis. The inquiry will show that the press, a unique and powerful presence in the modern social fabric, escapes its corollary duties and responsibilities because this fact is not taken adequately into account.

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The press is in a position to violate rights on such a wide scale and in such a multifarious manner that it is imperative to scrutinize the controversial claim of the positive obligation of the press as a private business body. The contradictory propositions must be openly confronted if they are to have any chance of being reconciled. Balancing individual rights or privileges with the perceived needs of the public interest becomes highly questionable in view of the classical notion of press freedom. Publishers, owners and advertisers are not necessarily ready to accept the claim that this 'private enterprise' called the press, is serving a democratic mission that they should 'pay' for. The dominant political forces in society, whose access and staying power is to a large extent dependent on portrayals in the press, are not ready to switch gear and interpret the prevailing legal text or implement it if it grants the press more scope to independently criticize them. The chilling effect on journalism of libel law is an acknowledged fact. The chilling effect of market politics congeals critical opposition within the media before it even shows up. The press is understandably not ready to bite the hand that feeds it by offending advertisers or other influential parties. Against such self-censorship, neither journalists nor the public, have a remedy.²³

It will be revealed that press responsibility is mandated by Article 10 read in the context of the Convention and its case-law. It is not merely a required or hoped for virtue but a conduct that must be subject to regulation.²⁴ It is an illusion that freedom within the press can be protected without any efficient safeguards. This study seeks to gradually find answers to some of the hypothetical issues raised in the affirmative interpretation of Article 10. A basic right such as freedom within the press should not depend on squeezing Article 10 or its case-law to yield a desired result. The method seeks to show that positive measures are a part of the dynamic interpretation of the Convention in order to guarantee that the rights are effective in a complex, social fabric of modern life. The purpose is to reflect the values at issue within the media, to offer a thorough comprehension of the problem with a re-conceptualization in order to come up with a remedy since there exists a right. The aim is furthermore to show that an interventionist media policy is not least imperative with regard to the printed press – a semi-sacred sphere from hands off policy so far. The ultimate goal of this study is to show that there is a pressing social need based on the legitimate aim of protecting the rights of others, in the meaning of Article 10 § 2, to make law on the Public Watchdog so that it can meet its obligations.

The recommendations to solve the dilemma of freedom within the press are introduced at the end of each chapter in Part II. Some of the suggestions are without

²³ 'This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed'. Dr. Goebbels quoted in G. H. Fox and G. Nolte, 'Intolerant Democracies', Vol. 36 *Harvard International Law Journal*, No. 1, Winter 1995, p. 1. (Originally quoted from Karl Dietrich Bracher et al. eds., 1983 *Nationalsozialistische Diktatur* 16, 1983).

²⁴ A sophism of Justice Burger's opinion representing the majority in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 256, (1974).

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do not difficult to implement in praxis, for legal, political and economic reasons. It must be emphasized that these are not introduced as fully-fledged solutions to the problems. That will require another study. The initial aim was to reveal the affirmative side of Article 10 with a cogent argument so that positive measures may be taken. The recommendations are not meant as a prescription for the member states as to which measures they should adopt to guarantee these rights within their jurisdictions. It must be taken into consideration, as the Court submits, that the scope of the contracting parties' obligations inevitably vary depending on the diversity of the situations within these states, difficulties involved in implementation and not least, choices which must be made in terms of priorities and resources.²⁵

III SCOPE

This is not a comparative study of press freedom within the member states of the Council of Europe. The focus is empirical to the extent that many relevant points raised with regard to the concrete problem are often based on experience and observation rather than on cases that have been brought before a court of law. The analysis takes aim at the practice in the oldest member states of the Council of Europe where the insidious pressures of market failure are the most far reaching. The emphasis is on the obscure impediments immobilizing the press in heeding to the vital role of the Public Watchdog. The focus is not on the 'clear and present danger'²⁶ of physical violence counteracting journalism or on arbitrary intervention by authorities distinctly contravening the rule of law. In the most advanced 'democracies' it may also be expected that human rights violations are more 'scheming', which may be described as the natural readjustment of the vices inherent in human nature trying to cope with the frame set by the law of human rights.

Throughout the world news and opinions are suppressed and courageous journalists persecuted in the interests of ideological conformity. Journalists in the more 'advanced' member states of the Council of Europe are also persecuted, albeit in a different manner and their fundamental rights are run down. They are often forced to resort to self-censorship in order to avoid conflicting with the business interests of their medium, since the free market ideology is antipathetic to any criticism questioning the imperfection of the market. Press practices in totalitarian states of the world are outside the scope of this study. Imprisonment of journalists

²⁵ Cf. *Ösgür Gündem v. Turkey*, 16 March 2000, RJD 2000-III.

²⁶ A phrase created by Justice Oliver Wendell Holmes in *Schenck v. United States*, 249 U.S. 247 (1919): '[T]he character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic . . . The question in every case is whether the words are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to the effort that their hindrance will not be endured.'

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and, the closing down of newspapers and television stations are gross violations of human rights. Journalists are killed in attending to their mission, even in the member states of the Council of Europe. Turkey is a horrendous example. The Court has deemed that although journalists are acting as propaganda tools, it does not provide justification for authorities in failing to take steps to effectively investigate and, where necessary provide protection against unlawful acts involving violence.²⁷ A murder is a murder and I call attention to this point since during seminars on this topic the issue has been raised that the problem I am dealing with is not that serious given the fact that journalists are tortured and killed. There has been a case where the applicant alleged a violation of Article 10 on account of torture and killing designed to deter the lawful exercise of freedom of expression.²⁸ That individuals are killed and tortured is concrete evidence of the need to enhance the legal protection of journalists doing their job.²⁹ Wherever injustice reigns it breeds violence and terrorism blighting fundamental human rights. If there is no one to report on it the misery will be prolonged.

However, public intervention that is extra judicial, e.g. done or given effect outside the course of regular judicial proceedings, is not excluded from the scope of this study. Oppression of journalists unconnected with the action of a court of law is the pivotal problem of this study as the focus is on the insidious restraints within the media, impeding the Public Watchdog. These violations are not justiciable as the violators are operating outside the legal framework. Attention is directed at this problem due to the paralysing effect it may have on the media and due to the lack of remedies. Journalists are public trustees as will be revealed here and this study seeks to show what that role consequently entails and requires in the form of legal remedies. To what extent journalism can expect protection under the Convention concerning the problem of self-censorship is one of the challenges of this work. The law of the Convention is juxtaposed with factors of reality by referring to hypothetical problems and examples to shed light on the interplay of legal regulation, market regulation and self-regulation.

The printed press – the good old newspapers – are of pivotal interest, although broadcasting is perceived of as much more ‘dangerous’ and hence in need of regulation. The divergent legal treatment of the two forms of media stems not only from scarcity of frequencies. It is reasoned that broadcasting has such a wide and immediate impact, especially on those who are not seen as avid seekers of information but rather as uncritical recipients. The legal distinction is challenged in

²⁷ In the case *Ösgür Gündem v. Turkey*, *supra* note 25, the applicants claimed that the government of Turkey, directly or indirectly, sought to hinder, prevent and render impossible the production of *Ösgür Gündem* by the encouragement of or acquiescence in unlawful killings of journalists, and by failure to provide any or any adequate protection of journalists when their lives were clearly in danger and despite requests for such protection. *Cf. Kilic v. Turkey*, 28 March 2000, RJD 2000-III, § 85.

²⁸ *Cf. infra* chapter 3.2.2 The Duty to Form an Opinion and Express it without Reserve.

²⁹ *Cf. Erdogan and Ince v. Turkey* [GC], *supra* note 29, § 54.

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this study, *inter alia* on the basis that it is equally important to ensure diversity of views in the newspapers as well as in broadcasting.

The scope of this study is clearly confined to regulation of journalistic practices. Competition law, structural regulation of cross-ownership and prevention of gateway monopolies do not seem to be adequate legal remedies for deficiencies within the press, as these do not sufficiently guarantee diversity of views and opinions. Even though ownership share is decreased, the operation of each media outlet is still conditioned by the same forces that otherwise stifle investigative journalism, which *sui generis* may conflict with the corporate interests of the medium. While plurality of ownership is seen as a step in the direction of ensuring programme diversity, it does not guarantee editorial independence. On the other hand, if editorial independence is ensured, it may guarantee that different media outlets, even with the same ownership, express a diverse range of views.

The application of anti-trust rules may be necessary but they are not a sufficient condition for programme diversity. On the EU level media concentration has been defined in the following way: 'By concentration is meant not just the concentration of capital and media, but also across-the-board concentration of outlooks and conceptions, through the sameness of the programmes on offer.'³⁰ This last distinction clearly refers to freedom within the press. The number of media outlets may increase the variety of news – but if the situation within each of these outlets resembles an 'iron cage' – a description of a certain economic and political order which cannot resolve the journalist's predicament – the two main objectives which the European Convention was to ensure through civil and political rights, namely 'democracy' and 'human dignity' are subverted. Competition among media outlets has revolved around maximizing audience share and therefore advertising revenue. As emphasized by Collins and Murrioni competition policy is applicable³¹ where competition accords with the public interest and but regulation where it does not. Competition policy may ensure the existence of a number of media outlets but it does not by itself guarantee the public debate required for the democratic process.³²

While press law and practices vary within the different member states of the Council of Europe most of them seem to have a malfunctioning press when contested with the ideal of the Public Watchdog. There is a widespread problem with regard to the active realization of press freedom, although the difficulties the press and its members are affronted with appear in different shapes. The consequences of a malfunctioning press are the same everywhere and paralysing to the democratic process.

³⁰ *Official Journal C* 100, 2 April 1996, p. 0048.

³¹ While there are no specific arrangements for the media, various directives and treaty Articles 85 and 86 dealing with cartels and price fixing and abuses of dominant position respectively and merger regulation can be invoked under EU laws.

³² R. Collins and C. Murrioni, *New Media, New Policies*, 1996 Polity Press, pp. 58–75.

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IV PURPOSE

The burden of this study is to gradually seek a theoretical answer to the positive obligation a state may have in intervening to secure a free, independent and responsible press given the practical problems of market regulation and self-regulation. The range and complexity of the problem may best be resolved on the basis of the Convention and the institutions set up by it. The Convention is a common frame of reference for many of its contracting parties. The Committee of Ministers has recommended to the member states of the Council of Europe that they adopt a media policy in line with Article 10 and resort to measures to promote media pluralism.³³ The intention is to explore how freedom within the media is best guaranteed and whether public interference in the form of legislation may be reconciled with Article 10 in context of the Convention. Law governing freedom within the media ought not to be viewed as control but a remedy to afford protection to journalists, editors, and even the publishers. It is imperative to provide a coherent and viable concept of freedom within the media that is relevant to both real life and the struggles that affront journalism widely in the member states of Council of Europe.

The recommendations to render freedom within the press an effective and practical right are set forward here as an attempt to create a dialogue on this highly controversial topic. I am aware of the fact that my recommendations may in the eyes of some – if not many – seem to subvert the very principles that they ought to promote. These are suggestions and they seek support from the Convention's jurisprudence. They are based on the premises that there is a pressing social need for the member states to intervene, as guaranteeing freedom within the media, editorial independence and journalistic integrity is essential to a functional press within the democratic context. The recommendations, however, are not elaborated minutely, but rather set forward as suggestions on necessary steps to be taken in order to actively guarantee a free and responsible press from an affirmative reading of Article 10.

Changes in society, towards the intervention of the welfare state, or as in recent years increased privatization, should not lead to a reduction and limitation of the Convention's guarantees as Judge Melchior emphasized in *Feldbrugge v. Belgium* in a Commission's minority opinion.³⁴ The Convention should be interpreted in such a way that it can cope with new situations which have appeared or developed since 1950, provided there are no technical obstacles. The correct approach, according to the dissenting judges, 'is not to argue that because a problem is important for the members of the public it must come within the scope of the Convention, but if the

³³ Council of Europe Committee of Ministers Recommendation No. R (99) 1 on Measures to promote media pluralism (Adopted by the Committee of Ministers on 19 January 1999 at the 656th meeting of the Ministers' Deputies).

³⁴ *Feldbrugge v. the Netherlands*, dissenting opinion of Commission's minority, 29 May 1986, Series A no. 99, pp. 37–47.

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problem is important to consider whether it is not possible, by observing the rules of logic and legal reasoning, to bring it within the scope of the Convention'.³⁵

This line of thinking seems in harmony with the ideas of Pierre-Henry Teitgen, one of the principal drafters of the Convention. As recognized by the drafters it was extremely difficult to define the rights and reach an agreement on the definition. The final Convention was a watered down version of the earlier drafts, which were submitted to committee after committee to almost suffer death from a thousand cuts.³⁶ Strange hesitations and regrettable omissions, to quote Mr. Teitgen,³⁷ characterized this process. The end result was to accept a weak Convention rather than no Convention at all.³⁸ In the words of the drafters themselves, they decided to 'go for the half loaf instead of no bread at all'.³⁹

The Convention was according to Teitgen not meant to correct individual occurrences but to set the stage for a new age, a new world of democracy, rule of law and human rights. In Teitgen's words the concern was not with 'isolated illegal actions taking place everyday – in every country, where there are tribunals which themselves correct the illegality committed in the immense majority of cases – where there is abuse of power, but to prevent the re-establishment or establishment of totalitarian dictatorship'.⁴⁰ The objective was to guarantee on a large scale the rule of law, democracy and human rights where freedom of the press could not be defined in the abstract. In his brilliant way of arguing, Mr. Teitgen, referred to the alleged protection offered to political rights in so called People's Democracies behind the Iron Curtain – mocking the way these principles were set forward in declarations of rights – and containing at the end of the provision a short supplementary article:

The freedoms defined above shall be exercised in conformity with the aims of the People's Democracy: they shall never be exercised outside these aims.⁴¹

The right to proclaim and to defend publicly in the press, the truths which every man's conscience dictates to him amounts to little if it is dictated by the 'state'. Half a century later in the liberal democracies of the original Council of Europe member states, the 'state' to be feared has assumed a different notion due to the interdependence of the elected authorities and big business. If the 'truth' is not according to the conscience of the journalist but dictated by the demands of powerful financial

³⁵ *Ibid.*

³⁶ Lord Layton, Collected editions of the *Travaux Préparatoires*, Vol. IV. Official report of the Sixth Sitting Monday 14 August 1950, Council of Europe Confidential H (61) 4, p. 841.

³⁷ Collected editions of the *Travaux Préparatoires*, Vol. IV. Official report of the Sixth Sitting Monday 14 August 1950, Council of Europe Confidential H (61) 4, p. 815.

³⁸ *Ibid.*, p. 849.

³⁹ Mr. MacEntee Ireland, *Travaux Préparatoires* Vol. IV, *supra* note 37 p. 859.

⁴⁰ Collected editions of the *Travaux Préparatoires*, Vol. IV, Council of Europe, confidential H (61) 4, p. 839.

⁴¹ *Ibid.*

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groups, even agitating particular political interests, the wishes of media owners or advertisers, it is not freedom. It is not just 'utter nonsense' but also a grave threat to the objectives of the Convention, democracy, rule of law and individual freedoms. If we do not take these rights seriously, they 'could serve as an unconscious alibi for the lack of effective solutions to the real problems [within the media]'.⁴²

The positive requirements imposed on the press, due to its vital role in democracy and because of its impact on the self-development and dignity of each individual, fall under the paradox of public international law, which in the words of Koskenniemi 'aims to create space for non-political normativity that would be opposable to the politics of states' while it is evident that 'what rights mean and how they are applied can only be determined by states'.⁴³ This is why resorting to international human rights law may be the only way to resolve the dilemma resulting from national practices. The European Convention was a compromise discussed from both the legal and political point of view. It parted from the Universal Declaration of Human Rights, which was not legally binding on the sovereign states that took part in the process of developing it or those that accepted it. Hence, the Convention promised action, as states were legally accountable for violating individual rights.

Opposite the challenge of a real and effective press freedom would be an example of a defamed politician who can turn to a court of law and sue the press, but the citizenry on the whole can do very little if the press is failing in its pre-eminent role. If the press is dictated to by the whims of the market and corrupt private forces, to which authorities turn a blind eye, then the impending danger is that equity, impartiality and conscience are replaced by obscure motives that suppress the freedoms that were intended to protect these societies from any form of tyranny over the minds of men.

In order to justify the use of the concept 'freedom within the media' as an autonomous legal concept it is imperative to analyze the broader rationales

⁴² Cf. F. Tulkens, quoting Rivero, 'Towards a Greater Normative Coherence in Europe/ The implications of the Draft Charter of Fundamental Rights of the European Union' in 21 *HRLJ* No. 8 (2000).

⁴³ M. Koskenniemi, 'Human rights, politics and love' in *Mennesker og rettigheter*, No. 4 (2001), p. 33.

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underlying protection and regulation;⁴⁴ the implication of subjective rights for objective law. Prohibition is not the sole method of securing the rights and freedoms guaranteed in the Convention.⁴⁵ Lack of common standards, may be one of the reasons that explains the failure of the member states to adapt the Convention to modernity.⁴⁶ It may also be a question of political will. Or perhaps it is lack of a comprehensive theory on the press in the legal environment. A coherent theory on press freedom in public international law requires analysis of the human right to freedom of expression and the obligation of the press as the Public Watchdog, as well as a theory of power relations.

⁴⁴ There is a divergent legal treatment of broadcasting on the one hand and printed press on the other.

⁴⁵ *Ireland v. the United Kingdom*, 18 January 1978, Series A No. 25, § 240.

⁴⁶ F. Tulken, *supra* note 42.

PART I

THE EUROPEAN CONVENTION AND ITS PUBLIC WATCHDOG

INTRODUCTION

The European Convention on Human Rights and its jurisprudence has entered the rights debate within many of the member states of the Council of Europe where there is growing appreciation of the impact of this remarkable instrument and its institutional mechanisms. Many of the judgments of the European Court of Human Rights, not least those concerning freedom of expression and the press, have reinforced the paramount impact of Article 10 in providing a frame of reference for shaping media policy or at least what such a policy should aspire to.

Part I focuses on the legal regulation of the press and its underlying principles. The rhetoric of the Public Watchdog is a multiplex problem not only subject to legal regulation but also market regulation and self-regulation as gradually revealed through each stage of the analysis of the component parts of Article 10. The concept of the Public Watchdog must be scrutinized from the perspective of the media's positive obligations in democracy, the basis of its legitimate role and not only from the legality of its conduct. The inadequacy of the legal regulation becomes apparent when analyzed in depth through the interplay of freedoms, rights and duties and in the context of the objective and purpose of the Convention.

Chapter 1 depicts the guarantee afforded by Article 10 of the Convention as reflected in the jurisprudence that has emerged from the case-law of the Court and the former Commission of Human Rights.⁴⁷ The principle itself, applying both to natural as well as legal persons opens the ground for conflicting interests between the practicing journalists, the receivers among the public, the individual subjects of journalism and the owners and the publishers of the media who may have their own agenda to pursue. The character of Article 10 is mysterious, protecting both the natural instinct of individual expression in every conceivable form while at the same time being loaded with the weight of civil and political obligations in society, giving it a character of a collective right rather than just an individual freedom. It protects the civil right of the individual not to be interfered with by the state. At the same time it protects the right of the citizen to be enlightened calling into question the positive obligation of authorities to ensure that process. It hands out a promise of citizen access to the governing process through democratic procedures, where the media serves a major role, shedding light on the indivisibility of all human rights whether of economic, social or cultural origin. The freedoms protected in Article 10 are useful only in the context of a social and economic structure where there is a sufficient range of choices. Accordingly, the freedoms of opinion, expression, imparting and receiving information and ideas are a collective rather than merely an individual good.

Whether one looks at the protection afforded by Article 10 as just protecting freedoms and not rights, media freedom is of little value unless viewed in a societal context where everyone can benefit from it. It is quite clear from jurisprudence concerning Article 10 that the Convention aims at a far broader protection of the

⁴⁷ Hereinafter the Commission.

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media than the traditional conception of this freedom proposed. Even those holding extreme liberal views of media freedom as a purely negative liberty accept some form of state interference to protect individuals against being harmed by others. The principle of freedom of expression is thus far from absolute.

The emergence of the new dimension of press freedom, which is the public's right to receive, marks a departure from the traditional view of the press' freedom as mainly a freedom of the publisher. Chapter 2 analyzes the quest for increased media responsibility as the corollary of the rights of others in the democratic context. It questions the role of this right in relation to the increased significance of the 'knowledge-based-society' and the impact of new information technologies on the public service ethos that has been a concomitant of broadcasting from the inception of the Convention. The divergent legal treatment of broadcasting and the printed press is subsequently challenged. The increasingly complex media environment of market driven information technology, competing with the vulnerable values of a democratic society in dire straits, has elicited the need for a coherent regulatory framework.

It is not easy to reconcile the claim for a responsible press on the basis of the Convention with the conflicting claims of divergent regulatory approaches and the practical difficulties imposed by the non-physical existence of new information technologies escaping jurisdictions. A tough battle is underway between market anarchy on the one hand and the press' intended instrumental role of promoting social cohesion against a dissolving world. When the dazzle over cyberspace and its alleged inexhaustible potentials disappears, the urgent need to get a hold of the situation even for reasons other than human rights is gradually revealing the sober facts of the situation. This in turn switches the focus of divergent approaches in research and legal policies to the initial stage of press practice, the source within the media, the individual journalist. At the end of the day it is not technology that rules but the human mind controlling it.

Chapter 3 explores the pivotal position of freedom of opinion, a somewhat neglected area in legal writing on press freedom. The Court goes step by step on the narrow path in a balancing exercise between the rights of others in a democratic society, and the rights of journalists to provoke the public in their contribution to the political debate. The Court has more often than not ruled in favour of the press to stave off the chilling effect that punishment may have within the media, acknowledging the threat that self-censorship has on journalism. There is, however, a territory in the interplay between the press and the public, which has not been explored thoroughly before the Court although aspects of it have been reviewed. This is the pall of prejudice fostering journalism that practices inequality and hence works against the objectives of tolerance, pluralism and broadmindedness, which it was intended to achieve. When exploring the interplay between journalism, human dignity and freedom of opinion, certain aspects of media freedom are unveiled. The press must not overstep the bounds set forth *inter alia* to protect the rights of others (negative requirements); at the same time it has the vital role in democracy of enlightening the public (positive requirements). What has so far escaped judicial

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review is the silencing effect of discriminating journalism, sexism and other forms of prejudice that infringe the rights of others without ever posing a problem for a judge. This is a wrong that does not have a corollary legal right. As the positive requirements are not within a legal framework, it is hard to show how they can be violated or brought under review of the exception to the right.

The public function that the Court has ascribed to the press in general – the vital role of the Public Watchdog – is analyzed in relation to the right to impart in chapter 4. There is some case-law recognizing the special status of the press to attend to this mission but the concept of the Public Watchdog has, however, evaded a clear legal definition despite its recurrent usage in the Convention's jurisprudence.

CHAPTER 1

ARTICLE 10 AND THE PRESS

Freedom of the press and freedom of speech mean in democracy the right to proclaim and to defend publicly, by meetings or in the press those truths, which every man's conscience dictates to him.⁴⁸ – *Pierre-Henry Teitgen*

1.1 A SYNOPSIS OF THE SUBSTANTIAL GUARANTEE OF ARTICLE 10

Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁴⁹ is the primary statement of public international law concerning the media in the member states of the Council of Europe. Article 10 also has implications for the law of the European Union.⁵⁰ Article 6 of the Treaty of Amsterdam was included to reaffirm that the EU 'is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and rule of law'. Furthermore, the EU shall respect fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950. The founding treaties of the EU contained no specific provisions on fundamental rights.

It will not be said of Article 10 like its famous counterpart in United States Constitutional law, the First Amendment,⁵¹ that it is almost magisterial in its simplicity.⁵² Article 10 is far from simple. The structure of Article 10 is like that of the other provisions in the category of civil and political rights, ranging from privacy (Article 8), thought, conscience (Article 9) to opinion, expression (Article 10) and association (Article 11). Under the Convention, all expression, whatever its content, falls within Article 10 § 1. The second paragraph identifies the criteria upon which

⁴⁸ Collected editions of the *Travaux Préparatoires*, Vol. IV, p. 850. Official report of the Sixth Sitting Monday 14 August 1950, Council of Europe Confidential H (61) 4, p. 850.

⁴⁹ ETS. 5, signed at Rome 4 November 1950; entered into force 3 September 1953, after its ratification by eight countries: Denmark, the Federal Republic of Germany, Iceland, Ireland, Luxembourg, Norway, Sweden and the United Kingdom.

⁵⁰ See the Preamble to the Single European Act, OJ 1987, L169; and Article F of Title I of the Maastricht Treaty on European Union (1992) 1 *CMLR* 719. Article F (2) TEU: 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member states, as general principles of Community law.'

⁵¹ The First Amendment to the United States Constitution provides that: Congress shall make no law abridging, the freedom of speech, or of the press.

⁵² O. M. Fiss, 'The Irony of Free Speech', 1996 Harvard University Press, p. 5.

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an interference with the rights may be justified. The rights and freedoms incorporated in Article 10 are 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 the reputation of the rights of others, for preventing the disclosure of information received in confidence, or from maintaining the authority and impartiality of the judiciary.

Article 10 does not mention the press,⁵³ apart from the last sentence of its first paragraph where it provides states the right to require the licensing of broadcasting and television.⁵⁴ The words ‘impart’ and ‘receive’ seem in particular directed at press activities and the role of the media in the democratic context. Broadcasting programmes fall under the category of information and ideas.⁵⁵ The words receive and impart information and ideas have more value under Article 10 in relation to distribution of information and ideas of a political nature rather than an artistic or a physical expression of feelings.⁵⁶ The width and scope of protection will be illustrated in an exhaustive context depending on which aspect of the rights and concomitant obligations are being scrutinized. The protection is *prima facie* extensive and reaches everyone and covers the content of information and ideas as well as the form and means to express them. Article 10 protects various forms of expression within the freedom to receive and impart information and ideas, which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds.⁵⁷ Article 10 can be invoked by anyone who can claim that public authorities are responsible for breaches of their freedom of expression rights. The provision has been raised by journalists as well as civil

⁵³ Cf. *supra* note 1.

⁵⁴ The licensing according to the Court’s case-law is not confined to technical reasons as will be discussed later on in analysing the case-law.

⁵⁵ Application no. 5178/71 *De Geillustreerde Pers N.V. v. the Netherlands*, Commission’s report, 6 July 1976, DR 8, p. 5.

⁵⁶ Application no. 7215/75, *X v. the United Kingdom*, Commission’s report 12 October 1978, DR 19; In *Scherer v. Switzerland*, Commission’s report, 25 March 1994, Series A no. 287, § 53, there was no pressing need to convict the applicant for showing a homosexual obscene video, as the shop was not open to minors or discernible from the street while the paintings in the *Müller* case were unrestrictedly open to the public at large.

⁵⁷ *Müller and Others v. Switzerland*, 24 May 1998, Series A no. 133, § 27.

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servants, defamed politicians, individuals dismissed from public service, publishers and editors and legal persons like broadcasters to name a few examples.

The words ‘without interference by public authority’ are understood to impose a barrier on government interference in the communication process. The principle established in Article 10 § 1 is that public authorities are not allowed to interfere with the freedom of expression of individuals, their right to impart and receive regardless of frontiers. States are however permitted to regulate broadcasting through licensing, which is an exception from this prohibition of public interference. Given that this provision authorizes the state to require licensing of broadcasting enterprises, it is legitimate for a state to enact measures to prevent the circumvention of conditions attached to the particular license.⁵⁸ Article 10 does not in terms prohibit the imposition of prior restraints on a publication as such, as evidenced in the words ‘conditions’ and ‘restrictions’ in Article 10 § 2. The Court confirmed this view in *Observer and the Guardian v. United Kingdom* stating:

On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of its value and interest.⁵⁹

The intention with the wording in paragraph 1 is to protect the individual right to freedom of expression and the democratic role of freedom of expression as has been confirmed in the case-law’s main principles with regard to Article 10. The Court has explicitly stated that these principles are ‘of particular importance as far as the press is concerned’.⁶⁰ A great deal of the case-law concerns the activities of the press in light of its fundamental role in contributing to the realization of human rights and effective democracy. The linchpin of Article 10 is the extensive protection warranted to the press in discussing matters of public concern as ‘it is in the interest of democratic society to enable the press to exercise its vital role as Public Watchdog’.⁶¹ ‘The Court is mindful of the fact that journalistic freedom [also] covers possible recourse to a degree of exaggeration or even provocation.’⁶²

A public authority refers to the government and other public bodies, the legislator, judiciary, administrative, local authorities, which may interfere with this freedom but only under the conditions laid down in Article 10 § 2. The verdict or

⁵⁸ Application no. 10799/84, *Radio X, S, W & A v. Switzerland*, Commission’s decision 17 May 1984, DR 37, p. 236.

⁵⁹ *Observer and Guardian v. the United Kingdom*, 26 November 1991, Series A no. 216, § 6.

⁶⁰ *Sunday Times v. the United Kingdom*, 26 April 1979, Series A no. 30, § 65.

⁶¹ *Goodwin v. the United Kingdom*, 27 March 1996, RJD 1996-II, p. 500, § 39.

⁶² *Prager and Oberschlick v. Austria*, 26 April 1995, Series A no. 313, § 38.

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judgment of a civil court deciding on a dispute between individuals is also to be considered as a decision by the state, represented by its courts.⁶³

1.1.1 The Restriction Clause

The ‘necessity’ of a restrictive measure is assessed in light of the nature of the right guaranteed, the degree of interference, the proportionality between the interference and the aim pursued, the nature of the public interest and the degree to which it requires protection in the circumstances of the case.⁶⁴ The Court supposedly seeks to preserve the best possible balance between paragraphs 1 and 2 in the light of conditions present in contemporary democratic society. In the Court’s own words, it ‘has to be satisfied that the interference was necessary with regard to the facts and circumstances prevailing in the specific case before it’.⁶⁵ The restriction implied in the imposition of the penalty must not serve the mere purpose of retaliation, but should be intended to protect the interests enumerated in Article 10 § 2. Restrictions of prisoners’ freedom are usually justified as necessary for the prevention of order or crime.⁶⁶ Injunctions on press articles have been justified as violating the principle of contempt of court.⁶⁷ Where a restriction or sanction consists in private criminal prosecutions and the public prosecutor decides not to prosecute, the justifying ground is limited to the protection of the rights of others.⁶⁸

The second paragraph is an important part of the law of Article 10. The Convention case-law has primarily evolved around defining restrictions rather than with an exposition of what really constitutes media freedom. Any interference will infringe the Convention if it does not meet the requirements of Article 10 § 2. The second paragraph allows public authorities various kinds of control or restrictions,

⁶³ D. Voorhoof, *Critical perspectives on the scope and interpretation of Article 10 of the European Convention on Human Rights*, Mass Media Files No. 10, 1995 Council of Europe Press, p. 13.

⁶⁴ Application no. 7805/77, *Church of Scientology v. Sweden*, decision 5 May 1979, DR 16, p. 68.

⁶⁵ *Sunday Times v. the United Kingdom*, *supra* note 60, § 49.

⁶⁶ Application no. 5442/72, *X. v. the United Kingdom*, Commission’s decision of 20 December 1974, DR 1, p. 41 (Buddhist prisoner not permitted to send out material for publication in Buddhist magazine. Difficulties for prison authorities of checking such correspondence. Measure necessary for the prevention of disorder or crime under Article 10 § 2.); Application no. 6166/73, *Baader, Meins, Meinhof, Grundmann v. Federal Republic of Germany*, decision of 30 May 1975, DR 2, p. 58. (The restrictive measures imposed on the applicants did not amount to sensory isolation or to a break of contacts both inside and outside the prison given the fact that the applicants were very dangerous, these measures were necessary for the prevention of disorder and crime and thus justified under Article 8 § 2 and Articles 10 § 2.).

⁶⁷ Application no. 6538/74, *Sunday Times v. the United Kingdom*, decision 21 March 1975, DR 2, p. 90.

⁶⁸ Application no. 8710/79, *X. Ltd. and Y v. the United Kingdom*, decision of 7 May 1982, DR 28, p. 77.

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but only in exceptional circumstances and under strict conditions. It identifies the criteria upon, which an interference with the rights enlisted in paragraph 1 may be justified.

In *Sunday Times v. the United Kingdom*⁶⁹ the Court rejected a claim that a finding of contempt of court against a newspaper for its writing on a pending litigation was necessary for maintaining the authority and impartiality of the judiciary. *The Sunday Times* judgment forms the basis for the interpretation of the three criteria necessary to justify restrictions which arise when considering whether an infringement of the rights enlisted in Article 10 § 1 meets the Article 10 § 2 conditions:

- I. Is the restriction on freedom of expression ‘prescribed by law’?
- II. Does the restriction have a legitimate aim?
- III. Is the restriction ‘necessary in a democratic society’?

These requirements are cumulative. The first two are largely formal although compliance with domestic law will not necessarily suffice for the lawfulness standard. The third requirement demands strict scrutiny on behalf of the Court. The expression ‘prescribed by law’ requires firstly that the impugned measure should have a basis in domestic law. According to settled case-law, the concept of ‘law’ must be understood in its ‘substantive’ sense, not its ‘formal’ one.⁷⁰ Restrictions with no statutory underpinning will lack a sufficient legal basis to be ‘prescribed by law.’⁷¹ The Court has reiterated that it is primarily for the national authorities, notably the courts, to interpret and apply national law.⁷² A norm cannot be regarded as ‘law’ unless it is formulated with sufficient precision to enable the individual to regulate his conduct. He must be able, if need be with appropriate advice, if the law is framed in a manner that is not absolutely precise,⁷³ to foresee to a degree that is reasonable in the circumstances, the consequences, which a given action may entail. Those consequences need not be foreseeable with absolute certainty, which the Court says experience shows to be unattainable.⁷⁴ A law, which confers a discretion is not itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference.⁷⁵

⁶⁹ *Sunday Times v. the United Kingdom*, *supra* note 60.

⁷⁰ *Association Ekin v. France*, 17 July 2001, RJD 2001-VIII, § 46.

⁷¹ *Cf. Silver and Others v. the United Kingdom*, 25 March 1983, Series A no. 61.

⁷² *Otto-Preminger-Institut v. Austria*, 20 September 1994, Series A no. 295.

⁷³ *Markt Intern Verlag GmbH and Klaus Beermann v. the Federal Republic of Germany*, 20 November 1989, Series A no. 165, § 30.

⁷⁴ *Rekvényi v. Hungary*, 20 May 1999, RJD 1999-III, p. 423.

⁷⁵ *Margareta and Roger Andersson v. Sweden*, 25 February 1992, Series A no. 226, § 75.

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The word 'law' covers not only statutes but also unwritten law. As the Court stated in *Sunday Times*: 'It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of common law is not 'prescribed by law' on the sole ground that it is not enunciated in legislation: this would deprive a common law State, which is Party to the Convention of the protection of Article 10 § 2 and strike at the very roots of that State's legal system'.⁷⁶ Rules of professional conduct, which find their basis in parliamentary legislation, the application of which is exercised under the control of the state,⁷⁷ are to be regarded as 'law' within the meaning of Article 10 § 2. Codes of conduct for journalists would not fall under this category, as they are set by the journalistic unions themselves and their application is generally not exercised under the control of the state.⁷⁸

In the *Groppera* case the Court recognized that the 'relevant provisions of international telecommunications law were highly technical and complex',⁷⁹ it could therefore be expected of a business company wishing to engage in broadcasting across a frontier, like Groppera Radio AG, that it would seek to inform itself fully about the rules applicable in Switzerland, if necessary with the help of advisers. In short, the rules in issue were such as to enable the applicants and their advisers to regulate their conduct in the matter.⁸⁰ In the *Open Door* case the Commission submitted that the interference with the freedom of expression of the applicants X and Y was not 'prescribed by law' as the restriction rule was insufficiently precise to enable X and Y to foresee that it would be unlawful for the applicant companies, or indeed anyone else, to provide them with reliable, specific information about abortion clinics in Great Britain should they need to consult such clinics.⁸¹ The Commission expressed the opinion that a law restricting the information flow across frontiers, especially in important matters, requires particular precision to enable individuals to regulate their conduct accordingly. The Commission solely on the basis that the interference in *Open Door* had *not* been 'prescribed by law' concluded that there had been a breach of Article 10. The Court was of the opposite opinion, 'taking into consideration the high threshold of protection of the unborn provided under Irish law generally and the manner in which the courts have interpreted their role as the guarantors of constitutional rights, the possibility that action might be taken against the corporate applicants must have been, with appropriate legal advice, reasonably foreseeable'.⁸²

⁷⁶ *Sunday Times v. the United Kingdom*, *supra* note 60, § 47.

⁷⁷ *Barthold v. the Federal Republic of Germany*, 25 March 1985, Series A no. 90, § 46.

⁷⁸ *Cf. infra* chapter 8.

⁷⁹ *Groppera Radio AG and Others v. Switzerland*, 28 March 1990, Series A no. 173, § 68.

⁸⁰ *Ibid.*

⁸¹ Application nos. 14234 and 14235/88, *Open Door and Dublin Well Woman v. Ireland*, Commission's report 7 March 1991, Series A no. 246. (Series B no. 227).

⁸² *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, Series A no. 246 § 60; *Sunday Times v. the United Kingdom*, *supra* note 60, § 49.

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Herczegfalvy v. Austria, which concerned interference with the correspondence of mental patients, is an example where the Court has found domestic law lacking. The person interfering with the correspondence had an unfettered discretion as to whether to do so and when to do so. The Court held that the interference was ‘not prescribed by law’.⁸³

Any interference by the state must be ‘proportionate to the legitimate aims pursued’, such as the protection of the reputation and rights of others⁸⁴ and the reasons adduced by the national authorities to justify it must be ‘relevant and sufficient’.⁸⁵ Additionally there may be no reason to suppose that the interference had any other purpose.⁸⁶ In the last instance the Court has referred to Article 18 of the Convention, which states that ‘[t]he restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they may have been prescribed.’

The third and final condition of Article 10 § 2 is whether the interference was necessary in a democratic society. The Court has noted that, whilst 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’.⁸⁷ Any restriction must imply a ‘pressing social need’.⁸⁸ At this stage the Court resorts to a balancing exercise characterising the proportionality test it uses to measure the necessity of interference within the meaning of Article 10 § 2. In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole. The necessity of interference by the domestic authorities must meet the criterion of a ‘pressing social need’ for the restriction and the reasons adduced by the domestic authorities to justify the interference must be relevant and sufficient.⁸⁹ In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.⁹⁰ Every formality, condition, restriction or penalty imposed on the exercise must be proportionate to the legitimate aim pursued. The Court in this connection recalls the foundational role of freedom of political and public debate in a democracy and the importance of the press in that regard. The core of the matter is the incumbency of

⁸³ *Herczegfalvy v. Austria*, 24 September 1992, Series A no. 244, § 91.

⁸⁴ *Jersild v. Denmark*, 23 September 1994, Series A no. 298, § 27.

⁸⁵ Cf. *Sunday Times v. the United Kingdom*, *supra* note 60, § 62; *Lingens v. Austria*, 8 July 1986, Series A no. 103, § 40; *Barfod v. Denmark*, 22 February 1989, Series A no. 149, § 28; *Janowski v. Poland*, 21 January 1999, RJD 1999-1, p. 187; *News Verlags GmbH & Co. KG v. Austria*, 11 January 2000, RJD 2000-I, § 52.

⁸⁶ *Lingens v. Austria*, *supra* note 85, § 36.

⁸⁷ *Sunday Times v. the United Kingdom*, *supra* note 60, § 59; *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24, § 48.

⁸⁸ *Sunday Times v. the United Kingdom*, *supra* note 60, § 59.

⁸⁹ *Barthold v. Federal Republic of Germany*, *supra* note 77, § 55; *Lingens v. Austria*, *supra* note 85, § 40.

⁹⁰ *Jersild v. Denmark*, *supra* note 84, § 31.

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the press to do its duty in democratic society, albeit that with its conduct it may disturb and offend the state or sectors of the public. Such are the demands of pluralism, tolerance and broadmindedness without which there can be no democratic society.⁹¹

On a superficial view it might appear that Article 10 § 2 virtually removes the right purportedly guaranteed in the first paragraph. The reality of the modern world is, however, such a complex business that the only way of regulating this fundamental right is conferring it with one hand and qualifying it with the other.⁹² The criteria of pluralism, tolerance and the spirit of broadmindedness are two-edged. They may *prima facie* justify absolute freedom at the same time as tolerance, which can result in a conflict because requiring people to tolerate the intolerable is a form of restriction. Tolerance works both ways, and the Article 10 right to express a provocative idea may be regarded as ‘a malicious violation of the spirit of tolerance’.⁹³

The restriction clause may, contrary to the common perception of undermining the protection afforded by the principle laid out in Article 10 § 1, work to the opposite effect. It may serve the instrumental goal of enhancing the protection of media freedom. Making the exercise of freedom of expression subject to restrictions may be interpreted as a democratic necessity to protect *inter alia* the rights of others. Such restrictions may serve the objective of protecting responsible journalism and reaffirm that ‘democracy is an inherent element of the rule of law’.⁹⁴ Such an approach might be in congruity with the aim of the Convention of a fair and decent society ‘furthering the realization of human rights’.⁹⁵ The need to restrict the media as a corporation, a legal entity enjoying protection under the Convention like a natural person, has increasingly been set in context with the responsibilities the media has in society and the widespread situation of concentration of media ownership, enabling those in charge to monopolize the information flow and hence manipulate public opinion.⁹⁶ As the freedom of expression within the media is a

⁹¹ *Handyside v. the United Kingdom*, *supra* note 87, § 49; *Lingens v. Austria*, *supra* note 85, § 41; *Observer and Guardian v. the United Kingdom*, *supra* note 59, § 75.

⁹² Cf. B. Dickson, ‘Criticisms of the Convention’ in B. Dickson (ed.), *Human Rights and the European Convention*, 1997 Sweet & Maxwell, p. 213.

⁹³ *Otto-Preminger-Institute v. Austria*, *supra* note 72, § 47.

⁹⁴ Document of the Copenhagen Meeting of the Conference on Human Dimension of the CSCE. Adopted by the Conference on Security and Cooperation in Europe on 29 June 1990.

⁹⁵ As stated in the Preamble to the European Convention on Human Rights.

⁹⁶ The fear of having their activities restricted is illustrated in the case of The World Press Freedom Committee (WPFC), a global umbrella organization of 45 media news groups. WPFC recently issued a report that attacks Article 10 § 2. In a letter to the Council of Europe Secretary General Daniel Traschys, Ronald Koven, European representative for the US-based organization (Reston, Virginia), says *inter alia*: ‘The very fact that the Court has had to elaborate a complex on-going series of restrictions on restrictions is *prima facie* proof that Section 2 of Article 10 is a dangerous provision.’ <http://www.coe.fr/europea40/e/9803/main.html>.

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political right any wrongdoing therein cannot be confined within the category of private conduct as it affects others to such an extent to be the law's business.

1.1.2 Duties and Responsibilities

Everyone who exercises Article 10 rights takes on duties and responsibilities and the obligations are proportional to the scope, situation and means used.⁹⁷ Governments occasionally invoke the 'duties and responsibilities' when seeking to limit the freedoms of a particular class of individuals, soldiers⁹⁸ or civil servants.⁹⁹ Restrictions are to be considered in light of the individual's particular position and the duties attached to that position.¹⁰⁰ In making public statements, especially to the press, a lawyer has special duties¹⁰¹ and responsibilities, not to bring his profession into disrepute.¹⁰² The special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Their public criticism must not overstep certain bounds. 'The dignity of the legal profession' requires vigilance.¹⁰³ Even judges off duty must show themselves worthy of the respect and trust due to their public office.¹⁰⁴ By entering the diplomatic service individuals accept certain restrictions on the exercise of their freedom of expression as being inherent in their duties.¹⁰⁵ The Court considers whether the requirements of protection have to be weighed in relation to the interests of press freedom or of open discussion of public concern when, for example, public officials are being criticized. They are not on the same footing as politicians or the press in that matter.¹⁰⁶

Duties and responsibilities of journalists and those running the media are enhanced because of the vital role of the Public Watchdog.¹⁰⁷ This means that a newspaper with a wide circulation has more obligations when exercising this right than an individual in his private capacity.¹⁰⁸ A widespread newspaper is likely to

⁹⁷ *Handyside v. the United Kingdom*, *supra* note 87, § 49.

⁹⁸ *Engel and Others v. the Netherlands*, 23 November 1976, Series A no. 22.

⁹⁹ *Vogt v. Germany*, 26 September 1995, Series A no. 323 (the case is discussed *infra* in chapter 3.3.2 Prohibition in Public International Law); *Ahmed and Others v. the United Kingdom*, 2 September 1998, RJD 1998-VI, p. 2356.

¹⁰⁰ Application no. 10078/82, *M v. France*, Commission's decision 13 December 1984, DR 41, p. 103.

¹⁰¹ Application no. 10414/83, *R, S and Z v. Switzerland*, Commission's decision 1 October 1984, DR 40, p. 214.

¹⁰² *Ibid.*

¹⁰³ *Schöpfer v. Switzerland*, 20 May 1998, RJD, 1998-III, p. 1042.

¹⁰⁴ Application no. 10279/83, *E v. Switzerland*, 7 May 1984, DR 38, p. 124.

¹⁰⁵ Application no. 18957/91, *Haseldine v. United Kingdom*, Commission's decision 13 April 1992, DR 73, p. 225.

¹⁰⁶ *Nikula v. Finland*, application no. 31611/96, judgment 21 March 2002, RJD 2002-II, § 48.

¹⁰⁷ *Jersild v. Denmark*, *supra* note 84, § 31.

¹⁰⁸ *Wingrove v. the United Kingdom*, 25 November 1990, RJD 1996-V, p. 1972. In the eyes of the Commission, it mattered if exposure of the contested material reached a wide audience

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enhance the influence of the impugned speech. This is why part of the Court has emphasized that attention should be directed at the general context in which the words are used and their likely impact.¹⁰⁹ The duties and responsibilities accompanying the right to freedom of expression are reflected in particular in not taking advantage of one's position to destroy the rights of others or limit them to a greater extent than provided for in the Convention.¹¹⁰ Journalism requires that journalists are not timid in interviewing.¹¹¹ The Court recognizes their right to be provocative,¹¹² although underscoring that they are to take their role as custodians of conscience seriously.¹¹³ It is their duty to confront and criticize,¹¹⁴ contest and question without overstepping the bounds. They have a duty to contribute to the public debate capable of furthering progress in human affairs. The duties of journalists, unlike that of judges or soldiers are complex, as they are *de facto* required to serve conflicting interests simultaneously. In the recent case of *Bladet Tromsø and Stensaas v. Norway* the Court stressed that if journalists wanted to seek shelter under Article 10 they had to take their duties and responsibilities seriously when reporting on issues of general interest and act in accordance with the ethics of journalism.¹¹⁵ The Court recognizes to an extent that investigative journalism requires special protection.¹¹⁶ As will be illustrated later the duties and responsibilities attached to journalism carry with them risks that are not always foreseeable. Like tightropewalkers journalists need skills and guts to do their tasks and they have the conflicting duty of catching the public's attention at the same time as they have the obligation not to overstep the boundaries set forth by law protecting competing interests. While walking the tightrope they have to measure up to the differing duties and if they slip there is no safety net. In short, as will be explored in Part II, the duties and responsibilities placed on journalists are so demanding that it borders on requiring personal sacrifices.

In *Erdogdu and Ince v. Turkey*,¹¹⁷ the applicants were the editor and a journalist of the monthly magazine 'Democratic Opposition' published in Istanbul. In 1992, the magazine published an interview conducted by the editor, Mr. Ince, with a Turkish sociologist on the Kurdish issue. The sociologist analyzed the situation and expressed the view that in some regions the formation of a Kurdish state could be

hence an open display to the general public required stricter scrutiny of examination. Cf. *Scherer v. Switzerland*, *supra* note 56, § 53.

¹⁰⁹ *Ceylan v. Turkey* [GC], 8 July 1999, RJD 1999-IV, concurring opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve, p. 44.

¹¹⁰ Application nos. 8348/78 and 8406/78, *Glimmerveen et al v. the Netherlands*, Commission's decision 11 October 1979, DR 18, p. 187.

¹¹¹ Application no. 25060/94, *Jörg Haider v. Austria*, Commission's decision 18 October 1995, DR 83-A, p. 66.

¹¹² *Prager and Oberschlick v. Austria*, *supra* note 62, § 38.

¹¹³ *De Haes and Gijssels v. Belgium*, 24 February 1997, RJD 1997-I, p. 198.

¹¹⁴ *Ibid.*

¹¹⁵ *Bladet Tromsø and Stensaas v. Norway*, *supra* note 11, §§ 65–66.

¹¹⁶ *Goodwin v. the United Kingdom*, *supra* note 61, p. 483.

¹¹⁷ *Erdogdu and Ince v. Turkey*, *supra* note 29, p. 185.

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detected. Subsequently the applicants were found guilty of disseminating propaganda against the indivisibility of the state. A unanimous Court found a violation of Article 10 and that the interview did not incite violence, stressing that the ‘duties and responsibilities’, which accompany the exercise of the right to freedom of expression by media professionals assume special significance in situations of conflict and tensions’, and:

Particular caution is called for when consideration is being given to the publication of the views of representatives of organizations, which resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence. At the same time, where such views cannot be categorized as such, Contracting States cannot with reference to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of criminal law to bear on the media.¹¹⁸

The words of the Court must also be looked at from the perspective of using the media as a vehicle in conflicts where authorities try to restrict media activities on the basis of national security in order to manipulate the information flow, striking at the root of editorial discretion on the basis of meeting the requirements of national security in Article 10 § 2. The legitimacy of the objective must meet strict scrutiny. Preventing disorder or restricting media activities in a democratic society in the interests of national security may be tempting for authorities in circumstances where they are in fact violating the rights of others, the citizens in a democracy, to form their own opinions on the basis of imparted information and ideas ‘regardless of frontiers’ in a tense global situation.¹¹⁹

1.1.3 Article 10 in Relation to Other Convention Provisions

The Convention is to be read as a whole and therefore the interpretation and application of Article 10 must be in harmony with the logic of the Convention.¹²⁰ Other provisions of the Convention and relevant Protocols may either tend to restrict the scope of Article 10 or enhance it. In many cases the Court has to consider the relation between different parts of the Convention, to decide whether a matter should be covered by one provision exclusively. As the Convention must be read as a whole, the same question may sometimes be considered under more than one provision. Where a matter is covered by one provision the Court may recognize that another article has a bearing on the matter but not if such an interpretation would

¹¹⁸ *Ibid.*, § 54.

¹¹⁹ The grounds for restriction connected with State security were much debated during the Gulf war (E/CN.4/Sub.2/1991/9) and are of great concern in the situation following the terrorist attack on the United States on 11 September 2001.

¹²⁰ *Otto-Preminger-Institute v. Austria*, *supra* note 72, § 47; *Klass and Others v. the Federal Republic of Germany*, 6 September 1978, Series A no. 28, § 68.

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render the main provision nugatory. It follows from the wording of Article 1 of the Convention ‘everyone within their jurisdiction’ that no one is exempt from making a complaint based on Article 10 of the Convention.¹²¹

There are competing interests and values at stake within the sphere of Article 10. The media plays a key role in shaping individual identities as well as influencing public opinion. Inherent in this freedom is the respect of human dignity, not to degrade people or show them disrespect due to their social origin or other status (Article 14). The media enjoying its Article 10 freedoms must respect the right to a fair trial. According to Article 6 § 1, the press and public may be excluded from all or part of a trial, ‘in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice’.

Article 10 may not only conflict with Article 8 (the right to privacy) but may also be said to impose a duty on journalists and the media not to overstep certain boundaries.¹²² The methodology of Article 8 is the same as Article 10. In the context of journalism, the conflict of these rights arise in situations likely to be perpetrated by private bodies such as newspapers¹²³ and television stations rather than the by the state. An individual may however be able to rely directly on Article 8 when the medium is a public authority like state broadcasting. The claim to respect privacy is automatically reduced to the extent that the individual himself brings his private life into contact with public life.¹²⁴ Article 8 does not, as such, guarantee the right to honour and good reputation.¹²⁵ The state must protect the rights guaranteed under Article 8¹²⁶, and Article 10 must be taken into account when an applicant complains about the failure to restrict a third party’s freedom of expression. The concept of a positive obligation is more developed with regard to Article 8 than Article 10 (albeit it is surfacing there to) and may involve the adoption of measures designed to secure respect for private life.¹²⁷ The absence of laws protecting Article 8 rights in this respect may raise an issue under the Convention.¹²⁸ Journalists in their professional

¹²¹ Application no. 9228/80, *X v. the Federal Republic of Germany*, Commission’s decision 16 September 1982, DR 30, p. 132.

¹²² This approach became a rule with the *Marckx v. Belgium*, 13 June 1979, Series A no. 31, § 31; *X and Y v. the Netherlands*, 26 March 1985, Series A no. 91, § 3.

¹²³ Applications nos. 28851/95 and 28852/95, *Earl and Countess Spencer v. the United Kingdom*, Commission’s decision 16 January 1998, DR, 92-A.

¹²⁴ Application no. 10083/82, *R. v. the United Kingdom*, Commission’s decision 4 July 1983, DR 33, p. 270.

¹²⁵ Application no. 10733/84, *Acosición de Aviadores de la República Jaime Mata et al. v. Spain*, Commission’s decision 11 March 1985, DR 31, p. 211.

¹²⁶ Application no. 9310/81, *Rayner v. the United Kingdom*, Commission’s decision 16 July 1986, DR 47, p. 5.

¹²⁷ *X and Y v. the Netherlands*, *supra* note 122, § 23.

¹²⁸ Application no. 10871/84, *Winter v. the United Kingdom*, Commission’s decision 10 July 1986, DR 48, p. 154.

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life might seek shelter under Article 8, as the Court has not excluded activities of a professional or a business nature from the notion of 'private life'.¹²⁹

The Court accords states a broad latitude in fulfilling such positive obligations 'to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals'.¹³⁰ Respect for family life implies an obligation on the state to act in a manner calculated to allow these ties to develop normally.¹³¹

Individuals are protected under Article 8 'to live as far as one wishes, protected from publicity'.¹³² Journalists must allow people the right to live their own life with a minimum of interference¹³³ in a day and age where the private life of individuals has become a highly lucrative commodity for certain sectors of the media. On the other hand, certain facts relating to the private lives of public figures such as politicians may indeed be of interest to citizens. It may be of legitimate concern for readers of the press to get information, even on the 'private' conduct of politicians before they cast their vote, as Article 3 of Protocol 1 is intended to ensure in practice the free expression of the opinion of the people in the choice of their representatives.

The right of the publisher of a newspaper to freedom of expression of a political tendency may contravene the right of the journalist to adhere to his conscience (Article 9) in not writing an article that goes against his conviction. Inherent in Article 10 § 1 is also protection against obliging someone to declare his political beliefs.¹³⁴

Article 11 (freedom of Association) may be considered in light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11. That applies all the more in relation to political opinions in view of their essential role in ensuring pluralism and the proper functioning of democracy.¹³⁵ In the *Young, James and Webster* case, the Commission and later the Court linked compulsory membership of a trade union to the Article 10 right to dissent from a view propagated by the trade union.¹³⁶

Article 14 provides that the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. It is clear from the words 'such as' and 'other status' that these categories are not closed. The non-

¹²⁹ *Niemietz v. Germany*, 16 December 1992, Series A no. 251, § 29 (discussed *infra* 5.2.4 Defencelessness in the Workplace).

¹³⁰ *Johnston and Others v. Ireland*, 18 December 1986, Series A no. 112, § 55.

¹³¹ *Ibid.*, §§ 74–76.

¹³² Application no. 6825/74, *X v. Iceland*, decision 18 May 1976, DR 5, p. 86.

¹³³ Parliamentary Assembly Resolution 1165 (1998) *Right to Privacy*. Adopted 26 June 1998.

¹³⁴ Application no. 9228/80, *supra* note 121, p. 132.

¹³⁵ *Socialist Party and Others v. Turkey*, 25 May 1998, RJD 1998-III, p. 1233, § 41.

¹³⁶ *Young, James and Webster v. the United Kingdom*, 13 August 1981, Series A no. 44, § 57.

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discrimination clause does not prohibit all kinds of differential treatment but it does prohibit such discrimination, which has ‘no reasonable justification’.

Article 15 permits authorities to ‘in time of war or other public emergency threatening the life of the nation to take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law’. Since this text limits public freedoms, it can only be given a restrictive interpretation. In the *Lawless* case¹³⁷ the Court took the view that the normal and customary meaning of the words: ‘In time of war or other public emergency threatening the life of the nation’ was clear enough, they referred to a situation of crisis or an exceptional and imminent danger that affected the entire population and constituted a threat to the organized life of the community that made up a state. Although the Commission and literature on the subject¹³⁸ have rejected for the purposes of Article 15 the requirement of a situation of total war, i.e. of an armed conflict threatening ‘the very life of the nation, that is to say its frontiers and internal order, its economy and culture and the life and liberty of its citizens’,¹³⁹ the threat must be direct for Article 15 to be applicable. The UN Special Rapporteurs accentuated in their 1991 report that the restrictions imposed on the media in the ‘Gulf war’¹⁴⁰ by reason of exceptional circumstances represented by the state of war did not seem appropriate to the situation.¹⁴¹ The coalition countries made recourse to the mechanism provided by Article 4 of the International Covenant on Civil and Political Rights,¹⁴² which parallels Article 15 of the Convention and Article 27 of American Convention on Human Rights.¹⁴³ These countries were engaged in armed conflict far from their own territory and it appeared that applying the restriction clause was inappropriate to justify derogation from the rights of others to information. The measure seemed in fact a perversion of legitimacy.¹⁴⁴

With the nuts and bolts of modern terrorism, the threat may be perceived of as closer and more likely, which may result in restrictions to protect national security or prevent disorder but the rights of others in a democracy also demand that citizens are not deceived of their right to form their own opinion based on miscellaneous information and to actively participate in the democratic process. The duties and responsibilities of editors and journalists also entail the discretion to censor themselves based on their professional evaluation of what constitutes present danger. As freedom of expression is a fundamental right, restrictions taken against professionals in the field of information may run the risk of legitimizing a threshold,

¹³⁷ *Lawless v. Ireland*, 1 July 1961, Series A no. 3.

¹³⁸ E/CN.4/Sub.2/1991/9.

¹³⁹ *Ibid.*

¹⁴⁰ In the ‘Gulf war’ 84 per cent of journalists questioned considered themselves to have been manipulated during the conflict, *supra* note 138, p. 23, § 124.

¹⁴¹ E/CN.4/Sub.2/1991/9, p.20, §§ 106–108.

¹⁴² Referred to as the ICCPR.

¹⁴³ Referred to as ACHR.

¹⁴⁴ E/CN.4/Sub.2/1991/9, p.22, § 120.

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which strikes at the root of genuine freedom of expression. In the aftermath of September 11th, the UN Special Rapporteurs issued a joint declaration along with the OSCE Representative on Freedom of Media and the OAS Special Rapporteur on Freedom of Expression¹⁴⁵ stating the importance of open public debate based on the free exchange of ideas and that broadcast regulators and governing bodies should be constituted so as to protect them against political and commercial interference.

Article 16 provides that nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens. This is a very controversial clause although the need to restrict measures threatening national security, territorial integrity or public safety is understandable. Such restrictive measures in respect to aliens would have to satisfy the requirements of Article 10 § 2.

Article 16, if interpreted loosely would enable public authorities to arbitrarily and unnecessarily suppress the political views of foreign journalists or political activists.¹⁴⁶ In cases involving the deportation of a journalist or a writer, Article 10 does not necessarily protect the right to reside on the territory of which he is not a national. Deportation on security grounds does not constitute an interference with Article 10 rights.¹⁴⁷ The Court in the case of *Piermont v. France* did not allow the state to rely on Article 16 to justify expulsion of a German national and member of the European Parliament who took part in a public meeting and a march organized by the independence and anti-nuclear movements in French Polynesia. During the demonstration the applicant, Ms. Piermont, denounced the continuation of nuclear testing and the French presence in the Pacific. The Court held that her speech contributed to the democratic debate in Polynesia and there had been a breach of Article 10.

Article 17 provides that nothing in the 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 the rights and aims set forth in the Convention or their limitation to a greater degree than is provided for in the Convention. The duties and responsibilities accompanying freedom of expression are reflected in particular in Article 17.¹⁴⁸ This provision has been referred to mainly in relation to racism and 'anti-democratic ideologies',¹⁴⁹ but the restriction clause in Article 10 § 2 leads to the same result rendering the application of Article 17 in most cases unnecessary. One of the judges of the Court, Carillo Salcedo, at the Sixth

¹⁴⁵ Joint Statements of International Mechanisms for Promoting Freedom of Expression, November 2001 (the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression): *Internet and Broadcasting; Security and Countering Terrorism*.

¹⁴⁶ *Piermont v. France*, 27 April 1995, Series A no. 314.

¹⁴⁷ Application no. 7729/76, *Agee v. the United Kingdom*, Commission's decision 17 December 1976, DR 7, p. 164.

¹⁴⁸ Application nos. 8348/78 and 8406/78, *supra* note 110, p. 187.

¹⁴⁹ Application no. 9777/82, *T v. Belgium*, Commission's decision 14 July 1983, DR 34, p. 158.

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International Colloquy on the Convention in 1985, said that should freedom of expression be endangered by private groups or enterprises, the states would be under a positive obligation under Article 17 to safeguard the horizontal effects of Article 10.¹⁵⁰

In the *Engels* case, the applicants alleged that the penalty imposed on them for having written an article in a journal could not be justified in this particular case by Article 10 § 2 and that consequently constituted a violation of Article 17. The Commission declared this part of the complaint to be admissible,¹⁵¹ but it was later declared ill-founded by the Court, following the Commission in that respect, after it had been found that the challenged prohibition was justified under Article 10 § 2.¹⁵²

What is of interest with regard to Article 17 is the potential scope of application *vis-à-vis* private parties, where the aim of Article 17 is to prevent them, for example monopolistic media, from invoking their right to freedom of expression for the purpose of destroying or limiting the expression rights of others (dismissing highly qualified journalists or hindering the public in receiving information of genuine interest). The application of Article 17 may, however, not be necessary as Article 10 § 2 may serve the same purpose.

The greatest conflict lies perhaps within the open-ended wording of Article 10 itself, where paragraph 2 stresses the duties and responsibilities, inherent in the exercise of this right, which gains paramount significance when exercised in the forum of the media.

1.2 A COMPARISON WITH OTHER INSTRUMENTS

Article 10 of the Convention does not specifically mention the press, as does for example the First Amendment to the United States Constitution. It does not mention ‘any media’ as does Article 19 of the United Nations Declaration of Human Rights¹⁵³ of which it is modelled after nor does it contain the wording of the parallel provision of the Canadian Charter of Rights and Freedoms which protects, ‘freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication’. Article 10 is weaker in language than the parallel provision of the International Covenant on Civil and Political Rights (ICCPR), which states in Article 19 § 2:¹⁵⁴

¹⁵⁰ Cf. Documentation Sixth International Colloquy about the European Convention on Human Rights (Sevilla Colloquy), 7 *HRLJ*, No. 1, 1986, pp. 117–126.

¹⁵¹ Applications nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, *ECHR Yearbook* 15 (1972), p. 508.

¹⁵² *Engel and Others v. the Netherlands*, *supra* note 98, §§ 101–104.

¹⁵³ United Nations General Assembly Resolution 217 A (III), U.N. Doc. A/810, 71 (1948). Hereinafter referred to as UDHR.

¹⁵⁴ International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by the General Assembly of the United Nations, resolution 2200 (XXI) of 16 December 1966 (United Nations Treaty Series, Vol. 999, p. 171). Entry into force: 23 May 1976.

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Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 10 does not protect the right to seek¹⁵⁵ or the imparting of information and ideas of ‘all kinds’. Article 19 of the ICCPR, seems to offer broader protection and to create a scope for more tolerance towards all kinds of speech, even pornography.¹⁵⁶

Article 17 of the ICCPR expressly guarantees the right of an individual against unlawful attacks on his or her honour or reputation. Article 20 of the ICCPR does, however, exclude an absolute protection as it explicitly prohibits propaganda for war and advocacy for national, racial or religious hatred. Not including the words of ‘all kinds’ in the text of Article 10 of the Convention may indicate a more structured and instrumental approach to protection. Especially in light of the Convention’s jurisprudence as one of the most famous phrases concerning this protection states:

The Court’s supervisory functions oblige it to pay the utmost attention to the principles characterizing a ‘democratic society’. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. 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’.¹⁵⁷

The protection of this aggressive form of speech has a political purpose. Speech may be quite offensive and journalists are allowed to resort to exaggeration and provocation,¹⁵⁸ if it serves *inter alia* the purpose of raising the political consciousness of their readers. This form of guarantee may be further justified in the special protection offered to the forming of an opinion, which is one of the basic corollaries of the function of the media in Article 19 § 1 and is especially evident in the French version, ‘*Nul peut être inquiete pour ces opinions*’, which may be translated as prohibiting impairing opinion.

The Court is evidently of the opinion that Article 10 has come to mean not only the guarantee of the ‘press to inform the public but also the right of the public to be

¹⁵⁵ Access to information as part of Article 10 rights is discussed *infra* 2.3.1 and *infra* 4.3.2 with regard to journalists’ rights.

¹⁵⁶ The Court has referred in its case-law to the text of the ICCPR on the grounds that it is a more recent document (1966) and has been ratified by a large number of states parties to the Convention. Cf., *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161, § 108.

¹⁵⁷ *Handyside v. the United Kingdom*, *supra* note 87, § 49.

¹⁵⁸ *Prager and Oberschlick v. Austria*, *supra* note 62, § 38.

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‘properly informed’,¹⁵⁹ as stated in its landmark decision of the *Sunday Times* case in 1979. Despite this clear pronouncement, in fact a requirement for the media to see to it that the public gets a coherent picture of reality, neither the text of the Convention nor the Court takes into consideration that in order to be ‘properly informed’ it is necessary to prohibit other prior restraints, not only those stemming from public authorities. Of the instruments examined here, the youngest one, the American Convention on Human Rights,¹⁶⁰ goes to the greatest length in prohibiting abuse of this freedom by private parties, as it explicitly recognizes in Article 13 § 3:

The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinion.

The above wording is extremely pertinent to the problem of this study, as it explicitly tackles the threat imposed by indirect and unofficial measures prompting self-censorship within the media, as obscure forces are more difficult to fight than an overt effort to censor journalistic conduct.

It is also evident from the wording in Article 19 of the ICCPR that the drafters were aware of the threats imposed by private forces as Article 19 § 1 intentionally omits the word ‘public’ from interference to widen the scope of protection from private abuse as well, stating: ‘Everyone shall have the rights to hold opinions without interference.’

Freedom of opinion is guaranteed on the horizontal level as well as from public interference. It is, however, disputed whether the right to freedom of opinion in Article 19 is the right to form an opinion. Subsequently the question arises whether it entails protection from being manipulated by unilateral political propaganda or being ‘brainwashed’.¹⁶¹ This subject will be discussed at further length in chapter 3 on freedom of opinion. For the time being it is sufficient to say that freedom of opinion enjoys more protection in Article 19 § 1 of the ICCPR than in Article 10 § 1 of the Convention – at least on the surface.

The preparatory work of the ICCPR supports the view that freedom of opinion and freedom of expression are separate freedoms, with separate characters. Freedom of opinion, according to the drafters, was a purely private matter, belonging to the realm of the mind, while the latter was a public matter, or a matter of human relationship, which should be subject to legal as well as moral restraint. It was recognized that a person was invariably conditioned or influenced by the external world, it was generally agreed that no law could regulate his opinion and *no power*

¹⁵⁹ *Sunday Times v. the United Kingdom*, *supra* note 60, § 66.

¹⁶⁰ ‘*Pact of San José*’, adopted by the Organization of American States on 22 November 1969, San José, Costa Rica. (OAS Treaty Series No. 36) Entry into force 18 July 1978.

¹⁶¹ D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, 1991 Oxford University Press, p. 460.

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could dictate what opinion he should not entertain. The decision was made, therefore, to treat the right to freedom of opinion separately.¹⁶²

Originally the English version of Article 19 § 1, ICCPR read: 'Everyone shall have the right to freedom of opinion without interference.' This sentence was later changed to read: 'Everyone shall have the right to hold opinions without interference.'¹⁶³ There is a marked difference between the two phrases where the latter may be seen as protecting less, e.g. merely the right to *hold* an opinion whereas the original sentence, which was abandoned in the end-result may be interpreted as offering protection to the process of *forming* an opinion. The change of wording, during the drafting stages, from the 'right to freedom of opinion' to 'the right to hold opinions' is a token of the broader meaning of 'the right to freedom of opinion' entailing the right to form an opinion with the correlative duty imposed on the opinion-makers. As originally proposed, the phrase 'without interference' was followed by the phrase 'by governmental action'. There were two views regarding this point. One was that Article 19 § 1 was intended to protect the individual only against government interference. The other view was that the Article 19 § 1 should protect the individual against all kinds of interference.¹⁶⁴ It was discussed that private financial interests and monopoly control of media information could be as harmful as government interference, and that the latter should not be singled out to the exclusion of the former.¹⁶⁵

The right to receive and impart information will be discussed separately in relation to journalism, both in the historical perspective of the special meaning attached to the right to information in the United Nations forum in the beginning years, as well as the significance of these rights to the agenda of the *information society*. It is, however, clear that the right to receive adds a new dimension to the classical perception of freedom of expression, generally perceived of as the freedom of the press, the journalists and publishers alike to publish without prior restraint. The right to receive underscores the duty aspect of press freedom as evident in the words 'freedom-of-the-press-by-extension'.¹⁶⁶ To what extent the press' duties towards the public in a democratic society can be taken to mean a positive obligation is one of the core problems of this study.

Debates on the right of freedom of information entered the United Nations agenda as early as 1946 and continued for years within UNESCO as well as within the various organs of the Council of Europe. Information has increasingly been viewed as a fundamental right, granting the public a right to access to information in

¹⁶² Doc. A/2929, chapter 6 §§ 119–138 (Official Records of the General Assembly, Tenth Session, 1954).

¹⁶³ *Ibid.*, § 121.

¹⁶⁴ *Ibid.*, § 122.

¹⁶⁵ Doc. A/5000, §§ 5–35 (Official Records of the General Assembly, Sixteenth Session, 5 December 1961), § 24.

¹⁶⁶ I. Österdahl, '*Freedom of Information in Question*' 1992 Uppsala University Swedish Institute of International Law, referring to Rapporteur on Freedom of Information, Salvador P. Lopez, p. 38. Cf. H. Eek, Report E/3443, p. 11.

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public administration where authorities are not to consider that they own such information.¹⁶⁷ At the same time the concept of information is an immensely problematic one. The width of it requires that the precise meaning be defined concretely in the context of the relevant circumstances, proceeding from the principle that all types of information should be available to everyone.¹⁶⁸ The right to receive does not entail the active phase of the right to seek in Article 10 of the Convention.

The Convention as well as the ICCPR and the ACHR have embodied in varying details the same grounds for the legitimacy of restrictions as the Universal Declaration of Human Rights in Article 29, which states:

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Any restriction on the principle of freedom of expression must relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law.¹⁶⁹

The first sentence of the restriction clauses in Article 19 § 3 of the ICCPR states that the 'exercise of the rights provided for in paragraph 2 of this article carries with it *special* duties and responsibilities'. This provision can be interpreted in two ways, as a 'preamble' introducing the more specific provisions of the paragraph or as a general rule having an independent value.¹⁷⁰ Article 10 § 2 on the other hand states: 'the exercise of these freedoms, *since* it carries with it duties and responsibilities'.¹⁷¹ The Court has taken this term to have a special significance for journalists and their publishers. The injection of the word 'special' in Article 19 may have the same connotation. The word 'since' in Article 10 § 2 seems to take for granted that these freedoms carry with them duties and responsibilities whereas it is disputed whether the preamble in Article 19 § 3 is a general rule having an independent value or is a 'preamble' introducing the more specific provisions of the paragraph which may be subject to certain restrictions, but these must be provided for by law and necessary

¹⁶⁷ Cf. Parliamentary Assembly Resolution 1003 (1993) on the ethics of journalism. (Doc. 6854).

¹⁶⁸ Cf. E/CN.4/Sub.2/1992/9, p. 4.

¹⁶⁹ E/CN.4/Sub.2/1991/9, p. 9, § 41.

¹⁷⁰ Cf. E/CN.4/Sub.2/1992/9, p. 6; Article 27 § 1 of chapter II of the African Charter on Human and Peoples' Rights concerns duties of every individual towards society.

¹⁷¹ Emphasis added.

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(a) ‘for respect of the rights *or* reputations of others’¹⁷² and (b) ‘for the protection of national security or public order (*ordre public*), or of public health or morals’.

Lawyers generally tend to agree with the latter interpretation of the ‘preamble’ in Article 19 § 3.¹⁷³ On the other hand as pointed out by the Special Rapporteurs in 1992, ‘the interpretation may not exhaust all the implications of the reference to ‘special duties and responsibilities’ in the paragraph’.¹⁷⁴ They argue that this reference leaves room for moral as well as legal implications. The provision in Article 19 § 3 ‘rights of others’¹⁷⁵ is in fact so wide as to contain a very strict demand on the ‘special duties and responsibilities’ towards others. The Court in its reasoning in *Sunday Times* touched upon this particular aspect when it emphasized that it was not sufficient that interference belonged to the class of exceptions nor was it sufficient that interference was imposed because its subject matter fell within a particular category, the Court had to be satisfied that the interference was necessary.¹⁷⁶ Article 18 of the Convention submits that restrictions cannot be applied ‘for any purpose other than those for which they have been prescribed’. The degree to which interests listed in Article 10 § 1 will be protected will in practice depend on how widely the first paragraph of Article 10 is interpreted, how the preamble to the restriction clause is connected to current problems and how the democratic necessity test is interpreted.¹⁷⁷

The ‘rights of others’ in Article 10 § 2 may be understood to mean the right to equality, the right to dignity and the right to protection against degrading treatment, or again the right to information.¹⁷⁸ Restrictions imposed to protect the rights of others are based on the aim of reconciling conflicting rights. The explicit or implicit reference to the rights of others finds an echo in certain restrictive provisions laid down in the general interest by the international instruments. Thus, paragraph 3 of Article 29 of the UDHR provides that ‘these rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations’.

The ICCPR states the same principle in the similar terms in Article 5 § 1. The ACHR lays down this rule in its Article 29 with similar wording to Article 17 of the Convention, thus enabling restrictive measures to the rights of others, which has so far been recognized for combating racial discrimination.¹⁷⁹ The applicability of

¹⁷² Emphasis added.

¹⁷³ E/CN.4/Sub.2/1992/9, p. 6.

¹⁷⁴ E/CN.4/Sub.2/1992/9, p. 6.

¹⁷⁵ It is interesting to note that the Icelandic law incorporating the European Convention on Human rights (1994 nr. 62 May 19) omits the words ‘*of others*’ and only speaks of ‘reputation or rights’ in Article 10 § 2.

¹⁷⁶ *Sunday Times v. the United Kingdom*, *supra* note 60, § 65.

¹⁷⁷ A. Tomkins, ‘Civil Liberties in the Council of Europe’ in C. A. Gearty, (ed.), *European Civil Liberties and the European Convention on Human Rights*, 1997 Kluwer Law International, p. 9.

¹⁷⁸ E/CN.4/Sub.2/1991/9, p. 9, § 43.

¹⁷⁹ As the American Civil Liberties Union emphasized, at a conference held by the London based NGO Article 19, with regard to Article 5 of the ICCPR and Article 17 of the Convention. (See E/CN.4/Sub.2/1991/9, p. 10.)

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Article 17 of the Convention is also conceivable in the case of monopolistic powers manipulating the information flow for their own private/political interests. The right to be well informed might serve as grounds for restricting the abuse committed by those in an unequal position of monopolistic power.

The ACHR adds the right to reply in a special Article 14 with special regard to the press, its duties and the rights of others, 'injured by inaccurate or offensive statements or ideas disseminated to the public in general'. To make this right effective with regard to the press, Article 14 § 3 makes it mandatory that every medium shall have a person responsible for imparted material.

Article 11 of the proposed Charter of Fundamental Rights,¹⁸⁰ corresponds broadly to Article 10 of the Convention but it provides:

1. Everyone shall have 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.
2. The freedom of pluralism and media shall be respected.

Pursuant to Article 52 § 3 of the Charter, the meaning and scope of this right are the same as those guaranteed by the Convention. The limitations, which may be imposed on it may therefore not exceed those provided for in Article 10 § 2 of the Convention, without prejudice to any restrictions which Community competition law may impose on member states' rights to introduce licensing arrangements referred to in the third sentence of Article 10 § 1 of the Convention.¹⁸¹ Article 11 § 2 spells out the consequences of paragraph 1 regarding freedom of the media. It is based in particular on the case-law of the European Court of Justice¹⁸² concerning television and on the Protocol on the system of public broadcasting in the member states, annexed to the EC Treaty, and on Council Directive 89/552/EC (particularly its seventeenth recital).¹⁸³ The ECJ has provided that Article 10 protecting press freedom and maintenance of press diversity may justify rules that obstruct the exercise of the free movement of goods.¹⁸⁴

¹⁸⁰ Charter of Fundamental Rights of the European Union. On 7 December 2000, at the European Council in Nice, the European Parliament, the Council of the European Union and the European Commission solemnly proclaimed the Charter of Fundamental Rights of the European Union. Cf. 21 *HRLJ*, No. 9-12, 2000, p. 473.

¹⁸¹ EU Charter/Explanatory Report, 21 *HRLJ*, No.9-12, 2000, pp. 477-487.

¹⁸² ECJ for abbreviation.

¹⁸³ Particularly in case C-288/89 judgment of 25 July 1991, *Stichting Collectieve Antennevoorziening Gouda and Others* [1991] ECR I-4007; The ECJ stated that 'the maintenance of the pluralism . . . is connected with freedom of expression, as protected by Article 10 of the Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order'. Explanatory Report, 21 *HRLJ*, No. 9-12, 2000, pp. 477-487.

¹⁸⁴ The ECJ in case C-368/95 submitted that maintenance of press diversity may justify rules obstructing the free movement of goods.

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1.3 THE ENFORCEMENT MECHANISMS

The legal machinery of the Convention serves four rather discreet functions. The admissibility criterion¹⁸⁵ filters out most of the complaints, which are deemed inadmissible on various grounds.¹⁸⁶ Secondly, it mediates disputes, trying to secure a friendly settlement between complainants and government.¹⁸⁷ Thirdly, it conducts fact finding with public hearings and access to documents. Fourthly, if a complaint has been admitted and a dispute cannot be settled, the Court adjudicates the case, rendering a binding legal judgment.

The Commission was originally set up to receive complaints from any individual, group of individuals or non-governmental organization, who claimed to be victims of a violation of a particular element or elements of the Convention. The former Article 25, which governed access to the machinery, is one of the keystones for the enforcement of the rights and freedoms set forth in the Convention.¹⁸⁸ With the adoption of Protocol 11 in 1998,¹⁸⁹ a reorganized Court took on the role of the Commission. The new Court has jurisdiction to deal both with individual and state applications. Applicants are now able to bring their cases directly before the Court without any restriction whatsoever. The so-called 'quasi-judicial' role of the Committee of Ministers (the executive political organ of the Council of Europe) often resulted in non-decisions. With the coming into operation of the new control mechanism that role has now been abandoned.¹⁹⁰ The Committee of Ministers, however, retains its role in supervising and execution of the Court's judgments, according to Article 46 of Protocol 11.

The Court sits in Chamber of seven judges, but cases may be declared inadmissible by a unanimous decision of a panel of three judges. If the case is deemed admissible the Court can seek to find a settlement between the alleged victim and the defending public authority. If the parties fail to reach a settlement the case may then progress further to a final judgment by the Court. Articles 43 and 30 of Protocol 11 deal respectively with referral to the Grand Chamber¹⁹¹ when cases

¹⁸⁵ Article 35 Protocol 11 to the Convention.

¹⁸⁶ Cf. Article 35; such as being substantially the same as a matter that has already been examined by the Court or is incompatible with the provisions of the Convention or protocols thereto, manifestly ill-founded etc.

¹⁸⁷ Article 38 Protocol 11 to the Convention. Article 39 of Protocol 11 to the Convention stipulates that if a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision, which shall be confined, to a brief statement of the facts and the solution reached.

¹⁸⁸ *Klass and Others v. the Federal Republic of Germany*, *supra* note 120, § 34.

¹⁸⁹ Ratified by all Council of Europe member states. See A. Drzemczewski, The European Human Rights Convention: Protocol 11 – Entry into force and first year of application, 21 *HRLJ*, Nos. 1-3, 2000, p. 1.

¹⁹⁰ *Ibid.*

¹⁹¹ Cf. *Hatton v. the United Kingdom*, application 36022/97, judgment 2 October 2001, concerning night flights at Heathrow Airport and the finding of a violation of Articles 8 and 13 of the Convention, which was accepted for referral to the Grand Chamber (according to

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raise serious questions affecting the interpretation or application of the Convention, such as when a judgment necessitates a substantial change to national law or administrative practice but does not itself raise a serious question of interpretation of the Convention. A serious issue must be one that is considered to be of 'general importance' that 'could involve a substantial political issue or an important issue of policy'.¹⁹²

During the Commission's existence many of its decisions concerning freedom of expression were less favourable to the public authorities in question than the Court's later judgments. The members of the Commission were according to Article 21 of the Convention, elected by the Committee of Ministers from a list of names drawn up by the Parliamentary Assembly of the Council of Europe. In practice, the first choice of the national government was almost always elected.¹⁹³

The members of the Commission were, however, of similar background and most of the judges were men.¹⁹⁴ The average age of appointment was fifty years. The background of the members was similar, most of them government or academic lawyers, judges, ombudsmen but no civil liberties lawyers or former advisers to pressure groups were included to balance the large number of former government lawyers.¹⁹⁵ These members were hardly representative of the people of Europe, as Tomkins points out, either in age or gender and not likely to calm fears of statism or deference to the views of governments rather than to those of complaining individuals. This homogeneous group consisting mostly of men makes it easy to assume that these individuals represent *establishment views*. The previous Article 21 § 3 stated that the candidates 'shall be of high moral character'. One would assume that such character distinctions could have been attributed to Socrates, who in his time, as John Stuart Mill emphasizes, had the high moral character to 'deny the gods recognized by the state'.¹⁹⁶ The same criterion for office applies to the Court under the present Article 21 as amended by Protocol 11; judges shall be of high moral character, sit on the Court in their individual capacity, and not engage in any activity, which is incompatible with their independence and impartiality. According to Article 22 of Protocol 11 the Parliamentary Assembly elects the judges after their

press release no. 177, 2 April 2002). The Grand Chamber delivered its judgment on 8 July 2003.

¹⁹² According to the Explanatory Report, §§ 100 and 101. *Cf.*, Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms and Explanatory Report in 15 *HRLJ*, No. 3, 1994, pp. 86–101.

¹⁹³ Under Article 23 of the Convention the members of the Commission were to sit in their individual capacity and were not to hold any positions, incompatible with their independence and impartiality.

¹⁹⁴ *Cf.* H. C. Krüger, 'Selecting judges for the new European Court of Human Rights', 17 *HRLJ*, No. 11–12, 1996, p. 401: 'It goes without saying that due regard should also be paid to the need to ensure gender equality.'

¹⁹⁵ According to A. Tomkins survey on the subject in Gearty, *supra* note 177, pp. 9–17.

¹⁹⁶ J. S. Mill, *supra* note 13, (the text '*On Liberty*' reproduces the first edition published in 1859), p. 29. This could be paraphrased today as the unfaltering belief in the market, in financial power making the world go around, which few dare deny or call in question.

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nomination by their respective states. Obviously there is an element of politics in this process requiring an attitude of conformity,¹⁹⁷ as from the government's point of view the candidates nominated must be agreeable and acceptable to the reigning political authorities.¹⁹⁸ The Court is now divided into four Sections, whose composition is fixed for three years. It is expected to be geographically and gender balanced and to take into account the different legal systems of the contracting states.¹⁹⁹

Some maintain that the case-law and the Court's decisions are *de facto* reflective of the homogeneous composition and hence likely to confirm the power of the sovereign. The same critics emphasize that the outcome in defining what constitutes fundamental freedoms within the law is equally rooted in political and legal considerations or a combination of the two.²⁰⁰ The political context is a decisive factor according to many known authorities of the Convention.²⁰¹ The success and failure of the Convention mechanisms is at the end of the day dependant on the political will of the member states.²⁰² Legal arguments, however cogent they may be, in the final analysis seldom override political considerations such as vital economic interests.²⁰³ Article 10 like other Convention rights is neither self-executing nor self-explanatory. The debates on judicial review reflect worries that judges are given an enormous power at the cost of the will of the majority and hence the need to make the judiciary representative of the community it serves.²⁰⁴

¹⁹⁷ Cf., H. G. Schermers, 'Election of Judges to the European Court of Human Rights', 23 *European Law Review* 1998, p. 568.

¹⁹⁸ How these authorities came to power is still another question but evidently the legitimacy based on the outcome of elections may be contested. It is of course debatable whether the conditions in society preceding the elections, for example the role of the media, does in fact ensure the free expression of the opinion of the people in choice of the legislature as stipulated in Article 3 of Protocol 1 to the Convention.

¹⁹⁹ Under the Rules of the Court (Rule 25) Chambers provided for under Article 26 (b), referred to as 'Sections'. Cf. Drzemczewski, *supra* note 189.

²⁰⁰ Cf. Kortteinen, Myntti and Hannikainen, 'Article 19' in Alfredsson and Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, 1999 Kluwer Law International.

²⁰¹ Drzemczewski, *supra* note 189, p. 6.

²⁰² The Court has no power to impose penalties, to censure or to set aside the acts of national authorities if it finds a violation of a right collectively guaranteed. The relationship between the European Court of Human Rights and domestic courts is one of a co-operation. Cf. F. Tulken, *supra* note 42, p. 33.

²⁰³ P. van Dijk and G. J. H van Hoof, *Theory and Practice of the European Convention on Human Rights*, third edition, 1998 Kluwer Law International, p. 618.

²⁰⁴ K. Ewing, 'The Bill of Rights' in Ewing, Gearty and Hepple (eds.), *Human Rights and Labour Law: Essays for Paul O'Higgins*, 1994, Mansell, p. 179.

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1.3.1 The Admissibility Process

In the Convention's legal machinery most applications are deemed inadmissible.²⁰⁵ If the Court deems the application admissible it tries to mediate the dispute and to reach a friendly settlement between complainants and governments. If a friendly settlement is reached, the Court shall strike the case out of its list by means of decisions, which shall be confined to a brief statement of the facts and solution reached.²⁰⁶

To consider cases brought before it, the Court according to Article 27 of Protocol 11, shall sit in committees of three judges. The committee may, according to Article 28 Protocol 11, by a unanimous vote declare inadmissible or strike out of its list of cases an individual application submitted under Article 34 Protocol 11, where such a decision can be taken without further examination. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rule of international law. The Court shall according to Article 35 § 3 Protocol 11 declare inadmissible any individual application, which it considers incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of application.

The admissibility aspect of the previous work of the Commission reveals that the overwhelming majority of petitions never progressed beyond the preliminary stage.²⁰⁷ An applicant first had to satisfy the Commission while it existed. Now, the Committee of three judges determines if an application is admissible and justifiable on the merits before convincing the Court that a violation of the Convention has occurred. With Protocol 11 and the merger of the Commission and the Court into one full time permanent Court there is not a substantial change in the procedure before the Court. The new structure builds upon the institutional, procedural and jurisprudential heritage of the original apparatus. The Registry of the Court will as the Secretariat of the Commission did before, establish all necessary contacts with the applicants and, if necessary, request further information. Next, the application will be registered by a Chamber of the Court and assigned to a judge-rapporteur who may then refer the application to the three-judge committee. If the committee, by a unanimous decision declares inadmissible or strikes out of the list (Article 28 of Protocol 11) an individual application, its decision shall be final. There is no appeal against a finding of inadmissibility.

²⁰⁵ Article 37 of Protocol 11 to the Convention on striking out applications.

²⁰⁶ Cf. Application no. 20915/92, *Familiapresse Zeitungs-GmbH v. Austria*, Commission's report 3 March 1995 on the application of Article 30 § 2 of the Convention, DR 80-B, p. 74. Cf. *infra*, 3.4.1. (Article 30 § 1 and § 2 of the Convention. Applicant's lawyer disclosing Commission's provisional opinion as to violation of Article 10 of the Convention for the purpose of related domestic proceedings to which the applicant is a party. Given this serious and unjustified breach of the confidentiality of Commission proceedings, it is no longer justified to continue the examination of the application. Lack of general interest. Application struck off the list of cases.)

²⁰⁷ Tomkins, *supra* note 177, p. 13.

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Deciding what an effective domestic remedy is under the present Article 35 of Protocol 11 is not as straightforward a matter as might be presumed. The term is broad, as it also refers to non-judicial procedures.²⁰⁸ The meanings of the phrases used in the admissibility process, ‘manifestly ill-founded’ and ‘incompatible with the Convention’ are also not clear. In its case-law the Commission has taken incompatible with the Convention to mean four different things: either that the application falls outside the Convention *ratione personae*,²⁰⁹ *ratione materiae*, *ratione loci* or *ratione temporis*. As applications may be directed only against states, applications against individuals are declared inadmissible *ratione personae* unless violations are seen as involving state responsibility. In a case against Switzerland, two journalists claimed that the closure of the *Novosti Soviet Press Agency* was on account of their political activities and constituted an infringement of the rights guaranteed to them by Articles 8, 9, 10 and 11.²¹⁰ The Commission submitted that the applicant journalists could not claim to be victims within the meaning of Article 25 of the Convention since no criminal or other measures had been taken against them to penalize their activities or restrain in the future their rights guaranteed under the above provisions.²¹¹ The closing of the *NSPA* was not intended to punish the journalists but to prevent a foreign press agency exercising activities considered incompatible with its status. The Commission alleged that the application was incompatible *ratione personae*, as the responsibility of the Swiss authorities could not be established. In practice there have been complaints directed against private news organizations,²¹² where responsibility of a state might have been involved.

In *Purcell v. Ireland*²¹³ the applicants submitted that in a situation where all members of a trade union are affected by a measure, which they complain infringes their Convention rights then the union itself, as a collective of its members is directly affected by the measure and becomes a victim within the meaning of Article 25, particularly where the union concerned has consistently asserted those rights on behalf of its members. The applicants argued that it is not only journalists who are affected by the Section 31 Order²¹⁴ but journalism as a profession; as professional associations of their members the trade union applicants represented all journalists

²⁰⁸ P. van Dijk and G. J. H. van Hoof, *supra* note 203, p. 701.

²⁰⁹ Article 34 of Protocol 11 to the Convention states that the Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

²¹⁰ Application no. 10628/83, *M. S. and P. S. v. Switzerland*, Commission’s decision 14 October 1985, DR 44, p. 175.

²¹¹ They lost their jobs as journalists and were hence restrained from exercising their Article 10 rights.

²¹² Cf. Applications nos. 28851/95 and 28852/95, *supra* note 123; *Vgt Verein gegen Tierfabriken v. Switzerland*, 28 June 2001, RJD 2001-VI.

²¹³ Application no. 15404/89, *Betty Purcell and Others v. Ireland*, Commission’s decision 16 April 1991, DR 70.

²¹⁴ Prohibiting interviews or reports of interviews with representatives of listed organizations.

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in defending their freedom of expression and in resisting and challenging censorship. The Commission did not espouse that argument. The fact alone that the trade unions consider themselves as guardians of the journalists' collective interests did not suffice to make them victims within the meaning of Article 25. The application was regarded to be incompatible *ratione personae* within the meaning of Article 27 § 2 of the Convention.

An application can also be deemed incompatible *ratione materiae*.²¹⁵ The Court's consideration during the admissibility stage is restricted to particular articles of the Convention on which the Committee has declared the application admissible while leaving out others on which it has reached the opposite conclusion. Attention is directed to certain aspects, while removing others from consideration. Examples from the case-law that have been deemed inadmissible *ratione materiae* may be categorized as falling under economic and social rights, although the division between these rights and civil and political rights is inexact.²¹⁶ The right to impart is largely dependent on material assets and can hence not be regarded as purely a political liberty. In *Hammerdahls Stormarknad AB v. Sweden*,²¹⁷ the applicant supermarket complained of a breach of Article 10 as the company, which distributed newspapers refused to deliver newspapers to the applicant, the reason being was the applicant's wish to sell the newspapers at a lower price than the fixed price. The Commission noted that the applicant was not prevented from selling newspapers. The dispute between the applicant and the distributor only related to the commercial conditions for the sale of the newspaper. The issue did not relate to the applicant's freedom of expression in the opinion of the Commission. The application was hence incompatible *ratione materiae*.

Under Article 1 of the Convention, states shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. Whether that responsibility reaches into activities within the media is a topic that has to be explored throughout this study. It suffices for the moment to refer to one judgment where the Court held that a state could not absolve itself from responsibility by delegating its obligations to private bodies or individuals.²¹⁸

The right of complaint of individuals has a more limited character than the right of complaint of states. An individual cannot bring an independent complaint concerning breach of Article 1, claiming that the state has failed in its obligation to secure the rights of the Convention to everyone within its jurisdiction. The victim has to advance a violation of one of the rights set forth in the Convention or the

²¹⁵ Examples of this include applications, which have concerned the right to divorce, to a passport or to a driving license.

²¹⁶ There is some degree of overlap between the Convention and the Social Charter, e.g. Article 11 of the former (dealing with freedom of assembly and association) and Article 5 of the latter (dealing with the right to organize).

²¹⁷ Application no. 11532/85, *Hammerdahls Stormarknad AB v. Sweden*, Commission's decision 9 October 1985, DR 45, p. 277.

²¹⁸ *Costello-Roberts v. the United Kingdom*, 25 March 1993, Series A no. 247.

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protocols thereto. The Court will not undertake a separate inquiry into Article 1.²¹⁹ In this context it must be kept in mind that although the right is not explicitly spelled out in the Convention an individual may find protection *indirectly via* one of the provisions of the Convention. Thus a journalist might claim to have a right to hold on to his job on the basis of the right 'not to be deprived of his possession except in the public interest' according to Article 1 of Protocol 1.

The Court in its judgment of *Guzzardi*²²⁰ held that 'the Commission and the Court had to examine in light of the Convention as a whole the situation impugned by an applicant. In the performance of this task, they are notably, free to give to the facts of the case, as found to be established by the material before them . . . a characterization in law different from that given to them by the applicant'.

The Commission has more than once found extremely politically sensitive petitions to be inadmissible when many observers have been of the opinion that there has been at the very least an arguable point about which there could have been a clear judgment from the Court.²²¹ When the Commission declares applications inadmissible as being manifestly ill-founded it is generally taken to mean that 'there is not even a *prima facie* case against the state'.²²² The requirement that an application must be demonstrated to have a 'realistic prospect of success',²²³ is possibly an aspect of the manifestly ill-founded criterion, whether or not such a *de minimis* rule is appropriate in a human rights context.²²⁴

The difficulty concerning subjects, which are not perceived of as appropriate subjects of international adjudication, such as might occur in relation to freedom within the media and editorial independence, may detain a clear judicial answer to a problem, which an establishment-friendly Court may not be aware of, being

²¹⁹ P. van Dijk and G. J. H. van Hoof, *supra* note 203, p. 123 and p. 695, referring to the Commission's decisions refraining from instituting a separate inquiry into the alleged violation of Article 1 in the case of an individual complaint. See its decisions on Application no.5493/72, *Handyside v. the United Kingdom*, Yearbook XVIII (1974), p. 228 (300) and Application no. 5613/72, *Hilton v. the United Kingdom*, Yearbook XIX (1976), p. 256.

²²⁰ *Guzzardi v. Italy*, 6 November 1980, Series A no. 39, pp. 21–23.

²²¹ Cf. Tomkins, *supra* note 177, p. 15.

²²² *Boyle and Rice v. the United Kingdom*, 27 April 1988, Series A no. 131, §§ 53–54.

²²³ As suggested by a Committee of Experts for the improvement of procedures for protecting human rights, reported to the Council of Europe's Steering Committee for Human Rights in 1989. This report, along with relevant accompanying documentation is reprinted at 15 E.H.R.R. 321–377. (Cf. Tomkins, *supra* note 177, p. 16).

²²⁴ The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto, according to Article 47 of Protocol 11. Such opinions shall not deal with any question relating to the content or the scope of the rights or freedoms set forth in Section 1 of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

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composed of mostly former government lawyers²²⁵ and judges, the first choices of their own authorities for the post in question. Although judges sit in their individual capacity and not as representatives of their governments, they must sit *ex officio* in cases concerning their respective states (Article 27 of Protocol 11) unless they have a personal interest in any case, or have previously acted for a party to the case or participated in domestic proceedings involving the case. Alternatively an ad hoc judge from the state in question can be appointed just for that case. Often the relevant national judges side with their government and not their fellow countrymen who claim to be victims,²²⁶ though that does not mitigate the fact that many of the Court's judgments are a testimony of its devotion to safeguarding human rights.

1.4 INTERPRETING THE CONVENTION

Although the Court does not follow the common law doctrine of precedent, it normally expects to follow its own previous decisions and will only not do so if very careful consideration has been given to the case. The Court has made it clear in its case-law that it follows and applies its own precedents but may depart from earlier decisions if persuaded that there are cogent reasons for doing so.²²⁷ Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions.²²⁸

In its case-law the Court and Commission have referred to their previous decisions and methods of interpretation, which are relevant to a greater or lesser extent. Perspectives from United States jurisprudence, Canada and the European Union legal order have been included. The rules of interpretation for the Convention, in Clapham's words are neither those of constitutional law, nor those of international law.²²⁹ The judges at the Court come from all the different 'legal schools' of Europe and thus make use primarily of the empirical method, familiar to the 'common law'.²³⁰ When a large body of case-law has accumulated major

²²⁵ Appointments made to the Court in the period 1980–1992: Of 26 appointments, 25 were men. Average age upon appointment was 60 years. All the appointees were lawyers; 12 had previously worked for their national governments, 12 were former judges and five were academic or practicing lawyers. Cf. Tomkins, *supra* note 177, pp. 17–19. In January 2001 there were eight women judges of the 43 judges of the Court, from Sweden, Belgium, Slovakia, Croatia, Macedonia, Norway, Bulgaria and the Netherlands. In February 2004, 12 out of 45 judges were women.

²²⁶ In two cases against Iceland concerning Articles 10 and 11 of the Convention, the Icelandic judges both concluded against the majority that there was no violation; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992 (although the effect of the judgment was the change of the penal law in Iceland), Series A no. 239; *Sigurdur A. Sigurjónsson v. Iceland*, 30 June 1993, Series A no. 264.

²²⁷ *Cossey v. the United Kingdom*, 27 September 1990, Series A no. 184, § 35.

²²⁸ *Inze v. Austria*, 28 October 1987, Series A no. 126, § 41.

²²⁹ A. Clapham, *Human Rights in the Private Sphere*, 1998 Clarendon Paperbacks, p. 4.

²³⁰ F. Mather, *supra* note 16, p. 64.

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principles emerge. Principles of particular importance as far as the press is concerned²³¹ have originated in landmark Article 10 cases: the *Handyside* case (1976), the *Sunday Times* case (1979) and the *Lingens* case (1986).²³² These principles contain both the negative and the positive requirements, which the press must meet.

The Court's method in interpreting the Convention reflects general beliefs about the proper judicial approach to treaty interpretation where the starting point is the principle of respect for the text. The Court's approach also stems from the special conception of the nature of the Convention, and as a corollary, a particular conception of the judicial role in relation to it.²³³ This approach of the Court of respect for the text along with interpreting the Convention as a whole and as a living instrument is consequently characterized by judicial restraint on the one hand and judicial activism on the other.

1.4.1 Teleological Interpretation of Object and Purpose

Since the Convention is an international treaty, the rules embodied in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 1969 apply. As the Court stated in the *Golder* case²³⁴ 'it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties,²³⁵ as they gave expression to generally accepted principles of international law on the interpretation of treaties between nations'. In *Fogarty v. United Kingdom* the Court stated it 'must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account'.²³⁶ What is clear is that the text of the treaty itself is given first priority and must be a starting point for any interpretation, and attention should be directed not so much at semantics as to the object and purpose of the treaty,²³⁷ which is the teleological interpretation. As stated in Article 31 § 1 of the VCLT: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

The context is then defined in Article 31 § 2 VCLT as including the text and 'including the preamble and annexes'. Subsequent agreements are to be taken into account, subsequent practice and relevant rules of international law (Article 31 § 3). Article 31 § 4 of the VCLT provides that: 'A special meaning shall be given to the

²³¹ *Observer and Guardian v. the United Kingdom*, *supra* note 59, § 59

²³² *Handyside v. the United Kingdom*, *supra* note 87; *Sunday Times v. the United Kingdom*, *supra* note 60; *Lingens v. Austria*, *supra* note 85.

²³³ Cf. J. G. Merrills, *The Development of International Law by the European Court of Human Rights*, second edition, 1993 Manchester University Press, p. 69.

²³⁴ Cf. *Golder v. the United Kingdom*, 21 February 1975, Series A no. 18, §§ 29-30, §§ 34-36.

²³⁵ Despite its lack of retrospective effect (Article 4 VCLT). The Convention dates from 1950 and is thus almost two decades older.

²³⁶ *Fogarty v. the United Kingdom*, application no. 37112/97, judgment 21 November 2001, RJD2001-XI, § 35.

²³⁷ F. Matscher, *supra* note 16, p. 66.

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term if it is established that the parties so intended'. The Court in *Golder* submitted that:

As stated in Article 31 para 2 of the Vienna Convention, the preamble to a treaty forms an integral part of the context. Furthermore the preamble is generally very useful for the determination of the 'object' and 'purpose' of the instrument to be construed.²³⁸

In one of its early judgments the Court held that it was necessary 'to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the party'.²³⁹ This view has characterized the Court's jurisprudence, especially in its landmark cases concerning press freedom. As put by Merrills, 'interpreting a text involves more than looking up the meanings of words in a dictionary. Treaties are drawn up with certain purposes in mind and a responsible interpreter must have regard to those purposes when deciding what the treaty means'.²⁴⁰

The object and purpose of the Convention can be seen from its Preamble, which discusses the 'maintenance and further realization of human rights and fundamental freedoms' on the basis of an 'effective political democracy', and the primacy of the 'rule of law'.²⁴¹ This criterion of interpretation has been clearly established by the Court.²⁴² It emphasizes that in 'interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. In addition, any interpretation of the rights and freedoms guaranteed has to be "consistent" with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society'.²⁴³

If the textual, contextual, systematic or teleological interpretation 'leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable', Article 32 VCLT regards the *Travaux Préparatoires* merely as

²³⁸ *Golder v. the United Kingdom*, *supra* note 234, § 34.

²³⁹ *Wemhoff v. the Federal Republic of Germany*, 27 June 1968, Series A no.7.

²⁴⁰ Merrills, *supra* note 233, p. 76.

²⁴¹ However, the rule of law implies 'that interference by the authorities with an individual's rights should be subject to effective control. This is especially so where the law bestows on the executive wide discretionary powers'. Cf. *Silver and Others v. the United Kingdom*, *supra* note 71, § 90.

²⁴² *Soering v. the United Kingdom*, *supra* note 156.

²⁴³ *Ibid.*, citing *Ireland v. the United Kingdom*, *supra* note 45, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, Series A no. 23. Emphasis added.

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‘supplementary means of interpretation’ and the Court makes use of them rarely.²⁴⁴ With regard to Article 10 the Court does not frequently resort to the preparatory work of the Convention but did so in the case of *Kosiek*, which concerned a physics teacher in Germany who did not get tenure in his post because his political activities raised doubts about his loyalty to the German Constitution. Mr. Kosiek claimed that his dismissal from the teaching post violated his right to freedom of expression. The Court maintained on the other hand that access to the civil service lay at the heart of the applicant’s claim, not the right to freedom of expression. It pointed out that the Convention does not confer a right to recruitment to the civil service and found this to be a deliberate omission from the Convention.²⁴⁵ It referred to Article 21 of the UDHR of 1948, which states that ‘everyone has the right of equal access to public service in his country’ and that ‘every citizen shall have the right and the opportunity . . . to have access, on general terms of equality, to public service in his country’. ‘In contrast’, the Court submitted, ‘neither the European Convention nor any of its Protocols sets forth any such right. Moreover, as the Government rightly pointed out, the signatory states deliberately did not include such a right: the drafting history of Protocols Nos. 4 and 7 shows this unequivocally. In particular, the initial versions of Protocol No. 7 contained a provision similar to Article 21 § 2 of the Universal Declaration and Article 25 of the International Covenant; this clause was subsequently deleted. Therefore, this is not a chance omission from the European instruments; as the Preamble to the Convention states, they are designed to ensure the collective enforcement of “certain” of the rights stated in the Universal Declaration.’²⁴⁶

The ‘special character’ of the Convention has increasingly called into question the ideological premises that might taint the adjudication of the Court when applying the rules of interpretation as stated in Articles 31 and 32 of the VCLT. The more cautious legal analysts are not questioning the relevance of the VCLT provisions but are pointing to the difficulties inherent in the criterion ‘object and purpose of the treaty’ as an ‘objective element of interpretation’.²⁴⁷ Of course this debate is endless, not least with regard to the Court’s adjudication in the area of the rights in relation to the press. It is clear that the object of guaranteeing a democratic society is frequently lurking underneath the judges’ reasoning as reflected in *Handyside*, where the Court

²⁴⁴ F. Matscher, *supra* note 16, p. 66. Often the Court has found that the *Travaux* is of little help or silent or unclear on the precise meaning, as the Court stated in another matter in the *Cruz Varas v. Sweden*, 20 March 1991, Series A no. 201, § 95.

²⁴⁵ *Kosiek v. the Federal Republic of Germany*, 28 August 1978, Series A no. 105, § 34. Abbreviations omitted from quoted text.

²⁴⁶ *Ibid.*

²⁴⁷ H. Golsong, ‘Interpreting the European Convention on Human Rights Beyond the Confines of the Vienna Convention on the Law of Treaties’, in MacDonald, Matscher and Petzold (eds.), *The European System for the Protection of Human Rights*, 1993 Kluwer Law International, p. 148.

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emphasized that its supervisory functions oblige it to pay the utmost attention to the principles characterizing a ‘democratic society’.²⁴⁸

The Convention is a law-making treaty,²⁴⁹ which in the Courts words should seek ‘the interpretation that is most appropriate to realize the aim and achieve the objective of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties’.²⁵⁰ This nature of the treaty is also exemplified in its Preamble and Article 1 stating that: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’

It may be questioned whether the Court’s interpretation is forcing new obligations on the contracting states. In the *Groppera* decision the Court based its reasoning on the ICCPR, an instrument which opened for signature in 1966 within the UN community.²⁵¹ The Court observed that Article 19 of the ICCPR did not include a provision corresponding to the third sentence of Article 10 § 1. The Court based this conclusion on the drafting history of Article 19, where an inclusion of licensing of the technical means of broadcasting had been proposed and opposed on the ground that it might hamper free expression.

In this case the Court obviously saw the licensing clause in Article 10 § 1 as being of limited scope in itself. Although nothing in Article 10 § 1 shall prevent states from requiring the licensing of broadcasting and television the Court made it clear that these licensing measures were otherwise subject to the requirements of paragraph 2 or else they would be contrary to the object and purpose of the Convention as a whole.²⁵² The *Groppera* decision is a good example of the teleological approach the Court uses when it associates the value of press freedom with some further good, which the exercise of that freedom advances. Thus freedom of expression is not in the deontological sense, only explained as a good in itself but rather on the basis of its purpose.²⁵³

1.4.2 Evolutive Interpretation in Light of Privatization and State Obligation

It is not disputed that the purpose of the Convention is to ensure a collective guarantee of human rights in the context of ever changing circumstances, rather than at a given point in time, that is, at the time of signing or ratifying the Convention. The standards of the Convention are to reflect social changes and requirements of democratic societies today, not more than half a century ago. In the *Tyrer* case the Court expressly endorsed the view that the Convention should be interpreted with

²⁴⁸ *Handyside v. the United Kingdom*, *supra* note 87, § 49.

²⁴⁹ F. Matscher, *supra* note 16, p. 66.

²⁵⁰ *Wemhoof v. the Federal Republic of Germany*, *supra* note 239, p. 23.

²⁵¹ As pointed out by Judge Pinheiro Farinha in a concurring opinion in *Groppera Radio AG and Others v. Switzerland*, *supra* note 79.

²⁵² *Groppera v. Switzerland*, *supra* note 79, § 61.

²⁵³ D. Feldman, *Civil Liberties and Human Rights in England and Wales*, 1993 Clarendon Press, Oxford, p. 4.

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reference to current conditions,²⁵⁴ stating that, ‘the Convention is a living instrument’, which as the Commission rightly stressed, ‘must be interpreted in the light of present day conditions’.²⁵⁵ This is why recourse to the *Travaux Préparatoires* is of relatively little importance for its interpretation.

The principle of interpreting the Convention as a living instrument is now generally accepted.²⁵⁶ Deciding, however, what interpretation is appropriate in modern conditions can raise difficult questions of judicial policy. This became apparent in the *Marckx* case where the Court had to decide whether Belgian legislation, which drew certain distinctions between legitimate and illegitimate children, contravened the Convention.²⁵⁷ The Court held that the traditional distinction had to be interpreted in light of the present day conditions. In the *Rees* case the Court referred to ‘certain developments’ of the laws in the contracting states, which demanded a fresh approach.²⁵⁸ The Court in *Rees* held that the position of transsexuals in the United Kingdom did not violate Article 8. It did, however, warn the British government along with the governments of the other member states that it might conclude differently in the near future.²⁵⁹

However, the Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention always has to be interpreted and applied in the light of current circumstances. The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.²⁶⁰

Despite this statement the Court maintained in *Sheffield and Horsham v. the United Kingdom*, in 1998, that it could not be established that the respondent state has a positive obligation under Article 8 to recognize in law the post-operative gender of transsexuals.²⁶¹ It, however, acknowledged that there is increased social acceptance

²⁵⁴ *Tyrer v. the United Kingdom*, 25 April 1978, Series A no. 26, § 31.

²⁵⁵ The Court in *Markt Intern v. the Federal Republic of Germany*, *supra* note 73, seems to have been influenced by the increasingly popular market philosophy, granting the State a wide margin of appreciation in commercial matters, as Judge Pettiti pointed out in his dissenting opinion, while the core of the problem was a restriction of journalistic criticism.

²⁵⁶ *Cf. Merrills, supra* note 233, p. 80.

²⁵⁷ *Marckx v. Belgium, supra* note 122.

²⁵⁸ *Rees v. the United Kingdom*, 17 October 1986, Series A no. 106.

²⁵⁹ It did not do so in *Cossey v. the United Kingdom, supra* note 227, to the dismay of the minority as evident from the sententious dissenting opinions of Judges MacDonald and Spielmann, Palm, Foighel and Pekkanen. In *Sheffield and Horsham v. the United Kingdom*, 10 July 1998, RJD 1998-V, § 58, the Court provided that ‘it continued to be the case that transsexualism raises complex scientific, legal, moral and social issues in respect of which there is no generally shared approach among the Contracting States’. In *Christine Goodwin v. the United Kingdom*, 11 July 2002 the Court reviewed the situation in 2002 finding a breach of Article 8 and 12 respectively with regard to transsexuals (§ 103).

²⁶⁰ *Rees v. the United Kingdom, supra* note 258, § 47. Citations omitted.

²⁶¹ *Sheffield and Horsham v. the United Kingdom, supra* note 259.

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of transsexualism and an increased recognition of the problems, which post-operative transsexuals encounter.²⁶² The law has changed as a result of the European Union law to give, 'authoritative recognition of the right of transsexuals to respect for their dignity and freedom on footing of equality with non-transsexuals'.²⁶³ In Denmark, as the Commission pointed out, a change of civil status is automatically granted after surgery, which was permitted by law in 1935.

The interpretation of privacy has been extended to be more harmonious with modern living,²⁶⁴ albeit the applicability of human rights in the private sphere has not been recognized unless to a small extent. The general trend of privatization in the member states of the Council of Europe in recent decades sheds light on the legal controversies ensuing from violations in that domain, which was not such a big issue in the early 1950s when public authorities were seen as the main threat to individual civil and political rights.

The division between the public and private spheres is seen by many scholars as a failure to ascribe *Drittwirkung* (third party effect) to the provisions of the Convention. Can newspapers for example be considered as entities merely falling within the confines of the 'private sphere'? As it is now, publishers can complain of being oppressed in their freedom of expression rights by the state while the Court has denied a journalist protection from the owners who dismissed him.²⁶⁵ Journalists cannot use the Convention as a basis of complaint against their 'oppressors' if the latter are preventing them from adhering to their codes of conduct, although the Court has held that such is the duty of journalists if they want to enjoy the safeguards of Article 10.²⁶⁶ The problem of violations of fundamental rights in the 'private sphere' has increased extensively, *inter alia*, due to privatization of public bodies, since the adoption of the Convention.

The Court has recognized to an extent that privatization cannot exempt the state from its obligations. The case of *Costello Roberts*, concerned the corporal punishment of a seven-year-old boy in a non-state funded school where the parents paid for the education. Mrs. Costello Roberts and her son complained that the headmaster's punishment violated Article 3 of the Convention. The Commission found state responsibility in ensuring a legal system that provides adequate protection to children's physical and emotional integrity. The Court did not find a breach of Article 3 but noted that the case fell under the ambit of the right to education and that the government was responsible under the Convention for the actions of the school because, *inter alia*, states are obliged to secure the right to education to children and they cannot absolve themselves from their responsibility

²⁶² *Ibid.*, § 60.

²⁶³ *Sheffield and Horsham v. the United Kingdom*, Commission's report, RJD 1998-V, § 52, footnote, p. 2075.

²⁶⁴ *Rees v. the United Kingdom*, *supra* note 258, § 47. *Cf. B v. France*, 25 March 1992, Series A no. 232-C.

²⁶⁵ *Jacobowski v. Germany*, 23 June 1994, Series A no. 291.

²⁶⁶ *Bladet Tromsø og Stensaas v. Norway*, *supra* note 11, p. 289.

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by devolving authority to private bodies or individuals, and that the treatment complained of could in theory engage the responsibility of the state.²⁶⁷

Changes in society towards the intervention of the welfare state, or as in recent years increased privatization, should not lead to reduction and limitation of the Convention's guarantees, as Judge Melchior emphasized in *Feldbrugge v. Belgium*.²⁶⁸ The Convention should be interpreted in such a way that it can cope with new situations, which have appeared or developed since 1950, provided there are no technical obstacles.²⁶⁹

The often-quoted *Handyside-formula* is also reflective of a modern understanding of a democratic society, where the Court held that without 'pluralism, tolerance and broadmindedness' there is no democratic society. This phrase is reminiscent of one of the most famous explanations for protecting press freedom in US Supreme Court jurisprudence, Justice Brennan's words hereof: 'uninhibited, robust and wide-open' debate.²⁷⁰ The Commission referred to the threat of media monopolies in one of its decisions, claiming that if such a situation became reality the state had a positive obligation to interfere.²⁷¹ The media landscape has certainly changed but as becomes clear with reading Eek's report for the UN²⁷² on freedom of information and the press, the basic problems remain the same. The market has grown in size and scope since the adoption of the Convention and the obstacles to freedom of expression may be more obscure and the potential manipulation of the media more 'sophisticated'. Such tendencies were, however, obvious to some of the contemporaries of Eek, summarized in the famous phrase by Liebling: 'Freedom of the press is guaranteed only to those who own one'.²⁷³ During the drafting stages of the proposed UN Convention on Freedom of Information that never materialized, the basic problems threatening the infrastructure of an informed citizenry were evidently realized.²⁷⁴

The Court has warned against abusing a dominant position, which might threaten the hallmark of democratic society, pluralism, broadmindedness and tolerance.²⁷⁵ The Court is not as vituperative as the Supreme Court of the United States, which at times paints an awesome scene of the present reality without coming up with a consistent conclusion. In the case of *Miami Herald v. Tornillo*²⁷⁶

²⁶⁷ *Costello-Roberts v. the United Kingdom*, *supra* note 218.

²⁶⁸ *Feldbrugge v. the Netherlands*, *supra* note 34, Commission's minority opinion, pp. 37–47.

²⁶⁹ *Ibid.*

²⁷⁰ *New York Times v. Sullivan*, *supra* note 6.

²⁷¹ Application no. 5178/71, *supra* note 55; *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Series A no. 276.

²⁷² E/3443, 2 February 1961. Report on Developments in the Field of Freedom of Information since 1954.

²⁷³ Cf. J. A. Barron, *Freedom of the Press for Whom? The right of access to mass media*, 1973 Indiana University Press.

²⁷⁴ H. Eek, *Freedom of Information As a Project of International Legislation*, 1953 Uppsala A.-B. Lundequistska Bokhandeln, p. 41.

²⁷⁵ *Young, James and Webster v. the United Kingdom*, *supra* note 136.

²⁷⁶ *Miami Herald Pub. Co. v. Tornillo*, *supra* note 24.

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in 1974 the Supreme Court struck down a Florida statute mandating a right to reply for political candidates criticized by newspapers. The opening discussion in the majority opinion seemed to lead to another conclusion as it contained an extended critique of the modern press, portraying it as monopolistic 'big business' with the 'capacity to manipulate popular opinions and change the course of events'.²⁷⁷ The text and footnotes of the Supreme Court's opinion are sprinkled with data about the diminishing pluralism in the newspaper market with references to books and articles on the general indictment to support the view that 'vast changes' have placed 'in few hands the power to inform the American people and shape public opinion'. The decision has been called 'schizophrenic',²⁷⁸ as after this elaborate description of this threatening situation in the media market, the Supreme Court rejects any legal controls despite the validity of its own arguments.²⁷⁹

The European Court of Human Rights, a few years later, in its landmark opinion in *Sunday Times*, took an affirmative stance towards the democratic role of the press and its significance for the public. It referred to the need for a provocative debate that would agitate either the state or any sector of society, which required the co-operation of an enlightened public, and it made it incumbent on the media to shoulder the responsibility of informing people of all matters of public interest, not only by providing information but also by imparting ideas. The Court concluded, 'not only do the media have the task of imparting such information and ideas: the public also has a right to receive them'.²⁸⁰

The Court may not have the same insight into the real situation of the media as illustrated in the aforementioned *Miami Herald* decision, although it should not lack information on the gravity of the situation given the activities on the forum of the Council of Europe in this field. It has not had the opportunity to reflect on the situation within the press in order to elaborate upon what the undertaking of practicing responsible journalism within the media requires. It is aware of the necessary condition of pluralism for democratic objectives without recognizing the complexity of the practical obstacles.

In *Informationsverein Lentia v. Austria*, the Court minimized the threat of private monopolies, when it stated: 'In many States of a comparable size to Austria, in which the coexistence of private and public stations, according to rules which vary from country to country and accompanied by measures preventing the development of private monopolies, shows the fears expressed [by the Austrian government] to be groundless'.²⁸¹ All the same it stressed the fundamental role of freedom of expression in a democratic society, adding

in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive.

²⁷⁷ *Ibid.*, at 249.

²⁷⁸ L. C. Bollinger, *Images of A Free Press*, 1991 The University of Chicago Press, p. 53.

²⁷⁹ *Ibid.*

²⁸⁰ *Sunday Times v. the United Kingdom*, *supra* note 60, § 65.

²⁸¹ *Informationsverein Lentia and Others v. Austria*, *supra* note 271, § 42.

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Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.²⁸²

The decisive stand of the Court is illustrative of its dynamic interpretation of Article 10 and the criterion that pluralism is indispensable for press freedom.

The Court has in some instances given a special meaning to terms known as 'autonomous concepts' and such a process of interpretation is known as giving the Convention an 'autonomous interpretation'.²⁸³ The Commission emphasized in *Markt Intern* that freedom of expression under Article 10 is an autonomous concept whose meaning is not necessarily the same as its counterpart in domestic law.²⁸⁴ The term Public Watchdog may be seen as involving a degree of judicial initiative as it confirms that the Court is making demands of a positive nature on the press, requiring it to accomplish a task, which is far removed from the accepted negative notion of prohibiting public interference with the freedom of expression. The Court with its use of the term Public Watchdog has applied the Convention to conduct in the private sphere, by creating duties on private bodies such as privately owned newspapers and broadcasting. The autonomous meaning that the Convention organs have given to the term Public Watchdog may be completely different from the subjective understanding of the contracting parties. As a member of the Parliamentary Assembly of the Council of Europe warned during the drafting phase of the Convention, 'behind each State there hides a permanent temptation whatever be the political regime, to invoke the *reason of state*'.²⁸⁵ The *reason of state* half a century later, is not unlikely inspired by large corporations due to the key role that they play in political as well as economic life of states. There are, what Habermas calls 'freedom-restricting side effects'²⁸⁶ of inequalities in society, which the Public Watchdog may not even be in a position to point out since the media itself may be enslaved by the same logic of the *reason of state*.²⁸⁷

As the main aim of the Convention is to set down an international standard, the concept of Public Watchdog must be considered within the actual framework that the press is operating within, as contemplated by the US Supreme Court in its reasoning in *Miami Herald*, even though the ruling itself was not in congruity with

²⁸² *Ibid.*, § 38. Citations omitted. Emphasis added.

²⁸³ Merrills, *supra* note 233, p. 70.

²⁸⁴ *Markt Intern Verlag GmbH and Klaus Beermann*, Commission's report 18 December 1987, Series A no. 165 § 201.

²⁸⁵ Pierre-Henri Teitgen, Collected editions of the *Travaux Préparatoires*, Vol. I, Kluwer Law International, p. 40. Cf. M. Delmas-Marty, *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions*, 1992 Kluwer Law International, p. 2.

²⁸⁶ J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by W. Rehg, 1996 The MIT Press, p. 417.

²⁸⁷ These aspects of media 'freedom' are discussed thoroughly in Part II.

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that reasoning.²⁸⁸ The contracting parties of the Convention ought not to be in a position of defying the meaning of the Public Watchdog, as did a former minister of education in Iceland and the highest ranking authority of television and radio broadcasting. He proclaimed that it is meaningless to protect editorial independence, as no one could be expected to spend their assets to their own disadvantage. He questioned whether people would bother to worry about such things as editorial independence if they were 'loaded' with money.²⁸⁹ In an equivalent manner one might ask if financial means acquit individuals of the duties inherent in Article 10 rights or if practical difficulties simply render rights meaningless.

So far the Court has not been criticized for using the Public Watchdog term as abusing its authority with an excessive interpretation of Article 10. But no one has asked the Court whether this was to begin with too extensive an interpretation of press freedom. In the *Winterwerp* case the Court emphasized that a term, in this case 'persons of unsound mind', could not be given a definite interpretation, as the progress of knowledge and research in society has an impact on the general understanding of what a term entails.²⁹⁰ In the *Autronic* case the Commission observed that the legal and technical developments in the field of broadcasting and telecommunications could be taken into account in so far as they contribute to a proper understanding and interpretation of the relevant rules.²⁹¹

In a case against Ireland, where divorce is not permitted, the Court held that Article 12 of the Convention protecting the right to marry and found a family did not entail the right to divorce.²⁹² Responding to accusations that it was not interpreting the Convention as a living instrument in light of present day conditions, the Court said it could not 'by means of evolutive interpretation, derive from this instrument a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate'.²⁹³

The right to marry and found a family serves the object and purpose to protect the family as a cornerstone of society, while the right to divorce serves other objects – even antithetical to the former. This is illustrated by the interpretation of the Court of the term family life, protected under Article 12. The Court has elaborated on the necessary conditions for marriage, such as 'cohabitation', as it is 'scarcely conceivable that the right to found a family should not encompass the right to live

²⁸⁸ *Miami Herald Publishing Co. v. Tornillo*, *supra* note 24, at 249.

²⁸⁹ Cf. Clause on www.bjorn.is (13 January, 2001).

²⁹⁰ *Winterwerp v. the Netherlands*, 24 October 1979, Series A no. 33, § 37.

²⁹¹ The legal development being the signature of the Council of Europe on 5 May 1989 of the European Convention on Transfrontier Television; technical developments mentioned: that several member states allowed reception of uncoded television broadcasts from telecommunications satellites without requiring the consent of the authorities of the country in which the station transmitting to the satellite is situated. Cf. *Autronic AG v. Switzerland*, Commission's decision 20 June 1989, Series A no. 178, § 62.

²⁹² *Johnston and Others v. Ireland*, *supra* note 130, § 52.

²⁹³ *Ibid.*, § 53.

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together'.²⁹⁴ Furthermore, the Court has provided that a fundamental element of family life is the mutual enjoyment by parent and child of each other's company.²⁹⁵ The Court has not in the same manner elaborated the need for freedom of the press as being scarcely conceivable if it does not encompass the right to editorial independence from external pressures. Marriage and divorce are antithetical, just like the 'right to life' and a 'right to die',²⁹⁶ while press freedom and editorial independence are indispensable features of the same phenomenon just like the right to found a family and live together are intertwined.

What is inherent in a right and what may be implied? Freedom of expression under the Convention is a much wider term, than freedom of speech and of the press under the US First Amendment. Article 10 protects everyone's right to freedom of expression. Does that place an obligation on the state to secure for each individual the right to freedom of expression or to form an opinion, which is another facet of that right? Although Article 10 § 2 sets out restrictions that may be necessary in a democratic society for various purposes, the scope for interpreting to whose benefit these restrictions may work is wide. The 'pressing social' need may be regarded as being wide where the 'rights of others' in a democracy are concerned with regard to media abuse. Ewing points out how the provisions of the Convention are drafted at times in question-begging terms.²⁹⁷ This is evident from the first substantive provision, namely Article 2, providing that: 'Everyone's life shall be protected by law.' Does it include the unborn? If so, what is the effect of Article 2 on laws authorizing abortion? And how does Article 2 connect with the right to respect for privacy under Article 8 or the right not to be discriminated against on the ground of sex or other status?

There are many questions that wait to be answered with regard to Article 10 as they have not been posed before the Court and the theme of this study is to gradually seek a hypothetical answer on the positive obligation the state might have under the Convention to guarantee freedom within the media. With regard to Article 11 the Court has, in a case against Sweden, confirmed that there might be a positive obligation on the state to secure the effective enjoyment of Article 11 rights, leaving open whether the positive rights under this provision are on equal footing with the negative rights.²⁹⁸

Issues that have surfaced concerning Article 10 on what may be implied from that provision with regard to positive obligations concern, e.g. the public's right to

²⁹⁴ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94, § 62.

²⁹⁵ *Johansen v. Norway*, 7 August 1996, RJD 1996-III, p. 979, § 52.

²⁹⁶ The Court held recently that the right to life guaranteed under Article 2 could not be interpreted as conferring the diametrically opposite right, namely a right to die. *Pretty v. the United Kingdom*, application no. 2346/02, judgment 29 April 2002 RJD 2002-III.

²⁹⁷ Ewing, *supra* note 204, p. 157.

²⁹⁸ *Gustafsson v. Sweden*, 25 April 1996, RJD 1996-II, p. 598, § 45.

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know and the authorities duty to impart information of legitimate concern,²⁹⁹ access rights of minorities to broadcasting,³⁰⁰ the right to enjoy protection because of one's political posture while publicly employed and the right not to be dismissed.³⁰¹ The case-law demonstrates that the Court is prepared to use a broad conception of the object and purpose of the Convention in relation to Article 10. The right to a free press is not a pronounced right in the text of Article 10 § 1. The jurisprudence concerning this provision implies, however, that the media is the most important forum for exercising Article 10 rights in modern society. The Court does not perceive of such a society functioning properly without the media playing its 'vital role of the Public Watchdog'. The Court may be influenced by the internal logic of the Convention but it is undoubtedly also influenced by the historical importance attached to the notion of press freedom in most constitutions, not least with the gravity of this right in American jurisprudence where it is explicitly protected by the First Amendment.

The Convention has been likened to a 'constitutional instrument of European public order in the field of human rights'.³⁰² The Court as the judicial arm of the Convention is required to investigate and pronounce on many issues that have not been regarded as 'appropriate subjects of international adjudication', which in turn raises the question of how far the Court is entitled to go in monitoring the laws and practices of the contracting states.³⁰³ Essentially this is a question about the impact of human rights, the dominant ethic of the 21st century on law and practices in the member states of the Council of Europe, rather than perhaps its impact on national sovereignty. The infiltration of human rights in domestic legislation is increasingly recognized as a corollary of the role of Strasbourg adjudication in establishing and enforcing uniform standards. This is evident from the increased rhetoric on human rights in the contexts of ordinary day-to-day problems. There is furthermore a growing tendency to make the Convention part of domestic law even in those states, which still follow the dualistic approach for treaties in general, like Iceland, Denmark and the United Kingdom which recently incorporated the Convention into its domestic legal order. As Salcedo points out: 'A state acting in breach of its obligations in the sphere of human rights cannot evade its international responsibility by claiming that such matters are essentially within its domestic jurisdiction'.³⁰⁴

²⁹⁹ *Leander v. Sweden*, 26 March 1987, Series A no. 16; *Guerra v. Italy*, 19 February 1998, RJD 1998-I, p. 210.

³⁰⁰ Application no. 25060/94, *supra* note 111.

³⁰¹ *Vogt v. the Federal Republic of Germany*, *supra* note 99.

³⁰² Application nos. 15299, 15300 and 15318/89, *Chrysotomos and Others v. Turkey*, Commission's decision of 4 March 1991, DR 68; 12 *HRLJ* (1990), p. 113 at p. 121.

³⁰³ Merrills, *supra* note 233, p. 9.

³⁰⁴ J. A. C. Salcedo, *supra* note 15, p. 21.

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1.4.3 The Principle of Proportionality

The balancing exercise that the Court uses most of the time with regard to journalistic activities and the press illustrates the relativity of the freedoms and rights enlisted in Article 10. According to this principle the requirement should achieve its intended objective but not go beyond what is necessary.³⁰⁵ The requirement is not to create unforeseen inefficiencies or costs without significant benefits. Applying this principle necessarily entails passing a value judgment on the contested conduct.

The Court takes into consideration the case as a whole in order to determine whether interference was proportionate to the legitimate aim, having regard to the paramount importance of a free press in democracy. Proportionality implies that the pursuit of the aims mentioned in Article 10 § 2 have to be weighed against the value of a wide-open political debate, weighing the legitimacy of restriction against the legitimacy of expression. The Court takes into consideration the chilling effect that the fear of sanctions may have on journalists.³⁰⁶ A high amount of damages in a libel case may be disproportionate to the legitimate aim of protecting someone's reputation and the state in question hence in breach of Article 10 in not preventing such severe restrictions hampering free expression.³⁰⁷

A typical balancing exercise would be balancing the effective right to respect for private life with the right of journalists to impart information and the subsequent right of the public to receive such information in a democracy. The Commission considered the issue on a number of occasions but dodged the problem each time.³⁰⁸

In a recent case the Court submitted that the 'genuine, effective exercise' of journalistic freedoms³⁰⁹ does not merely depend on the state's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals.³¹⁰ It provided that in determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is called throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations in contracting states, the difficulties involved in policing modern societies and choices which must be made in terms of priorities and resources. A positive obligation on the state may not be

³⁰⁵ *News Verlags GmbH & Co. KG v. Austria*, *supra* note 85, § 69.

³⁰⁶ *Jersild v. Denmark*, *supra* note 84.

³⁰⁷ *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Series A no. 316, § 55 (GBP 1.5 million).

³⁰⁸ Application no. 10871/84, *supra* note 128, p. 154; application no. 28851/95 and 28852/95, *supra* note 123; *N v. Sweden*, application no. 11366/85, decision 16 October 1986, DR 50.

³⁰⁹ *Ösgur Gündem v. Turkey*, *supra* note 25, § 43.

³¹⁰ Citing *X and Y v. the Netherlands*, *supra* note 122, § 23.

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interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.³¹¹

The promotion of political debate, which is essential for democratic society,³¹² presupposes the recognition that the press is active in that debate and not impeded in that undertaking. While the protective aim of the Convention is not seen, as evident from the rule of subsidiarity, as requiring absolute uniformity or that the substantive or procedural characteristics of domestic laws of the member states should be disregarded the underlying presumption seems to be that the member states have at least a common denominator in the democratic tradition. In Golsong's view, 'the object and purpose' of the Convention as laid out in 1950 requires an interpretation of a given human right in a manner, which ensures a high degree of harmony among the member states.³¹³ The object and purpose is the 'collective enforcement' of the freedoms and rights enlisted in the Convention and its later Protocols, as stated in the Preamble. The 45 member states of the Council of Europe are, however, not as culturally likeminded as the 'collective enforcement' would require. The member states are at various stages of democratic culture, as evident with the former communist regimes of Eastern Europe and with recurrent human rights violations in countries like Turkey.

1.4.4 The Margin of Appreciation

The control of the Court as regards restrictions is a control of 'compatibility', which implies its recognition of a national margin of appreciation. The concept of margin of appreciation is nowhere mentioned in the Convention. It has been developed on a case-by-case basis. It implies the discretion and scope that the Court gives to national authorities when it has a problem of assessing whether the reasons for interfering were sufficient to show that the interference was necessary. The margin is especially invoked as regards the clause providing for restrictions 'necessary in a democratic society' in Article 10. In the case-law, the adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The contracting states have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.³¹⁴

The Court articulated the idea of the margin of appreciation in the 1976 case of *Handyside v. United Kingdom*.³¹⁵ It pointed out that 'the machinery of protection

³¹¹ *Ösgür Gündem v. Turkey*, *supra* note 25§ 43 citing *Rees v. the United Kingdom*, *supra* note 258, § 37, *Osman v. the United Kingdom*, 28 October 1998, RJD 1998-VIII, pp. 3159–3161, § 116.

³¹² *Feldek v. Slovakia*, 12 July 2001, RJD 2001-VIII.

³¹³ Golsong, *supra* note 247, p. 149.

³¹⁴ *Vgt Verein Gegen Tierfabriken v. Switzerland*, *supra* note 212, § 67.

³¹⁵ *Handyside v. the United Kingdom*, *supra* note 87.

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established by the Convention is subsidiary to the national systems safeguarding human rights as the Convention leaves to each contracting state, in the first place, the task of securing the rights and liberties it enshrines'.³¹⁶ *Handyside* was one of the first Article 10 cases to be heard by the Court and concerned English obscenity legislation. Both the Commission and the Court concluded that the prosecution and conviction of Mr. Handyside, a publisher, and the seizure of the contested material 'The Little Red School Book' was 'necessary in a democratic society' and within the state's 'margin of appreciation'. The Court noted that when interference with freedom of expression is for 'the protection of morals', the state has a significant margin of appreciation. The competent English judges were entitled in the exercise of their discretion, to think at the relevant time that the Schoolbook would have pernicious effects on the morals of many of the children and adolescents who would read it.³¹⁷ The applicant alleged that he was a small-scale publisher whose political leanings met with the disapproval of a fragment of public opinion and 'hysteria' was stirred up and kept alive by ultra-conservative elements. The Commission maintained that the seizure was not necessary as in addition to the original Danish edition of the 'Little Red School Book' it circulated freely in the majority of the member states of the Council of Europe. The Court referred to the margin of appreciation, which Article 10 § 2 leaves to the contracting states. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, which are called upon to interpret and apply the laws in force.³¹⁸ Nevertheless, Article 10 § 2 does not give the contracting states unlimited power of appreciation. The domestic margin of appreciation goes hand in hand with a European supervision.

In the Court's view national judges are better equipped to evaluate what constitutes a 'pressing social need' when the aim of the restriction is based on morality, which varies according to time and place. Hence in this sphere states are allowed the widest margin.³¹⁹

it is not possible to find in the domestic law of the various contracting states a uniform conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and place to place, especially in our era, which is characterised by a rapid and far-reaching evolution on the subject. By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than an 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.³²⁰

³¹⁶ Cf. *Belgian Linguistic Case*, 23 July 1968, Series A no. 6, p. 35, § 10 in fine.

³¹⁷ *Handyside v. the United Kingdom*, *supra* note 87, § 52.

³¹⁸ *Ibid.*, § 48; citing *Engels and Others v. the Netherlands*, *supra* note 98, § 100.

³¹⁹ *Sunday Times v. the United Kingdom*, *supra* note 60, § 59.

³²⁰ *Ibid.*, § 48.

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The Court defined the margin of appreciation in 1986 as based on the premise that ‘because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is ‘in the public interest’.³²¹

In the Court’s view some of the legitimate purposes in Article 10 § 2 justifying restrictions are so precise that there is hardly any margin of appreciation left to the states. The Court assumes that there is a much more uniform approach in the member states to the objective aims under Article 10 § 2 such as the authority of the judiciary. Where this is the case, the review under the Convention is enhanced and domestic discretion reduced. In the *Sunday Times* case the Court held that the ‘authority of the Court’ was an ‘objective notion’ unlike morality, as ‘the domestic law and practice of the contracting states revealed a fairly substantial matter of common ground in this area. Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation’.³²²

In *Barfod v. Denmark* the Court used the margin of appreciation to overrule a near-unanimous finding by the Commission that a conviction of an author for an article questioning the impartiality of two lay judges, both employees of the government, was a violation of Article 10.³²³ Judge Gölcüklü, dissenting, criticized the majority of the Court for restricting public debate about the functioning of the judiciary, which weighed more heavily than the interests of the two judges. He held that this ruling contradicted *Lingens* where the Court held that ‘politicians’ must be ready to accept more criticism than non-politicians. He argued that the Court had not meant with this that criticism in political matters should be directed solely against politicians.³²⁴

Underlying the margin of appreciation approach is the Court’s recognition that political opinions on economic and social issues differ in the various member states. The Court has granted states a wider margin of appreciation in matters concerning restriction of property rights, as expropriating property will commonly involve such considerations. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s conclusion as to what is ‘in the public interest’.³²⁵ However, the measure taken must always be contested with the proportionality to the legitimate aim pursued in a society that means to remain democratic.³²⁶ The actions taken domestically must not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness.³²⁷

³²¹ *James and Others v. the United Kingdom*, 21 February 1986, Series A no. 98, § 46.

³²² *Ibid.*, § 59.

³²³ *Barfod v. Denmark*, *supra* note 85.

³²⁴ *Ibid.*, dissenting opinion of Judge Gölcüklü, p. 16.

³²⁵ *James and Others v. the United Kingdom*, *supra* note 321, § 46.

³²⁶ *Ibid.*

³²⁷ *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, Series A no. 113, § 52.

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In cases concerning the press, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under Article 10 § 2, whether the restriction was proportionate to the legitimate aim pursued.³²⁸ The degree to which a member state is allowed to restrict journalistic freedoms is dependent on what the Court considers characteristic of democratic necessity. In the case of *Tolstoy Miloslavsky v. the United Kingdom* in 1990 the Court held that states were to enjoy a wider margin of appreciation with regard to speech that 'does not or is not claimed to enjoy protection of Article 10' as perceptions as to what would be an appropriate response by society might differ greatly from one contracting state to another.³²⁹

The extent of the margin of appreciation is considerably reduced, when what is at stake is not 'a given individual's purely "commercial" interests, but his participation in a debate affecting the general interest', for example public health.³³⁰ Political debate is essential to democracy, hence states have little margin in restricting such a debate. The convicted journalist in the *Lingens* case invoked his role as a political journalist in a pluralist society; as such he considered that he had a duty to express his views on a politician. He considered, as did the Commission, that a politician who was accustomed to attacking his opponents, had to expect fiercer criticism than other people. The Court reiterated the general principles concerning the importance of an open public debate, revoking the famous *Handyside-formula*, that subject to paragraph 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. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society.'³³¹ The Court held that the interference with Mr. Lingens' exercise of the freedom of expression was not necessary in a democratic society for the protection of the reputation of others; it was disproportionate to the legitimate aim pursued. There was accordingly a breach of Article 10.

Although there is little scope under Article 10 for restrictions on political speech or on debate of matters of public interest, political discussion does not enjoy absolute protection. The limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician because in a democratic system the actions and omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Due to the dominant position, which the government occupies it is necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to criticism, although it remains open to a state to adopt appropriate measures, even of a criminal law nature, and it enjoys

³²⁸ *Thoma v. Luxembourg*, 29 March 2001, RJD 2001-III, § 48; *Feldek v. Slovakia*, *supra* note 312.

³²⁹ *Tolstoy Miloslavsky v. the United Kingdom*, *supra* note 307, § 48.

³³⁰ *Hertel v. Switzerland*, 28 August 1998, RJD 1998-VI, § 47.

³³¹ *Handyside v. the United Kingdom*, *supra* note 87, § 49.

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a wider margin of appreciation when there is incitement to violence. In a case against Turkey, the applicants, a professor and a journalist and a publisher of an academic essay dealing with the 'Kurdish problem', were charged with disseminating propaganda against the indivisibility of the state. The article analyzed the socio-economic development of Turkey since the 1920s and criticized the 'official ideology' of the state and referred to the 'Kurdish nation'. The applicants were convicted and sentenced to twenty months imprisonment and a fine and five months imprisonment and a fine. The professor was furthermore dismissed from his post as a lecturer.³³² The Court, albeit taking into consideration the background of terrorism, submitted that domestic authorities failed to have sufficient regard to the freedom of academic expression and to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective might be for them.³³³

Judge Bonello in a concurring opinion in one of the many freedom of expression cases against Turkey,³³⁴ where incitement to violence was the issue, pointed out that the common test employed by the Court seemed to have been that if the writings published by the applicants supported or instigated the use of violence, then their conviction by the national courts was justifiable in a democratic society. 'I discard this yardstick as insufficient', said the Judge, maintaining that a 'clear and present danger' had to be evident, quoting the famous American Supreme Court Justice Oliver Wendell Holmes, 'one of the mightiest constitutional jurists of all times'.³³⁵

'We should be eternally vigilant against attempts to check the expression of opinion that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country'.³³⁶

The question of interference when incitement to violence is at issue is according to American Supreme Court jurisprudence a question of proximity and degree.³³⁷

It is evident that the Court regards restrictions within the area of morals as secondary to political speech although some would question why it is necessary to restrict such speech in a democratic context.³³⁸ The Court has reasoned that the need to protect the rights of others may in certain situations be analogous to the 'protection of morals', especially where children or those who are in a state of

³³² *Baskaya and Okcuoglu v. Turkey*, 8 July 1999, RJD 1999-IV, §§ 61–67.

³³³ *Ibid.*, § 65.

³³⁴ *Erdogdu and Ince v. Turkey* [GC], *supra* note 29, p. 216.

³³⁵ *Ibid.*

³³⁶ *Abrahams v. United States* 250 U.S. 616 (1919) at 630.

³³⁷ *Schenck v. United States*, *supra* note 26, at 52.

³³⁸ This topic is discussed in relation to the forming of opinion and silencing effect on those defenceless from impact of harmful speech in chapter 3.

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dependence are concerned.³³⁹ In a case³⁴⁰ concerning the confiscation of original paintings considered obscene, depicting 'in a crude manner' sexual relations between men and animals, the Commission found the interference with the artist's freedom of expression unnecessary to protect morals in a democratic society and disproportionate to the legitimate aim pursued, however, the Court concluded that the margin of appreciation left to the Swiss courts under Article 10 § 2 entitled them to impose this restriction not least because the exhibition of the paintings was open to the general public.³⁴¹

In 1996 the Court held that a British film director, Wingrove,³⁴² had not been denied his freedom of expression rights under Article 10 as a consequence of the banning of a 18-minute short video work he had produced about St. Theresa of Avila, a sixteenth century Carmelite nun who experienced powerful ecstatic visions of Jesus Christ. The British Board of Film Classification had rejected Wingrove's application for a classification certificate on the basis that the film was indecent and blasphemous, depicting the nun as moved by sexual ecstasy of a perverse kind. The Court's decision met harsh criticism from among others, Lord Lester who has criticized the margin of appreciation, calling it the 'mistaken concept of subsidiarity, which weakens the universality of human rights'.³⁴³ Lester describes the *Wingrove* decision as a timorous ruling, illustrating the Court's vacillation in its commitment to free speech.³⁴⁴ He argues that there cannot be equal and effective protection of Convention rights in Europe, irrespective of national frontiers, unless there are both common standards³⁴⁵ and also national courts able and willing to provide effective remedies for breaches of those rights. He says that the margin of appreciation is used to obviate the need for the Court to discern and explain the criteria appropriate to particular problems,³⁴⁶ that it has become slippery and elusive as an eel and that the Court seems to use it as a substitute for coherent legal analysis at stake.³⁴⁷ Lester accuses the Court of hiding behind this approach and abandoning its intended role of being 'a court of last resort than of first recourse'.³⁴⁸

³³⁹ *Dudgeon v. Ireland*, 22 October 1981, Series A no. 45, § 47. Cf. *infra* 3.5 Children: Protection Against Exploitation.

³⁴⁰ *Müller and Others v. Switzerland*, *supra* note 57.

³⁴¹ *Ibid.*, § 36.

³⁴² *Wingrove v. the United Kingdom*, *supra* note 108.

³⁴³ Lord Lester of Herne Hill, Q.C., 'Universality versus Subsidiarity' in 1998 *E.H.R.L.R.* Issue 1, p. 75.

³⁴⁴ 'British Censors versus Freedom of Speech', *Evening Standard*, 27 November 1996.

³⁴⁵ *Cossey v. the United Kingdom*, *supra* note 227, pp. 34–37, Judge Martens' dissenting opinion: '[I]n such a larger, diversified community, the development of common standards may prove the best test, if not the only way of achieving the Court's professed aim of ensuring that the Convention remains a living instrument to be interpreted so as to reflect social changes and to remain in line with present day conditions.'

³⁴⁶ Lester, *supra* note 343, p. 73.

³⁴⁷ *Ibid.*, p. 77.

³⁴⁸ *Ibid.*, p. 75.

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A leading French commentator, Emmanuel Decaux,³⁴⁹ finds it strange that the Court in the case of *Jersild v. Denmark*, showed far less concern for the sensibilities of vulnerable groups in the face of racial abuse freely uttered on television than it did in a case against Austria for the sensibilities of the overwhelmingly Catholic population of the Tyrol region who did not have to view the offending film if they did not wish to.³⁵⁰ Professor Gérard Cohen-Jonathan finds it difficult to understand ‘why the Court did not accord [the Danish judges] the same powers of appreciation that it did to the Austrian judges. Did the Court really believe that the religious sensibilities lampooned by a satirical film were different in character from the respect of human dignity owed to a ‘nigger’ ridiculed on a TV programme?’³⁵¹ The Court in the *Jersild* case was preoccupied with the essential function of journalism and the chilling effect of restrictions, even if the vulnerability of the targeted group may have been much more noteworthy than in the Austrian case.³⁵²

The scope of the margin of appreciation depends on such factors as the nature and seriousness of the interests at stake and the gravity of the interference.³⁵³ The width of the margin of appreciation varies as the Court is dealing with different rights, different claims in respect of the same right by applicants in different situations and with different legal reasoning of the states. The Court has been criticized from within of seriously diluting the strong principles in its own case-law by withholding findings of infringements by relying on the margin of appreciation.³⁵⁴ In the case of *Wabl v. Austria*³⁵⁵ the Court granted a wide margin of appreciation to the government of Austria in curbing political speech in a truly David versus Goliath situation. A Green Party politician accused the largest daily in Austria of ‘Nazi journalism’ in the wake of *Neue Krone Zeitung*’s conviction for defaming him. The weakness of the Court in this case was to focus on the nature of the words spoken instead of the contextual setting in which the speech was uttered. The Norwegian Judge Greve dissented on the ‘contextual basis’ pointing out that the politician was attacked on a personal level and that he should not have been in a more disadvantageous position than the press. Five judges of the Court have submitted a new application of Article 10 based on the ‘contextual approach’, which ‘requires a measured assessment of the many different layers that compose the general context in the circumstances of each case’.³⁵⁶ A relevant question is if the

³⁴⁹ Cf., P. Mahoney, ‘Universality versus Subsidiarity in the Strasbourg case-law on Free Speech: Explaining some Recent Judgments’, 1997 *E.H.R.L.R.* Issue 4, p. 367.

³⁵⁰ *Otto-Preminger-Institute v. Austria*, *supra* note 72. The case concerned the seizure and forfeiture of a film, considered blasphemous.

³⁵¹ Mahoney, *supra* note 349, p. 367.

³⁵² Discussed *infra* 3.3.4.

³⁵³ *Leander v. Sweden*, *supra* note 299, § 58; *Z v. Finland*, *supra* note 20, p. 348, § 98.

³⁵⁴ Cf. *infra* chapter 7.3.1 Competition or Journalism?, discussing the case of *Markt Intern and Klaus Beermann v. the Federal Republic of Germany*, *supra* note 73.

³⁵⁵ *Wabl v. Austria*, application no. 24773/21, judgment 21 March 2000 (not yet published). Discussed *infra* chapter 6.1.2 The Proprietor’s Position vis-à-vis the Public (*Wabl v. Austria*).

³⁵⁶ *Ceylan v. Turkey*, *supra* note 109, concurring opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve, p. 44: ‘We share the Court’s conclusion that there has been a violation

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convicted person occupies a position of influence in society of a sort likely to amplify the impact of his words?³⁵⁷

In *Markt Intern v. Germany*,³⁵⁸ one of the Court's most controversial decisions, the Court was divided but, with the casting vote of the President, found in favour of a wider margin of appreciation in commercial matters 'in particular, in an area as complex and fluctuating as that of unfair competition'.³⁵⁹ The Court did not want to undertake a re-examination of the facts and all the circumstances of each case,³⁶⁰ confining its review to the question of whether the measures taken on the national level were justifiable in principle and proportionate.³⁶¹ The dissenting judges criticized the Court for leaving too wide a margin to the German authorities allowing commercial interests to forfeit the principles of free journalism and for not undertaking a re-examination of the facts and all the circumstances of the case. They stressed that the Court was in fact eschewing its task, which falls to it under the Convention, of carrying out 'European supervision' as to the conformity of the contested 'measures' 'with the requirements' of that instrument.³⁶²

The dissenting judges in *Jacobowski v. Germany* accused the Court of 'giving excessive significance to the doctrine of margin of appreciation'.³⁶³ The applicant journalist had been harshly attacked by his employer in a press release, culminating in his dismissal without notice. He was prevented from sending newspaper articles, critical of his former employer, to a number of journalists when trying to defend his damaged reputation. The Commission was unanimous in finding a breach of the journalist's freedom of expression. The Court, on the other hand, accepted the German Court's conviction, which found the journalist to be motivated by competitive purposes. A wide margin was left to the German Courts 'in such a complex and fluctuating area as that of unfair competition'.³⁶⁴

The margin of appreciation has its proponents as well as sceptics. Those praising it say that it allows governments some flexibility in meeting their

of Article 10 in the present case although we have reached the same result by route which employs the more contextual approach set forth in Judge Palm's partly dissenting opinion in *Süreş v. Turkey* (No. 1) [GC], no. 26682/95, 8 July 1999, RJD-IV.

³⁵⁷ *Ibid.*, p. 44.

³⁵⁸ *Markt Intern Verlag GmbH and Klaus Beermann v. the Federal Republic of Germany*, *supra* note 73.

³⁵⁹ *Ibid.*, § 33.

³⁶⁰ *Ibid.*

³⁶¹ *Barthold v. the Federal Republic of Germany*, *supra* note 77, § 55.

³⁶² *Markt Intern Verlag GmbH and Klaus Beermann v. the Federal Republic of Germany*, *supra* note 73, joint dissenting opinion of Judges Gölcüklü, Pettiti, Russo, Spielmann, De Meyer, Carrillo Salcedo and Valticos, pp. 23–25.

³⁶³ *Jacobowski v. Germany*, *supra* note 265, dissenting opinion of Judges Walsh, Macdonald and Wildhaber, pp. 16–17.

³⁶⁴ *Markt Intern Verlag and Klaus Beermann v. the Federal Republic of Germany*, *supra* note 73, § 33.

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obligations.³⁶⁵ Judge Macdonald has expressed scepticism regarding a pragmatic justification that the doctrine is necessary to avoid damaging conflicts between states and the Court in the era leading up to a uniform system of European Human Rights Protection. In his view the margin of appreciation is no longer acceptable,³⁶⁶ being a 'pragmatic device' and more a principle of justification than interpretation. It helps the Court to show a proper degree of respect for the objectives that a contracting party may wish to pursue, and trade-offs that it wants to make while at the same time preventing unnecessary restrictions on the fullness of the protection of the Convention rights.³⁶⁷ The margin of appreciation shows deference to the member states at the cost of a coherent realization of human rights. The Court is, in MacDonald's view, an insecure supranational organization trying to strike a delicate balance between national sovereignty and international obligation.³⁶⁸ Paul Mahoney believes that the doctrine is recognition that the member states' parliaments have the major responsibility for regulating changes in matters of social, economic and political controversy.³⁶⁹ Freedom within the media is certainly such a controversy as will be elaborated in Part II.

The Court has undeniably comprised its own strong and defensive principles concerning journalistic freedoms as in the case of *Jacobowski*. There are, perhaps understandably, discrepancies in the case-law, which may reveal a lack of understanding of what is at stake. Members of the Court have emphasized the need to take into account the 'clear developments' in the area of family life within the member states.³⁷⁰ They have acknowledged the need to interpret and apply the Convention in light of current circumstances, in the area of the family and home, rather than in the changes affecting the media landscape and the important exercise of responsible journalism. As this criticism underlines, the Court, which attaches the highest priority to political journalism in its case-law, does not always seem aware of when the *modus operandi* essential to political journalism is seriously threatened. It concluded that such journalism was at stake in *Jersild* but not in the case of *Wabl*. There is a strong case pointing to the fact that artistic speech³⁷¹ can contribute to the overall democratic debate and a cause for warning against categorizing speech to

³⁶⁵ T. A. O'Donnell, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights', 4 *Human Rights Quarterly* (1982), p. 496.

³⁶⁶ *Cossey v. the United Kingdom*, *supra* note 227, joint partly dissenting opinion of Judges MacDonald and Spielmann, p. 21.

³⁶⁷ According to R. St. J. MacDonald, 'The Margin of Appreciation' in MacDonald et al (ed.), *The European System for the Protection of Human Rights*, 1993 Kluwer Law International, p. 123.

³⁶⁸ *Ibid.*, p. 124

³⁶⁹ Mahoney, *supra* note 349, p. 364.

³⁷⁰ *Cossey v. the United Kingdom*, *supra* note 227, joint partly dissenting opinion of Judges MacDonald and Spielmann, p. 21.

³⁷¹ The form of art was expressly guaranteed under Article 10 in an older version. Cf. Report of the Conference of Senior Officials 19 June 1950, Collected editions of the *Travaux Préparatoires*, Vol. III, Council of Europe Confidential H (61) 4, p. 668.

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such an extent as drawing a line between criticism of public authorities and the often social criticism involved in artistic work.

Judge De Meyer in a case against Finland³⁷² concerning the seizure of medical records and their inclusion in an investigation file, which the Court did not find in breach of Article 8 said in a partly dissenting opinion that 'where human rights are concerned, there is no room for a margin of appreciation, which would enable the states to decide what is acceptable and what is not. On that subject the boundary not to be overstepped must be as clear and precise as possible. It is for the Court, not each state individually, to decide that issue, and the Court's views must apply to everyone within the jurisdiction of each state.'³⁷³

1.4.5 The Effectiveness Principle

In *Artico v Italy*,³⁷⁴ the Court asserted that '[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.³⁷⁵ A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.³⁷⁶ The effectiveness principle means that the judges look beyond formalities and focus on the reality of the situation of the individual. When the method of effectiveness is scrutinized the different political ideologies of the judges become apparent as in the remarkable *Airey* case.³⁷⁷ This case is probably one of the best examples of the effectiveness principle, that the Convention is intended to guarantee rights that are practical and effective, and hence it must be interpreted in light of present day conditions, as it is designed to safeguard the individual in a real and practical way.³⁷⁸

Johanna Airey was a married woman with four children who wanted to obtain a judicial separation from her husband, an alcoholic who abused her physically. However, because of her low income she could not afford to retain a solicitor and she was not in a position to proceed with the case without legal advice and representation. The Court held by a majority that the failure of Ireland to institute an accessible legal procedure in family law matters amounted to a breach of Article 6 § 2 and Article 8. It found that Article 8 § 1 comprised a right for Mrs. Airey to have access to the High Court in order to petition for judicial separation. The possibility that she might conduct her case in person without the assistance of legal advice did not exhaust her right because the rights protected in the Convention must be practical and effective. Article 8 was breached because effective respect for private or family life obliged the state to make the means of protection constituted by

³⁷² *Z v. Finland*, *supra* note 20, partly dissenting opinion of Judge De Meyer, p. 323.

³⁷³ *Ibid.*, p. 357.

³⁷⁴ *Artico v. Italy*, 13 May 1980, Series A no. 37, § 33.

³⁷⁵ *Ibid.*

³⁷⁶ *Christine Goodwin v. the United Kingdom*, *supra* note 259, § 74.

³⁷⁷ *Airey v. Ireland*, 9 October 1979, Series A no. 32.

³⁷⁸ *Ibid.*, § 26.

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judicial separation effectively available, where appropriate, to anyone who might wish to employ it. That protection was not effectively available to Mrs. Airey.³⁷⁹

The Court made it clear that it was aware that the further realization of social and economic rights is largely dependent on the situation, notably financial, reigning in the state in question. On the other hand, the Convention must be interpreted in the light of present-day conditions and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals.³⁸⁰ Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no watertight division separating that sphere from the field covered by the Convention.³⁸¹

The Icelandic Judge Vilhjálmsón, dissenting in *Airey*, stated that ‘the war on poverty cannot be won through broad interpretation of the Convention’.³⁸² This statement, in short, sheds light on the different judicial (political) ideologies prevailing in the Court, judicial restraint on the one hand and judicial activism on the other. Although the Judge found it ‘deplorable’ that poor people did not have the same chances of enjoying human rights as others, interpreting the Convention in the way the majority of the Court had done was in the view of Judge Vilhjálmsón, opening up problems whose range and complexity could not be foreseen but which would doubtlessly prove to be beyond the power of the Convention and the institutions set up by it.

An example of judicial activism is Judge Evrigenis’ dissenting opinion agreeing with Mrs. Airey’s submission that she was a victim of discriminatory treatment on the ground of property; in view of her financial situation, the high costs of judicial separation proceedings in reality blocked her access to the courts. The applicant was complaining of a ‘clear inequality’ of treatment based on property, which was a ‘fundamental aspect’ of the case. In his view, this was a violation of Article 14 taken in conjunction with Article 6 § 1, as the former covered all situations of discrimination in an enjoyment of a Convention right; whether it was a plain refusal of a right protected or the full embodiment of that right in the domestic system.³⁸³

³⁷⁹ The Irish government responded to the Court’s decision against it by establishing a civil legal aid scheme in 1980. (L. Flinn, ‘Ireland’, in Gearty, *supra* note 177, p. 198.

³⁸⁰ *Marckx v. Belgium*, *supra* note 122, § 41.

³⁸¹ *Airey v. Ireland*, *supra* note 377, § 26.

³⁸² *Ibid.*, dissenting opinion of Judge Thor Vilhjálmsón, p. 26.

³⁸³ During the drafting stage of the Convention, the French and Italian delegates considered that Article 6 § 3 made discrimination between those persons who had the means of paying for a defense counsel and those who had not. The latter are therefore given the right, in any case, to have legal assistance of their own choosing while the others are only entitled to the service of a defense counsel when the interests of justice so require. These delegates considered that this rule was contrary to the principle of non-discrimination. (Report of the

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The late professor Evrigenis, writing when he was still a member of the European Court, said that the 'growing complexity of the social fabric is obliging the State to take positive action to protect rights and freedoms, which in the traditional view, only required protection against interference by public authorities'.³⁸⁴ Thus for at least two decades members (at least some of them) of the Court have been aware of the fact that the traditional division between civil and political rights on the one hand, and economic and social rights on the other, has been weakened. And furthermore, that many of the violations are caused by power holders, other than the state. Judge Evrigenis emphasized 'that the individual must be protected against that danger . . . although not the author of such interference, the State is still regarded as liable and has a duty to intervene and prevent it'.³⁸⁵

Some would maintain that the clashing ideological differences between judicial restraint and judicial activism is that the former sees the judge's job as to apply the law and the latter sees it as both applying the law and where necessary to make it.³⁸⁶ Applying the law may require an understanding of political and economic circumstances, which the judge cannot ignore. To accuse the Court of judicial activism or of taking over the role of legislator if it interprets the Convention to the extent of requiring state action is not fair in light of the fact that the state is under the obligation of securing to everyone within its jurisdiction the rights set forth in the Convention. Furthering human rights means interpreting the law of the Convention to be an effective weapon against injustice, both in the case of a poor woman who is beaten by a drunken husband and a journalist who is forced to censor himself out of intimidation by his superiors at the expense of the public interest.

1.5 CONCLUSION: SUBLIME AIMS

In dealing with the problems before it the Court is not required to do so in a general or abstract manner, but 'only insofar as the facts of the particular case are concerned'.³⁸⁷ The Court submits that its judgments are essentially declaratory. Its task is to determine whether the contracting states have achieved the result called for by the Convention.³⁸⁸ Although, in so doing the Court 'must have regard to the essential function of the press in a democratic society'³⁸⁹ and its supervisory role entails questioning whether there is a pressing social need to interfere. Even if dealing only with a particular problem on the facts presented before it, it is

Conference of Senior Officials 19 June 1950, Collected editions of the *Travaux Préparatoires*, Vol. III, Council of Europe Confidential H (61) 4, p. 652).

³⁸⁴ Cf. Clapham, *supra* note 229, pp. 182–183.

³⁸⁵ *Ibid.*

³⁸⁶ As described by Merrills, *supra* note 233, p. 230.

³⁸⁷ *Markt Intern Verlag and Klaus Beermann v. the Federal Republic of Germany*, report of the Commission 18 December 1987, Series A no. 165, § 225.

³⁸⁸ *Vgt Verein gegen Tierfabriken v. Switzerland*, *supra* note 212.

³⁸⁹ *Lingens v. Austria*, *supra* note 85, § 41.

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noteworthy that the principle of the Public Watchdog safeguarding human dignity and democracy has been elaborated in the Strasbourg Court room.

Although the legal mechanisms of the Convention have provided a forum for complaints, it may also be stated that this forum is affording the European governments a placebo in the form of a supervisory mechanism, while remedial measures stand over on the domestic front, as the Court vacillates in its judicial review and in recognizing the need to enforce rights whose implementation may run counter to the prevailing ideology of the establishment in question. The application of human rights law is more complicated in practice than theory and not even in the latter is it simple. The Council of Europe's commitment to human rights as evidenced in the Convention, including the objective of a free press as the lifeline of democracy, contains costs for society as well as benefits if realized in full. This is why the concept of freedom of the press must be looked at afresh but not disposed of by a slavish adherence to some absolute notion, which is just as illusory as the utopian version of a complete enjoyment of these rights for all.

Despite sublime aims, the case-law concerning Article 10 of the Convention is not like a well-written chain novel, with drama, story line and a teleological outcome. Rather it resembles an ongoing television programme where several analysts deal with current problems from different perspectives in various periods facing variable challenges. A general consensus on what constitutes 'common standards' is not a foreseeable solution in the near future. The struggle is ongoing. Recently, the Court declared that it attaches less importance to the lack of evidence of a common European approach to the resolution of legal and practical problems posed than to clear and uncontested evidence of continued international trends in favour of legal recognition of certain social problems.³⁹⁰ The margin of appreciation, which may work contrary to the objectives of the Convention, is certainly an escape route for the Court in some difficult matters. The margin may also serve the purpose of a test of the *zeitgeist* versus values that touch directly upon human dignity and democracy. There are those who do not view pornography as falling under freedom of expression³⁹¹ but instead as an affront to women's dignity and hence a question of equality or non-discrimination rather than free speech. A gender balanced Court would probably have added tendencies to approach disputes from this angle or note the relevance of discrimination in more circumstances.

The insufficiency or inconsistencies in the terminology of the Court, with regard to the main principles based on Article 10 result in part from the original evasion while formulating the legal text to take into account the positive obligations necessary to ensure the rights in question. It was a sensitive political dilemma and still is. This is why it is imperative that the Court is reflective of the community it serves, the heterogeneous population of the member states. A stale Court, mainly composed of conservative judges from comfortable backgrounds, may not only pose a threat in the forum of unsettling political decisions within the member states, but

³⁹⁰ *Christine Goodwin v. the United Kingdom*, *supra* note 259.

³⁹¹ *Cf. infra* Chapter 3.

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also in their judicial restraint by countenancing inactivity of authorities in protecting fundamental rights. Judges are in a position to make major political decisions and one way this is done is through the upholding of domestic actions. Hence, the independence of the judiciary is a valuable and indispensable principle of an effective, political democracy.

There is no simple answer to the question of judicial restraint or judicial activism in solving the democratic deficit of the media. The evolution has been, to increasingly recognize the interdependence of needs and rights, objectives and freedoms. It is unavoidable, that the judges devise 'some normative theory about the nature of freedom and democracy', although the political culture of the member states is quite diverse.³⁹² Social, economic or geographical reasons should not be used to shun efforts to come up with a theory on Article 10 that may serve as the basis for legislative uniformity concerning freedom within the media. It must not be forgotten that an 'effective political democracy' requires efficient media. The Court has through the years built norms and guidance for the member states and considering the aims to be achieved the concept of the Public Watchdog must be scrutinized from the perspective of the media's obligations and not only from the permissibility factor.³⁹³ Every term in Article 10, starting from the 'right to' and subsequently the contested concepts of opinion, imparting and receiving, duties and responsibilities, democratic society, rights of others and so forth, demands a normative theory based in political and rights philosophy on the content and application. There is no predetermined meaning to a right.

To analyze the problem of freedom within the press under the Convention it is necessary to establish a conceptual basis upon which freedom within the press as an international legal concept can be built. We start the journey by scrutinizing the terms of Article 10, which are contested in the context of the Convention's objectives. The analysis will begin with the right to receive in a democratic society.

³⁹² According to P. Monahan, quoted in Ewing, *supra* note 204, p. 158.

³⁹³ K. Boyle, 'Restrictions on the Freedom of Expression', The Third Informal ASEM Seminar on Human Rights, Paris, France, 19–20 June 2000, An ASEF Monograph, p. 37.

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The greatest menace to freedom is an inert people . . . public discussion is a political duty.³⁹⁴ – *Louis Brandeis*

This chapter explores the new dimension added to the classic freedom of the press, the right to receive information. The emergence of this new right in public international law is not only an extension to the classic freedom of the press, that of publishers and journalists freedom from government interference, but also a recognition of the public's right to be 'enlightened'. It is a definite commitment to an 'effective political democracy', not merely requiring freedom from prior interference but additionally further positive measures to ensure a responsible press. When scrutinizing the conception of the right to receive, the affinity with the later conception of the 'information society' is evident. The right to receive projects the need to guarantee press freedom in its entirety – a general rule, which when further analyzed indicates that the protection needs to be extended into the realm of freedom within the media. Protecting this right is thus protecting a process, rather than preventing insulated violations, enabling the citizenry of the member states to deal with government on a level of equality.

2.1 TOWARDS PROTECTING THE PUBLIC INTEREST

Article 10 embodies more than a commitment to freedom of expression and communicative interchange for their own sakes.³⁹⁵ It has a structural role to play in protecting and promoting other human rights forming the basis of a democratic society. It is impossible to guarantee individual freedoms and rule of law without guaranteeing democracy, as these three aspects of one reality are 'indissolubly linked' to quote Pierre-Henry Teitgen, one of the drafters of the Convention.³⁹⁶ With the emergence of the new freedom of information that was the cause of much debate and controversy during the drafting stages of the Universal Declaration of Human Rights,³⁹⁷ the European Convention on Human Rights, the UN Covenant on Civil and Political Rights and not least the intended Convention on Freedom of Information, a new dimension is added to the traditional negative freedom of the

³⁹⁴ *Cf.*, *Whitney v. California*, 274 U.S. 357 (1927) at 372.

³⁹⁵ *Cf.* A paraphrase of Justice Brennan's description of the First Amendment in *Richmond Newspapers v. Virginia*, 488 U.S. 555, 100 (1980) at 2833; even more relevant in the case of Article 10.

³⁹⁶ Collected editions of the *Travaux Préparatoires*, Vol. IV Ninth sitting, 16 August 1950, Council of Europe Confidential – H (61) 4, p. 853.

³⁹⁷ United Nations General Assembly Resolution 217 A (III), U.N. Doc. A/810, 71 (1948).

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publisher.³⁹⁸ Adding the freedom of information to the established notion of being able to publish without prior restraints was an extension of this freedom. Prior to the productive debates that took place when the intended Convention on Freedom of Information was being prepared, press freedom was perceived of in the manner that Blackstone said consisted in laying no previous restraints upon publications.³⁹⁹

Some maintain that freedom of information was inserted into the provisions of the human rights instruments without thorough consideration of its implications.⁴⁰⁰ That is quite conceivable as implicit in this right is a structural claim providing *inter alia* for open access as well as making demands on the media. In the Convention's case-law it is incumbent on the press, the print media as well as the audiovisual media,⁴⁰¹ to impart information and ideas on matters of public interest, which the public has the right to receive.⁴⁰²

As will be explored in this chapter guaranteeing the information flow in the international instruments is, firstly, recognition of a positive obligation implicit in the structural role of this right. Secondly, the antecedent assumption of the valuable role of the press in democracy in enhancing the public debate is rendering the discourse meaningful with relevant information and ideas. If democracy is to survive, its livelihood depends on an informed citizenry. James Madison realized this. His famous words in 1822 could equally describe the underlying presumptions of the information society:

A popular government without popular information, or the means of acquiring it, is but a Prologue to Farce or a Tragedy, or perhaps both. Knowledge will forever govern ignorance: And people who mean to be their own governors must arm themselves with the power that knowledge gives.⁴⁰³

There is more to the right to receive than may seem apparent at first. It is recognition of Madison's principle, especially with the emphasis on the active phase of this dimension of the information flow. People must arm themselves with the power that

³⁹⁸ The Final Act of the United Nations Conference of Freedom of Information held in Geneva in 1948 contained three draft conventions. The third of the three draft conventions proposed by the Conference was the Draft Convention on Freedom of Information, which was supposed to define freedom of information as a legal right carrying with it duties and responsibilities. See E/3443, *supra* note 272, p. 14. This Convention never materialized.

³⁹⁹ W. Blackstone, 'Commentaries on the Laws of England' (1766 Oxford: Clarendon Press, Vol. 4, 151–52) in R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, 1996 Oxford University Press, p. 197.

⁴⁰⁰ K. Tomasevski, 'Freedom of Information: an Old Human Right and a New One', a paper prepared for the Conference on the Third Generation of Human Rights, Oxford, 29–31 May 1987.

⁴⁰¹ *Jersild v. Denmark*, *supra* note 84, § 31.

⁴⁰² *Observer and Guardian v. the United Kingdom*, *supra* note 59, § 59.

⁴⁰³ G. Hunt, (ed.), 'Writings of James Madison' (New York: Putnam's 1900–1910), 9:103, letter to W. T. Barry, 4 August 1822. Quoted in F. S. Haiman, *Speech and Law in a Free Society*, 1981 The University of Chicago Press, p 368). Emphasis added.

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knowledge gives. Public awareness in the complex context of modern society is contingent on the media's performance. In today's media environment there is a powerful tendency in the direction of homogenization of ideas and journalism characterized by a monochromatic view of the world. Pluralism in media content depends on the number of structural outlets but at the end of the day it depends on responsible journalism within the media. What also becomes evident with greater scrutiny of the right to receive in the context of a democratic society is that the right itself cannot be confined to the classical category of civil and political rights. Pierre-Henri Teitgen emphasizing the need for a principle of collective responsibility for the maintenance of human rights said: 'Freedom is in danger in our countries – let us have the courage to admit it – because of the economic and social conditions of the modern world'.⁴⁰⁴ Professor Teitgen when referring to Western Europe, where millions of men still lacked the means to exercise the fundamental freedoms, stated:

It is true that these freedoms are written into the laws; they exist on papers for them as for others, the privileged ones; but those poverty-stricken creatures lack the means to exercise them and to benefit by them day by day . . . Of what value is the principle of free access to public appointments, if, in practice, education, culture, and humanism are the privilege of inherited wealth?

We must have the courage to recognize that freedom of money, of competition and of profit has sometimes threatened to destroy the freedom of men. In such a case I may recall the saying of Larcordaire, that it is freedom, which enslaves and law that liberates.⁴⁰⁵

A notion in human rights law evoking interest much later in Europe is that private inequalities may render both basic human rights as well as democratic society a farce or a tragedy if deprivation inhibits individuals in arming themselves with the power that knowledge gives. One of the great American constitutional jurists, Justice Brandeis, as long ago as 1914 asserted that the US Constitution protected the entire social and economic programme necessary to ensure a functional system of free speech. For this reason Louis Brandeis emphasized the need for freedom within

⁴⁰⁴ Collected editions of the *Travaux Préparatoires* Vol. I, 1975 Kluwer Law International, introduction and p. 42.

⁴⁰⁵ In August 1949 in a Motion to recommend to the Committee of Ministers, an organization within the Council of Europe to ensure the collective guarantee of human rights proposed by Mr. Teitgen, Sir David Maxwell-Fyfe and other representatives. The birth pains of the Convention were not easy. The first initiative had been taken by the unofficial European Movement. The International Juridical Section of the European Movement was set up under the chairmanship of M. Pierre-Henri Teitgen, with Sir David Maxwell-Fyfe and Professor Fernand Dehousse as joint rapporteurs. This body produced a draft European Convention on Human Rights and a draft Statute of the European Court of Human Rights, which was submitted by the European Movement to the Committee of Ministers to the Council of Europe on 12 July 1949. See Collected editions of the *Travaux Préparatoires* Vol. I. 1975 Kluwer Law International, introduction and p. 42.

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the workplace – bringing the right into the wider context of other rights. Brandeis declared that the ‘right to life’:

Is now being interpreted according to the demands of social justice and of democracy as the right to live and not merely to exist. In order to live men must have the opportunity of developing their faculties; and they must live under conditions in which their faculties may develop naturally and healthily.⁴⁰⁶

The European Court of Human Rights in the case of *Pretty v. United Kingdom*, almost a century later, declared the right to life in Article 2 of the Convention to be

unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life. To the extent that these aspects are recognized as so fundamental to the human condition that they require protection from State interference, they may be reflected in the rights guaranteed by the other Articles of the Convention, or in other international human rights instruments.⁴⁰⁷

Respect for human dignity is the very essence of the Convention;⁴⁰⁸ hence the Court does not discard the context that the rights are exercised in. The individual dimension cannot be disengaged from the societal context. In *Handyside* the Court embraced the two strongest theoretical foundations for protecting freedom of expression as one of the ‘essential foundations of democratic society, one of the basic conditions for its progress and for the development of every man’.⁴⁰⁹

Equal rights and status for all citizens⁴¹⁰ means the free expression of all their legitimate interests and aspirations, political pluralism and social tolerance creating the conditions in democracy that voting turnout ‘ensures the free expression of the opinion of the people in the choice of the legislature’, as stated in Article 3 of Protocol 1 to the Convention.⁴¹¹ Recommendation (99) 15 of the Committee of Ministers, on measures concerning media coverage of elections, stressed the important role of journalists in fulfilling this task and the fundamental principle of editorial independence, which assumes a special importance in election periods.⁴¹²

⁴⁰⁶ Brandeis quoted in M. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism*, 1991 University of California, p. 119.

⁴⁰⁷ *Pretty v. the United Kingdom*, *supra* note 296, § 3.

⁴⁰⁸ *Ibid.*, § 65.

⁴⁰⁹ *Handyside v. the United Kingdom*, *supra* note 87, § 49.

⁴¹⁰ Cf., wording in Document of the Copenhagen Meeting of the Conference of the Human Dimension of the CSCE, (Adopted by the Conference on Security and Cooperation in Europe on 29 June 1990), chapter IV.

⁴¹¹ Cf. Article 3 of Protocol 1 to the European Convention on Human Rights.

⁴¹² Council of Europe, Committee of Ministers Recommendation (99) 15 *On Measures Concerning Media Coverage of Election Campaigns* (Adopted by the Committee of Ministers on 9 September 1999 at the 678th meeting of the Ministers’ Deputies).

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2.1.1 Evoking Media Responsibility

The right to receive has in the Court's interpretation come to mean that the press is under an obligation to see to it that the public is 'properly informed',⁴¹³ not only informed on matters that the media in question may deem relevant but properly informed so the outcome of elections is truly democratic. This right subjects not only the public authorities to the constraints of the law, but indirectly the publishers of the printed press, the owners of the news media by redistributing the duties and responsibilities of expression rights.

It will be reasoned here that with the advent of the two-way flow of information and ideas in the European Convention – the protection is extended into the realm of freedom within the media, e.g. freedom of the press in its entirety. It protects the press as an entity to itself from government interference and it gives credit to the press as serving the public. In fact this small clause marks a transitional departure from the established notion of what press freedom meant. It may be said to mark the beginning of a new understanding of what democracy means in public international law. The words 'right to receive' are not merely a corollary to the right to impart but a separate right on its own.⁴¹⁴

An attempt to minimize the inherent democratic claim in the right to receive is to distinguish between the 'active' right to impart versus the 'passive right to receive'.⁴¹⁵ To cut that notion off at the roots, it suffices to mention the conception of the information society, which is presumed on the right to receive and furthermore presupposes active participation of the recipients; otherwise this right would not become effective.

There is more than a semantic difference between an 'informed public' and a 'public informed'.⁴¹⁶ An informed public is an 'enlightened public', which the Court visualized in *Sunday Times* while a public informed can be confined to being informed on some isolated incident without any democratic significance.⁴¹⁷ The most persuasive argument underlying this right is the democratic rationale; the right to receive demands that the public have access to 'those facts necessary for public judgment about public things, and, more important, that it have the greatest possible opportunity to learn and master the art of political judgment'.⁴¹⁸ In other words the right in question is an elaboration of Madison's principle encompassing press

⁴¹³ *Sunday Times v. the United Kingdom*, *supra* note 60.

⁴¹⁴ E/CN.4/1997/31, 4 February 1997, Question of the Human Rights of All Persons Subjected to any Form of Detention or Imprisonment, promotion and protection of the right to freedom of opinion and expression. Report of the Special Rapporteur, Mr. Abid Hussain. Cf. E/CN.4/1995/32, § 35.

⁴¹⁵ M. Kloepfher, *Freedom within the Press? And 'Tendency Protection' Under Art. 10 of the European Convention on Human Rights*, 1997 Duncker & Humblot, Berlin, p.21.

⁴¹⁶ Bathory and McWilliams, quoted in D. M. O'Brien, *The Public's Right to Know: The Supreme Court and the First Amendment*, 1981 Prager, p. 13.

⁴¹⁷ The Court rejected the notion of raw journalism, imparting information without any analysis in *Lingens v. Austria*, *supra* note 85, § 41.

⁴¹⁸ Bathory and McWilliams, *supra* note 416, p. 13.

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freedom as enabling people to participate fully and knowledgeably in public affairs and to deal with government on a level of equality.

The right to receive, which has altered the traditional focus on press freedom, accentuates the need for media responsibility with free and balanced information flow⁴¹⁹ and large diversity of sources of news and views available to the general public, preventing press concentrations.⁴²⁰ Monopolies and manipulation of the information flow present a threat to journalistic activities and ultimately democracy. The right to receive has shifted the focus to the need to protect the public from the press itself⁴²¹ due to the manipulation factor. The problem however is that the right is not self-executing,⁴²² in particular with regard to the positive requirements expected of the press. In principle this freedom exists so far as the law does not limit it.⁴²³

Protecting this right is thus no less protecting a process than preventing insulated violations rendering it difficult to attain. Increasingly the Council of Europe organs on the basis of Article 10 jurisprudence have set forth more demanding paradigms to fulfil the expectations of the role of the media in democracy, recognizing that this freedom originates *inter alia* within the media itself and that if it is not guaranteed *within* the press, the public's right to receive is not effective.⁴²⁴

It is important in this context to look into the drafting process to find out what the drafters had in mind when resting the future of human rights and democracy on this aspect of the new freedom and what kind of democracy was assumed antecedent to this right? These are all questions that need to be contemplated not least from the jurisprudence on these valuable terms. Were the drafters aware of how complicated the protection of this new dimension of the media freedom is in practice? And that in fact, information is a commodity that is independent of the emergence of new technologies. The economic logic renders it difficult for the media to reconcile the conflicting objective of adhering to public interest obligations at the same time as it is bent on making profit. If anything, the new information technologies that the drafters could not have predicted have made it even more apparent that access to information is dependant on material inequalities, both with regard to seeking

⁴¹⁹ One of the UNESCO priorities in the mid 1970's. See: E/CN.4/Sub.2/1992/9, p. 4; Cf. S. McBride, *Many Voices, One World: Report of the International Commission for the Study of Communications Problems*, 1981 UNESCO, 2nd publication, p. 172.

⁴²⁰ Committee of Ministers Resolution (74) 43 *On Press Concentrations* (Adopted by the Committee of Ministers on 16 December 1974 at the 240th meeting of the Ministers' Deputies).

⁴²¹ R. Pinto, *La Liberte d'Information et d'Opinion en Droit International*, 1984 Economica, p. 19.

⁴²² Cf. O'Brien, *supra* note 416.

⁴²³ Feldman, *supra* note 253, p. 612.

⁴²⁴ Council of Europe, Committee of Ministers Recommendation (99) 15 on *Measures Concerning Media Coverage of Election Campaigns* (Adopted by the Committee of Ministers on 9 September 1999 at the 678th meeting of the Ministers' Deputies).

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information and contributing to the public debate, which are two factors essential to the balanced and free flow of information.

2.1.2 The Origin of the Right to Receive

Rights' thinking has predominantly concerned the relationship between the individual and the state. Thus, as traditionally understood, human rights instruments are to erect barriers between the individual and the state.⁴²⁵ That was the primordial premise when the rights here in question were being drafted. It seems that the word information was inserted into the freedom of expression provisions seeing daylight in the aftermath of World War II without a clear indication of what this new right really meant. It may be presumed that neither the drafters of the Convention nor the drafters of the ICCPR thoroughly considered the implications of the insertion of the words 'right to receive information', where the protection is even broader in the latter instrument, including the right 'to seek', and the words 'of all kinds'.⁴²⁶ The notion of a new social reality that this new right promised has become increasingly recognized in the more than half a century since the adoption of the Convention and its model, the Universal Declaration of Human Rights. Emphasis on the information flow and the public's entitlement to a democratic press required a different approach because of the narrow focus on protecting the press and publishers from government interference. Freedom of information was, at the very beginning, seen as an extension of traditional press freedom.⁴²⁷

Article 10 of the Convention does not draw a distinction between the different media but sets out freedom of information in general terms, subject to the third sentence of paragraph 1. Article 19 of the ICCPR does the same, providing that freedom of expression may be exercised either orally, in writing or in print, in the form of art or through any other media. These provisions promise a new social reality, not only for the public in the democratic context but also for the journalists within the media as the new right is an extension of the traditional protection of the press, which did not make this distinction. The concern was the protection of the publisher from prior restraints, without the broad social implication, which the extended protection of the information flow added. The contextual framework of press freedom is broadened to the extent of putting it almost on equal footing with the right to participate through elections in the democratic process, where Article 3 of Protocol 1 presumes that voters are enlightened, implicitly involving the media. The right to receive is an indissoluble aspect of the democratic process because of the fundamental social and political role of information.

By looking briefly at the advent of this right on the forum of the UN it becomes evident that the right to freedom of information, as this is what it boils down to, was

⁴²⁵ K. Klare, 'Legal Theory and Democratic Reconstruction' in 25 *University of British Columbia Law Review* 69, (1991), at p. 97, excerpts in H. J. Steiner, H. J. and P. Alston, *International Human Rights in Context*, 1996 Clarendon Press, Oxford, pp. 177–179.

⁴²⁶ K. Tomasevski, *supra* note 400, p. 4.

⁴²⁷ For a thorough reading on the origin of this subject see: I. Österdahl, *supra* note 166.

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a highly explosive and politically delicate subject. There were complicated aspects to this new promise as evident by the fact that the Convention on the Freedom of Information, which was to be prepared shortly after the establishment of the UN, was never adopted. It is thus clear that here was a great political problem, a promise that came to be seen as compromising the foundations of the free market system.⁴²⁸ Guaranteeing the right to receive is more than just a guarantee of a hands off policy by the state. It is a promise that the contracting states made at the time without perhaps knowing that they were promising something that was not completely up to them to fulfil or that they may not even have been prepared to fulfil. The international protection assigned to the press a task carrying with it the responsibility of acting as the source of enlightenment for the modern public.⁴²⁹

The notion of Montesquieu's phrase, 'whoever has power is tempted to abuse it',⁴³⁰ was far from alien to the drafters of the human rights instruments. From the inception of the United Nations, before the Universal Declaration of Human Rights was drafted, the focus was on freedom of information.⁴³¹ At the very beginning, the process of laying down a common universal standard in the area of freedom of expression at the United Nations was hampered by difficulties resulting from the lack of a common starting point. Views at odds and differing ideologies at the beginning of the cold war characterized the international scene as states struggled to develop a world community. This friction affected the process of the draft Covenants on Human Rights and the draft Convention on Freedom of Information. At its first session, the General Assembly in Resolution 59 [1] declared freedom of information to be a fundamental right and the 'touchstone of all the freedoms the United Nations is consecrated with'.⁴³² In that same Resolution the importance of this right is given special value in relation to the mass media as '[f]reedom of information implies the right to gather,⁴³³ transmit and publish news anywhere and everywhere without fetters'.⁴³⁴ At the same session in 1946, the General Assembly discussed a proposal to call an International Press Conference to ensure the establishment, operation and movement of a free press throughout the world. As a sequel the Secretary General was in Resolution 59 [1] instructed to place the

⁴²⁸ 'Nothing in the present Convention shall affect the right of any Contracting State to take measures which it deems necessary in order: To prevent restrictive or monopolistic practices or agreements in restraint of the free flow of information.' *Article 7 (b) of the Draft Convention of Freedom of Information from 1948* (never adopted).

⁴²⁹ *Sunday Times v. the United Kingdom*, *supra* note 60, § 65.

⁴³⁰ P. Teitgen, *Travaux Préparatoires Vol. 1*, 1975 Kluwer Law International, p. 40.

⁴³¹ E/3443, *supra* note 272, p. 48.

⁴³² United Nations Action in the Field of Human Rights (United Nations, New York and Geneva, 1994), p. 112.

⁴³³ There is a definite difference between the vague concept 'gather' and the much more teleological concept 'seek', which is in Article 19 of both the UDHR and the ICCPR. The latter may be said to impose obligations on the state to grant information if required whereas 'gather' refers to collecting or accumulating at one's own risk and lacks the teleological connotation.

⁴³⁴ E. Lawson, *Encyclopedia of Human Rights*, 1991 Taylor & Francis Inc., p. 592.

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question of the organization of such a conference on the agenda of the second part of that session.⁴³⁵ This Conference constituted a significant endeavour by the United Nations to ensure the establishment, operation and movement of a free press throughout the world and denoted that the United Nations was committed to major responsibility in that field.⁴³⁶ The Economic and Social Council was instructed to undertake the convocation of an International Press Conference, the purpose of which would be to formulate views concerning the rights, obligations, and practices that should be included in the concept of freedom of information. Accordingly, the Council convened (Resolution 74 (V)) the United Nations Conference on Freedom of Information, which met in Geneva in 1948.⁴³⁷ In the midst of a grave political crisis, the representatives of sixty nations spent nearly one month in deliberation, marked by a frank interchange of views and a desire to reach a compromise but they did not succeed in translating into reality the concept of freedom of information.⁴³⁸

The first Special Rapporteur on this project, Salvador P. López, defined freedom of information as 'freedom of the press by extension', as it takes into account the other powerful media of mass communications, which modern technology has placed in the service of ideas, as well as the rights and interests of the consumer of the news.⁴³⁹ The implementation of the right to freedom of information presupposes the existence of media. Freedom of expression is manifestly a social and political right. The freedom to communicate with oneself or to hold opinions without sharing them with others is next to meaningless. Political participation hinges for its effectiveness on the right to voice views as well as to be heard. But views without information are as worthless as a speech without an audience.⁴⁴⁰ The first prerequisite of the free flow of information is the availability of media of all kinds. Media and news sources are identical⁴⁴¹ as the need for a genuine pluralism of information sources goes hand in hand with the democratic ideal.⁴⁴²

⁴³⁵ *Ibid.*

⁴³⁶ E. I. Daes, 'Freedom of Information and the Press: The Experiment that failed', in Eide and Skogly, (eds.), *Human Rights and the Media*, 1986 Norwegian Institute of Human Rights Publications, p. 70.

⁴³⁷ Lawson, *supra* note 434, p. 592.

⁴³⁸ C. P. Romulo, UN Bulletin Vol. iv. No. 9, 1 May 1948.

⁴³⁹ S. P. Lopez, (Special Rapporteur) 'Freedom of Information 1953' E/2426; Cf. I. Österdahl, *supra* note 166, p. 38.

⁴⁴⁰ K. Boyle, 'Article 19, The International Centre Against Censorship' in A. Eide and S. Skogly (eds.), *Human Rights and the Media*, 1986 Norwegian Institute of Human Rights Publications, p. 107.

⁴⁴¹ H. Eek, E/3443, *supra* note 272, p. 32. In this same report (p. 35) Eek's definition: 'media of information in a technical sense are the press (books, newspapers and other periodicals), films, radio, broadcasting and television. The news agencies may also be regarded as one of the media, although its activities consist in services to the other media and not in services directly to the public'.

⁴⁴² E/CN. 4/Sub. 2/1992/9, p. 5 and p. 32, quoting K. Tomasevski, *supra* note 400, p. 4 and p. 7: Dahl regards the existence of genuine pluralism of information sources as the first step in

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The Conference preparing the drafting of the Convention on Freedom of Information in 1948⁴⁴³ gave advice to the Human Rights Commission when it was drafting Article 19 of the Universal Declaration on Human Rights, on the freedom of opinion and expression. Article 19 provided the basis for Article 10. From the beginning, as is evident from the *Travaux Préparatoires*; there were misgivings about the viability of this freedom. The threat that private financial interests and monopoly control of media presented, as public interferences, to the free flow of information was recognized during the drafting stages of the ICCPR and thus the latter should not be singled out to the exclusion of the former.⁴⁴⁴

Hilding Eek, appointed by the Secretary General as a consultant on the subject of freedom of expression, says that it was expected from the beginning that drafting the UN Covenants would be a long-range project. The draft Convention on Freedom of Information was on the other hand intended to become effective shortly upon its signature and was really an experiment to check whether and to what extent a common starting point existed.⁴⁴⁵ It did not become effective shortly thereafter and the draft Convention on Freedom of Information, prepared by the United Nations Conference on the topic in 1948, has not been adopted more than half a century later.⁴⁴⁶ In chapter II of the agenda for the Conference on Freedom of Information, a note was included to clarify the meaning of the concept 'information'. This note reads: 'By information, for the purpose of the Conference, is meant the following means of bringing current situations, events and opinions thereon to the knowledge of the public: newspapers, news periodicals, radio, broadcasts and newsreels.' The following items were amongst others included in the agenda and discussed by the Conference: a) consideration of the drafting of a charter of rights and obligations of

the process of building a democratically organized State. Cf. R. Dahl, '*Democracy and Human Rights under Different Conditions of Development*', paper prepared for the Nobel Symposium on Human Rights, Oslo, 20–23 June 1988, pp. 17 and 18.

⁴⁴³ Eek, *supra* note 274, pp. 13–14.

⁴⁴⁴ General Assembly, Sixteenth Session, Doc. A/5000, Report of the Third Committee, 5 December 1961, § 24. A Report of the Secretary-General on Public and Private monopolies and their effects on freedom of information in 1955 (where governments were requested to provide steps taken to increase the amount of domestic and international information by eliminating monopolistic, restrictive or exclusive arrangements or practices limiting the import and dissemination of information for domestic publication) is significant of the awareness of the potential danger to the media stemming from private interests. See: Doc E/2687 (Economic and Social Council – Nineteenth Session – Annexes § 23.

⁴⁴⁵ Eek, *supra* note 274, p. 13

⁴⁴⁶ The Sub-Commission on Freedom of Information has long been discontinued; efforts to prepare an internationally sanctioned code of ethics for information personnel had been abandoned and the consideration of periodic reports on freedom of information by the Commission on Human Rights had ended by the termination of the periodic reporting system in 1981. Cf. *United Nations Action in the field of human rights*, 1994 United Nations, New York and Geneva, p.112.

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the media; b) consideration of the possible machinery to promote the free flow of information.⁴⁴⁷

Views differed on the routes to that ideal *via* the principle of freedom of information. The prevailing view at the time was of the state as the natural enemy of democracy. This was a reaction to the German experience of the elimination of plurality in all mass media by the Nazi government and the communist doctrine rejecting the idea of a privately owned media.⁴⁴⁸ There were those, however, who distinguished between the need for legal regulation to enhance responsible journalism and arbitrary interference.⁴⁴⁹ The representative of France during a debate, at the thirteenth session of the Economic and Social Council in Geneva in 1951, stressed the idea that legal control is not the same as arbitrary governmental interference. Jacques Kayser in replying to a remark of the representative of Canada that every qualification of a particular freedom might warrant legislation to restrict its exercise considered on the contrary, that failure to qualify a particular freedom might give rise to abuses and tend to favour monopolies. He thought it essential to combat monopolies by putting some restrictions on the exercise of particular rights saying that: 'If freedom was neither safeguarded nor protected, it became license and in the case of freedom of information, such license might lead to grave dangers.'⁴⁵⁰

The threat of government pressures were acknowledged as hampering press freedom in many countries at the outset of the United Nations. The decline in freedom of information in many countries was also explained from the economic point of view due to mergers of vast press, radio and television companies, tending to encourage 'controlled information'.⁴⁵¹

The efforts to reach results might have been helped if the ideological differences had been recognized from the very beginning, in particular the dividing points within the constitutional democratic states themselves. It was preposterous at the time that the constitutional guarantee of the right to freedom of expression or of communication involved the responsibility of the state. There was agreement to the hands off policy of the state within the Western block and solidarity on the limited meaning of obligating the state to forswear any kind of interference with the individuals' freedom. That can hardly be seen as a great sacrifice as this hands-off policy was in keeping with the national legislation in most of these countries. The supervision of this right was relinquished by not explicitly recognizing the positive obligation of the state. The focus on the ideological differences between the East and West seems to have drawn attention from the necessity of a coherent view within

⁴⁴⁷ Daes, *supra* note 436, p. 67.

⁴⁴⁸ Cf. U. K. Preuss, 'The Constitutional Concept of the Public Sphere According to German Basic Law with Special Consideration of the Boundaries of Free Speech' in Sajó and Price (eds.), *Rights of Access to the Media*, 1996 Kluwer Law International, p. 122.

⁴⁴⁹ Cf. Eek, *supra* note 274, p. 17.

⁴⁴⁹ Cf. E/CN.4/Sub.2/1992/9, p. 5.

⁴⁵⁰ Cf. UN doc. E/AC.7/SR 201, p. 17.

⁴⁵¹ UN Doc. E/3443 submitted to the Economic and Social Council in 1960, *supra* note 272, p. 20.

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those countries that might have had a common starting point towards the concept of freedom of expression. The cold war may also have been an excuse for not scrutinizing the problem in accordance with the declared goals of the United Nations. According to Eek 'it would be superficial to ascribe all the difficulties met in seeking a universal and modern concept of freedom of information to the cold war'.⁴⁵²

The debates on freedom of information that started in 1946 with the aim of describing properly the essential features of the information process and setting the international community's objectives continued on the agenda of UNESCO. The concept of freedom of information was replaced by the notion of 'free flow of information' and 'free and balanced flow of information', which became one of UNESCO's priorities in the mid-1970s. In 1978 a UNESCO commission, headed by Sean McBride, was handed the task of studying the totality of communication problems in the modern world. The task of the McBride Commission was to 'undertake a review of all the problems of communication in contemporary society against the background of technological progress and recent developments in international relations with due regard to their complexity and magnitude'.⁴⁵³ The basic assumption of this report is that information/communication is a fundamental individual and collective right. It endorses the view that news is not a commercial commodity but a social good with specific objectives.⁴⁵⁴ The authors of *Many Voices, One World* wrote:

Communication nowadays, is a matter of human rights. But it is increasingly interpreted as the right to communicate, going beyond the right to receive communication or to be given communication. Communication is thus seen as a two way process, in which the partners – individual and collective – carry on a democratic and *balanced dialogue*, in contrast to monologue, is at the heart of much contemporary thinking, which is leading a process of developing a new area of social rights.⁴⁵⁵

The principle of free flow of information across frontiers is adopted in the European Convention on Transfrontier Television of 1989 and the EC Directive on Television without Frontiers from the same time.⁴⁵⁶ Both instruments formulate the same fundamental principle that reception of broadcasts emanating from member states must be allowed in other jurisdictions, provided they comply with common

⁴⁵² *Ibid.*, §§ 315–317.

⁴⁵³ The Director of UNESCO, M'Bow, appointed a kind of 'brains trust' consisting of highly competent personalities, not unlike the US Hutchins committee three decades earlier. Cf. K.P. Misra, 'Structure of the New Information Order' in H. Köchler, (ed.), *The New International Information and Communication Order*, 1985 Wilhelm Braumüller A-1092 Wien, pp. 25–26; Peng Hwa Ang, '*Free Expression and the Internet: Limits and Possibilities*' www.people.kfem.or.kr/macbride/paper15htm.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ S. McBride, *supra* note 419, p. 172.

⁴⁵⁶ ETS 132, 1989, p. 243.

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standards for programmes and advertising. The restriction clauses of the articles protecting the information flow in the ICCPR and the Convention may, however, provide a basis for a prior consent principle of the recipient state, as a state must ensure that foreign broadcasts do not conflict with the vital interests such as national security, health and morals.

2.2 AN EFFECTIVE POLITICAL DEMOCRACY

The media is the custodian of the democratic objective of enhancing public participation in the political process or at least securing consent for the legitimacy of the free democratic basic order. This may be inferred from the Convention. The intention behind the European Convention on Human Rights was the pre-eminence of democracy over all other systems.⁴⁵⁷ Convention jurisprudence has since actuated the role of the media as the Public Watchdog essential for an effective political democracy. But what do these words mean? Susan Marks in an article on the Convention and its democratic society maintains that the concept means little more than it did in the beginning years.⁴⁵⁸ The Convention's 'democratic society' that has emerged from the jurisprudence during the last decades is marked by the ideology prevailing in the post war period where ignorance and intolerance were seen as posing grave threats to freedom. A bold line distinguished the democratic 'we' from the totalitarian 'they' and it seems that in the beginning it was to prevent a totalitarian dictatorship.⁴⁵⁹

This is not to say that preventing the rebirth of totalitarianism is not a worthy and important objective or that it is no longer an actual goal. The question that needs to be scrutinized is the scope of this concept, e.g. 'effective, political democracy' and what is envisaged as a means to this end or if these words are merely an indicator of a preferable involvement in the boisterous sea of liberty, reflecting a belief or hope of the drafters that such a society would eventually be the outcome in states 'ruled' by law and free market competition. An effective political democracy is not the same as economic equality but it is somewhere in the vicinity. For maintaining 'only' an effective, political democracy means that participants in that process are equal under the law and have an equal opportunity in participating in the political process, the formal entitlement of one vote per citizen. Having equal political status must mean: 'Every man to count for one and no one to count for more than one.'⁴⁶⁰

A draft motion submitted by Teitgen in August 1950 included a recommendation to add three rights not included in the Committee of Ministers'

⁴⁵⁷ C. Jacq and F. Teitgen, 'The Press' in Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights*, 1992 Kluwer Law International, p. 52.

⁴⁵⁸ S. Marks, 'The European Convention and its "Democratic Society"' in *LXVI BYIL* 1995.

⁴⁵⁹ P. Teitgen, Collected editions of the *Travaux Préparatoires*, Vol. IV Ninth sitting, 16 August 1950, Council of Europe confidential – H (61) 4, p. 855.

⁴⁶⁰ I. Berlin, *Concepts & Categories*, 1980 Oxford University Press, p. 81.

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draft Convention.⁴⁶¹ These were the right to property; the right of parents to choose the education of their children; and the so-called ‘political liberties clause’,⁴⁶² which suggested that contracting parties undertake to respect in good faith the fundamental principles of democracy and in particular:

1. To hold elections, at reasonable intervals, on the basis of a free and secret universal franchise with a view to ensuring that governmental action and legislation are in conformity with the expression of the will of the people.
2. To refrain from limit by any arbitrary measure, the right of criticism and the right of organizing political opposition.⁴⁶³

The pre-eminence is not on periodic voting in elections (electoral rights were not included in the Convention at its adoption, it was not until two years later in Article 3 of the First Protocol that they were added) but on a more far reaching kind of democracy, preferably where citizens are active participants and their consent the basis of government. Evidently such an informed consent cannot develop unless information is received from the media. The understanding further elaborated in the Convention’s jurisprudence is that elected authorities cannot be held accountable to the public unless the media plays its vital role.

2.2.1 Article 3 Protocol 1: Majority Rule and Free Discussion

The Court in *Mathieu-Mohin and Clerfayt v. Belgium* stated:

According to the Preamble of the Convention, fundamental human rights and freedoms are best maintained by an ‘effective political democracy’. Since it enshrines a characteristic principle of democracy, Article 3 of Protocol No. 1 is accordingly of prime importance in the Convention system.⁴⁶⁴

The right to receive information from the media is closely linked to the electoral process as reflected in the wording of Article 3 of Protocol 1, which states:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, *under conditions, which will ensure*

⁴⁶¹ A Protocol to the Convention covering the three further rights was duly concluded and signed on March 1952.

⁴⁶² Collected editions of the *Travaux Préparatoires*, Vol. I, Kluwer Law International, 1975, p. xxviii.

⁴⁶³ Collected editions of the *Travaux Préparatoires*, Vol. IV, Council of Europe, confidential H (61) 4, p. 875.

⁴⁶⁴ *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* note 327, § 47.

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*the free expression of the opinion of the people in the choice of legislature.*⁴⁶⁵

Article 25 of the ICCPR provides *inter alia* that every citizen shall have the right and the opportunity without unreasonable restrictions to vote and be elected at genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

One of the drafters of Article 25 of the ICCPR stated that ‘no government is valid unless it reposes on the will of the majority’.⁴⁶⁶ The same idea was expressed in different words by Justice Brennan in explaining the constitutional principle of protecting criticism of public questions, as the First Amendment ‘was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people’.⁴⁶⁷ Jürgen Habermas describes the legitimacy of majority rule by linking it with free discussion and thus the role of the media in democracy providing:

Hence, laws require the justified assent of all. The democratic legislature, however, decides by majority. Consensus and majority rule are compatible only if the latter has an internal relation to the search for truth: public discourse must mediate between reason and will, between the opinion-formation of all and the majoritarian will-formation of the representatives.⁴⁶⁸

To the extent that the Convention authorities have had to address Article 3 of Protocol 1⁴⁶⁹ they have attached considerable significance to it.⁴⁷⁰ Article 3 of Protocol 1 creates a positive obligation on member states to ‘hold’ democratic elections.⁴⁷¹ The Commission has taken the view that this provision entails ‘universal suffrage’⁴⁷² and then, as a consequence of the concept of subjective rights of participation, the ‘right to vote’ and the ‘right to stand for election to the legislature’. The Court has held that Article 3 of Protocol 1 does not create an obligation to introduce a specific electoral system, provided that the system employed ensures ‘equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election’.⁴⁷³ In exercising its ultimate supervision the Court takes into consideration ‘that features that would be unacceptable in the context of one system may be justified in the context of another, at least so long as

⁴⁶⁵ Emphasis added.

⁴⁶⁶ U.N. GAOR 3d Comm., 16th Session, 1097th mtg. at 186, U.N. Doc. A/C.3/SR. 1097 (1961) (statement of Mr. Ferreira Aldunate, Uruguay).

⁴⁶⁷ W. Brennan, quoting *Roth v. United States* 354, U.S. 476 (1957) at 484.

⁴⁶⁸ Habermas, *supra* note 286, p. 475.

⁴⁶⁹ *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* note 327.

⁴⁷⁰ Cf. Marks, *supra* note 458.

⁴⁷¹ *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* note 327, § 50.

⁴⁷² *Ibid.*, § 51.

⁴⁷³ Application no. 11123/84, *Etienne Tette v. France*, Commission’s decision 9 December 1987, DR 54, p. 52.

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the chosen system provides for conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.⁴⁷⁴

A textual interpretation of this provision taken in conjunction Article 10 would prohibit any efforts to manipulate and process information with the aim of misinforming the public.⁴⁷⁵ Like its counterpart Article 15 of the ICCPR, Article 3 of Protocol 1 presupposes that the conditions for the media to exercise its corollary function of the public's right to receive are not controlled by a few people or manipulated to exclude criticism and political opposition. In reality access to the media in order to ensure a wide variety of news and views, necessary to respond to the need of the populace for an analytical picture of the world, is not open to adversary opinions to promote the emergence of 'a sufficiently clear and coherent political will'.⁴⁷⁶ A monopolistic media market, imparting tendentious information to the public, does not ensure the conditions necessary to guarantee the free expression of the popular will. Such a situation is an example of non-governmental interference curtailing on a wide scale fundamental human rights to the extent of severely threatening the democratic fabric. Dissidents or those opposing the hegemony of big business in society are inhibited by the cost of media access. At the same time their rights are infringed upon, it affects the rights of others to form an opinion.

The Court has observed that

electoral systems seek to fulfil objectives, which are sometimes scarcely compatible with each other: to reflect fairly faithfully the opinions of the people and to channel currents of thoughts so as to promote the emergence of a sufficiently clear and coherent political will. In these circumstances the phrase 'conditions which will ensure the free expression of the will of the people in the choice of the legislature' implies essentially – apart from freedom of expression (already protected under Article 10 of the Convention) – the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election.⁴⁷⁷

According to the Court, 'all votes must not necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate 'wasted votes'.⁴⁷⁸

The Commission has accepted as legitimate under Article 3 of Protocol 1, a French rule, stipulating that those who want to represent a list in general elections must pay a deposit, which will only be reimbursed to lists having obtained at least

⁴⁷⁴ *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* note 327, § 54.

⁴⁷⁵ The Parliamentary Assembly has warned against restrictions on access to information in areas of conflict (for example, in Chechnya and in Kosovo), *cf.* press release from Parliamentary Assembly, Paris, and 13 March 2001.

⁴⁷⁶ *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* note 327, § 54.

⁴⁷⁷ *Ibid.*, § 54.

⁴⁷⁸ *Ibid.*

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five per cent of the votes cast. Anything less than five per cent is not a ‘sufficiently clear and coherent political will’.⁴⁷⁹

The right to freedom of expression protected under Article 10 does not prohibit the subsidizing of political parties.⁴⁸⁰ Neither is such support prohibited under Articles 9 or 11.⁴⁸¹ Official subsidizing of political parties on the basis of their voting turnout in elections was deemed by the Commission permissible under Article 3 of Protocol 1 as ‘the free expression of the opinion of the people primarily signify that the elections cannot be made under any form of pressure in the choice of one or more candidates, and that in his choice the elector should *not be unduly induced* to vote for any one party or another’.⁴⁸² The purpose of the system in Germany of election campaign subsidy is, in the words of the Commission, to make the parties more independent from sources of money, which might unduly influence their political actions. Furthermore, the word ‘choice’ in Article 3 of Protocol 1 signifies that the different political parties must be ensured a reasonable opportunity to present their candidates at elections.⁴⁸³ ‘Unduly induced’ must require what the Court confirmed in the *Castells* case that opposing ideologies to the established power must always have a chance of appearing in the media, unless they are seen as in direct conflict with the legitimate rights and interests in Article 10 § 2.⁴⁸⁴

The main concern of the drafters was that compromises would result in agreements of the lowest common denominator granting the citizens of the Council of Europe Member states civil liberties, such as freedom of expression, opinion and information, against the incursion of the state. The words in the Preamble certainly reflect the reactionary mood against the terrors of World War II in Europe to prevent the ‘rebirth of totalitarianism’. That terror, like any other ill-force, may reappear in a different guise. For this reason Article 17 of the Convention, a safeguard against those who claim, to be using their civil and political rights to abuse the rights of others, may well be thought of in other contexts than just against racists and neo-Nazis. Long-term survival of democratic institutions accordingly outweighs short-term deprivation of political rights to anti-democratic actors.⁴⁸⁵ The few people controlling the media market today may qualify as ‘anti-democratic actors’. The socially deviant behaviour of hoodlums pale in comparison with the insidious dangers of obscure powers, which have the means to alter the nature of societies.

It was fresh in the memories of every drafter of the Convention how the media had been recklessly and skilfully used by the Nazis as instruments of ideological

⁴⁷⁹ Application no. 11123/84, *supra* note 473.

⁴⁸⁰ Application no. 6850/74, *Association, X, Y and Z v. the Federal Republic of Germany*, Commission’s decision of 18 May 1976, DR 5, p. 90.

⁴⁸¹ *Ibid.*

⁴⁸² Application no. 6850/74, *supra* note 480, pp. 93–94. Emphasis added.

⁴⁸³ Application no. 8941/80, *X v. Iceland*, Commission’s decision 8 December 1981, DR 27, p. 145.

⁴⁸⁴ *Castells v. Spain*, 23 April 1992, Series A no. 236.

⁴⁸⁵ G. H. Fox and G. Nolte, *supra* note 23, p. 2.

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domination and seduction.⁴⁸⁶ Thus, the need to protect the public from the media as an element of upholding the democratic order was recognized. The wording in the Preamble to the Convention of ‘effective political’ democracy confines the aim within the scope of the civil and political sphere at least *prima facie* as a means to protect citizens from the worst abuses of state power.⁴⁸⁷ The *Greek case*⁴⁸⁸ is the only example of a state being forced out of the Council of Europe for violation of human rights originating in an application from the governments of Denmark, Norway and Sweden and the Netherlands subsequent to the Greek military’s *coup d’état* on 21 April 1967.⁴⁸⁹ The four states’ complaints led to proceedings against Greece before the Commission and the Committee of Ministers, which may have conduced to the downfall of the military regime in Greece.⁴⁹⁰ Behind these inter-states’ complaints there was a moral sentiment that if the Convention were not employed against the Greek military regime the whole Council of Europe system would be endangered.⁴⁹¹

The Court has made clear that political rights referred to in the *Travaux Préparatoires* with regard to interpretation of Article 3 of Protocol 1 means that the commitment is not merely thought of in relation to justifying interference, that the primary obligation is not one of abstention or non-interference but one of adoption by the state of positive measures.⁴⁹² The scope of the Convention can be expanded beyond what the drafters intended fifty years ago due to the fact that circumstances have changed.⁴⁹³ The states have a wide margin of appreciation in this sphere without curtailing the rights in question to such an extent as to impair their very essence and legitimate aim. In particular the conditions within the states must not ‘thwart the free expression of the opinion in the choice of the legislature’.⁴⁹⁴ As the Court has reiterated the essential role of the press is ‘in ensuring the proper functioning of a political democracy’.⁴⁹⁵ The importance of the media is clear in this respect. The media is one of the means to see to it that government carries on its business in public, bringing about the transparency of power without masks.⁴⁹⁶ An

⁴⁸⁶ Cf. Preuss, *supra* note 448, p. 123.

⁴⁸⁷ Marks, *supra* note 458, p. 231.

⁴⁸⁸ ECHR Yearbook 12, 1969.

⁴⁸⁹ Applications no. 3321/67, *Denmark v. Greece*; no. 3322/67, *Norway v. Greece*; no. 3323/67, *Sweden v. Greece*; no. 3344/67, *Netherlands v. Greece*.

⁴⁹⁰ Cf. Janis, Kay, Bradley, *European Human Rights Law, Text and Materials*, 1995 Clarendon Press, pp. 51–64.

⁴⁹¹ *Ibid.*, Becket, ‘The Greek case before the European Human Rights Commission’, 1 HRLJ, No. 91, 94–6 (1970); quoted in Janis, Kay, Bradley, *European Human Rights Law: Text and Materials*, 2nd edition, 2000 Oxford University Press, p. 62.

⁴⁹² *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* note 327, § 50.

⁴⁹³ *Matthews v. the United Kingdom*, 18 February 1999, RJD 1999-I, § 39.

⁴⁹⁴ *Ibid.*, § 53.

⁴⁹⁵ *Erdogdu and Ince v. Turkey* [GC], *supra* note 29, § 48, *Lingens v. Austria*, *supra* note 85, § 41, *Fressos and Roire v. France* [GC], 21 January 1999, RJD 1999-I, § 45.

⁴⁹⁶ Cf. N. Bobbio, *The Future of Democracy*, 1987 University of Minnesota Press, p. 3.

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independent and responsible media is one of the essential prerequisites of ensuring the free formation of public opinion preceding elections.

2.2.2 An Informed Public: A Democratic Entitlement?

Scholars such as Thomas Franck now claim that a distinct right to participate in government – ‘a democratic entitlement’ – is emerging as an internationally protected human right. The task Franck and others have set is to define democracy in a global context by seeking to identify an international consensus on a set of core democratic principles, which do not exist yet.⁴⁹⁷ Many take free and fair elections to be the decisive criterion of democracy.⁴⁹⁸ Another distinctive characteristic is the lawfulness of political opposition.⁴⁹⁹ Frank says that ‘the term “democracy”, as used in international rights parlance, is intended to connote the kind of governance that is legitimated by the consent of the governed. Essential to the legitimacy of governance is evidence of consent to the process by which a populace is consulted by its government’.⁵⁰⁰

Democracy as a global entitlement became real in the 1990s. In the wake of the collapse of the communist regimes in Central and Eastern Europe the stated objective of the former communist states was to develop pluralist democracies, rule of law and market economies.⁵⁰¹ The emphasis on ‘free market economies’ as an inherent part of the pluralism that presupposes democracy is, albeit, more implicit than explicit.⁵⁰² The UN Agenda for Democratization in 1996 eulogizes the

⁴⁹⁷ T. Franck, ‘Democracy as a Human Right’, in L. Henkin and J. Hargrove, J (eds.), *Human Rights: An Agenda for the New Century* (1994) p.75; quoted in S. Marks, ‘The End of History? Reflections on Some International Legal Thesis’ in 8 *EJIL* (1997), p. 462.

⁴⁹⁸ How to define ‘democracy’ has remained one of the fundamental questions of political theory since ancient times. The issue, according to Fox and Nolte has only recently been addressed in a serious way by international lawyers, *cf. supra* note 23, p. 2.

⁴⁹⁹ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE; adopted by the Conference on Security and Cooperation in Europe on 29 June 1990; I 5.1.

⁵⁰⁰ Franck, *supra* note 497.

⁵⁰¹ A. Rosas, and J. Helgesen, *The Strength of Diversity, Human Rights and Pluralist Democracy*, 1992 Kluwer Law International, p. 1.

⁵⁰² Under the heading: ‘*The Century of Capitalism*’, Time magazine 13 April 1998 stated on p. 33: ‘Democracy can exist without capitalism, and capitalism without democracy, but probably not for very long. Political and economic freedom tend to go together.’ Corporations today have an immense impact on the political process through campaign financing and indirect control of the media rendering the above statement rather naïve as reflected in more recent news: ‘A relentless stream of revelations of accounting misdeeds at big corporations in recent months [2002] has eroded public confidence in corporate America. Thousands have been laid off and millions have lost retirement savings. President Bush called for stiff new penalties for corporate criminals and a crackdown on boardroom scandals.’ (*CNN*, 9 July 2002). According to same news story, quoting billionaire financier and corporate raider Carl Icahn, ‘there is no real democracy in corporate America. Until you have democracy, you’re going to have corruption’.

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‘economic act of privatization [that] can be as well a political act, enabling greater human creativity and participation’. Yet, it is emphasized in the same paragraph that: ‘The material means of progress can be acquired, but human resources – skilled, spirited and inventive workers – are indispensable, as the enrichment found through mutual dialogue and the free interchange of ideas. In this way, a culture of democracy, marked by communication, dialogue and openness to the ideas and activities of the world, helps foster a culture of development.’⁵⁰³

In short, the emphasis is on healthy economic competition where individual ‘freedom of thought, the impetus to creativity and the will to involvement are all critical to economic, social and cultural progress’.⁵⁰⁴ It is claimed that ‘democracy is not an affirmation of the individual at the expense of the community’.⁵⁰⁵ This is analogous to a sententious renunciation of a full-fledged *laissez-faire* approach to the market or the presumption that democracy is dependent on its unbridled forces. In line with the living instrument doctrine of the Court’s case-law it is timely to acknowledge that the competitive industrial capitalist society that influenced the objectives of the Convention has long since been replaced by corporate capitalism, gravely altering the premises of the desired political democracy where the state is the ultimate power. The democratic deficit in modern societies results from the immense impact that corporations have on the political process through the financing of political parties and indirect control of the media.

The relationship between human rights, democracy and the rule of law was confirmed by the Charter of Paris for a New Europe in 1990, stating *inter alia*: ‘Democratic government is based on the will of the people, expressed regularly through free and fair elections. Democracy has as its foundation respect for the human person and the rule of law. Democracy is the best safeguard of freedom of expression, tolerance of all groups of society and equality of opportunity for each person.’⁵⁰⁶ The word ‘effective’ accentuates the need to extend democratic control to a number of areas within society such as within the media, for the *summum bonum*.⁵⁰⁷ Adding the word effective moves the phrase from being descriptive of a desired objective towards being a prescriptive characterization of democratic practice where the system must be able to bring about the intended results.

The Preamble to the European Convention reflects the ideological framework surrounding the legal text where the belief is expressed that a just society is best maintained by an ‘effective political democracy’ and a ‘common understanding and observance of human rights upon which they depend’. One should be careful not to read too much into the preamble of any human rights instrument. After all it is outside the legal text, as Koskeniemi points out: ‘The one thing that is certain about the Preamble is that whatever it contains was not accepted as part of the text

⁵⁰³ UN Agenda for Democratization, General Assembly A/51/761, 10 December 1996, § 22.

⁵⁰⁴ *Ibid.*, § 22.

⁵⁰⁵ *Ibid.*

⁵⁰⁶ Rosas and Helgesen (eds.), *supra* note 501, p. 3.

⁵⁰⁷ Cf. *United Communist Party of Turkey and Others v. Turkey* [GC], 30 January 1998, RJD 1998 I, § 45; *Ahmed and Others v. the United Kingdom*, *supra* note 99, § 52.

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itself'.⁵⁰⁸ In *Kuhnen v. the Federal Republic of Germany*, concerning the conviction of a neo-Nazi journalist, the Commission considered that the applicant's proposals ran counter to one of the basic values underlying the Convention, as expressed in its fifth preambular paragraph, namely that the fundamental freedoms enshrined in the Convention are best maintained by an effective political democracy.⁵⁰⁹ In the *United Communist Party of Turkey* judgment, the Court submitted: 'Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it'.⁵¹⁰

The Convention as a living instrument must be interpreted in the light of present day conditions. Underlying the words 'effective, political' is an emphasis that democracy is not to be an empty formality. It is more than 'a system for recruiting leaders', although, recruiting leaders requires a well-informed public, capable of making its choice on the basis of political issues and preferences.⁵¹¹ The question not only concerns whether one votes every four years but rather what impact one has on the evolution of society. Thus, the major dilemma concerning the fifty-year-old Convention is if it tackles the 'invisible powers' as a living instrument.

The right to stand for election to the legislature, enshrined in Article 3 Protocol 1 entails that money is not to be the determinant factor allowing individuals to exercise this right.⁵¹² In essence, domination of public discourse contingent on economic advantages impairs the rights in question.

There are growing public concerns over cases of corruption linked to political parties within the 'democratic' member states of the Council of Europe, the decreasing independence of political parties and the improper influence, which may be exerted on political decision-making through financial means.⁵¹³ The impact of privatization may also have conduced to curtailing fundamental rights where individuals are defenceless against powerful organs in society that have emerged under the bulwark of state power without connoting public responsibility. The democratic accountability of governments has been undermined, empowering private bodies that have never been subject to public scrutiny.

⁵⁰⁸ M. Koskeniemi, 'The Preamble of the Universal Declaration of Human Rights', in Alfredsson and A. Eide, *supra* note 200, p. 27.

⁵⁰⁹ Application no. 12194/86, *Kuhnen v. the Federal Republic of Germany*, Commission's decision of 12 May 1988, DR 56, p. 205.

⁵¹⁰ *United Communist Party of Turkey and Others v. Turkey*, *supra* note 507, pp. 21–22, § 45.

⁵¹¹ C. Lasch, *The Revolt of the Elites and the Betrayal of Democracy*, 1996 Norton, p. 76.

⁵¹² *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* note 327, § 51.

⁵¹³ Cf. Political Affairs Committee Report on the need of drawing up a Council of Europe code of good electoral conduct. Parliamentary Assembly spring meeting in Istanbul, 21–23 May 2001.

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The Project Group of ‘Human Rights and Genuine Democracy’, set up by the Committee of Ministers⁵¹⁴ undertook in 1994 the preparation of a draft recommendation containing principles for the financing of political parties, which could be used as a possible model for legislation.⁵¹⁵ GRECO, the group of member states with the aim of fighting against corruption illustrates that the original premise of progress within the member states towards an effective political democracy is recognized as having gone awry.⁵¹⁶ Corruption and organized crime are symptoms of the cancerous state of capitalism. Massive economic inequalities and abuses of dominant positions result from the conditions in modern societies where the *modus operandi* of democracy, i.e. the press, which is expected to bolster up the realization of human rights, may work to the opposite effect due to the inwrought ties of political parties and the media with financial power.

2.2.3 Tolerance, Pluralism and Broadmindedness

Gradually the Court and Commission have elaborated upon the interrelationship between the media, the public’s right to receive and the principles of democracy, albeit not perceiving the invigorating factors essential to democracy, but rather tiptoeing around the knots that were to be tolerated to ensure that every restriction was proportionate to the legitimate aim pursued.

Based on the fact that the rights in the Convention fall under the category of civil and political rights does not necessarily mean that they are devoid of social justice. In the famous *Handyside* case in 1976 the Court spelled out the essential prerequisites of democracy, designating that democracy is more than a set of procedural rules.⁵¹⁷ Underlying democracy are ideals such as tolerance, pluralism and broadmindedness that cannot flourish unless there is an active ongoing debate in society, the method of democracy to resolve social conflicts without resorting to violence.⁵¹⁸ In the Court’s words: ‘[F]reedom of political debate is at the very core

⁵¹⁴ Abbreviation CAHDD (1991) made up of representatives of different steering committees. The CHADD broke new ground by de-compartmentalising the activities of these various committees and tackling them within a single multidisciplinary setting. It was entrusted to draw up a research and priority action plan on ‘Human Rights and Genuine Democracy’. Cf., ECHR Yearbook 37, 1994, p. 510.

⁵¹⁵ ECHR Yearbook 38, 1995, p. 971.

⁵¹⁶ Group of States against Corruption (GRECO), authorized by Resolution (98) 7 (adopted by the Committee of Ministers on 5 May 1998, at its 102nd Session). The aim of GRECO is to improve the capacity of its members to fight corruption by following through a dynamic process of mutual evaluation and peer pressure, compliance with their undertaking in this filed (Statute of GRECO, Appendix to Resolution (99) 5 adopted by the Committee of Ministers on 1 May 1999).

⁵¹⁷ *Handyside v. the United Kingdom*, *supra* note 87, § 49.

⁵¹⁸ Bobbio, *supra* note 496, p. 42.

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of the concept of a democratic society.⁵¹⁹ This acknowledgement indicates that the interests of all members of society need not be compatible with each other, that there is freedom of choice and tolerance of unlike choices. Intolerance is natural to mankind, said Mill.⁵²⁰ Intolerance induces self-censorship.⁵²¹ Even though Larch says that ‘tolerance, a fine thing, is only the beginning of democracy’, it is still, if achieved, a sign of fairness and social justice.⁵²² No one should be neutral *vis-à-vis* the defence of democratic values, as stated in Parliamentary Assembly Resolution 1003.⁵²³ The Court confirmed the need of active and critical citizens in a recent case, where an applicant had revealed corruption in a newly emerging democracy maintaining that it was crucial for the general interest to strengthen the rule of law.⁵²⁴ By keeping public power accountable the media conduces to such a state. In a recent case where a well-known journalist in Italy was convicted for criticizing a public prosecutor the Court reiterated that the press is one of the means for public opinion to hold those in public positions, i.e. those discharging heavy responsibilities, accountable.⁵²⁵

Tolerance may be the first layer of the democratic foundation, a passive forbearance requiring the fertile soil of pluralism with robust public debate leading to, perhaps the more active stage of broadmindedness. When the Court provided that subject to Article 10 § 2 people had to live with offending and shocking information and ideas that they might find disturbing⁵²⁶ it echoed Justice Brandeis’ famous separate opinion that fighting for freedom is not for cowards or those who fear political change.⁵²⁷ Tolerating ideas that one finds disturbing may be the first step, while broadmindedness is more akin to the political virtue of public-spiritedness. To tolerate opinions, beliefs and customs different from one’s own differs in essence from broadminded understanding and sympathy.

As the Court has said many times there can be no democracy without pluralism.⁵²⁸ Underlying the Convention’s democratic society is not merely an objective but also a description of the complex and various power centres in modern societies. Dissident voices are features of an active democracy. The Court has emphasized the need for such opposition urging that it must find a place in the political arena. In order for opposition to materialize there must be a variety of platforms to speak from, which calls for the distribution of power as opposed to the

⁵¹⁹ *Oberschlick v. Austria*, 23 May 1991, Series A no. 204, § 58; Application no. 18714/91, *David Brind and Others v. the United Kingdom*, Commission’s decision 9 May 1994, D.R. 77-A, p. 50.

⁵²⁰ J. S. Mill, *supra* note 13, p. 11.

⁵²¹ *Ibid.*, p. 38 (it induces men to disguise their opinions).

⁵²² Lasch, *supra* note 511, p. 89.

⁵²³ Parliamentary Assembly Resolution 1003 on the ethics of journalism, (1993) Doc. 6854.

⁵²⁴ *Maronek v. Slovakia*, 19 April 2001, RJD 2001-III, § 56.

⁵²⁵ *Perna v. Italy*, application no. 48898/99, judgment of 25 July 2001, RJD 2003-V, § 41.

⁵²⁶ *Handyside v. the United Kingdom*, *supra* note 87, § 49.

⁵²⁷ *Whitney v. People of the State of California*, *supra* note 394, at 372.

⁵²⁸ *Freedom and Democracy Party (ÖZDEP) v. Turkey*, 8 December 1999, RJD 1999-VIII, § 37.

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concentration of power in the hands of a few. Political opposition, the core element of pluralism, is a concept, which describes a specific aspect of government. Its roots can be found in human rights law: Article 20 of the UDHR, Article 22 of the ICCPR and Article 11 of the Convention. Opposition is not only a mechanical constitutional process but is made up of rights of individual citizens to formulate and voice their views, in particular their dissent from official policies.⁵²⁹ The Court has reiterated the importance of pluralism with regard to the role of media in democracy.⁵³⁰ Pluralism as a significant trait of political democracy signifies the freedom of political dissent. 'The promotion of free political debate is a very important feature in a democratic society', as the Court has emphasized.⁵³¹ It attaches the highest importance to the freedom of expression in the context of political debate, which takes place in the forum of the news media. The Court has submitted: 'One of the principal characteristics of democracy is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression.'⁵³² Pluralism in this sense is therefore not merely referring to the number of media outlets or the supply of diverse media material but diversity of views contributing to the operation of an effective political democracy. In a case against Turkey the Court said that 'the domestic authorities in the instant case failed to give sufficient weight to the public's right to be informed of a different perspective on the situation'.⁵³³

The Court has underlined the need for a strong political opposition in a democracy to scrutinize actions or omissions of the government⁵³⁴ and has attributed particular significance to the press in this respect due to the public's right to receive.⁵³⁵ The Court assessed what it really meant with the democratic role of the media when it emphasized the need of political dissent.⁵³⁶ In *Castells v. Spain*, an opposition member of parliament was convicted for insulting the government in a press article. The Court stated in this respect:

While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interference with the freedom of expression of an opposition

⁵²⁹ C. Tomuschat, 'Democratic Pluralism: The Right to Political Opposition' in Rosas and Helgesen (eds.), *supra* note 501, p. 29.

⁵³⁰ *Informationsverein Lentia and Others v. Austria*, *supra* note 271, § 38.

⁵³¹ *Feldek v. Slovakia*, *supra* note 312, § 83.

⁵³² *Socialist Party and Others v. Turkey*, *supra* note 135, § 45.

⁵³³ *Erdogdu and Ince v. Turkey* [GC], *supra* note 29, §42; *Sener v. Turkey*, 18 July 2000, RJD 2000-VIII, § 45.

⁵³⁴ *Castells v. Spain*, *supra* note 484, §§ 42 and 46.

⁵³⁵ *Observer and Guardian v. the United Kingdom*, *supra* note 59, § 50.

⁵³⁶ *Castells v. Spain*, *supra* note 484.

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Member of Parliament, like the applicant, calls for the closest scrutiny on the part of the Court.⁵³⁷

The Court noted that Mr. Castells did not express his opinion from the senate floor as he might have done without fear of sanctions, but in an article in a periodical, reiterating the pre-eminent role of the press in a state ruled by law, adding:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion, it thus enables everyone to participate in the free political debate, which is at the very core concept of a democratic society.⁵³⁸

The response to the crime of seditious libel defines the society, said Harry Kalven,⁵³⁹ maintaining that the absence of seditious libel as a crime is the true pragmatic test of freedom of speech.⁵⁴⁰ A government in a democratic society is subject to criticism and dissent due to other power centres, like the media that scrutinizes its conduct and holds it publicly accountable. A political democracy does not necessarily rely on consensus of all its members. On the contrary it is a political system, which presupposes dissent but requires that there exists equality before the law. According to Bobbio, 'on close inspection it turns out that only in pluralist society is dissent possible: not just possible but vital'.⁵⁴¹ The discourse must be authentic. Otherwise the media is merely a showplace of pluralistic interests.

Broadmindedness is the last and perhaps least discussed characteristic of a democratic society. It is an outgrowth of tolerance and pluralism in relation to the media, if the public is exposed to different views and sources of information. While pluralism is a characteristic of an effective political democracy, broadmindedness may ensure the 'realization of human rights and fundamental freedoms',⁵⁴² by accomplishing the other objective of the Convention, 'common understanding and observance of human rights'.⁵⁴³

2.3 THE STATE'S ROLE IN FOSTERING PUBLIC AWARENESS

The Court has made clear that the principles set forth in *Handyside* are 'of particular importance as far as the press is concerned'.⁵⁴⁴ In the *Sunday Times* case the Court

⁵³⁷ *Ibid.*, § 42.

⁵³⁸ *Ibid.*, § 43, citing *Lingens v. Austria*, *supra* note 85, § 43. Emphasis added.

⁵³⁹ Professor of law at the University of Chicago, constitutional scholar and known authority on the First Amendment.

⁵⁴⁰ Quoted in J. Rawls, *Political Liberalism*, 1996 Columbia University Press, pp. 342–343.

⁵⁴¹ Bobbio, *supra* note 496, p. 60.

⁵⁴² *Ahmed and Others v. the United Kingdom*, *supra* note 99, § 52 citing *United Communist Party of Turkey and Others v. Turkey*, *supra* note 507, § 45.

⁵⁴³ *Ibid.*, § 52.

⁵⁴⁴ *Sunday Times v. the United Kingdom*, *supra* note 60, § 65.

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used the term ‘enlightened public’ when it took a decisive stand on the role of the mass media in relation to the interests of the community⁵⁴⁵ as confirming the need of each individual to mature through exposure of the complex elements of reality, not only its comfortable sides.⁵⁴⁶ This exemplifies the development from mere toleration to active understanding.⁵⁴⁷ The *Sunday Times* judgment is the landmark judgment in nailing down the essence of media freedom in democracy in one sentence:

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 . . . of public interest. Not only do the media have the task of imparting such information and ideas: the public also has the right to receive them.⁵⁴⁸

In the 1980s the Court continued to elaborate on the need for the press to uphold political criticism and debate to inform the public. Broadmindedness cannot result from the simple circulation of information. The public’s right to receive entails a right to a competent and moreover responsible media as the Court made clear in the leading case of *Lingens v. Austria* in 1986. The Court confirmed that it meant *an informed public* and not merely a public informed when it held that facts must be interpreted for the readership and audience of the media. It is not enough merely to impart facts in the form of news.⁵⁴⁹ An effective political democracy calls for a revitalized citizenry where the right to receive equalizes people who are otherwise unequal in their capacities. So that the public may receive from the press information of all matters of public interest, the Court has confirmed that ‘journalistic freedom also covers possible recourse to a degree of exaggeration or even provocation’.⁵⁵⁰ Furthermore the interest of democratic society is ‘in enabling the press to exercise its vital role of Public Watchdog by imparting information of serious public concern’.⁵⁵¹ In 1991 in the *Sunday Times* (No. 2),⁵⁵² the Court reiterated that the major task of the press is to be a purveyor of information and a Public Watchdog.⁵⁵³ And that the public’s right to receive was the right to be adequately informed.⁵⁵⁴ The Court has elaborated on the role of the Public

⁵⁴⁵ *Ibid.*, § 65.

⁵⁴⁶ *Cf. Handyside v. the United Kingdom*, *supra* note 87, § 49; *Lingens v. Austria*, *supra* note 85, § 42.

⁵⁴⁷ *Enlightenment* has been defined by Lasswell and McDougal in relation of law to social process as ‘gathering, processing and disseminating information and knowledge’. H.D. Lasswell and M. S. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy*, 1992 Kluwer Law International, p. 30.

⁵⁴⁸ *Sunday Times v. the United Kingdom*, *supra* note 60, § 65.

⁵⁴⁹ *Lingens v. Austria*, *supra* note 85, § 42.

⁵⁵⁰ *Prager and Oberschlick v. Austria*, *supra* note 62, § 38.

⁵⁵¹ *Bladet Tromsø and Stensaas v. Norway*, *supra* note 11, § 59.

⁵⁵² *Sunday Times v. the United Kingdom* (No. 2), 6 November 1991, Series A no. 217.

⁵⁵³ *Ibid.*, § 50; *Barthold v. the Federal Republic of Germany*, *supra* note 77, § 58.

⁵⁵⁴ *Oberschlick v. Austria*, *supra* note 519, § 58.

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Watchdog adding more emphasis on the duty to impart – ‘in a manner consistent with its obligations and responsibilities’ – information on all matters of public interest.⁵⁵⁵

Presupposing an enlightened public is proclaiming a right to being not only informed but also acquiring knowledge and understanding through the media. The Court not only emphasizes the special role of the media in this process⁵⁵⁶ but also the duties and responsibilities of journalists in their work.⁵⁵⁷ Exercising this freedom does not mean that everyone has the same opportunity to become informed but that does not diminish the media’s responsibility with regard to the receiving end. A known commentator⁵⁵⁸ on the Convention has called into question the principle of the media’s duty to ‘enlighten’ contending that it cannot be taken to mean that each member of the public has a right to be informed by the mass media.⁵⁵⁹ This is a bizarre conclusion in a way. It is almost akin to saying that the law is superficial or pretentious. The Court has held that ‘freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every man and woman’.⁵⁶⁰

Thus in relation to the individual right to information as essential to personal growth and development, the Court has ruled in favour of individuals to receive vital information concerning their childhood as securing respect for private and family life under Article 8.⁵⁶¹

The Commission provided a long time ago⁵⁶² with regard to Article 3 of Protocol 1 that it did not accord the right unreservedly to every single individual to take part in elections as certain groups may be disqualified to exercise this right, provided that this disqualification is not arbitrary. Legal equality need not result in economic and other forms of equality, given the different endowments of men. Isaiah Berlin states that the only inequality, which should be avoided is inequality based on characteristics, which the individual cannot alter.⁵⁶³ But where is the line to

⁵⁵⁵ *Jersild v. Denmark*, *supra* note 84, § 31, *De Haes and Gijssels v. Belgium*, *supra* note 113, § 37.

⁵⁵⁶ *Lingens v. Austria*, *supra* note 85, §§ 41–42.

⁵⁵⁷ *Erdogdu and Ince v. Turkey* [GC], *supra* note 29, §54; *Sener v. Turkey*, *supra* note 533, § 42.

⁵⁵⁸ M. Bullinger, ‘Freedom of expression and information: an essential element of democracy’, Report presented in the Proceedings of the Sixth International Colloquy about the European Convention on Human Rights, Sevilla, 13–16 November 1985 in 6 *HRLJ*, No. 2–4, 1985.

⁵⁵⁹ *Castells v. Spain*, *supra* note 484, § 43 explicitly states that everyone is to be enabled to participate in the free political debate.

⁵⁶⁰ *Handyside v. the United Kingdom*, *supra* note 87, § 49; *Barthold v. Federal Republic of Germany*, *supra* note 77, § 58. Emphasis added.

⁵⁶¹ *Gaskin v. the United Kingdom*, 7 August 1989, Series A no. 160, § 49.

⁵⁶² Application no. 6573/74, *X v. Netherlands*, Commission’s decision of 19 December 1974, DR 1, p. 87.

⁵⁶³ Berlin, *supra* note 460, p. 93.

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be drawn? Social mobility and equal opportunities are not natural elements of any society.

In the recent case of *Z v. the United Kingdom* the applicants, four unfortunate children, alleged that the local authority had failed to take adequate protective measures in respect of the severe neglect and abuse which they were known to be suffering due to their ill-treatment by their parents and that they had no access to court or an effective remedy in respect of this.⁵⁶⁴ The Court found a violation of Article 3 of the Convention on the basis of a finding that 'the neglect and abuse suffered by the four children reached the threshold of inhuman and degrading treatment'.⁵⁶⁵ As regards the applicants' claims for pecuniary loss, the Court submitted that the future prognosis for child A might reasonably be described as bleak. In his case, it may be claimed that the damage suffered from the abuse will in all probability affect his prospects of gaining employment in the future. An award appropriate to reflect this loss bore in mind the uncertainties of the applicant's situation, making an assessment on an equitable basis.⁵⁶⁶ The Court awarded A the sum of GBP 50,000 for future medical costs and GBP 50,000 for loss of employment opportunities. This example of the Court's prognosis is a sad testimony of the aim of realizing human rights associated with the *laissez-faire* society whose proponents say may lead to inequalities but defend upon the ground that it gives an equal opportunity to all, whereas any attempt to secure a greater degree of ultimate equality can only be obtained by interfering with this initial equalization of opportunity for all.⁵⁶⁷

In *Vgt Verein gegen Tierfabriken v. Switzerland*⁵⁶⁸ in June of 2001, the Court acknowledged that the pressure from the financial impact of powerful groups might endanger the independence of the broadcasting media by unduly influencing public opinion or endangering the equality of opportunity between the different forces of society. It hence acknowledged the threat of economic disparities through the media on evolution in society.

Article 10 provides scope for protection of the preliminary stages of the democratic procedure, even though they are not a part of the formal decision making procedure. The preliminary stages of the democratic procedure are protected where considered necessary because of the public interest or because of scarcity preventing equal opportunities. Broadcasting is regulated on conditions applying to the dissemination of political ideas.⁵⁶⁹ This is evident from the third sentence in paragraph 1 of Article 10 permitting states to license broadcasting.⁵⁷⁰ The process of

⁵⁶⁴ *Z and Others v. the United Kingdom*, 10 May 2001, RJD 2001-V.

⁵⁶⁵ *Ibid.*, § 74.

⁵⁶⁶ *Ibid.*, § 125.

⁵⁶⁷ I. Berlin, *supra* note 460, p. 94.

⁵⁶⁸ *Vgt Verein gegen Tierfabriken v. Switzerland*, *supra* note 212, § 75. Discussed *infra* 7.4 US Approach to Corporate Speech.

⁵⁶⁹ *Cf.*, *infra* section 2.4.2: Regulating broadcasting to ensure the public's right to receive.

⁵⁷⁰ *Groppera Radio AG and Others v. Switzerland*, *supra* note 79, § 49 discussed in section 2.4.2 (states can license for other reasons than merely technical).

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the dissemination of political ideas may be regulated to protect the forming of public opinion. The Public Watchdog role is certainly not a part of the formal procedure, yet it is preposterous to equate it with the individual liberty under Article 10 as discussed in chapter 4.

The Commission has even acknowledged that the right to receive information may entail a right to access to documents, otherwise not accessible, if it is of particular importance to an individual's own position.⁵⁷¹ Every individual counts in an effective political democracy where an informed citizenry is the sum of the parts. The Committee of Ministers, in a declaration on education for democratic citizenship based on the rights and responsibilities of citizens, emphasized that it constitutes 'a lifelong learning experience', which takes place in various contexts, among them 'the workplace' and through the media.⁵⁷² Those who have tried to undermine the claim on public authorities to secure to everyone within their jurisdiction the right to receive have not had time on their side. The Parliamentary Assembly stated in 1993:

Information is a fundamental right, which has been highlighted by the case-law of the European Commission and Court of Human Rights relating to Article 10 of the European Convention and recognized under Article 9 of the European Convention on Transfrontier Television, as well as in all democratic constitutions. The owner of the right is the citizen, who also has the related right to demand that the information supplied by journalists be conveyed truthfully, in the case of news, and honestly, in the case of opinions, without outside interference either by public authorities or the private sector.⁵⁷³

The Court has in its case-law referred to the need for the public to receive coherent information. Of particular relevance amongst the various Council of Europe documents in the field under consideration in the present case are Parliamentary Assembly Resolution 1087 on the consequences of the Chernobyl disaster.⁵⁷⁴ Referring not only to the risks associated with the production and use of nuclear energy in the civil sector but also to other matters, it states 'public access to clear and full information must be viewed as a basic human right'.⁵⁷⁵

The Court ironically makes more demands on the press as a purveyor of information than on public authorities, who have no obligation to disseminate

⁵⁷¹ Application no. 8383/78, *X v. the Federal Republic of Germany*, decision of 3 October 1979, DR 17, p. 227).

⁵⁷² Committee of Ministers' Declaration and Programme on Education for Democratic Citizenship based on the Rights and Responsibilities of Citizens (Adopted by the Committee of Ministers on 7 May 1999, at its 104th session).

⁵⁷³ Parliamentary Assembly Resolution 1003 (1993) *On the Ethics of Journalism* (Adopted on 1 July 1993, 42nd Sitting).

⁵⁷⁴ Adopted on 26th April 1996, 16th Sitting.

⁵⁷⁵ *Guerra and Others v. Italy*, *supra* note 299, § 34. Emphasis added.

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information of their own motion.⁵⁷⁶ The press and broadcasting, albeit privately owned, may on the other hand not curb delivery of any information essential to the public welfare and enlightenment.⁵⁷⁷ This goes to show, as will be elaborated in chapter 4, that the press is a private enterprise encumbered with a public function.⁵⁷⁸

The right to receive is a passive freedom with regard to the citizen's right to seek information from authorities. The right according to the Court '*basically* prohibits government from restricting a person from receiving information that others wish or may be willing to impart to him'.⁵⁷⁹ The state may fall short of expectations with regard to the public's right to receive opposite the media's role in enlightening the public.⁵⁸⁰ The Court in the case of *Guerra v. Italy* in 1998 maintained that the right to receive could not be construed as imposing on a state a positive obligation to collect and disseminate information of their own motion, in this case fostering awareness of local environmental hazards.⁵⁸¹ An EC Directive transposed into Italian law in 1988 made it obligatory for local mayors to inform residents of hazardous industrial activities but years passed without such information being provided to the local population. The Court decided there had been a breach of the right to respect for private and family lives under Article 8. But it overruled the Commission's majority decision that there had been a breach of Article 10 where the words right to receive information in Article 10 § 1 had to be construed as conferring an actual right to receive information, in particular from the relevant authorities, on members of local populations who had been or might be affected by an industrial or other activity representing a threat to the environment. The Commission held that Article 10 imposed on states:

[A] positive obligation to collect, process and disseminate such information, which by its nature could not otherwise come to the knowledge of the public. The protection afforded by Article 10 therefore had a preventive function with respect to potential violations of the Convention in the event of serious damage to the environment and Article 10 came into play even before any direct infringement of other

⁵⁷⁶ *Leander v. Sweden*, *supra* note 299, § 74.

⁵⁷⁷ In cases concerning restrictions on freedom of the press it has on a number of occasions recognized that the public has a right to receive information as a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest (*see*, among other authorities, the *Observer and Guardian v. the United Kingdom*, *supra* note 59, § 59 (b); *Thorgeir Thorgeirson v. Iceland*, *supra* note 226, § 63.

⁵⁷⁸ *Cf.*, H. Eek, E/3443, *supra* note 272, p. 24.

⁵⁷⁹ *Guerra and Others v. Italy*, *supra* note 299, § 53. Italics added to emphasize the word *basically* as meaning that this does not exclude that the authorities have 'a corresponding duty to make available information on matters of public interest within reasonable limits and a duty for mass communication media to give complete and general information on public affairs'. As stated in Parliamentary Assembly Resolution 428 (1970).

⁵⁸⁰ *Cf. Sunday Times v. the United Kingdom*, *supra* note 60, § 65.

⁵⁸¹ *Guerra and Others v. Italy*, *supra* note 299, § 53.

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fundamental rights, such as the right to life or to respect for private and family life occurred.⁵⁸²

The Court on the other hand rejected the applicability of Article 10 in the instant case. Six judges in a concurring opinion maintained that the judgment in this particular case put strong emphasis on the factual situation at hand ‘not excluding that under different circumstances the state may have a positive obligation to make available information to the public and to disseminate such information, which by its nature could not otherwise come to the knowledge of the public’.⁵⁸³ In a partly dissenting opinion, Judge Vilhjálmsson, in principle agreed with the Commission’s arguments but held that the case should have been dealt with under Article 10. It seems the judges acceded on finding the state liable of breaching Article 8 by awarding each applicant non-pecuniary damages of ITL 10 million and hence overlooked the importance of the preventive function of information in fostering public awareness of important matters.

Implicit in the wording of the right to receive is the right to know as evident from the Court’s case-law regarding the vital role of the Public Watchdog. The Court anticipates that private corporations on the media market will accomplish the task of informing the citizenry and holding public authorities accountable, albeit it is also evident from the case-law that the state is to secure that there is not a monopoly of the information flow.⁵⁸⁴

Ensuring the greatest possible public access to information is a fundamental concern of the Council of Europe as evident in more than forty declarations, recommendations and resolutions in the media field, which have been adopted by the Committee of Ministers; the more than forty recommendations and resolutions approved by the Parliamentary Assembly; and as evidenced primarily in the Convention case-law. The Committee of Ministers attaches great significance ‘to wide access to official documents on a bases of equality and in accordance with clear rules’ so that the ‘public [may] have an adequate view of, and to form a critical opinion on, the state of the society in which they live and on the authorities that govern them, whilst encouraging informed participation by the public in matters of common interest’.⁵⁸⁵ The specific responsibility of the Council of Europe in aiding the design of measures at the regional level that may infiltrate into domestic law to safeguard political pluralism has been reiterated at Ministerial Conferences on Mass Media Policy.⁵⁸⁶ If authorities do not facilitate that process or remove obstructions

⁵⁸² *Ibid.*, § 52.

⁵⁸³ Mrs. Palm joined by Mr. R. Bernhardt, Mr. Russo, Mr. MacDonald, Mr. Makarczyk and Mr. Van Dijk, *Guerra and Others v. Italy*, *supra* note 299.

⁵⁸⁴ Application no. 5178/71, *supra* note 55; *Information Lentia and Others v. Austria*, *supra* note 271.

⁵⁸⁵ Committee of Ministers Recommendation Rec (2002) 2 of the Committee of Ministers to member states on access to official documents. (Adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers’ Deputies.)

⁵⁸⁶ *Cf.* 3rd European Ministerial Conference on Mass Media Policy, Nicosia, 9–10 October 1991.

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they are liable for the information blockage resulting in an unenlightened public and such negligence may be seen as contravening Article 1 of the Convention. The public's right to know is based on the legitimate claim to participate in democratic government, but it has also increasingly come to be seen as a vital aspect of good governance. As Amartya Sen, the Nobel Prize-winning economist has observed, there has not been a substantial famine in a country where the press is relatively active.⁵⁸⁷

2.3.1 Information Acts and Transparency

Information acts in various countries confirm that the incorporation of the freedom of information into the international and regional human rights instruments has profoundly altered the traditional perception of the publishers' freedom from prior restraints, paving the way for the information age replacing the industrial society. Although the role of information has long been recognized as evident from the 1766 Freedom of Information Act in Sweden, a state that has not yet adopted an information act, hardly classifies as a modern state.

Article 10 cannot be praised for providing the legal basis for adopting information acts, as the words 'to seek' were deliberately omitted from the provision to put a stop to discussions as to whether or not the state would be under an obligation to provide information.⁵⁸⁸ As the guarantor of pluralism the state must secure access of the public to information that others are willing to impart to it. The right to receive in the democratic context serves the goal of allowing the public democratic control. The Committee of Ministers in a 1981 recommendation on access to information held by public authorities urged that the 'utmost endeavour should be made to ensure the fullest possible availability to the public of information held by public authorities'.⁵⁸⁹ Information acts reflect that times are changing and that democratic procedures require more openness and transparency and not obsessive secrecy in deeply rooted elitism of those in power. After adopting Resolution (2000) 2 on the Council of Europe's information strategy, the Committee of Ministers has adopted a new policy on access to its own documents, based on the principle that 'transparency is the rule and confidentiality the exception'. This policy was applied to all the Committee of Ministers' documents from 1 January 2001, with the exception of those relating to the 'human rights' and 'monitoring' meetings. In line with this new approach, the Committee of Ministers also decided to

⁵⁸⁷ Cf. *The Public's Right to Know: Principles on Freedom of Information Legislation*, Article 19 International Centre Against Censorship, London, June 1999. Cf. A. Sen, *Poverty and Famines*, 1981 Oxford University Press.

⁵⁸⁸ G. Malinverni, 'Freedom of Information in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights' in 4 *HRLJ*, No. 4. 1983, p. 449.

⁵⁸⁹ Council of Europe Committee of Ministers Recommendation No. R (81) 19 of the Committee of Ministers to member states on the Access of Information held by Public Authorities.

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declassify a considerable number of existing documents, which concern in particular the historical period from 1989–1999, thus opening its archives to researchers and historians.

Article 19, the International Centre Against Censorship in London, has elaborated nine principles on ‘Freedom of Information Legislation’ to epitomize the ways in which governments can achieve maximum openness, in line with the best international standards and practice.⁵⁹⁰ These principles are as follows:

1. Maximum Disclosure. (Freedom of Information legislation should be guided by the principle of maximum disclosure.)
2. Obligation to Publish. (Public bodies should be under an obligation to publish key information.)
3. Promotion of Open Government. (Public bodies must actively promote open government.)
4. Limited Scope of Exceptions. (Exceptions should be clearly and narrowly drawn and subject to strict ‘harm’ and ‘public interest’ tests.)
5. Processes to Facilitate Access. (Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available.)
6. Meetings of Public Bodies should be open to Public.
7. Disclosure takes Precedence. (Laws, which are inconsistent with the principle of maximum disclosure should be amended or repealed.)
8. Protection for Whistleblowers.⁵⁹¹ (Individuals who release information or wrongdoing must be protected.)⁵⁹²

The adoption of freedom of information acts takes into account the democratic requirement of access to official information as a fundamental right. Denmark has, for example, legislation defining the right to freedom of information. ‘Offentlighedsloven’ (Access to Information Act) and ‘Forvaltingsloven’ (Public Administration Act), which came into force in 1987. The former Act confirms that everyone has the right of access to documents received or produced by an administrative authority; the latter governs professional secrecy of employees in the public sector.

According to Article 19 principle 1, ‘information’ and ‘public bodies’ should be defined broadly. Private bodies should be included if they hold information whose

⁵⁹⁰ These principles were drafted by Toby Mendel, Head of Article 19’s Law Programme. They are the product of a long process of study, analysis and consultation overseen by Article 19 and drawing on extensive experience and work with partner organizations in many countries around the world.

⁵⁹¹ Discussed *infra* chapter 4 in relation to Convention case-law and the right to impart.

⁵⁹² The right to access of information is discussed as a vital aspect of journalistic rights in conducting investigative journalism in chapter 4; while this brief overview is meant to shed light on the increased acknowledgement of information rights since the adoption of the Convention in 1950.

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disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health. Given the considerable role that corporations play in modern societies, the demands for their openness, transparency and accountability are growing. It is recommended in the above Article 19 principles that the destruction of records is a criminal offence.⁵⁹³

Information acts lead to an important advance for the democratic process and confirm the public's right to know and the press' role in vindicating that right. Obtaining information is paramount to journalism as discussed in chapter 4. Information acts that provide access to official records are as crucial to journalism as they are to the development of good governance, transparency and accountability but they do not as such compensate the press' role in fulfilling the public's right to receive. Information acts are not to be confused with the public entitlement to information in relation to journalism, as the categories of information that public bodies are under an obligation to deliver upon request have little in common with journalistic analyses.⁵⁹⁴

The institution of freedom of information acts facilitate the press in doing its task but for the general public, access to official documents have come in use in extremely special circumstances but never in the same manner as people need to have access to the media. The acts are most often used to obtain access to personal files, either by individuals or legal firms rather than to reveal the inner workings of governments.⁵⁹⁵ Using the information acts is both costly in time and money but most importantly the general public do not necessarily know what to look for.⁵⁹⁶ It is the media, which is the purveyor of information, promoting public awareness in matters of political importance. If the media fulfils its task the readers become more avid seekers but usually they depend on the media to do the research. The media is the primary source of information and its importance as such is recognized by authorities in other power sectors, which use special briefings, press meetings and even unofficial leaks for strategic purposes in the political context. This obviously calls into question the manipulation of the information, which the media as an agent

⁵⁹³ The Icelandic Prime Minister, David Oddsson, in an open lecture of The Icelandic Historian Society on 3 October 2000, conceded that people in power have learned to circumvent the intended transparency of the Icelandic Information Act (enacted in 1996) by not writing down memos or documenting important information. He said that eventually the question if history would benefit from the knowledge that otherwise might go into the grave with each and every figure of authority depended on the willingness of the person in question to write it in his memoirs.

⁵⁹⁴ A process for deciding upon requests starts with the public body, may then be appealed to an independent administrative body and finally to the courts.

⁵⁹⁵ Cf. Feldman, *supra* note 253; p. 610; W. Overbeck, *Major Principles of Media Law 1999 Edition*, 1999 Harcourt Brace & Company.

⁵⁹⁶ On top of that the information stored may not be that interesting or revealing, if those in control of valuable information do not make it available.

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of the people (the Public Watchdog) ought to resist.⁵⁹⁷ The traditional media is partly in charge of the democratic process and hence the Internet may be seen as rectifying the democratic deficit with its infinite amount of information. However, Internet users searching for news are deceived in the same manner as the users of traditional media since manipulation starts at the source, i.e. with journalistic conduct within the press.

Information acts indicate that the right to receive is widely interpreted as imposing a positive obligation on the state to have an information policy and to secure access to information sources to a large extent. The Parliamentary Assembly has stated that the owner of the information is the citizen.⁵⁹⁸ The adoption of the concept of the 'information society'⁵⁹⁹ of the Council of Europe further confirms the legal trend that the right to receive is in fact a right to have access to plurality of information sources, where access to government documents is but one source.⁶⁰⁰

2.3.2 Regulation of Broadcasting and Democratic Values

In addition to being covered by general law, broadcasting has been and continues to be, subject to special regulatory obligations. Broadcasting is extensively regulated by law throughout the world, *inter alia* to guarantee the objectivity and impartiality of reporting, the diversity of opinions, and particularly in the case of public service balanced programming. Some domestic laws stipulate the independence of persons and bodies responsible for programming.⁶⁰¹ The main reasons why broadcasting has been regarded as an entirely legitimate field of public policy intervention (unlike the printed press) are:

- Airwaves and cable are considered as public goods
- Scarcity of airwaves and of cable access
- Intrusive character of radio and television
- Public financing

⁵⁹⁷ Cf. Parliamentary Assembly Recommendation 1506 (2001), *Freedom of expression in the media in Europe*, referring to restrictions on access to information in areas of conflict (for example, in Chechnya and in Kosovo).

⁵⁹⁸ Parliamentary Resolution 1003 (1993): *On the ethics of journalism*. Text adopted on 1 July 1993 (42nd Sitting). Doc 6854.

⁵⁹⁹ Discussed *infra* 2.5 The New information technologies and democracy.

⁶⁰⁰ It has been recognized as an attribute of freedom of expression in the broadcasting and press decisions of the French Conseil Constitutionnel (Decision 86-217 of 18 September 1986, Debbasch, *Les Grand Arrêts du Droit de l'Audiovisuel*, 245 Paris 1991); as an aspect of broadcasting freedom by the German Constitutional Court (*The First Television* case, 12 BverfGE 205 (1961) and the *Fourth Television* case, 73 BverfGE 118 (1986) and the Italian Constitutional Court (Decision 225/74 (1974). *Giur.cost.* 1775 and Decision 826/88 (1988) *Giur. cost.* 3893. See E. Barendt, 'Access to the Media in Western Europe' in Sajó and Price (eds.), *Rights of Access to the Media*, 1996 Kluwer Law International, 1996, p. 110.

⁶⁰¹ Cf. Law of 10 July 1974 on the Austrian Broadcasting Corporation, *Informationsverein Lentia and Others v. Austria*, *supra* note 271, §§ 20 and 36.

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- Regulations of competition
- Historical reasons

The justification for heavier regulation of broadcasting is largely contingent upon historical circumstances and constitutional form and tradition rather than clearly defined principles.⁶⁰² Broadcasting is a more recent phenomenon while the printed press has been developing for centuries and was not seen as threatening democratic objectives until it was firmly in its niche. The press operates in an environment, which is virtually free from regulation. It is, of course, subject to general law but usually there are no particular strings on its economic activity.

Regulation of broadcasting is accepted widely as a significant way of ensuring the functioning of a democratic society. After the introduction of commercial broadcasting, the public service ethos prevailing for decades even infiltrated the programming in commercial stations. Maintaining balanced, quality programming has been an uphill struggle due to the great financial and political interests at stake as powerful alliances in society have viewed this sphere of the media landscape as an excellent opportunity to enhance and maintain their economic and political stance. The ingrained mentality of public service has, however, staved off complete take-over, justifying remaining regulation.⁶⁰³ The development of commercial broadcasting will not adhere to the public service ethos unless it conforms to economic rationality, as Hoffman-Riem, an authority on broadcasting law, submits.⁶⁰⁴ This is an acceptance of the fact that the regulation of commercial broadcasting is problematic and can be a stimulus for maintaining and further developing the alternative of public service broadcasting.⁶⁰⁵

2.4. BROADCASTING UNDER THE CONVENTION

Article 10 of the European Convention explicitly covers broadcasting unlike the printed press. The last sentence of Article 10 § 1 submits that states are not prevented from requiring licensing of broadcasting television.

At the adoption of the Convention the principal television stations in the member states were state owned monopoly services.⁶⁰⁶ Private commercial broadcasting has been gradually introduced in most European countries in the last two decades. There exist public and private television channels side-by-side in most of the member states of the Council of Europe. Technological advances in satellite and cable have resulted in multi-channel broadcasting systems. In view of the considerable increase in transmission opportunities, the 'scarcity of frequency' rationale no longer serves to justify broadcasting monopolies, without excluding

⁶⁰² Feintuck, *supra* note 7, p. 63.

⁶⁰³ Hoffman-Riem, *supra* note 9, p. 335.

⁶⁰⁴ *Ibid.*, p. 357.

⁶⁰⁵ *Ibid.*, p. 359.

⁶⁰⁶ In the United States radio and television has from the outset been operated by private undertakings.

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content related demands on programmes or programme providers. The position recognized in the ‘third sentence’ of Article 10 has been understood as a justification for traditional broadcasting regulation in Western Europe, which in the words of Hoffman-Riem, always aimed at structuring the broadcasting order with positive measures.⁶⁰⁷

In this regard the drafters of the Convention adopted the fundamental assumption underlying broadcasting law, which has existed since the inception of radio in the 1920s. The significance of broadcasting with regard to other factors than merely technical was noticeably underscored in the *Groppera* case.⁶⁰⁸ In this case a radio station came under Italian jurisdiction (broadcasting from a mountain near the Swiss border) but retransmission of its programmes came under Swiss jurisdiction. A Swiss federal ordinance prohibited Swiss cable companies from re-broadcasting from the transmitters, which did not satisfy international telecommunications rules.⁶⁰⁹ The applicants Groppera Radio AG and others complained of the ban on cable re-transmission broadcast by Sound Radio from Italy. The Court submitted that the insertion of the third sentence in Article 10 § 1 at an advanced stage of the preparatory work on the Convention was clearly due to technical and practical considerations. It also reflected a political concern on the part of several states, namely that broadcasting should be the preserve of the state.⁶¹⁰ Changed views and technical process have since resulted in the abolition of state monopolies in many European countries and the establishment of private radio stations in addition to the public service ones. The Court proclaimed that the object and purpose of the third sentence in Article 10 § 1 (permitting licensing) and the scope of its application must be considered in the context of Article 10 as a whole and in particular in relation to the requirements of paragraph 2. The Court referred to the negotiating history of Article 19 of the ICCPR, which does not include a provision corresponding to the third sentence of Article 10 § 1. It referred to proposals of licensing, during the drafting stages of Article 19, in order to prevent chaos in the use of frequencies. The inclusion was opposed on the ground that it might be used to hamper free expression, and it was decided that such a provision was not necessary because licensing for technical reasons was covered by reference to ‘public order’ in Article 19 § 3 of the ICCPR.⁶¹¹ This example, the Court continued, supported the conclusion that the third sentence in Article 10 § 1 allowing states to license broadcasting served technical purposes, adding: ‘It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2, for that would lead to a result contrary to the object and purpose of the treaty’.⁶¹²

⁶⁰⁷ Hoffman-Riem, *supra* note 9, p. 278.

⁶⁰⁸ *Groppera Radio AG and Others v. Switzerland*, *supra* note 79, § 55.

⁶⁰⁹ *Ibid.*, p. 15. The International Telecommunications Convention had at the time of the Groppera decision been ratified by all Council of Europe member states.

⁶¹⁰ *Groppera Radio AG and Others v. Switzerland*, *supra* note 79, § 60.

⁶¹¹ *Ibid.*, § 61.

⁶¹² *Ibid.*

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The Court in this ruling opened up the door, by a majority of sixteen to three, that states could use their power to license for reasons other than technical ones if the measure meets the legitimate aim required by Article 10 § 2 and that authorities can show that there is a pressing social need. This interpretation does not, however, make the ‘third sentence’ in paragraph 1 nugatory.⁶¹³ It seems rather to confirm the view that broadcasting, and hence the licensing thereof, is a means to reach the normative objectives of the Convention rather than being an end in itself. The Court has confirmed such an instrumental view in later case-law, referring to the *Groppera* principle. It emphasizes that the third sentence of Article 10 § 1 makes it clear that states are permitted to regulate by a licensing system the way in which broadcasting is organized in their territories, particularly in its technical aspects but also with regard to other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local levels, the rights and needs of a specific audience and the obligations deriving from international instruments.⁶¹⁴ In *Informationsverein Lentia and others v. Austria*,⁶¹⁵ the Court ruled that to protect public opinion from manipulation it was not necessary to have a public monopoly in the broadcasting industry, reiterating the principle of the public’s right to receive and that ‘such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor’.⁶¹⁶

The Court in the case of *Jersild v. Denmark* acknowledged the intrusive element of broadcasting and its power in shaping public opinion:

In considering the ‘duties and responsibilities’ of a journalist, the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media. The audiovisual media have means of conveying through images meanings, which the print media are, not able to impart.⁶¹⁷

The trend towards deregulation and re-regulation in Western Europe in the 1980s resulted in increasingly detaching television and radio from its public service obligations. According to critics of this development public service channels have come to resemble commercial channels but research shows that public service in North-Western Europe in the 1990s increased the amount of news and current affairs and in the Nordic region it also increased the amount of domestic fiction.⁶¹⁸ Yet,

⁶¹³ *Ibid.*, p. 31, concurring opinion of Judge Pinheiro Farinha.

⁶¹⁴ *Informationsverein Lentia and Others v. Austria*, *supra* note 271, § 32.

⁶¹⁵ *Ibid.*

⁶¹⁶ *Ibid.*, § 38.

⁶¹⁷ *Jersild v. Denmark*, *supra* note 84, § 31; citing application no. 15404/89, *supra* note 213, p. 262.

⁶¹⁸ K. Siune and O. Hultén, ‘Does Public Broadcasting have a Future?’ in D. McQuail and K. Siune (eds.), *Media Policy, Convergence, Concentration & Commerce*, 1998 Euromedia Research Group, Sage Publications, p. 29.

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private commercial broadcasters have had to accept restrictions to devise programme schedules, restrictions that imposed on newspaper editors would have been regarded as interference with editorial discretion.

Even though controls of broadcasting are being reduced, not least in the United States, the Convention machinery has clung to the cautious approach with regard to broadcasting.⁶¹⁹ As a result of the technical progress over the last decades the Court holds that broadcasting monopolies can no longer only be justified with such considerations as the number of frequencies and channels available.⁶²⁰ The member states, however, enjoy a margin of appreciation, which goes hand in hand with European supervision. In a recent case against Austria the Court held that Austrian broadcasting law was in conformity with Article 10, where broadcasting has to be explicitly authorized by federal legislation and that the Austrian monopoly was capable of contributing to the quality and balance of programmes. Restrictions, on the basis of other aims such as those provided for in Article 10 § 2 are neither automatically a violation nor automatically valid. The Court acceded to the standpoint of the Austrian government, not to allocate the only remaining terrestrial frequency to a single private broadcaster, which would amount to creating a private monopoly. It accepted that the route chosen by the Austrian authorities, to give private broadcasters access to cable broadcasting while reserving terrestrial television broadcasting to the ORF provided a solution, less restrictive than the former complete broadcasting monopoly of the ORF, which is compatible with Article 10 of the Convention.⁶²¹

2.4.1 Public Service Broadcasting

Initially broadcasting in virtually every country was a state or public monopoly and the survival of public service broadcasting has been generally regarded as a cultural imperative.⁶²² The established perception of public service is that of informing, educating and entertaining the citizenry. The Committee of Ministers in a recommendation in 1996 stressed,

[T]he vital role of public service broadcasting as an essential factor of pluralistic communication, which is accessible to everyone at both

⁶¹⁹ In the case *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) at 389–390, the Supreme Court confirmed as lawful the authority of the Federal Communications Commission (FCC) to license broadcasters and the lawfulness of the so-called ‘Fairness Doctrine’ dating back to 1949, which, although allowing licensed broadcasters to editorialize, required them to devote some time to the discussion of important issues and to present contrasting views on controversial topics. This doctrine was abolished during the Reagan years (1987). Requirements to broadcast news and current affairs, and the limited restrictions on advertising were lifted.

⁶²⁰ *Informationsverein Lentia and Others v. Austria*, *supra* note 271, § 39.

⁶²¹ *Tele 1 Privatfernsehgesellschaft MBH v. Austria*, 2 September 2000 (not yet published), § 38.

⁶²² E. Barendt, *Broadcasting Law: A Comparative Study*, 1995 Oxford University Press, p. 50.

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national and regional levels, through the provision of a basic comprehensive programme service comprising information, education, culture and entertainment.⁶²³

Public service broadcasting has a constitutional dimension in some countries (Germany, Italy).⁶²⁴ The German Constitutional Court has developed a doctrine of the basic broadcasting service, where broadcasters have the responsibility of ensuring a wide range of programmes.⁶²⁵ Private broadcasters have also been required to observe the public service concept of broadcasting. In 1986, in the so-called '*Fourth TV Ruling*', the Federal Constitutional Court stressed the important future role of public service broadcasters.⁶²⁶ They should continue universally to provide a basic comprehensive service (*Grundversorgung*). The very constitutionality of commercial broadcasting and its exemption from the same quality programming requirements and from the same degree of internal regulation depended on the public broadcasters' fulfilment of this key role.⁶²⁷ Barendt points out that, the public service concept, which forms the primary obligation of the British Broadcasting Corporation (BBC), has had a notable impact on the private broadcasters in the United Kingdom, albeit they are less bound by it.⁶²⁸

Corresponding to the European 'public service ethos' was the 'Fairness doctrine' imposed by the Federal Communication Commission (FCC) on broadcast licensers in the United States, creating an obligation on them to cover issues of public importance. The US 'Fairness doctrine', which was a model for the duties of balance and fairness set forth in some Western European countries such as Germany did not prohibit broadcasters from editorializing, although it stipulated fairness in the coverage of programming, dealing with controversial matters of general importance.⁶²⁹ The 'Fairness doctrine' was contested as being unconstitutional in the famous *Red Lion Broadcasting* case of 1969, where the Supreme Court of the United States solemnly declared that it was the right of viewers and listeners, not the right of broadcasters, which was paramount.⁶³⁰ In 1987 the FCC concluded that the 'Fairness doctrine' was not constitutional as the technical scarcity rationale no longer applied. The 'Fairness doctrine' was used in an analogous way as the third sentence in Article 10 § 1, which the European Court of Human Rights, despite the political

⁶²³ Committee of Ministers Recommendation No. R (96) 10 of the Committee of Ministers to Member States *On the Guarantee of the Independence of Public Service Broadcasting* (Adopted by the Committee of Ministers on 11 September 1996 at the 573rd meeting of the Ministers' Deputies).

⁶²⁴ *Ibid.*

⁶²⁵ Barendt, *supra* note 622, p. 51: *Grundversorgung* (*Fourth Television* case, 73 BverfGE 118, 153 (1986)).

⁶²⁶ P. J. Humphreys, Rules for Private Broadcasting in Germany, 16 *Cardozo Arts & Ent. L. J.* Nos. 2–3, p. 532. (BverfGE 73 (1986), 118, 4 *Rundfunkentscheidung*).

⁶²⁷ *Ibid.*, p. 533.

⁶²⁸ E. Barendt and L. Hitchens, *Media Law: Cases and Material*, 2000 Longman, p. 67.

⁶²⁹ Hoffman-Riem, *supra* note 9, p. 34.

⁶³⁰ *Red Lion Broadcasting Co. v. FCC*, *supra* note 619.

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ambience in the early 1990s, said served other purposes than exclusively technological.⁶³¹ In defending the 'Fairness doctrine', Sunstein maintains that it is by no means clear that it is law 'abridging the freedom of speech', not allowed under the First Amendment. On the contrary, it promoted freedom of speech by ensuring a diversity of views on the airwaves – diversity that the market failed to bring about.⁶³²

The 4th European Ministerial Conference on Mass Media Policy in 1994 issued Resolution No. 1 on the Future of Public Service Broadcasting with general principles and a policy framework.⁶³³ These affirmed the commitment to maintain and develop a strong public service broadcasting system. The public service requirements were to provide thorough programming; a reference point for all members of the public and a factor for social cohesion and integration of individuals, groups and communities without discrimination and social segregation. Public service broadcasting is to provide a forum for public discussion in which a broad spectrum of news and opinions is possible; to broadcast impartial and independent news; information and comment; to develop pluralistic programming and not sacrifice quality for commercial reasons; and to reflect different ideologies and beliefs. The participating states were to undertake to maintain and secure a funding framework, which guarantees public service broadcasters the means necessary to accomplish their mission and to ensure that the economic practices in the media field would not prejudice the vital contribution of public service broadcasting. There exist a number of sources for funding, sustaining and promoting public service broadcasting, such as license fees, public subsidies, and advertising and sponsorship revenues. The Resolution emphasized that the participating states must undertake to guarantee the independence of public service broadcasters against political and economic interference. In Resolution 2 of the same ministerial conference the paramount importance of journalistic freedoms and genuine editorial independence *vis-à-vis* political power and pressures, exerted by private parties or public authorities, is stressed.⁶³⁴

License fees usually finance public service broadcasting and are sometimes complemented with public funding and advertising revenues. The BBC with its lofty journalistic status, diverse and ambitious programming is the archetypical public service broadcaster in the world. It is solely financed by license fees, whose level is fixed by Parliament upon proposal by the House Secretary.⁶³⁵ The BBC is not running as a competitor to private broadcasters for financing in the form of advertising. License fees also fund the public service in Norway, Denmark, Sweden, Finland and Belgium while public broadcasters in France and Italy enjoy additional

⁶³¹ *Groppera Radio AG and Others v. Switzerland*, *supra* note 79.

⁶³² C. R. Sunstein, *Democracy and the Problem of Free Speech*, 1995 The Free Press, p. 55.

⁶³³ 4th European Ministerial Conference on Mass Media Policy, Prague, 7–8 December 1994, Council of Europe DH-MM (98) 4.

⁶³⁴ Resolution No. 2: *Journalistic Freedoms and Human Rights*. Council of Europe, DH-MM (98) 4.

⁶³⁵ Hoffman-Riem, *supra* note 9, pp. 67–71.

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public funding. Advertising as a supplement to license fees and public funding is, however, crucial to the survival of most broadcasters. In Germany public broadcasters base their operation on fees and advertising revenues. In France public service broadcasting is financed partly by audience fees, and Channels 2 and 3 to a considerable extent through advertising.⁶³⁶

The public service ethos has had an uphill fight in an environment of dwindling advertisement revenues and political reluctance to raise licensing fees. Its success or lack thereof has more or less been dependent on the prevailing political ideology. During the free market extremism of the Reagan/Thatcher period on both sides of the Atlantic, deregulation and privatization characterized the broadcasting environment. A new reasoning of the public service ethos seemed underway as evident from the 1990 Broadcasting Act in the United Kingdom where diversity was interpreted from the standpoint of consumerism rather than citizenship since 'programmes [are] calculated to appeal to a variety of tastes and interests'. The robust-public-debate argument seems to have become a 'political taboo' in the 1980s. The commandment was to abandon 'paternal' concerns of enlightening to catering to the tastes of consumers.⁶³⁷

All the same, the Committee of Ministers recalled the importance of public service broadcasting in a declaration in 2000 stating among other things;

cultural diversity has always been a dominant European characteristic and a fundamental political objective in the process of European construction, and . . . it assumes particular importance in the building of an information and knowledge-based society in the 21st Century; . . . all democratic societies based on the rule of law have in the past developed measures to sustain and protect cultural diversity within their cultural and media policies.⁶³⁸

Even the market-orientated EU confirmed the important contribution made by public service broadcasting to the democratic process in a Protocol to the Treaty of Amsterdam on Public Service Broadcasting, which submits that 'the system of broadcasting in the member states is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism'.⁶³⁹

In the Treaty of Amsterdam, the member states unanimously stressed the important role of public service broadcasting. Their task is to provide funding for public service broadcasting where such funding enables public broadcasting organizations to fulfil their remit, and insofar as there is no distortion, to trade and

⁶³⁶ *Ibid.*, p. 165.

⁶³⁷ T. Gibbons, *Regulating the Media*, 1998 Sweet & Maxwell, p. 58; Barendt and Hitchens, *supra* note 628, p. 69.

⁶³⁸ Council of Europe Committee of Ministers *Declaration on Cultural Diversity* (Adopted by the Committee of Ministers on 7 December 2000 at the 733rd meeting of the Ministers' Deputies).

⁶³⁹ Treaty of Amsterdam signed on 2 October 1997, entered into force on 15 May 1999; it amended and renumbered the EU and EC Treaties.

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competition in the EU. Public service broadcasting must benefit from technological progress and reach a wide audience without discrimination to respect the common interest.⁶⁴⁰

The funding of public broadcasting within the EU is to be subject to the principles of proportionality, going no further than what is strictly needed to fulfil the public service remit and it should be provided under conditions of complete transparency.⁶⁴¹ The large majority of complaints to the DG IV are focused on funding schemes of public broadcasters and their possibility of enjoying dual funding, i.e. state funding and advertising revenues, which is normally precluded to others. The European Court of Justice case-law confirms that media pluralism has to be considered as a public interest of the EU member states and as a legitimate Community objective, as highlighted by the Amsterdam Protocol.⁶⁴² The private broadcasting sector has widely been characterized with a high degree of media concentration; whether ownership, audience share or advertising revenue. The role of public service broadcasting is hence seen as more vital than ever, as a counterbalance to the accumulated media power of large private broadcasting concerns.⁶⁴³ Pluralism accordingly is only conceivable if ensured by the presence of efficient and technologically advanced public broadcasters.

According to Peter Humphreys, an expert in comparative media policy in Europe, the Federal Constitutional Court in Germany has repeatedly highlighted the special role of the public broadcasters. However, the public broadcasters in Germany, as elsewhere in Western Europe, face a very severe challenge; the very legitimacy of the license fee may be jeopardized by possible future developments in the media marketplace. One reason is the fragmentation of TV audiences, a serious decline in their audience share. The big question in the coming years is whether public broadcasters with support from constitutional guarantees and Article 10 case-law, which acknowledges their significance in support of pluralism and diversity, will be able to resist the encroachment of the market? Increased emphasis on the public service ethos is a further affirmation of the prevailing view that the public authorities are the ultimate guarantors of the required quality and diversity and that the member states of the EU as well as those of the Council of Europe have positive obligations in ensuring this endeavour. This view is confirmed in a recommendation of the Committee of Ministers of the Council of Europe on the guarantee of the independence of public service broadcasting in 1996: 'reaffirming the vital role of public service broadcasting as an essential factor of pluralistic communication'.⁶⁴⁴ In

⁶⁴⁰ OJ C 30, 1999.

⁶⁴¹ Address by Marcelino Oreja, Member of the European Commission to the Spanish Parliamentary Subcommittee on the RTVE (Spanish Broadcasting Corporation), 11. 12. 1998. http://europea.eu.int/comm/dg10/avpolicy/key_doc.

⁶⁴² Cf. case C-23/93, 1994 ECR I 4795.

⁶⁴³ Humphreys, *supra* note 626, p. 552.

⁶⁴⁴ Council of Europe Committee of Ministers Recommendation (2000) 23 of the Committee of Ministers to Member States *On the Independence and Functions of Regulatory Authorities*

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Appendix to Recommendation No. R (96) 10 the guidelines on the guarantee of the independence of public service broadcasting emphasize that the legal framework governing public service broadcasting organizations should clearly stipulate their editorial independence and institutional autonomy.⁶⁴⁵

Public service broadcasters have widely had to endure subtle attempts by authorities to influence programming, the selection of personnel and sources of financing.⁶⁴⁶ The Committee of Ministers has emphasized the importance of the *independence* and functions of regulatory authorities for the broadcasting sector with the monitoring of broadcasters' compliance with their commitments and obligations. It calls attention to the need to provide for adequate and proportionate regulation of the broadcasting sector and recommends for this purpose specially appointed independent regulatory authorities for the broadcasting sector. Such regulatory authorities with *expert knowledge in the area* have an important role to play within the framework of the law.⁶⁴⁷ For this reason governments of the member states ought to

include provisions in their legislation and measures in their policies entrusting the regulatory authorities for the broadcasting sector with powers, which enable them to fulfil their missions, as prescribed by national law, in an effective, independent and transparent manner. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.⁶⁴⁸

Politicians have an interest in furthering the outcome of certain policies and should thus be kept away from the board or other authorities within public service broadcasting that have the power to appoint the staff or regulate programming or content. The Icelandic National Broadcasting Service (RUV), an independent public service owned by the state, is an example of a case of an encroachment by public authorities. The Broadcasting Board is representative of the political parties and it is appointed in the wake of parliamentary elections in proportion to the outcome. The minister of education appoints the director of the RUV (for five year terms) and chairman and vice chairman of the Board. The Broadcasting Board makes final decisions on programming and makes recommendations on all appointments that

for the Broadcasting Sector (Adopted by the Committee of Ministers on 20 December 2000 at the 735th meeting of the Ministers' deputies).

⁶⁴⁵ Council of Europe Committee of Ministers Recommendation No. R (96) 10 (Adopted by the Committee of Ministers on 11 September 1996 at the 573rd meeting of the Ministers' Deputies).

⁶⁴⁶ Hoffman-Riem, *supra* note 9, p. 1.

⁶⁴⁷ Recommendation (2000) 23 *on the independence and functions of regulatory authorities for the broadcasting sector* (Adopted by the Committee of Ministers on 20 December 2000 at the 735th meeting of the Ministers' Deputies). Emphasis added.

⁶⁴⁸ *Ibid.* Emphasis added.

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have to do with programming.⁶⁴⁹ Political favouritism is the name of the game. In the case of the BBC the Board of Governors appoints the Director General. The composition of the Board is not governed by the representation principle like the board of the RUV; rather it aims to appoint 'remarkable men and women . . . of the highest calibre'.⁶⁵⁰

The Committee of Ministers recommends that the legal framework governing public service broadcasting organizations should clearly stipulate editorial independence and institutional autonomy in definition of programme schedules, editing and presentation of news and current affairs and not least in recruitment, employment and staff management.⁶⁵¹ The public service has to fend off pressures on many fronts, if it is to retain its objective and survive.

2.4.2 Access to Broadcasting

One of the most difficult questions concerning the much-desired balanced dialogue in democracy concerns open access to broadcasting, reconciling the claims of those who demand access with the importance of using broadcasting as an efficient method of communication. Given the wide impact of the audio visual media, which the Court recognizes in particular, the question is whether those controlling access to broadcasting are obliged to tend to some form of balancing in allowing access or whether they have full discretion in these matters.⁶⁵² It is well established in Convention jurisprudence that Article 10 does not give a citizen or private organization a 'general and unfettered right' to put forward an opinion through the media unless in 'exceptional circumstances'.⁶⁵³ Such circumstances may occur for instance if one political party is excluded from broadcasting facilities at election time while other parties are given broadcasting time.⁶⁵⁴

The European Convention on Transfrontier Television entails a right to reply provision in Article 8 of the 1998 Protocol amending the Convention from 1989. Article 9 of the same Convention provides access to the public to major events, where each party to the Transfrontier Convention 'shall examine the legal measures to avoid the right of the public to information being undermined due to the exercise by a broadcaster of exclusive rights for the transmission or retransmission . . . of an event of high public interest'. This provision underlines the importance of the right

⁶⁴⁹ Icelandic Broadcasting Act 1985, no. 68, 27 June 1985; III. Ríkisútvarpid (The National Broadcasting Service).

⁶⁵⁰ Hoffman-Riem, *supra* note 9; p. 123.

⁶⁵¹ Appendix to Recommendation No. R (96) 10 *Guidelines on the guarantee of the independence of public service broadcasting*.

⁶⁵² *Informationsverein Lentia and Others v. Austria*, *supra* note 271, § 38.

⁶⁵³ Application no. 25060/94, *supra* note 111.

⁶⁵⁴ Application no. 4515/70, *X and Association Z v. the United Kingdom*, Commission's decision 12 July 1971, ECHR Yearbook 1971, p. 538; Application no. 25060/94, *supra* note 111, p. 73; Application no. 9297/81, *X Association v. Sweden*, Commission's decision 1. March 1982, DR 28, p. 204.

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to receive but does not entail a general access right for minorities to voice their differences or bring up new viewpoints and hence, *their* right to receive.

Access to the media would seem to serve both the right to impart and also the right to receive because readers and audiences have a right to be exposed to different political perspectives.⁶⁵⁵ Article 10 guarantees the right to impart and the right to receive but neither broadcasting stations nor newspapers are open to all. The Commission declared inadmissible an application under Article 10 from an independent candidate for the European Parliament who was not allowed to make a party political broadcast.⁶⁵⁶ The complaint concerned the BBC's threshold requirement of a minimum percentage of seats in an election before a party could qualify for an election broadcast. The Commission recognized that airtime is limited and thus the threshold was compatible with Article 10 § 2 to ensure that airtime was spent on political views that commanded some public support.⁶⁵⁷

In the case of *Purcell v. Ireland*,⁶⁵⁸ journalists and producers employed by Radio Telefis Eirann (RTE) complained that an order restricting live interviews with members of Sinn Fein constituted an unjustifiable interference with freedom of expression and was a serious infringement with their right to impart information to the public in a democratic society and of their right to receive information without unnecessary interference by public authority. The Commission noted that the Irish broadcasting ban on live interviews with spokesmen of Sinn Fein, a legally existing organization (albeit not denied that it was an integral part of the IRA an illegal organization), had a legitimate aim under Article 10 § 2 in conjunction with Article 17. In assessing whether the ban was necessary it referred to the 'duties and responsibilities' inherent in the exercise of freedom of expression and

that the defeat of terrorism is a public interest of the first importance in a democratic society . . . and where advocates of violence seek access to the mass media for publicity purposes it is particularly difficult to strike a fair balance between the requirements of protecting freedom of information and the imperatives of protecting the state and the public against armed conspiracies seeking to overthrow the democratic order, which guarantees this freedom and other human rights.⁶⁵⁹

The Commission referred to the 'immediate' impact of television as opposed to the print media and the limited possibilities of correcting or qualifying broadcasting material, as opposed to the print media. The 'immediacy factor' was too much of a risk. Even conscientious journalists could not control it within the exercise of their professional judgment.⁶⁶⁰

⁶⁵⁵ *Erdogdu and Ince v. Turkey*, *supra* note 29, § 54.

⁶⁵⁶ Application no. 24744/94, *Huggett v. the United Kingdom*, DR 82-A.

⁶⁵⁷ *Ibid.*, p. 101.

⁶⁵⁸ Application no. 15404/89, *supra* note 213.

⁶⁵⁹ *Ibid.*

⁶⁶⁰ *Ibid.*

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Jörg Haider complained under Article 10 that the way in which the ORF (Austrian Broadcasting Corporation) reported on news events in general and on him in particular did not meet the requirements of plurality of information and objectivity as required by society.⁶⁶¹ The Commission dismissed Haider's complaint under Article 25 submitting that he did not qualify as a victim since complaining as a representative for the people in general constituted '*actio popularis*'.

The limited access to broadcasting has led to speculation that the right protected under Article 10 in the democratic context is of little value if those who wish to express their ideas are denied access to either publicly or privately owned channels or communication. There is no real freedom of expression if one is prevented from speaking to one's target audience, or at least those who wish to hear; hence those without access to the media are not really free to express their views.⁶⁶² In order to make up their mind, voters need to be exposed to more views than those of the party they intend to vote for or end up voting for. That is the antecedent reasoning for ranking political debate higher than most other categories of expression. Democracy is implausible without plurality, broadmindedness and tolerance, its characteristic features.⁶⁶³ Undermining political pluralism, which along with the rule of law 'forms the basis of all genuine democracy' may constitute an infringement of Article 10.⁶⁶⁴ The Court is willing to safeguard outspoken criticisms, provided it does not incite violence against the state or other citizens.

The state, being the ultimate guarantor of such diversity must intervene when monopolies prevent political change.⁶⁶⁵ Broadcasting regulation within the member states that requires a fair portrayal of opposing political views is an attempt to guarantee such diversity.⁶⁶⁶ Those requirements entail access quotas. The printed press is however exempt from any such demands in domestic legislation.

⁶⁶¹ Application no. 25060/94, *supra* note 111.

⁶⁶² D. Gomien, 'Pluralism and Minority Access to the Media' in Rosas and Helgesen (eds.), *supra* note 501, p. 50; J. Donnelly and R. E. Howard, 'Assessing National Human Rights Performance: A Theoretical Framework', 10 *Human Rights Quarterly*, 1988, p. 51.

⁶⁶³ *Handyside v. the United Kingdom*, *supra* note 87, § 49.

⁶⁶⁴ Committee of Ministers, Declaration and Programme On education for Democratic Citizenship, Based on the rights and Responsibilities of Citizens (Adopted by the Committee of Ministers on 7 May 1999 at its 104th session).

⁶⁶⁵ *Informationsverein Lentia and Others v. Austria*, *supra* note 271, § 38.

⁶⁶⁶ Cf. Article 15 of the Icelandic Broadcasting Law No. 68/1985 provides that the National Broadcasting Service (RUV) is an independent organization owned by the state. According to Article 15 § 2 the RUV must observe the principles of democracy and human rights and freedom of speech and opinion. According to Article 15 § 3 it is to provide general news service and be the sounding board of different views and topical matters of public concern. According to Article 15 § 4 radio programmes must be aimed at the variety of Icelandic society and provide all the service technically possible and to the benefit of the people.

According to Article 9 of the General Broadcasting Act No. 5317/2000: Broadcasting stations must observe democratic principles in all their conduct. They must respect freedom of expression and present in their programmes diverse views in controversial matters. If, however, a broadcasting station has received its license on the professed purpose to advance a

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According to Dirk Voorhoof, a well-known authority on Article 10, the modern state within the Convention's sphere has a kind of 'promotional obligation' in the human rights field, which obliges it to go beyond mere abstention and to take positive action.⁶⁶⁷ It should be noted, however, that while it is the duty of the contracting party to take reasonable and appropriate measures to protect and ensure the rights and freedoms of the Convention, the national authorities have a wide discretion in the choice of means to be used. Enforcing access to the media is theoretically and practically difficult. The right of access of minorities has been labelled an 'empowerment right' as it increases participation in the democratic procedure.⁶⁶⁸ The Parliamentary Assembly recommends on such premises that governments of member states adopt a law on gender equality in the media.⁶⁶⁹ Granting the female population equal access to publish their views is an urgent matter. Mandating the media to open its gates may, however, be problematic in essence and practice. It may however be necessary to legislate on the matter if equality between men and women is to be achieved *de facto*.⁶⁷⁰ Evidently the positive duties imposed on the media entail a demand that could be interpreted as involving a gender-balanced portrayal of public issues, which reciprocally requires equal representation of the sexes.⁶⁷¹ The need for a balanced portrayal of gender-based views is discussed in chapter 3 in relation to opinion-formation in society and in the reciprocal silencing effect of discriminatory journalism.

Access rights have the same aim as regulation of media ownership, i.e. of broadening the perspective within the media by opening it up to different viewpoints.⁶⁷² Diversity will not be achieved unless the media is balanced in representing the viewpoint of different gender and ethnic minorities and different social and economic classes. There are tremendous access disparities at present that have an impact on the public debate. The media has been accused of not being representative enough by neglecting minority viewpoints.⁶⁷³ Those with financial or political power usually have greater access to the media than those whose voices might make a difference for democracy, if heard. The right to receive involves

particular cause, it is exempt from the obligation of presenting views that go against this cause.

⁶⁶⁷ Voorhoof, *supra* note 63, p. 55.

⁶⁶⁸ Gomien, *supra* note 662, p. 50.

⁶⁶⁹ Parliamentary Assembly Doc. 9394 (25 March 2002): *Images of Women in the Media*.

⁶⁷⁰ Cf. Declaration on Equality of Women and Men (Adopted by the Committee of Ministers on 16 November 1988 at its 83rd Session).

⁶⁷¹ At present, there is no woman in the position of editor-in-chief, assistant editor or director of broadcasting in the Icelandic news media, a situation, which is bound to be to the disadvantage to the female population. Different gender fosters different viewpoints especially in light of the unequal situation of the sexes and the ongoing struggle for equality. Cf. *infra* Chapter 3 for further discussion on the topic.

⁶⁷² Cf. Recommendation No. R (99) 1 of the Committee of Ministers *on measures to promote media pluralism* (Adopted by the Committee of Ministers on 19 January 1999 at the 656th meeting of the Ministers' Deputies).

⁶⁷³ Application no. 25060/94, *supra* note 111.

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gaining access to media coverage to prevent chauvinistic, ideological and religious biases. The ‘duties and responsibilities’ referred to in Article 10 § 2 have been seen as finding even a clearer expression in Article 17 of the Convention.⁶⁷⁴ Article 17 may be invoked both by an individual against a state, and a state against private parties in society to justify interference with freedom of expression rights. According to that provision no one may invoke the right to freedom of expression to attack the free functioning of democratic institutions.⁶⁷⁵ The power in Article 17 is available to exclude groups from participation in politics and the public debate if their agenda involves an interference with human rights. It is, however, questionable to apply it with regard to access to the public sphere above the duties inherent in Article 10 § 2, which require that those exercising these rights do not do so to curtail the dissemination and discussion of information concerning significant issues in society, setting back democratic solutions and the objectives of the Convention.⁶⁷⁶

Related to access rights, but distinct as well, is the claim that individuals be given an opportunity to reply to coverage, which is unfair. The right to reply refers to factual allegations in the press. The primary importance of this right is remedial, to redress wrongs to the individual.⁶⁷⁷ Various jurisdictions have incorporated statutory rights to reply in their mechanisms for regulation of the media.⁶⁷⁸ The right to reply centres upon individuals or legal persons who can claim injury or financial loss if the impugned media coverage is not corrected. The objective of this right is to rectify individual cases rather than serve the democratic principles requiring diversity of views. Icelandic law on the right to print includes a provision on the duty of rectification.⁶⁷⁹ In Sweden there is no legal right to reply. The matter is left to the Swedish Press Council to regulate according to its Code of Ethics. A Press Ombudsman also provides some protection.⁶⁸⁰ The right to reply is firmly secured with regard to broadcasting in the Convention on Transfrontier Television, Article 8.

The US Supreme Court has confirmed that the right to reply with regard to the print media is unconstitutional thereby preventing legislative attempts to grant any access rights to print journalism. The case of *Miami Herald v. Tornillo*,⁶⁸¹ introduced a distinction into the law between broadcasting and publishing.⁶⁸² The case had arisen in Florida under the state’s ‘right to reply’ statute. The Miami Herald had refused to print a reply by a political candidate, Pat Tornillo, to a blistering

⁶⁷⁴ E/CN.4/Sub.2/1991/9.

⁶⁷⁵ Application no. 250/57, *KPD v. Federal Republic of Germany*, 1 Yearbook ECHR 222, at 223 (1957).

⁶⁷⁶ *Handyside v. the United Kingdom*, *supra* note 87, § 49.

⁶⁷⁷ Cf. Barendt, *supra* note 622, p. 157.

⁶⁷⁸ P. J. Humphreys, *Mass Media and Media Policy in Western Europe*, 1996 Manchester University Press, p. 58 (Austria, France, Germany, Netherlands, Norway, Spain). This aspect is discussed *infra* Chapter 6 in relation to owner’s discretion over his property in conjunction with the rights protected under Article 10.

⁶⁷⁹ Law on Printing 1956 No. 57 10 April, chapter VI Duty of rectification of publisher/editor.

⁶⁸⁰ P. J. Humphreys, *supra* note 678, p. 58.

⁶⁸¹ *Miami Herald Publishing v. Tornillo*, *supra* note 24.

⁶⁸² O. M. Fiss, *supra* note 52, p. 63.

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editorial on him. When the politician asked for his right to reply in the column of the Herald, his request was denied, so he sued. The Florida Supreme Court reversed a lower Court's decision, which had ruled in favour of the newspaper, maintaining that the Florida right to reply statute furthered 'the broad societal interest in the free flow of information'. The Supreme Court of the United States lastly struck down the Florida statute maintaining that even if a newspaper would face no additional costs to comply with compulsory access law and would not be forced to forgo publication by the inclusion of a reply, the Florida statute failed to clear the barriers of the First Amendment because of its intrusion into the function of editors. The Supreme Court held that a mandatory right to reply contravened editorial control and judgment. In short, statutory access rights to print journalism were unconstitutional because such legislation required publishers to use their resources to promote opinions they did not share.

2.4.3 The Divergent Legal Treatment of Broadcasting and Print Media

Regulating broadcasting because the spectrum is a finite and very limited resource has seemed reasonable. Furthermore it was natural to think of the spectrum as belonging to the public.⁶⁸³ Digitalization in television broadcasting means a final end to frequency scarcity, the most long-standing justification for regulation of broadcasting.⁶⁸⁴ The convergence of the telecommunications, media and information technology sectors, frequently referred to as 'multimedia' is an area hitherto treated by the law separately.⁶⁸⁵ Telecommunications services, previously provided by a public monopoly, are now in the hands of private operators in a competitive market. Now digital technology is calling into question the traditional approach to broadcasting regulation, as convergence opens up the scope for regulatory bypass. Media companies are less interested in owning another broadcasting company or a newspaper and more interested in gaining control over key programming sources.⁶⁸⁶

The print media is not subject to any licensing. Only criminal and civil law limit the freedom of the printed press while broadcasters are additionally subject to a number of special restrictions. A company that wants to operate a channel must obtain a license. Secondly, programme restrictions go beyond the constraints imposed by law, they must adhere to positive programme obligations, show impartiality and fairness in presenting unlike political views. A newspaper is free to support any political party, although it may in theory not disregard 'matters of legitimate public concern' in line with the positive duties of the Public Watchdog (discussed in chapter 4). The public function of the media is increasingly acknowledged, in particular its significance in the periods preceding elections. The Committee of Ministers has recommended that member states resort to regulatory

⁶⁸³ J. Lichtenberg (ed.), *Democracy and the Mass Media*, 1995 Cambridge University Press (first published 1990), p. 4.

⁶⁸⁴ Feintuck, *supra* note 7, p. 24.

⁶⁸⁵ Barendt and Hitchens, *supra* note 628, pp. 286–288.

⁶⁸⁶ *Ibid.*, p. 284.

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measures on media coverage during elections. The recommendation emphasized the fundamental principle of editorial independence, which assumes a special importance in election periods. Regulatory measures may not, however, interfere with the editorial independence of the printed press.⁶⁸⁷ The recommendation distinguishes between broadcast media and print media in this sense, confirming the fixed view that TV audiences are more credulous than readers of newspapers. The emphasis on a certain period over another illustrates the perception that reporters are enfeebled during election periods or that external forces are more encroaching during such periods (which has a point). The strife for political power is, however, not confined to delimited cycles.

In the above recommendation the 'significant differences, which exist between the print and broadcasting media' are accentuated. An appendix to the recommendation spells out that the regulatory framework on media coverage of elections should not interfere with the editorial independence of newspapers or magazines or with their right to express any political preference.⁶⁸⁸ It is crucial in this context to distinguish between editorializing and news analysis. Expressing political preference in editorials may shed light on the bias of the respective newspapers but if it goes as far as tainting the whole political landscape, omitting facts that may work to the opposite of the paper's political preference, then the press is not tending to its duties and responsibilities. Exempting newspapers from being fair during election periods because the 'news coverage' is on paper and not on the screen seems old fashioned, especially in light of the fact that newspaper-journalism may be a content source for other forms of communication such as the Internet. In a declaration from the Committee of Ministers on a European policy for the new information technologies, the need for a clear regulatory framework is emphasized in light of the objectives that freedom of expression is to promote.⁶⁸⁹ The approach to the Internet is akin to that applied to the printed press, e.g. only negative requirements.⁶⁹⁰

Attempts to control the Internet, which has no physical existence, no centralized storage location or control point linking individuals, corporations and governments around the world seem futile. It is out of the reach of a single entity to regulate the information conveyed on the Internet.⁶⁹¹ Imposing public service ethos on the Internet would probably be viewed as an infringement of freedom of expression. Yet, as technological convergence illustrates, the focal point of any potential regulatory measure is the programming source, e.g. the journalist. As the differences between the media dissolve, the need to establish a regime that recognizes the rights

⁶⁸⁷ Recommendation (99) 15 *on Measures Concerning Media Coverage of Election Campaigns*, (Adopted by the Committee of Ministers on 9 September 1999 at the 678th meeting of Ministers' Deputies).

⁶⁸⁸ *Ibid.*

⁶⁸⁹ Adopted by the Committee of Ministers on 7 May 1999, at its 104th Session.

⁶⁹⁰ Cf. *infra* 2.5.1 Economic Disparities and the Right to Receive

⁶⁹¹ R. Wacks, 'Privacy in Cyberspace: Personal Information, Free Speech and the Internet' in P. Birks (ed.) *Privacy and Loyalty*, 1997 Clarendon Press 1997, pp. 93, 95–96, 97, 102.

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of the receivers and operators in accordance with the principles of Article 10 becomes more apparent. If the two extremes are close, the impact of the Internet and the old printed press on society are not worlds apart. Graham, writing on broadcasting policy and the digital revolution, emphasizes that from the public interest perspective the source of information must be trusted. He fears that will not be the case if operation of the Internet is left to the property interests of the market.⁶⁹²

The recurrent notion in light of the complex technological environment and the need for a coherent legal framework is the public trustee role associated with broadcasters who are not public bodies but non-paying recipients of administratively awarded spectrum rights.⁶⁹³ The prohibitive costs and the threat of high concentration of ownership or other signs of market failure are also seen as legitimate reasons for regulating broadcasting, even though prohibitive costs are also an obstacle in founding a newspaper. The scarcity principle applicable to broadcasting may seem equally applicable to newspapers, as pointed out by Eek in his report of 1953, an argument that still holds: 'It is a fact that only a few individuals can exercise the right of starting a newspaper. This right is monopolized by the very rich.'⁶⁹⁴ The economic environment is characterized by scarcity of basic resources essential for publishing a newspaper (print, equipment, paper, distribution mechanisms).⁶⁹⁵

According to Isaiah Berlin, 'everything that is scarce should be distributed as equally as possible unless there is strong reason against it'.⁶⁹⁶ Material inequalities affect the democratic process when 'the marketplace of ideas' or the 'public sphere' is dominated by the wealthy. Newspapers are in a way 'licensed' in a largely equivalent but simply less visible way than broadcasting. Newspapers are given explicit, exclusive property rights by government, and these exclusive rights enable newspapers to exclude other people, as pointed out by Sunstein.⁶⁹⁷ The price of owning a newspaper is prohibitive to all but a very few – albeit the legal right to establish a newspaper is open to all (except perhaps aliens as Article 16 of the Convention allows the contracting parties to impose restrictions on the political activities of aliens). It is much more costly to set up a national newspaper than a local community radio station and the number of newspapers that can survive in a given area is extremely small. Yet, anybody rich enough to own a newspaper can use it to publish what he wants, as long as it does not go beyond the controls

⁶⁹² A. Graham, 'Broadcasting Policy and Digital Revolution' in J. Seaton (ed.), *Politics and the Media: Harlots and Prerogatives at the Turn of the Millennium*, 1998 Blackwell Publishers, p. 30, at pp. 36–37.

⁶⁹³ S. Holmes, 'Liberal constraints on private power' in Lichtenberg, (ed.), *supra* note 683, p. 45.

⁶⁹⁴ Eek, *supra* note 274, p. 41.

⁶⁹⁵ C. J. Hamelink, *Preserving Media Independence: Regulatory Frameworks*, 1999 UNESCO publishing, p. 12.

⁶⁹⁶ I. Berlin, *supra* note 460, p. 95.

⁶⁹⁷ Sunstein, *supra* note 632, p. 109.

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imposed by criminal and civil law. The publisher of a newspaper will not be held liable if he does not want to take into consideration the diversity of viewpoints or to appeal to the diversity of the readership.⁶⁹⁸ Shunning the public interest in such a manner contravenes Article 10 jurisprudence. There are, however, no remedies for individuals or the public to claim such a violation, as the Convention does not allow scope for '*actio popularis*'.⁶⁹⁹

Editorial independence, responsible journalism, pluralism and diversity of views is recurrently stressed when the Council of Europe organs urge the member states to promote and develop a media policy in harmony with Article 10. In the Court's case-law, as will be frequently reminisced throughout this study, freedom of the press is of no less democratic value when applied to the printed press. The Public Watchdog role is equally applicable to newspapers as it is to broadcasting. It may even be argued that it is more significant in the case of newspapers in tending to their positive duties of informing the public with analysis of the political situation, setting things in context and interpreting the complex realities of modern public life. Such complex journalism is not practiced within the broadcasting sphere to the same extent, with short cut reporting in the form of news and current affairs often summarized in shallow discussions rather than profound analysis which may appear in print. When the Court accentuates the impact of broadcasting it is usually preoccupied with the negative requirements of Article 10 duties. The threat stems from the immediate impact that television has when programmes overstep the bounds set forth in paragraph 2 and the alleged vulnerability of sections of society that are more receptive to harmful speech.⁷⁰⁰ It seems lurking in the air of courtrooms as widely as anywhere that the divergent legal treatment is attributable to a different group of receivers, where audiences need protection taken on the whole but readers do not, unless they can claim to be victims of violations in their private capacity.

The complete autonomy that newspapers have unlike broadcasting – at least in theory – is not righteous. The divergent legal treatment is furthermore not in harmony with Article 10 § 2. In a recent case against Switzerland concerning political advertising the Court disputed the need to distinguish between the different media, broadcasting and the printed press, submitting that 'while the domestic authorities may have had valid reasons for this differential treatment, a prohibition

⁶⁹⁸ In judgment No. 151/1999, the Supreme Court of Iceland provided that according to the law on The National Broadcasting Service (RUV) No. 68/1985 the RUV is commended to be the sounding board of public debate on topical matters of public interest. Due to this legally ascribed role of the RUV it must present candidates for Parliamentary elections and their policies, when possible. The RUV must unequivocally tend to equality in its conduct as Article 15 § 2 of the broadcasting law entails. That obligation does not merely entail equality between the concerned candidates and political forces but likewise must take into account the receivers of the radio programs. (In this case the appellant was the Society of the Deaf.)

⁶⁹⁹ Cf. Application no. 25060/94, *supra* note 111.

⁷⁰⁰ *Jersild v. Denmark*, *supra* note 84, Commission's report 8 July 1993, dissenting opinion of Mr. Gaukur Jörundsson joined by Sir Basil Hall and Mr. Geus, p. 40.

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of political advertising, which applies only to certain media, and not to others, does not appear to be of a particularly pressing nature'.⁷⁰¹

Although the Court has not scrutinized the economic reasons for newspaper scarcity the right to receive from a plurality of sources is also directed to the printed press.⁷⁰² It seems odd in light of this that the duties and obligations legally ascribed to the press were formulated primarily with regard to newspapers as evident from the landmark decision of *Sunday Times* in 1979 and as the Court clarified later, hence providing that the press cannot shun the public interest by simply focusing on sensational matters with stupefying effects.

[I]t is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'. *Although formulated primarily with regard to the print media, these principles doubtless apply also to the audiovisual media.*⁷⁰³

The Court does not assume that criminal law deterring the press from hurting others will automatically provide enough guidance for it in its otherwise unsupervised role of the Public Watchdog. Safeguards that must be afforded to the press are of particular importance. Due to the nature of the cases before it the Court has never had to scrutinize the question of *how* the press is to fulfil its obligation towards the public due to a lack of editorial independence. It simply assumes that the press adheres to this responsibility while it acknowledges that it may be necessary for broadcasting to be subject to editorial regulation such as impartiality requirements that not only have roots in technological reasons but also in political ones.⁷⁰⁴

Economic manipulation of the information flow has not been taken adequately into consideration. Control over the content of information resides increasingly in the constraints imposed by the market. The Parliamentary Assembly has, however, often touched upon this issue, stating in March 2001 that precarious economic conditions and a low level of democratic culture are themselves a threat to freedom of expression, since they risk preventing the media from carrying out its role as a Public Watchdog and transforming it into 'an instrument for settling scores' and 'mercenaries acting upon orders'. New challenges are seen as sacrificing quality journalism to '*infotainment*' with sensationalist stories, '*advertorials*' and 'Big Brother-style' programmes.⁷⁰⁵

⁷⁰¹ *Vgt Verein gegen Tierfabriken v. Switzerland*, *supra* note 212, § 74.

⁷⁰² *Informationsverein Lentia and Others v. Austria*, *supra* note 271, § 38.

⁷⁰³ *Jersild v. Denmark*, *supra* note 84, § 31. Emphasis added. Court's citations omitted.

⁷⁰⁴ Cf. *Groppera Radio AG and Others v. Switzerland*, *supra* note 79.

⁷⁰⁵ Parliamentary Assembly Doc. 9000, 19 March 2001, *Freedom of Expression in the media in Europe*; Report Committee on Culture, Science and Education. (Rapporteur: Mr. Guyla Hegyi.)

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Freedom within the press presupposes editorial discretion from interference of outsiders in the content of information.⁷⁰⁶ Licensing broadcasting is in agreement with Article 10 § 1. The impartiality requirements that broadcasting must meet in most member states does not, however, guarantee editorial independence. The newsrooms of the most influential broadcasting stations may be under similar external financial and political pressures as the editorial offices of most newspapers. These ‘prior restraints’ are insidious and not prescribed by law although it is not excluded that some broadcasting acts may provide scope for public interference and could hence be contested under Article 10 § 1.⁷⁰⁷ The National Broadcasting Council in Iceland is composed of seven members elected by parliament according to the representational principle. The minister of education appoints the chairman and vice-chairman from this highly political body, which the law stipulates shall determine in substance the programming of the National Broadcasting Service within the budgetary confines. The members are not drawn from the ‘great or good’⁷⁰⁸ but from among fellow partisans of those in power. During the drafting stages of the ICCPR and the Convention the problem of external controlling influence over reporting was recognized. The text adopted in Article 19 of the ICCPR bears testimony to the effort of preventing private restraints.⁷⁰⁹ The threats inherent in efforts to control the media have not diminished in the half century since the adoption of the Convention and the slightly younger ICCPR. These instruments did not explicitly tackle the manifold ways in which material inequalities inhibit the press, as does the ACHR in its Article 13 § 3 prohibiting private control as well.⁷¹⁰ Social, technological, economic and political changes have since educed the need to take into account the latent and potential threats to journalistic freedoms when regulatory measures are contemplated.

2.5 THE NEW INFORMATION TECHNOLOGIES AND DEMOCRACY

The concept of the ‘information society’ did not originate within the framework of the Council of Europe but within the EU where transformation in telecommunication, liberalization, explosive growth of the Internet and a growing tide of mergers between computer, media and telecommunications technologies led to the development of this concept. While evidently a response to the economic and technological considerations, the concept seems to embody the intention of the right to receive in the democratic context. The objective of the information society embraces the notion of ‘effective political democracy’ with increased emphasis on

⁷⁰⁶ Council of Europe Steering Committee on the Mass Media (CDMM). Group of Specialists on Journalistic Freedoms and Human Rights (MM-S-JF) (94) (13) Def.

⁷⁰⁷ Cf., Icelandic Broadcasting Act, no. 68/1985, law on the National Broadcasting Service, Chapter III, Article 19.

⁷⁰⁸ Cf. Phrasing of Pilkington Report, 1962, p. 123 on the composition of the Board of the BBC. Hoffman-Riem, *supra* note 9, p. 69.

⁷⁰⁹ See *supra* p. 40.

⁷¹⁰ See *supra* chapter 1.2 A Comparison with Other Instruments

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the additional dimension of economic and social development.⁷¹¹ The origin of the information society is to be found in the technological advances of recent years, for example in the field of digitalization, data compression and advanced telecommunications networks, of which the outstanding example is the Internet.⁷¹²

The objective of the information society on the EU agenda was seen as opening up vast possibilities for economic progress and employment. The New Information Technologies (NITs)⁷¹³ evolve quite logically from earlier technology where innovations and further refinements are fusing existing technologies, diminishing size, increasing speed and expanding capacity.⁷¹⁴ In 1941 Herbert Marcuse wrote an essay called 'Some Social Implications of Modern Technology' wherein the author was not focusing on technology as such but instead as 'an instrument for control and domination'.⁷¹⁵ Each time a new medium comes along great hopes are raised. The lesson of history is, according to media historian Barnouw, that every new medium provides new opportunities for selling as well as for education, for monopolists as well as for democracy, and for abuse as well as for benefit.⁷¹⁶ Society, not technology, is the starting point for the Council of Europe. A High Level Expert Group, in a report for the EU Commission on the information society in 1997 pointed out 'the technology itself is neither good nor bad, it is the way in which any technology is used, which determines both the nature and extent of its benefits'.⁷¹⁷ The term 'cohesion' is frequently referred to in this expert report where the focus is on the importance of individual participation in the emerging information society. Ideally the information society should help to reduce exclusion, not increase it.⁷¹⁸ This is why the public service ethos is described as having the common denominator, across various models, of the commitment to delivering 'a wide ranging quality service to the whole population'.⁷¹⁹

⁷¹¹ Approximately four million Europeans employed in the content sector of the multimedia.

⁷¹² Opening speech Dr. Paul Weissenberg, Head of Cabinet of Dr. Martin Bangemann, Member of the European Commission: Info 2000 Conference in Stockholm.

⁷¹³ The term Information Communication Technologies (ICTs) is used to describe the same phenomenon. For clarity reasons the term NITs is used here to be in harmony with the usage on the Council of Europe agenda. Cf. Declaration of the Committee of Ministers on a European Policy for New Information Technologies, (Adopted by the Committee of Ministers on 7 May 1999, at its 104th session).

⁷¹⁴ C. J. Hamelink, *The Ethics of Cyberspace*, 2000 Sage Publications, p. 23.

⁷¹⁵ H. Marcuse, 'Some Social Implications of Modern Technology' in Arato and Gebhard (eds.), *The Essential Frankfurt School Reader*, 1978 Blackwell, Oxford, p. 139.

⁷¹⁶ S. Lohr, 'The Great Unplugged Masses Confront the Future' in *The New York Times*, 21. 4. 1996, § 4 at 1, quoting Erik Barnouw, Professor Emeritus at Columbia University and media historian.

⁷¹⁷ Final policy report of the high-level expert group, *Building the European Information Society for us all*, April 1997 (Luc Sohete chairman of the Group), p. 19.

⁷¹⁸ *Ibid.*, p. 55.

⁷¹⁹ P. J. Humphreys, *supra* note 678, p. 117.

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The subject matter of the information society is the ‘knowledge-based-society’,⁷²⁰ based on the know-how and wisdom of people who must be put in charge of the information rather than it being used to control them.⁷²¹ The aim of the information society based on the initiative and active participation of the citizens seems like a logical culmination of the process starting in the 18th century, with Madison’s words, where people who aim to be their own governors must arm themselves with the power, which knowledge gives. The Internet offers the potential of increased citizen access to the media in terms of input, as it consists of a network of computer networks that span the world, where literally millions of users are providing and assessing content on a daily basis.⁷²²

The Court has acknowledged the need to overcome ‘ignorance’ by actively seeking information.⁷²³ With regard to the NITs the Court has held that Article 10 applies not only to the content of information but ‘also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information’.⁷²⁴ The Commission had prior to that held that ‘without such equipment the right under Article 10 of the Convention to receive such programmes could not be effectively enjoyed’.⁷²⁵ The Council of Europe organs have incorporated the term of the ‘information society’ into their own rhetoric as it embodies the right to receive.

The Internet is the first medium where global distribution is inevitable. This worldwide computer network gives rise to new legal issues, especially in public international law, particularly on freedom of expression, discriminatory content, pornography, paedophilia and racism, violence and crime, the rights of the child, universal access, intellectual property and fair use, protection of privacy, personal data security and the overall Article 10 objectives of promoting democracy by contributing to pluralism, tolerance and broadmindedness and protecting individual dignity. An important feature of the online environment is that, even though content can be assessed from one computer connected to the network, it may in fact be

⁷²⁰ Previous term used was ‘learning society’ which has now been replaced by ‘knowledge-based-society’, cf. Council of Europe Committee of Ministers *Declaration on Cultural Diversity* (Adopted by the Committee of Ministers on 7 December 2000 at the 733rd meeting of the Ministers’ Deputies).

⁷²¹ First Reflections of the High Level Group of Experts set up in May 1995 to examine the social and societal changes associated with the Information society, established by Commissioner Flynt, led by professor Luc Soete. <http://www.ispo.ece.be/hleg/hleg-ref.htm>.

⁷²² Feintuck, *supra* note 7, p. 188.

⁷²³ *Open Door and Dublin Well Woman v. Ireland*, *supra* note 82; Cf. dissenting opinion of Judges Wildhaber et al., in *Odievre v. France*, application no. 42326/98, judgment 13 February 2003 (not yet published), referring to the unilateral power of one party to condemn the other to lifelong ignorance by refusing to impart information if there are no legal means to challenge such decision.

⁷²⁴ *Autronic AG v. Switzerland*, 22 May 1990, Series A no. 178, § 47.

⁷²⁵ *Ibid.*

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stored on a number of different computers or 'servers' which need not be in the same jurisdiction as the individual assessing the material.⁷²⁶

2.5.1 Economic Disparities and the Right to Receive

In light of the proliferation of NITs, a legal problem facing the member states of the Council of Europe is if this evolution calls for positive measures to guarantee that large sections of society are not deceived in their opportunities to benefit from the progress. The right to receive is unquestionably compromised by social and economic inequalities rendering the classical division of civil and political rights from economic and social rights obsolete.⁷²⁷

The Internet, a market-driven phenomenon, has been perceived of as signifying the entrance into a new era of democracy of the public, a truly effective political democracy, where the NITs play the role of revitalizing the citizenry. In principle it is acknowledged that to actively enjoy this right requires certain economic and social conditions. Participation in cyberspace requires electricity, telephone, infrastructure, computer, software know-how, literacy and a certain standard of living.⁷²⁸ The emergence of the NITs has thus led to speculations on 'balkanization' within society, where citizens are not becoming more powerful but more manipulated and controlled.⁷²⁹ Despite an increased volume of available information more people may know less. Control over and access to advances in NITs are very unevenly distributed and the fact that millions of individuals use their private computers does not alter the fact that the management structure of the information industry is not affected by the proliferation of electronic gadgets.⁷³⁰ This adds to worries that the promise of new communication technologies, characteristic of the

⁷²⁶ Gareth Grainger, 'Freedom of Expression and Regulation of Information in Cyberspace: Issues concerning Potential International Cooperation Principles' in *The International Dimensions of Cyberspace Law*, 2000 UNESCO.

⁷²⁷ Even the EU, which is not as concerned with human rights as the Council of Europe, recognizes the interdependence of civil and political rights and economic and social rights as evident from this clause: 'Human rights policies must address the situation of human beings comprehensively. For example, implementing rights such as the right to education, health and social security contributes to the enjoyment of civil and political rights as well. Conversely, promoting economic, social and cultural rights through open public debate requires, *inter alia*, freedom of speech and association, and the existence of political parties and trade unions. Also, all human rights – whether civil and political, or economic, social and cultural – share many common denominators. For these reasons, the Union subscribes to the interdependence and indivisibility of all human rights and rejects efforts to limit the enjoyment of one set of rights on the pretext that priority attention must be given to another.' (EU Annual Report on Human Rights. Adopted by the General Affairs Council in Luxembourg on the 11 October 1999). http://ue.eu.int/pesc/human_rights/main99.asp.

⁷²⁸ Cf. E. De Bens and G. Mazzoleni, 'The Media in the Age of Digital Communication' in D. McQuail and K. Siune, *Media Policy*, 1998 Sage Publications, p. 177.

⁷²⁹ S. Rodotà, *Citizens' participation in an electronic Democracy: building an electronic citizenship*, Info 2000 Conference – Stockholm 27–28 June 1996.

⁷³⁰ Hamelink, *supra* note 714, p. 25.

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information society, will be converted into a source of inequality and impede the enjoyment of civil and political rights.⁷³¹ The NITs are embedded in similar institutional arrangements that determine their social applications as the traditional information process.⁷³² The current institutional arrangements in the field of NITs are the same as with the traditional content providers: market driven, corporate-directed and profit-oriented.⁷³³

According to the Committee of Ministers' recent resolution the main concern is the impact of the NITs on democratic norms within the member states.⁷³⁴ Many doubt that the Internet will stimulate social cohesion. An individual may obtain large benefits from surfing on the Internet, discovering interesting articles but that does not constitute the public sphere, as he is alone in this political search. Such a scene is not in harmony with the promotion of 'social cohesion', which is one of the main objectives of the mass media policy of the Council of Europe. A robust public debate pertaining to current problems requires a degree of common exposure. This requires that all the news media is persistent in covering matters of serious public concern independent of the amount of media outlets. This common focus is threatened when business interests dominate the media environment.

Economic conditions result in 'haves' and 'have-nots' in the information society, as it did in the previous industrial and agricultural societies. In the democratic framework, which this right is to secure, the principle of equal access should also prevail, consistent with the ideal that freedom of expression is to be secured to everyone. This principle entails equal access to the sources of information, which each autonomous individual needs to effectively participate in the democratic process. The joint declaration of three international mandate holders of freedom of expression in November 2001 stressed the 'equal opportunity for all sections of society to access the airwaves'.⁷³⁵

The right to receive as has been reiterated here is in fact a denial of the traditional concept of press freedom as merely a negative liberty from state interference. An effective political democracy means not only equal legal opportunities but also in fact equal economic opportunities. Asbjørn Eide has suggested that instead of focusing on civil rights in a separate category from economic and social rights, a tripartite obligation to respect, protect and fulfil human

⁷³¹ In the USA there are 10 million illiterate and millions of people do not even have a telephone connection. Cf. De Bens and Mazzoleni, *supra* note 728, p. 176.

⁷³² Hamelink, *supra* note 714, p. 27.

⁷³³ Even media mogul Rupert Murdoch, the owner and chairman of News Corporation announced at a general meeting in fall 2000 that firms imparting information through the Internet were depending solely on advertising revenues and that such companies stand a 1% chance of surviving in such an unsteady economic environment. *Morgunbladid*, 29. 10. 2000.

⁷³⁴ Council of Europe Committee of Ministers *Declaration on Cultural Diversity* (Adopted by the Committee of Ministers on 7 December 2000 at the 733rd meeting of the Ministers' Deputies).

⁷³⁵ Joint Statements of International Mechanisms for Promoting Freedom of Expression, November 2001, *supra* note 145.

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rights should be adopted.⁷³⁶ This dynamic interpretation presumes that the realization of human rights develops in three stages from idealization to taking appropriate measures necessary for protection (legislative, administrative, budgetary and judicial), towards the full realization of all human rights independent of their category.⁷³⁷

On the Council of Europe agenda it has been stressed that there can be no democracy where there is not equality.⁷³⁸ A society, where many are under-represented in the various echelons of decision-making in the political, economic and social areas, cannot be termed an 'effective political democracy'. To assess the media's contribution to democracy requires a theory on democracy and the democratic information society. Does the advent of the NITs hold a promise of direct democracy like in Athens? Or is it the beginning of a 'balkanisation' of society where information is superabundant without contributing to the democratic ideal of a public debate but closer to the logic of political populism?⁷³⁹ As Dewey has argued, 'effective intelligence is not an original, innate endowment . . . the actuality of mind is dependant upon the education, which social conditions effect'.⁷⁴⁰ Like education, healthcare, food and housing, access to media information is in effect a prerequisite for a meaningful construct of citizenship.⁷⁴¹ It is evident from the case-law that the public has a right to receive and acquaint itself with information or ideas intended for dissemination.⁷⁴²

The High Level Expert Group warned against leaving the development of the information society to the private sector as advocated in the Bangeman Report, when preparing the way for the information society.⁷⁴³ The NITs offer both potential for positive social change and heavy social risks.⁷⁴⁴ The main concern with the NITs is their role in the aspired information society where old and new forms of 'state and commercial censorship' not only threaten the conventional mass media but also the right to impart and receive through the Internet.⁷⁴⁵ A critical public may yield to an apolitical mass, as Internet material will increasingly obtain commercial sponsorship. Economic power can be abused as easily through the Internet as when converted into political power *via* traditional journalism.

⁷³⁶ Cf. A. Eide, The Right to Food as a Human Right, UN Doc. E/CN.4/Sub.2/1987/23; K. Drzewicki, 'The Right to Work and Rights in Work' in *Economic, Social and Cultural Rights*, in Eide and Rosas (eds.), 2001 Kluwer Law International, p. 226.

⁷³⁷ *Ibid.*

⁷³⁸ Council of Europe, Directorate General of Human Rights; <http://www.humanrights.coe.int/equality>.

⁷³⁹ Rodotà, *supra* note 729.

⁷⁴⁰ Quoted in Hamelink, *supra* note 714, p. 182.

⁷⁴¹ Feintuck, *supra* note 7, p. 192.

⁷⁴² Cf. Application no. 5528/72, *X, Y and Z v. the United Kingdom*, decision 4 March 1976, DR 5, p. 5.

⁷⁴³ Final policy report of the high-level expert group, *Building the European Information Society for us all*, April 1997 (Luc Sohete chairman of the Group), p. 26.

⁷⁴⁴ Hamelink, *supra* note 714, p. 29.

⁷⁴⁵ *Ibid.*, p. 179.

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2.5.2. Lex Internet

As of now it is not clear, which approach the case-law will develop with regard to the Internet.⁷⁴⁶ The notion of a democratic society has increasingly become linked to the possibilities and advantages associated with the NITs but always with reference to the human rights goals inherent in the Convention and the principles of media freedom, starting with pluralism of content, not focusing on the means per se although they are protected as such.⁷⁴⁷ The 2nd Summit of Heads of State and Governments of the Council of Europe stressed in 1999 that the rule of law prevailing in the member states should be extended to the emerging information society. There is no reason to treat information and services produced or distributed with NITs differently than information and services produced and distributed with more conventional means. If illegal information is being distributed or other crimes committed, mechanisms must be developed to bring the perpetrators before the law. On the other hand, what is legal in society generally must be legal in the information networks too. The point is to develop policies maximizing the societal good and minimizing the potentially dangerous effects that the application of the NITs is capable of producing.

Many Internet providers have been guided by the principles of US jurisprudence whereby the Internet should not be regulated at all. The failure of the US Communications Decency Act has reinforced this view.⁷⁴⁸ This attitude is awkward in light of the international obligations spelled out in the ICCPR and the Convention where prohibition of dissemination of racist propaganda and discrimination is as applicable to the Internet as to broadcast and print journalism.⁷⁴⁹

In view of the Internet's enormous potential for disseminating hate propaganda, pornography and paedophilia,⁷⁵⁰ the need for European harmonization of law prohibiting such conduct seems imperative as differences in legal protection within the member states stimulate perpetrators in operating from the country where sanctions are of the lowest denominator.⁷⁵¹ Infringement of intellectual property rights further confirms the need for some regulatory framework. If the Internet is to serve the common good it requires both the protection of intellectual property

⁷⁴⁶ The US Supreme Court ruled unconstitutional the indecency standards that Congress sought to apply to the Internet as part of the 1996 Telecommunications Act. The Court specifically refused to apply the *Red Lion* spectrum scarcity argument to the Internet; *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329 (1997).

⁷⁴⁷ Cf. *Autronic AG v. Switzerland*, *supra* note 724.

⁷⁴⁸ Hereinafter CDA.

⁷⁴⁹ Committee on the Elimination of All Forms of Racial Discrimination, 52nd session, summary record of the 1274th meeting, Geneva, 20 March 1998.

⁷⁵⁰ Cf. Council of Europe Committee of Ministers, Recommendation (2001) 16 *on the protection of children against sexual exploitation* (Adopted by the Committee of Ministers on 31 October 2001 at the 771st meeting of the Ministers' Deputies).

⁷⁵¹ P. R. Rodrigues, 'Cross-border Discrimination: Private International Law, the Denial of the Holocaust on the Internet' in Loenen & Rodrigues (eds.), *Non-Discrimination Law: Comparative Perspectives*, 1999 Kluwer Law International, p. 407.

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(Article 27 of the UDHR) and the free flow of information protected by Article 10 of the ECHR as well as Article 19 of the ICCPR. The rise of the global computer network is destroying the link between the geographical location and the power of local governments to assert control over online behaviour.⁷⁵² An international network of experts on Internet content has highlighted the developments that need to be addressed in dealing with Internet content. To begin with national regulatory frameworks do not meet the requirements of the global nature of the Internet. Prosecutors are under pressure to pursue child pornography and other illegal content on the Internet but lack knowledge and competence in filter technology and, in some countries, lack awareness of who to contact to deal with cases of recognized Internet misuse. Content providers seldom use existing self-rating mechanisms. Internet service providers are not able to control the carried information but are concerned about securing acceptance of the new medium on the Internet. Users lack knowledge and competence in filter technology and in some countries, lack awareness of who to contact to deal with cases of recognized Internet misuse.⁷⁵³

The collection, processing and communication of personal data by means of the NITs, particularly the Internet, are governed by the provisions of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.⁷⁵⁴ The Committee of Ministers in a recommendation to member states for the protection of privacy on the Internet submitted, '[t]hat communications carried out with the aid of new information technologies must also respect the human rights and fundamental freedoms and, in particular, the right to privacy and to secrecy of correspondence, as guaranteed by Article 8 of the European Convention on Human Rights'.⁷⁵⁵

Debates on the possibility of some form of international agreement on the use of the Internet have taken place within the EU, UNESCO, and OECD and in the forum of the Council of Europe. There is, however, strong opposition to any regulation of the Internet among the European Publishers Council, who have urged the Commission of the European Union to accept the fundamental principle that content on the Internet, the World Wide Web and any future electronic networks should be subjected to no greater government control than print publication and this principle should guide any future regulatory model.⁷⁵⁶ Maintaining traditional approaches to regulation, like broadcasting, becomes problematic when the convergence of NITs

⁷⁵² Cf. E. Longworth, 'The Possibilities for a Legal Framework for Cyberspace – including a New Zealand Perspective' in 2000 UNESCO publishing Law of Cyberspace Series, Vol. 1, The International Dimensions of Cyberspace Law, p. 18.

⁷⁵³ Cf. Grainger, *supra* note 726, p. 103.

⁷⁵⁴ ETS No. 108, Strasbourg 1981.

⁷⁵⁵ Recommendation No. R (99) 5 of the Committee of Ministers to member states *for the Protection of Privacy on the Internet Guidelines for the Protection of Individuals with regard to the Collection and Processing of Personal Data on Information Highways* (Adopted by the Committee of Ministers on 23 February 1999, at the 660th meeting of the Ministers' Deputies).

⁷⁵⁶ The European Publishers Council, <http://europa.eu.int/ISPO/convergence>.

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opens up the scope for regulatory bypass.⁷⁵⁷ The general approach seems to be that the accountability of content providers should be achieved by self-regulation and criminal law, which would tackle harmful or discriminatory content on the Internet.⁷⁵⁸ National legislation schemes dealing with criminal or illegal content have to link with those of other countries. Harmonization of law on the international level concerning discriminatory expression has been suggested, but it should not lead to conflict with national fundamental norms or values.⁷⁵⁹ It has been pointed out that the Internet is not a medium in the sense of broadcasting as it does not have the intrusive character. It is more akin to an individual information service. It is neither a public good nor a scarce resource and it is not publicly financed.⁷⁶⁰ Imposing public service ethos on the Internet is not a likely legal solution in the foreseeable future because of its nature as an individual service, akin to a library rather than the public sphere where public opinion is being formed. For this reason a hands off policy approach is likely to prevail, as has been the case with the printed press, which is liable only in breach of the negative duties. Efforts will be made to ensure accountability through self-regulation of content providers and carriers of information, and the existence of technological tools for protection and empowerment of end users.

The European Ministerial Conference on Mass Media Policy held in Krakow in the summer of 2000 emphasized the importance of the advantages and opportunities of the NITs in the democratic context with special reference for the need to protect 'freedom within the media', e.g. the content provider. The Declaration emphasized the fundamental importance for democracy of freedom of expression and information and the free flow of information and ideas and media freedoms, as enshrined in Article 10, including the principle of editorial independence. This declaration furthermore stressed the need to define the common principles in the area of media law and policy. It emphasized the need to enhance the impact of the Council of Europe in inter-governmental activities in the media field at the pan-European level by focusing on fundamental issues, in line with the texts adopted at the 2nd Summit of Heads of State and Governments of the Council of Europe, as well as the declaration of the Committee of Ministers on a European policy for the NITs.⁷⁶¹

The human and democratic dimension of communication is seen as calling for a programme of action on the pan-European level, implanted by the Steering Committee on the Mass Media (CDMM) of the Council of Europe; in co-operation with other relevant Council of Europe bodies and in close consultation with various

⁷⁵⁷ Barendt and Hitchens, *supra* note 628, p. 288.

⁷⁵⁸ Rodrigues, *supra* note 751, p. 404.

⁷⁵⁹ *Ibid.*

⁷⁶⁰ Professor Jan Kabel, Institute for Information Law, University of Amsterdam 'Broadcasting and the Internet', *EU-China Dialogue Seminar on Human Rights*, Beijing 30–31 May 2002.

⁷⁶¹ Declaration of the Committee of Ministers on a European Policy for New Information Technologies (Adopted by the Committee of Ministers on 7 May 1999, at its 104th Session).

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bodies concerned, in particular with professional media organizations. The programme of action relates to activities focusing around finding the balance between freedom of expression and information and other rights and legitimate interests, pursuing pluralism of content and promoting social cohesion. The need to adapt the regulatory framework for the media in light of the ongoing changes is acknowledged. The Committee of Ministers in a declaration on a European policy for the NITs recommends a partnership between the public and private sectors to maximize the benefit of these technologies to their societies.⁷⁶² Member states are urged to promote the broadest possible access for all to the new information and communication services, for example through the development of widespread access points in public places.

An international harmonization of legal rules aimed at Internet transactions will at most cover illegal activities while the vital interests of democratic society will be left to self-regulatory efforts. Creating a uniform law on the Internet entails a number of difficulties. It would need to be 'technology neutral' due to rapid technological advances and a high level document such as an international treaty with a fair degree of generality would not cover many of the diverse and large scale problems posed by the Internet.⁷⁶³ There is moreover no consensus on the Internet as having positive media obligations. Any legal issues concerning the medium confront at most the negative requirements of not overstepping the boundary of harming others with criminal content. Should member states decide to create regulatory bodies concerning certain aspects of the Internet, they must in any case respect Article 10 of the Convention and comply with the terms of Recommendation No. R (2000) 23 on the independence and functions of regulatory authorities for the broadcasting sector, in particular as regards their transparency and independence from political and economic powers and the right to have their decisions reviewed by national courts.⁷⁶⁴ In view of the objectives that a media policy is to pursue, preferably a coherent legal framework in accordance with Article 10, the NITs cannot be distinguished from the conventional media as long as it either promotes or inhibits the information flow.

2.6 CONCLUSION: SOCIAL COHESION AND A COHERENT LEGAL FRAMEWORK?

It seems that no affirmative steps will be taken to include the Internet in a coherent regulatory framework on the media, as it is clearly considered to be a market-driven phenomenon, providing consumer service rather than public service, as an offspring

⁷⁶² Appendix I Declaration of the Committee of Ministers *On a European Policy for New Information Technologies*; Council of Europe, Committee of Ministers, *the Budapest Declaration For a greater Europe without dividing lines* (Adopted by the Committee of Ministers on 7 May 1999, at its 104th session).

⁷⁶³ Cf. Longworth, *supra* note 753, pp. 40–41.

⁷⁶⁴ According to a Draft Declaration on Freedom of Communication by a Group of Specialists on On-line Services and Democracy (MM-S-OD), Strasbourg 15 October 2002.

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of the private sector. The emphasis is on self-regulation and the adoption of national and international measures for the effective investigation and punishment for crimes on the Internet. Maintaining traditional approaches to regulation is, however, problematic in light of the convergence within the media sector. Therefore, it is imperative to abandon the traditional approach of different legal regimes within the news media and place emphasis on securing the reliability of the provider of news, regardless of the form it takes. Those with greater property and wealth, and/or the greater skills that accompany them must be prevented from controlling the NITs to the disadvantage of others' right to receive information of legitimate concern. Rawls describes democracy as 'a regulated rivalry between economic classes and interest groups where disparities in resources are turned into disparities in political influence'.⁷⁶⁵ Even that chance may perish if the media is without a coherent regulatory framework. Social cohesion is an indissoluble aspect of 'effective political democracy', which is unlikely to thrive in an anarchic environment, were large sections are alienated from information relevant for self-governance and democratic participation.

More than half a century after the establishment of the Council of Europe, which made democracy, human rights and the rule of law permanent priorities for post-war Europe, the right to receive in the Convention's jurisprudence has taken on increased weight in relation to freedom within the media.⁷⁶⁶ Evidently the Court attaches more significance to the public interest of the right to receive from the media than in other instances where the right is partly dependant on the willingness of the imparting side. With regard to the press the Court has proceeded from the interests of the recipients in light of participatory democracy. The interests of the readers/audience of the media are in receiving as much information and as wide a range of ideas as possible to enable individuals to vote intelligently. The main principles with regard to Article 10 all lean in this direction and are reinforced when taken in conjunction with Articles 14 and Article 3 of Protocol No 1. Individuals are not to be discriminated against in participating in the public discourse due to their social status of being outside government.

Information acts are measures taken within the member states to affirm the right to receive and the need for transparency in administrative processes. However, these acts represent only one side of the multifarious modern society, which citizens need to have access to in order to actively arm themselves with power based on information. The media's task in this regard is to turn that information into knowledge by setting facts into an analytical context. It seems that freedom of information was inserted into the human rights instruments without a thorough consideration of what it called for, namely positive measures on the member states to see to it that the flow is effective and neither manipulated by public nor private parties. The drafters of the Convention were not ready to acknowledge the private

⁷⁶⁵ Rawls, *supra* note 540, pp. 356–358.

⁷⁶⁶ Council of Europe Committee of Ministers. *The Budapest Declaration For a greater Europe without dividing lines* (Adopted by the Committee of Ministers on 7 May 1999, at its 104th session).

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threat in the same way, as they perceived of ‘public interference’. Due to procedural complications inherent in the Convention the Court has not had a chance to analyze the economic conditions affecting the important enjoyment of this right.⁷⁶⁷

The objective of the Convention of an ‘effective political democracy’ may be insidiously read into the legal text of Article 10 where conditions are listed, which may require restrictions on the individual right if there is a democratic necessity. One of these conditions is to secure the rights of others. The ‘soft law’ in the Council of Europe forum reflects this objective as evident in numerous declarations, recommendations and resolutions of the Committee of Ministers and Parliamentary Assembly. These resolutions and recommendations are not legally binding but may nevertheless be considered an authoritative interpretation of the civil and political rights.⁷⁶⁸ They may serve as a partial *obiter dictum* in light of the problem of private manipulation of the media that seriously infringes the right to receive and has momentous effects on the making of public opinion.

The emergence of the NITs has made the problem even more apparent as evident in the declaration of the Committee of Ministers on a European policy for NITs, recognizing their potential to improve transparency and efficiency at all levels – national, regional and local – of the governance, administration and judicial systems of member states and hence to consolidate democratic stability.⁷⁶⁹ There are potential risks, involved in the use of these technologies for both individuals and democratic society which threaten the right to privacy through the abuse of stored information. One of the consequences may be the loss of public access to newsworthy information, which again reiterates the need for the news media to act as a tool of cohesion in an increasingly anarchic world.⁷⁷⁰ This evidently calls for some positive measures on behalf of authorities in light of the ongoing changes.

The right to receive presupposes that the political process is to an extent shaped by the media. A regulatory framework may help to promote the opportunities advanced by the NITs.⁷⁷¹ The quest for ‘common standards’ becomes more urgent with the information revolution as the core of the matter remains the same as in Madison’s time – the new information technology is to serve the public good.

The instrumental value of the right to receive in the information society according to the EU ideal is to strengthen the economic basis of the single market and thus reciprocally reinforce human rights. Although the Council of Europe does not put economic objectives in the foreground, the recognition of the interdependence of civil and political rights and economic and social rights appears in the emphasis of strengthening social cohesion for the benefit of all. The role of journalism in this process is undeniable. The active and informative role of the

⁷⁶⁷ Unless to an extent in the recent *Vgt Verein gegen Tierfabriken v. Switzerland*, *supra* note 212, discussed *infra* 7.3.2 The Political Nature of Advertising: A New Departure?.

⁷⁶⁸ P. van Dijk and G. J. H. van Hoof, *supra* note 203, p. 545. The assumption is in relation to Article 9 and the same seems to go for Article 10.

⁷⁶⁹ Adopted by the Committee of Ministers on 7 May 1999, at its 104th Session.

⁷⁷⁰ Cf. Overbeck, *supra* note 595, p. 321.

⁷⁷¹ Adopted by the Committee of Ministers on 7 May 1999, at its 104th Session.

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media is best illustrated when set in this context. Journalists are not librarians and the media is not a storage place for information that others are expected to seek and sort out. The press is an instructor, imparting analysis as well as facts in a society where time is of significant value.

With increased regional cooperation and common standards in the member states of the Council of Europe the important function of the media in joining unlike forces in society around common values of democracy and human rights is evident. The meaning of the right to receive in the information society is to equalize people with unequal capacities by mitigating prejudice with the emergence of 'an enlightened public' not merely a public informed.⁷⁷² The operation of public service broadcasting in the member states of the Council of Europe is an indication of the common conception of positive obligations on the state's behalf to guarantee the democratic requirement of the right to receive information and the need for a balanced dialogue.

The information revolution calls for stricter scrutiny on the press' ability to live up to its duties. Ensuring that the traditional media transmit a variety of views does not diminish with the emergence of NITs. As will be incrementally argued throughout this study, the need for a coherent regulatory framework for all the news media, independent of the form, is necessary to protect its vital role in promoting and maintaining a democratic society.

The right to receive in democracy is not a passive freedom but an indispensable aspect of an effective political democracy since it comprises the precondition for forming an opinion, still another problematic dimension of media freedom which is explored in chapter 3.

⁷⁷² Cf. *Sunday Times v. the United Kingdom*, *supra* note 60, § 65.

CHAPTER 3

OPINION, JOURNALISM AND DIGNITY

Reason obeys itself; and Ignorance submits to whatever is dictated to it.

⁷⁷³ – Thomas Paine

This chapter focuses on freedom of opinion. It scrutinizes the role of journalism in the forming of opinion and the Court's approach in determining restrictions to protect individual development and dignity. The individual self-realization precedes active participation in democratic society. In today's world the media is a decisive factor in this process. The objective of the Convention is not only majority rule with democracy but also that those participating are truly mature as moral actors.⁷⁷⁴ The public discourse ought to stimulate such citizenry. Democracy is implausible if made up of people living only by habit or tradition – stultified and 'unaware that they mask an implicit choice' by not acknowledging their responsibility.⁷⁷⁵ This sums up the two dimensions that freedom of expression through free argument and debate is to secure. Democracy and human dignity are two sides of the same coin in the objective of the Council of Europe to achieve unity between its members for the purpose of safeguarding and realizing human rights and to create a decent, fair and just society. Guaranteeing the equal dignity of all individuals is a stated goal of the Council of Europe seen as fundamental for the process of economic and social progress.⁷⁷⁶

The rights and freedoms guaranteed under Article 10 facilitate this process if realized to the full. It remains, however, unclear what the right to freedom of opinion entails as a part of the interrelated principles protected under Article 10. For this reason the drafting stages of that right are looked into to try to formulate the scope of freedom of opinion in relation to the media. Does the right to freedom of opinion simply refer to something internal? Is opinion, until expressed, merely analogous to thought and if so why then bother to protect it separately?

The legal equation explored in this context contains freedom of opinion, freedom within the media and human dignity. It is almost unthinkable to withdraw one of these concepts out of the equation without, at least in theory, fateful consequences, e.g. in the modern context of democratic society. Public opinion, as

⁷⁷³ T. Paine, *The Rights of Man*, T. Benn (ed.), 1993, J. M. Dent, p. 99.

⁷⁷⁴ F. Michelman, 'Law's Republic' in 97 *Yale Law Journal*, 1493 (1988), p. 1504. Referring to Kant's concept of moral autonomy.

⁷⁷⁵ *Ibid.*

⁷⁷⁶ Recommendation No. R (97) 21 of the Committee of Ministers to member states on *The Media and the Promotion of a Culture of Tolerance* (Adopted by the Committee of Ministers on 30 October 1997, at the 607th meeting of the Ministers' deputies).

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such, for example, is inconceivable without the media's input. Forming an opinion is an essential prerequisite for active participation in the democratic process.

Inherent in both the negative requirements made to the press in not overstepping the bounds restricting the rights of others, as well as in the positive requirements of enlightening the public, is the demand that journalism is not discriminating. Discrimination against people on the grounds prohibited under Article 14 (sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status), taken in conjunction with Article 10 is an attack on their dignity. The silencing effect of such journalism impedes the further realization of human rights. On the other hand there is much apprehension of restricting journalistic conduct for fear of the chilling effect that legal sanctions may have on journalists. From the Convention perspective it is explored to what extent freedom of opinion is protected from media manipulation in dictating silence on crucial issues on the one hand and in portraying minorities in a negative manner on the other hand. A cumulative harm may result from not respecting human dignity, either by the unequal presentation of different voices in society or by degrading or discriminatory coverage of groups or individuals. The relevant paradigm is individual dignity often in the context of minorities, determined by a series of small cases that will together set a limit of what is tolerated rather than deciding once and for all on one issue. It is furthermore analyzed whether legal responses to prejudice towards minorities are reconcilable with Article 10 and the objectives of the Convention.⁷⁷⁷

The first part of this chapter analyzes whether freedom of opinion entails the right to form an opinion and what this right entails for an individual in society. The second part tackles the impact of the media on opinion-formation in society and assesses the permissible restrictions on journalism in cases of defamation, group defamation and hate-speech. Finally the latent side of discrimination, the silencing effect of discriminatory journalism is dealt with.

3.1 FREEDOM OF OPINION: A CONTESTED NOTION

Article 10 § 1 provides that the right to freedom of expression 'shall include freedom to hold opinions'. It is a limited interpretation of this freedom to maintain that it is simply referring to the content of expression in a narrow sense as the subject matter of expression. The intention with the protection of this right was not superfluous. From the Teitgen report the guarantee of the internal freedoms of thought, conviction and opinion are not to be subject to a treatment intended to change the process of thinking or the opinion-formation or to protect the individual against '*ces abominable moyens d'enquête policière d'instruction judiciaire qui*

⁷⁷⁷ The concept minority is used here in relation to all groups apt to discrimination due to their 'inferior' position in the hierarchical order of society, including women, albeit not a numerical minority.

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prive le suspect ou l'inculpé du contrôle de ses facultés intellectuelles et de sa conscience'.⁷⁷⁸

Freedom of opinion from a contextual perspective is perhaps the most pivotal, consequential and vulnerable of the freedoms included in the right to freedom of expression. To a degree it may be asserted that the other rights included in Article 10 § 1 are only a means of realizing freedom of opinion.⁷⁷⁹ Underlying this assumption is the argument that 'freedom of opinion' extends the right merely to entertain a thought or an internal feeling. It is reasoned here that it is not a coincidence that freedom of opinion is protected under Article 10 along with the other freedoms essential to the functioning of the press. The intention must have been to protect opinion, as an aspect of the objectives that press freedom is to achieve, an informed public opinion essential to democracy and the individual growth of every citizen.

Freedom of thought is protected along with conscience and religion under Article 9 of the Convention. The ICCPR also protects thought, conscience and religion in Article 18 and opinion separately under Article 19 § 1. The ACHR does not make this distinction between thought and opinion and omits the latter completely, protecting conscience and religion under Article 12 and freedom of thought and expression in Article 13.

If, like mentioned during the drafting stages of the ICCPR, holding an opinion is a superfluous truism, why then bother to protect it, from whom or what? It is tempting to draw the conclusion from the drafting process that the original intention was to protect the formulation stage but adding the verb to 'hold' in the final draft is a sign of tentativeness. The fact that opinion is not protected separately in Article 10 of the Convention as in Article 19 of the ICCPR has provided rationale to those with who want to reduce the right to opinion to something equivalent to freedom of thought. From what may be gathered from the case-law the process of thinking is also protected as the basis of conscience and general outlook on life. Thought and conscience are inviolable as they are not subject to any restrictions set forth in Article 9 § 2 of the Convention, only the freedom to manifest one's religion or belief.⁷⁸⁰ Freedom of opinion on the other hand is not exempted from Article 10 § 2 of the Convention, which illustrates that the freedom of opinion is not unsusceptible to external forces with regard to protection as the *forum internum*. As a case in point, the French version of Article 19 of the ICCPR '*Nul ne peut être inquiété pour ses opinions*' is quite different in substance and style to the English version of Article 19⁷⁸¹ as well as the wording in Article 10 of the Convention.

In the preliminary draft Convention in February 1950, the right to hold an opinion was to be without interference as in Article 19 of the UDHR. The expert of the United Kingdom proposed amendments in March 1950, concerning these

⁷⁷⁸ *Recueil des Travaux Préparatoires*, Vol. I. The Hague, 1975, p. 223, quoted in P. van Dijk, and G. J. H. van Hoof, *supra* note 204, p. 542.

⁷⁷⁹ Malinverni, *supra* note 588, p. 445.

⁷⁸⁰ *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260, § 33.

⁷⁸¹ U.N. Doc A/2929, ch. 6 (1954), § 121.

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rights.⁷⁸² ‘Thought’ replaced ‘opinion’ in the first paragraph of the then Article 11 (freedom of thought was already protected in the then preceding Article 10). The ‘interference’ clause was confined to the government. Amendments to the British proposal shortly after eliminated the repetition of thought and the then Article 11 § 1 had almost reached the present wording of Article 10 § 1.⁷⁸³ Again, two alternatives concerning opinion and interference were represented in Alternative A of a Preliminary Draft Convention sticking to the British proposal.⁷⁸⁴ Alternative B stated: ‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinion *without interference* and to seek and receive and impart information and ideas through any media regardless of frontiers’.⁷⁸⁵

The distinction between these two proposals indicates that at least some of the drafters seriously contemplated the different nature of the protection proposed. In the British proposal opinion is reduced to next to nothing or equated with thought (already protected) and the insertion of ‘without governmental interference’ is repeated. That latter proposal, on the other hand, underlines the importance of opinion as an absolute right and does not confine interference with the government only but also as potentially stemming from elsewhere. The reasoning of the British delegates was that in the absence of clear and precise definitions of the rights to be safeguarded, states might be in great doubt as to whether they were in a position to accede to the Convention; ‘how could a country feel sure that its laws were consistent with the obligations it would assume on accession if it did not know what the obligations involved’.⁷⁸⁶ The compromise that led to the final wording of Article 10 of the Convention was decided in light of political rather than legal considerations.

According to Eek, powerful press organizations had an impact on the Labour government’s attitude during the drafting process of the UN Convention on Freedom of Information.⁷⁸⁷ It has also been shown that a British proposal which sought to augment the words ‘without interference’ with ‘without governmental interference’ was rejected by the Human Rights Committee due to the support voiced by the majority of the delegates for protection against *any* form of interference.⁷⁸⁸ Apparently, business interests in the media had an impact on the drafting of this provision in the forum of the UN. The right to freedom of opinion is not protected separately under Article 10 as it is in its counterpart Article 19. The preparatory work of the ICCPR supports the view that freedom of opinion and expression are

⁷⁸² Then included in Article 6 of the Convention, Cf. Collected editions of the *Travaux Préparatoires*, Vol. III, 1975 Kluwer Law International, p. 280.

⁷⁸³ Collected editions of the *Travaux Préparatoires*, Vol. III, 1975 Kluwer Law International, p. 288.

⁷⁸⁴ *Ibid.*, p. 318.

⁷⁸⁵ *Ibid.*, p. 320.

⁷⁸⁶ *Ibid.*, Vol. IV, p. 10.

⁷⁸⁷ Eek, *supra* note 274, p. 20; referring to U.N. Doc. A/C/3/SR 321, p. 309.

⁷⁸⁸ E/CN.4/365; E/CN.4/440. Cf. M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 1993 N.P. Engel Publishers, Kehl, p. 339. Emphasis added.

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separate freedoms.⁷⁸⁹ Separating opinion from expression in Article 19 has led to all sorts of speculations from the beginning. Does protecting opinion absolutely in paragraph 1 in Article 19 mean very little, as the Chairman of the Human Rights Committee drew attention to during discussions of draft General Comment on Article 19. 'Holding an opinion could not be interfered with if no one knew about it. Some phrase should perhaps be added to make clear what was being protected. Perhaps it was the right freely to form opinions without their being imposed, either directly or indirectly, publicly or in private.'⁷⁹⁰

The question of whether there is a distinction between 'thought' and 'opinion' has been raised, both in relation to Article 19 of the ICCPR and Article 10 of the Convention. Some maintain that the concepts, though not identical are close to each other in meaning; others believe that the two concepts are complementary and some say that in both Articles the right to hold an opinion is really a truism and therefore superfluous.⁷⁹¹ The process of thinking is protected in the foregoing Articles in question here, e.g. Article 9 of the Convention and Article 18 of the ICCPR. There is an interplay and similarity between the freedoms of thought and opinion. The concepts are certainly complementary to each other but definitely of different characters. Thought is an internal phenomenon referring to a process. Opinion is the result of a thought process or of receiving information and ideas from, as relevant, the media. Thoughts can be of all kinds, not necessarily formulated like an opinion, which brings it closer to a conviction.⁷⁹² It is ill-founded, not to make a distinction between thought and opinion, even if both are part of the realm of the mind and both essential to the liberty of the mind. Thought can be random where opinion is usually decisive. Thought is open-ended and opinion conclusive. Thought may be said to characterize the first step, opinion the second and so forth. Opinion is in essence a consistent advancement of thought. Opinion, need not however, be a logical evolution of a thinking process. It can be a reverberation from the environment. Just like one starts humming a hit song, one's mind can function as an echo chamber for something often heard and seen. The forming of opinion is not a final stage but subject to changes and alterations. Media coverage may induce hasty changes in public opinion. Opinion is not necessarily as strong a term as conviction but decisive all the same when it comes to making a political choice. The Court has reiterated that requiring proof of the truth of value judgments is impossible to fulfil and that such a requirement would infringe freedom of opinion itself, which is a fundamental part of the right secured by Article 10,⁷⁹³ albeit value judgments without any factual basis may be excessive and hence subject to restrictions. This submission goes to

⁷⁸⁹ U.N. Doc. A/2929, ch. 6, §§ 119–138.

⁷⁹⁰ McGoldrick, *supra* note 161, p. 45; GC 10 (19). Adopted by the HRC at its 461st meeting on 27 July 1983, Doc. A/38/40, p. 109.

⁷⁹¹ U.N. Doc. A/2929, § 123. Cf. Klopfer, *supra* note 415, p. 17.

⁷⁹² K. J. Partsch, 'Freedom of Conscience and Expression, Political Freedoms' in L. Henkin (ed.), *The International Bill of Rights*, 1981 Columbia University Press, p. 217.

⁷⁹³ *Lingens v. Austria*, *supra* note 85, § 46.

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show that the Court clearly distinguishes between opinions as value judgments and freedom of thought, which is absolute.

Freedom of opinion and human dignity are intertwined. The protecting of freedom of opinion is the acknowledgement that one has a right to make up one's mind and the idea that someone could hinder that process must be a violation of one's integrity and dignity. The fact that freedom of opinion in Article 10 is subject to restrictions in the same manner as uttered expressions *may render* the right even more meaningful, especially in light of the apprehension of drafters of the potential impact of various forces on the delicate internal process of cognitive development.

Making a distinction between opinion and thought in Articles 10 and 9 respectively, gives grounds for reasoning that *forming* an opinion is a necessary part of the political right of freedom of expression and information. The wording is open-ended and elastic, thus capable of being given a wide range of meanings. The emphasis in the Court's case-law on this right as one of the basic conditions for each individual's self-fulfilment suggests that opinion-formation must be taken into account, being a part of individual maturity.⁷⁹⁴ Those who argue that freedom of the press as protected under Article 10 is first and foremost the right of media owners or publishers, depreciate the perspective that the media can be held accountable in forming public opinion.⁷⁹⁵ This was however the concern of the drafters, although it is immensely complex to figure out how to protect a person's opinion against interferences by privately owned media in public international law.⁷⁹⁶

A deduction from the right to form an opinion, assuming there is such a right, that the media may not to disrupt the important process of opinion-formation by for example systematically leading astray the public, is a complex, even impertinent claim. Its effectiveness is also highly questionable. It is, however, the underlying assumption here that if this dilemma is not solved then the alleged protection of Article 10 is next to meaningless.

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The interpretation of what the right to freedom of opinion entails has strong ideological and political connotations. Interpreting freedom of opinion as a positive right lays burdens on authorities to guarantee the protection from any restraints that may cause harm. It is questionable to assert that opinion does not enjoy protection under the Convention from distorting media material. Enjoying the protection of Article 10 means that one is afforded a fundamental right to prosper as an individual in society with others, to mature and develop one's faculties with the aid of freedom of opinion where the media is recognized as shaping public opinion. Keeping this in mind it is also relevant to point out that the restriction clause to protect public opinion is in fact a form of regulation of journalistic content, rendering this right not

⁷⁹⁴ Application nos. 11553/85 and 11658/85 joined, *Hodgson and Others v. United Kingdom*, decision of 9. 3. 1987, DR 51, p.143.

⁷⁹⁵ Kloepfer, *supra* note 415, pp. 17–18.

⁷⁹⁶ Partsch, *supra* note 792, p. 218.

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only a negative right from public interference but also a positive claim right against distorting opinion-formation – ‘fourth-rate journalism’.⁷⁹⁷ Minds of receivers are of crucial importance in the democratic process and this is why the words of those imparting, especially from the forum of the media carry with them ‘duties and responsibilities’, as these freedoms gain a different meaning depending on the situation and the technical means used to impart.⁷⁹⁸ Words have always carried more weight when spoken by someone of authority. In Britain in the tenth century, ‘the penalty for slander⁷⁹⁹ was the tearing out of tongue’.⁸⁰⁰ The only way to avoid mutilation was to pay the ‘wergild’; the price was set for each social class. A prince’s words were dear while a serf’s were insignificant.

The Commission has referred to the ‘duties and responsibilities’ in Article 10 § 2 with regard to the exercise of freedom of expression of those who are addressing the public, in this case, on sensitive political issues, to take care that they do not condone unlawful political violence.⁸⁰¹ On the other hand, freedom of expression must be considered to include the right to openly discuss difficult problems such as those facing Turkey in connection with the prevailing unrest in part of its territory in order, for instance, to analyze the background causes of the situation or to express opinions on the solutions to those problems.⁸⁰²

The focus on the impact of media portrayal of groups and minorities on the forming of opinion in society is in congruity with the general trend in human rights rhetoric to widen the scope of protection to the horizontal level.⁸⁰³ It is doubtful, however, to speak of the media and individuals in society on the same footing. The press is a part of the establishment. The biggest publishing businesses with influential newspapers as well as broadcasting companies often rank at the top of the power structure in modern societies. It is thus misleading to speak of horizontal relations between the readers and the newspapers as between equals. The state is no longer omnipresent or omnipotent and the right to free development of the personality is to a large extent conditioned by the media.

Judge Matcher reasoned that the media could be held responsible in forming public opinion, indirectly, in a dissenting opinion, joined by Judge Vilhjálmsson, stating:

Lastly, the purpose of Article 10 of the Convention, in my opinion, is to allow a real exchange of ideas, not to protect primitive, fourth-rate journalism which, not having the qualities required to present serious arguments, has recourse to provocation and gratuitous insults to attract

⁷⁹⁷ *Oberschlick v. Austria* (No. 2), 1 July 1997, RJD 1997-IV, the term used in the dissenting opinion of Judge Matcher joined by Judge Thor Vilhjálmsson, p. 1279.

⁷⁹⁸ *Handyside v. the United Kingdom*, *supra* note 87, § 49.

⁷⁹⁹ Slander is an oral method of defamation while libel is defamation on print or in pictures.

⁸⁰⁰ W. S. Churchill, *A History of the English Speaking Peoples: The Birth of Britain*, 1993 Barnes & Noble, p. 67.

⁸⁰¹ *Karatas v. Turkey* [GC], 8 July 1999, RJD 1999-IV, § 37.

⁸⁰² *Erdogdu and Ince v. Turkey*, *supra* note 29, § 52.

⁸⁰³ Cf. Clapham, *supra* note 229, p. 179.

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potential readers, without making any contribution to an exchange of ideas worthy of the name.⁸⁰⁴

The media shapes our self-images to a large extent. The principles laid out in the case-law, such as broadmindedness and tolerance, are seen as essential features of journalism in contributing to 'the development of every man'.⁸⁰⁵ The impact of the media on public opinion is recognized. The Commission has held that 'public opinion [which] is to a large extent formed and expressed in the media'.⁸⁰⁶ The Court has confirmed the view that freedom of the press '[furthermore] affords the public one of the best means of discovering and *forming an opinion* of the ideas and attitudes of political leaders'.⁸⁰⁷

The approach to the media is marked by the rubric that the media is the Public Watchdog and that it has to act as such. Society is not an 'experimental laboratory', to quote a US Supreme Court Justice, who maintained that such was the case with the United States.⁸⁰⁸ He was warning against a federal prohibition of pornography and stated that the 48 United States were such laboratories. This was in 1957, during which time hard-core pornography was emerging as a major industry throughout the nation.⁸⁰⁹ It would seem politically incorrect to uphold this view today, say, for a judge to declare that the 43 member states of the Council of Europe were laboratories to experiment with the impact of obscenity on public opinion and consequently on gender equality.

The Court in evaluating the impact of the media has distinguished between those unversed on one hand and on the other hand readers that are avid seekers of information, which is expressed in their voluntary subscription of more serious publications. It has held that the potential impact of contested information was less of a threat as the readers were interested in 'environmental and public health issues' and hence probably better equipped to use their judgment against assertions that otherwise might cause uproar or be misleading.⁸¹⁰ The potential impact of the ideas was more limited on an audience or readership that is actively seeking information and not merely devouring television programmes in an uncritical manner.⁸¹¹ The power of broadcasting is conjectured to proceed from the less critical and more receptive audience than those that read newspapers. This distinction is analogous to the theory distinguishing between public opinion and psychology of the masses, a

⁸⁰⁴ *Oberschlick v. Austria (No. 2)*, *supra* note 797, dissenting opinion of Judge Mactcher joined by Judge Thor Vilhjálmsón, p. 1279.

⁸⁰⁵ *Handyside v. the United Kingdom*, *supra* note 87; *Barthold v. the Federal Republic of Germany*, *supra* note 77; *Lingens v. Austria*, *supra* note 85.

⁸⁰⁶ *Lingens v. Austria*, Commission's report, 11 October 1984, Series A no. 103, § 74.

⁸⁰⁷ *Lingens v. Austria*, *supra* note 85, § 42. Emphasis added.

⁸⁰⁸ *Roth v. United States*, *supra* note 467.

⁸⁰⁹ D. L. Teeter, D. R. Le Duc and B. Loving, *Law of Mass Communications: Freedom and Control of Print and Broadcast Media*, Ninth Edition, 1998 Foundation Press, New York, p. 95.

⁸¹⁰ *Hertel v. Switzerland*, *supra* note 330, p. 2298.

⁸¹¹ *Ibid.*, § 49.

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well-known characterization of masses as 'being largely de-individualized, irrational, easily influenced, prone to violent action and altogether of a regressive nature'.⁸¹² Dissenting from the majority of the Commission in the *Jersild* case,⁸¹³ Mr. Jörundsson with two others, revealed concern that the racist programme 'was seen by a wide public comprising people who may not necessarily have a critical mind, and whose living conditions may render them more receptive to racist propaganda'.⁸¹⁴

3.2.1 The Right not to be Mislead

The Court regards the freedoms protected under Article 10 as fundamental for the progress of democratic society and for the development of each individual.⁸¹⁵ The Federal Constitutional Court in Germany interprets the principle of freedom of expression as the 'free development of the personality'.⁸¹⁶ *Prima facie* the right to hold and form an opinion would seem to be the right to be left alone in doing so, e.g. to be free from external indoctrination. Freedom of opinion is not the right to defend one's thoughts and expressions in public, as that would fall under the category of freedom of expression. As reflected in the UN Human Rights Committee's comment on freedom of opinion, it is not clear what is being protected and how it is protected.⁸¹⁷ Perhaps it is not even clear why it is protected, unless to guarantee that individuals in a democratic society are cognitive beings. Inherent in the political aspect of freedom of opinion is the reciprocal need of society for active citizens, for participation on a pluralistic level and the need for the individual to take a political stand on the basis of his informed opinion. The only way to make a citizen out of a subject is to confer on him those rights, which writers in public law in the nineteenth century teemed *activae civitatis*.⁸¹⁸

Freedom of opinion is closely related to the freedoms of thought and conscience and falls into the category of basic communication and political rights.⁸¹⁹ It is of a defensive nature, the right is to enable the individual to ward off impermissible interference exercised either by state or private parties.⁸²⁰ It is a core Convention

⁸¹² Cf. T. W. Adorno, 'Freudian Theory and the Pattern of Fascist Propaganda' in Arato and Gebhardt, (eds.), *The Essential Frankfurt School Reader*, 1978 Blackwell, p. 118.

⁸¹³ Discussed *infra* 3.3.2 Prohibition in Public International Law

⁸¹⁴ *Jersild v. Denmark*, *supra* note 84, Commission's report, 8 July 1993, dissenting opinion of Mr. Gaukur Jörundsson joined by Sir Basil Hall and Mr. Geus, p. 40.

⁸¹⁵ *Handyside v. the United Kingdom*, *supra* note 87, § 49.

⁸¹⁶ *Glasenapp v. the Federal Republic of Germany*, 28 September 1986, Series A no. 104; referring to the: The Federal Constitutional Court's judgments 23 October 1952; 17 August 1956.

⁸¹⁷ McGoldrick, *supra* note 161, p. 45; GC 10 (19). Adopted by the HRC at its 461st meeting on 27 July 1983, Doc. A/38/40, p. 109.

⁸¹⁸ Bobbio, *supra* note 496, p. 35.

⁸¹⁹ M. Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 1993 N. P. Engel Publishers, Kehl, pp. 312–313.

⁸²⁰ *Ibid.*

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right. It is in fact a right to enjoy the external stimuli of becoming a person in society with others. The individual is a social being and needs social skills to participate in the community. Forming an opinion is an aspect of self-realization, which cannot be divorced from the 'social construct of reflection' and is in a sense analogous to education, even though it is more self-initiated rather than institutionalized.⁸²¹ Protecting as does Article 10, freedom to hold opinions without interference by public authority is recognition of the fact that opinion can be influenced and is influenced to a large extent by the authorities. In all the member states of the Council of Europe governments have the power to establish institutions that in practice are educative and indoctrinating, such as public schools, state universities, state financed political activities/parties/ or party publications or state broadcasting.⁸²² Of all these, the incessant impact of the general news media, broadcasting and printed press, albeit privately owned, is the most persisting, affecting the opinion process of individuals throughout their lives. This is why it is imperative to scrutinize the defensive freedom of opinion from the authority of the media. The right to develop into a moral actor on the democratic scene requires that the individual is not misguided from that path or deterred from taking a political stance.⁸²³

As the ultimate test of whether interference is necessary the Court resorts to the 'pressing social need' test. Intrusion from private parties is not prescribed by law and cannot hence be subject to the restriction clause although public opinion, the core of the democratic process, is shaped by the media. Given the great expectations to the enlightenment role of the press, the stultifying impact of sensationalist journalism on an unsuspecting public has evoked concern. 'Misleading' or 'distracting' people from matters of serious concern is a known psychological power method,⁸²⁴ which has led to much speculation on the sensationalist media with its stultifying effects, as evident from the admonition against 'fourth-rate journalism' in the Court's case-law.⁸²⁵

Since forming an opinion does not take place in a vacuum the question arises if freedom of opinion does not also entail the right to be protected against media manipulation of information. It is presumed, as reflected in a recent Parliamentary Assembly report,⁸²⁶ that the modern day media is polluting the minds of people with trivial stuff. The report depicts concern over 'infotainment' where sensational stories and 'Big-brother-style' programmes are replacing independent editorials.⁸²⁷ It may

⁸²¹ Cf. R. Jayakumar Nayar, 'Not Another Theory of Human Rights' in Gearty and Tomkins (eds.), *Understanding Human Rights*, 1999 Pinter (first published 1996), pp. 184–185.

⁸²² Cf. F. Schauer, *Free Speech: a Philosophical Enquiry*, 1982 Cambridge University Press, p. 156.

⁸²³ Cf. *infra* section 3.2.2 The Duty to Form an Opinion and Express it without Reserve

⁸²⁴ Thomas Jefferson spoke of his 'hostility of every form of tyranny over the minds of men'.

⁸²⁵ *Oberschlick v. Austria* (No. 2), *supra* note 797, dissenting opinion of Judge Macher joined by Judge Thór Vilhjálmsson, p. 1279.

⁸²⁶ Parliamentary Assembly Doc. 9000, *supra* note 705.

⁸²⁷ *Ibid.*

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be questioned whether such tactics are analogous to ‘brainwashing’, which according to the Court is not compatible with respect for the freedom of thought and conscience.⁸²⁸ Low-level media-culture may lead to what philosopher Herbert Marcuse described as the ‘comfortable, smooth, reasonable, democratic unfreedom’, hence evoking the question of the extensity of protection offered.⁸²⁹

The media has an immense impact on society. It not only reflects a way of living and being, it adduces to a way of living and being. The situation within the media, the quality of journalism, the intention of the publisher, the conditions that journalists work in, the protection afforded to ‘responsible’ journalism, and the aim of journalism are all factors heavily contributing to the shaping of society through constructing public opinion. The UN Human Rights Committee has concluded that with regard to the forming of public opinion, little attention has so far been given to the fact that, because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for in the restriction clause of Article 19 § 3 of the ICCPR,⁸³⁰ which is the restriction clause parallel to Article 10 § 2 of the Convention. There are eleven potential grounds for restrictions enlisted in Article 10 § 2 while there are ‘only’ six in Article 19 § 3. Instead of taking into account all the particular problems that might be necessary, during the drafting of Article 19, the route was chosen to enlist the general terms with public purposes. As with Article 10 § 2 the restriction clause of Article 19 of the ICCPR is introduced in a preamble, which makes both clauses unique in comparison with other provisions in their respective documents. The preamble emphasizes that the freedoms protected carry with them duties and responsibilities and these seem in particular relevant where the press is concerned. Presumably the duty is to conduct journalism, worthy of the name, with regard to imparting information accurately and truthfully and respecting the enumerated values intended for protection, as protecting freedom of opinion is fundamental to the commitments and aims of the Convention.⁸³¹

The media as a legal person is bound by Article 10, which if taken in conjunction with Articles 17 and 14, prohibits it from abusing its freedom of expression to manipulate public opinion or conduct journalism to the detriment of the democratic fabric and dignity of individuals. An irresponsible medium, whether preoccupied with sensationalist conduct to increase revenues or manipulating public opinion for ulterior political motives, surely goes against the notion of the ‘duty to form the truest opinion’ and the general perception of the ‘vital role’ of the press in democracy. The Court has emphasized that it attaches great importance to journalism that is mindful of allowing readers to form their own opinion.⁸³²

⁸²⁸ *Kokkinakis v. Greece*, *supra* note 780, § 48.

⁸²⁹ H. Marcuse, *One Dimensional Man: Studies in the Ideology of Advanced Industrial Society*, 1968 Routledge & Kegan Paul London, p. 1.

⁸³⁰ A/38/40, annex VI, 109; *Cf. Clapham*, *supra* note 229, p. 110.

⁸³¹ *Partsch*, *supra* note 792, p. 219.

⁸³² *Lopez Gomes da Silva v. Portugal*, 28 September 2000, RJD 2000-X, § 35.

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The Court in *Kokkinakis v. Greece* provided that thought, conscience and religion are not only vital to make up the identity of believers and their conception of life, but also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissoluble from a democratic society, which has been dearly won over the centuries, depends on it.⁸³³ The case concerned the conviction of a Jehovah's Witness for proselytism. The applicant complained of a restriction of freedom of religion and of restriction of freedom of expression of general socio-philosophical opinions. In weighing the requirements of the protection of the rights of others from the conduct of which the applicant stood accused, the Court distinguished between bearing Christian witness and improper proselytism. The former corresponds to true evangelism. The latter represents a corruption or deformation of it.⁸³⁴ The freedom to expound one's religious or philosophical beliefs and try to get other people to share them or even convert them is not a violation of Article 9,⁸³⁵ unless, improper pressure is exerted on people in distress or need; even entailing the use of 'brainwashing', which is not compatible with respect for freedom of thought and conscience.⁸³⁶ Corrupting people's minds and offering material or social advantages to win over others is hence not compatible with Article 9. The Court found the Greek government to be in breach of Article 9, as it had not been able to specify in what way the applicant Jehovah's Witness had attempted to convince his neighbour by improper means.

Judges Foighel and Loizou, dissenting in *Kokkinakis*, called attention to the intrusive form of proselytism as opposed to genuine, open and straightforward teaching of a religion, protected under Article 9. The term 'teach' entails openness and uprightness and the avoidance of the use of devious or improper means or false pretexts in order to gain access to a person's home, 'and once there abuse the courtesy and hospitality extended, take advantage of the ignorance or inexperience of those there'.⁸³⁷ These remarks are of interest in relation to the impact of the media in its 'proselytism' albeit not of a religious kind. The underlying thought of Judges Foighel and Loizou is that agitation, even if straightforward, should enjoy protection but not if it is insidious and aims at taking advantage of those who are inexperienced and caught off guard. This is a valuable thought when agitation is set in context with the related concept of freedom of expression – the distinction between Articles 9 and 10 in this regard is mainly drawn from the case of manifestation of religion⁸³⁸ – and taken in conjunction with Article 8. The media has access to the homes of people

⁸³³ *Kokkinakis v. Greece*, *supra* note 780, § 31.

⁸³⁴ *Ibid.*, § 48.

⁸³⁵ *Ibid.*, § 31.

⁸³⁶ *Ibid.*, § 48.

⁸³⁷ *Kokkinakis v. Greece*, *supra* note 780, joint dissenting opinion of Judges Foighel and Loizou, p. 40.

⁸³⁸ *Kokkinakis v. Greece*, Commission's report 3 December 1991, Series A 260, § 78: The Commission submitted that when the exercise of freedom of expression consists in the freedom to manifest one's religion or belief or worship, it is primarily the right guaranteed by Article 9.

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and it may, due to its enormous impact, insidiously taking advantage of those who are unversed or inexperienced.⁸³⁹ In this sense it may violate either the ‘spirit of tolerance’, broadmindedness or pluralism, which are all essential features of democracy.⁸⁴⁰ The Court has submitted in the context of Article 9, that a state may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with the respect for the freedom of thought and conscience.⁸⁴¹

In 1890 two young Boston lawyers wrote an article in *Harvard Law Review*, often named as the best example of the influence of law journals on the development of law, emphasizing how the press by invading privacy was overstepping the obvious bounds of propriety and decency, stating that ‘modern enterprise and invention have, through invasions upon [individual’s] privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury’.⁸⁴² This view if relevant more than a century ago is if anything much more pertinent today.

Since there is an overlap between Articles 9 and 10 with regard to evangelisation or proselytism when exercised in the media, the opinion of Judges Foighel and Loizou becomes even more cogent when warning against the ‘persistent efforts of some fanatics to convert others to their own beliefs by using unacceptable psychological techniques on people, which amount in effect to coercion’.⁸⁴³ A somewhat controversial television evangelization is practiced in Iceland through the broadcasting of mainly American programmes which are widespread in the US. The undertaking rests to a large extent on individual donations. The operation is based on government licensing, requiring a permit of the operation, which is based on broadcasting law. The European Convention on Transfrontier Television elaborated in line with Article 10, states in its Preamble, that the dignity and equal worth of every human being constitute fundamental elements in the aim of the Council of Europe.⁸⁴⁴ Chapter II of the European Convention on Transfrontier Television⁸⁴⁵ on programming matters states in Article 7 on the responsibilities of the broadcaster:

1. All items of programme services, as concerns their presentation and content, shall respect the dignity of human beings and the fundamental rights of others. In particular, they shall not:
 - a. Be indecent and in particular not contain pornography;

⁸³⁹ *Jersild v. Denmark*, *supra* note 84, Commission’s report 8 July. 1993, dissenting opinion of Mr. Gaukur Jörundsson joined by Sir Basil Hall and Mr. Geus, p. 40.

⁸⁴⁰ *Cf. Otto-Preminger-Insitut v. Austria*, *supra* note 72, § 47.

⁸⁴¹ *Ibid.*

⁸⁴² Samuel Warren and Louis D. Brandeis, ‘The Right to Privacy’, 4 *Harvard Law Review* (1890), p. 196, quoted in Teeter, Le Duc, Loving, *supra* note 809, pp. 304–305.

⁸⁴³ *Kokkinakis v. Greece*, *supra* note 780, joint dissenting opinion of Judges Foighel and Loizou, p. 40.

⁸⁴⁴ ETS No. 132 1989; European Conventions and Agreements, Vol. V 1983–1989, p. 242.

⁸⁴⁵ *Ibid.*

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- b. Give undue prominence to violence or be likely to incite to racial hatred.
2. All items of programme services which are likely to impair the physical, mental or moral development of children and adolescents shall not be scheduled when, because of the time of transmission and reception, they are likely to watch them.
3. The broadcaster shall ensure that news fairly represent facts and events and encourage the free formation of opinions.⁸⁴⁶

It is quite clear from the case-law that the freedoms in Article 10 of the Convention entail the right to form an opinion in a free manner, e.g. without unnatural external pressures and misleading practices. Forming an opinion is a delicate process, where manipulative techniques are in breach of the Convention.

The media's task in mediating information and analysis has the effect in theory to help people shape their convictions and form an opinion on the basis of the knowledge acquired from the media. This provides them with the means to make an intelligent choice when voting. The process of opinion-formation constitutes an essential procedure in democracy. It is a prerequisite for intellectual maturity. It is the means by which a majority comes to be a majority in the words of Dewey through 'antecedent debates, modification of views to meet the opinions of minorities'.⁸⁴⁷ The Court has held that the protection of personal opinions secured by Article 10 is one of the objectives of political participation.⁸⁴⁸ If the forming of opinion and public opinion is not free of external coercion then protection is not effective and the press is not functioning as expected with the Article 10 guarantee. An example of this is if advertisers or media owners in collaboration with political forces try to alter the public conception of an important matter of public interest and sway it to some private interests. In such a case the public has been deceived of its sovereignty or potential for self-rule. The formation of public opinion is not free of internal coercion if journalism lacks integrity and access to the public through the forum of the media is blocked and manipulated.

The Court's jurisprudence concerning the process of forming an opinion started out with the fresh approach that forceful, shocking and disturbing opinions constituted a necessary element for both democracy and individual development.⁸⁴⁹ In other words that in order to acquire the characteristics essential for democratic citizenship people needed to be exposed to all kinds of ideas having the slightest redeeming social importance; unorthodox, shocking, offending, controversial and hateful ideas, not only to the prevailing social climate but also towards minorities.⁸⁵⁰

⁸⁴⁶ Emphasis added.

⁸⁴⁷ Dewey quoted in Habermas, *supra* note 286, p. 304.

⁸⁴⁸ Cf. *Young, James and Webster v. the United Kingdom*, *supra* note 136, § 5; *Ezelin v. France*, 26 April 1991, Series A no. 202, § 37; *Vogt v. Germany*, 26 September 1995, *supra* note 99, § 64.

⁸⁴⁹ *Handyside v. the United Kingdom*, *supra* note 87, § 49.

⁸⁵⁰ Cf. *Jersild v. Denmark*, *supra* note 84.

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All ideas enjoy protection under Article 10 unless excludable because they encroach upon the limited area of more important interests. Under the last mentioned category morals seem to have more weight⁸⁵¹ than the injury words can cause towards socially excluded ethnic minorities.⁸⁵² Article 10 is generous and non-discriminating with regard to ideas. Yet, when states chose to suppress certain expressions that may affect the opinion of people towards sexual or religious matters – morals – and the Court does not feel up to solving such controversies, states are granted their margin of appreciation. This, somewhat criticized part of the case-law confirms firstly that the Court places the highest priority on leaving almost no margin to the member states in meddling with political speech and secondly that it does not view ‘morals’ as a crucial aspect of the democratic evolution. With morals the Court finds that there is no uniform conception of the significance of religion in society and the manner in which beliefs and doctrines are opposed.⁸⁵³ Subsequently it may be concluded that premiums attached to political speech reflects the impact attributed to the press in shaping public opinion.⁸⁵⁴

Harry Kalven, professor at the University of Chicago Law School, and a notable writer on the law of free speech said, ‘society can, for example, either treat obscenity as a crime or not a crime without thereby altering its basic nature as a society’.⁸⁵⁵ A society, however, that does not tolerate political dissent defines itself as a despotic society. In the words of Kalven, ‘political freedom ends when government can use its powers and its courts to silence its critics’.⁸⁵⁶

3.2.2 The Duty to Form an Opinion and Express it without Reserve

The further realization of human rights is not conceivable without active public support. John Stuart Mill held that it was the ‘duty’ of governments and individuals, to form the truest opinions they can, to form them carefully, and never to impose them upon others unless they are quite sure of being right:

But when they are sure (such reasoners may say), it is not conscientiousness but cowardice to shrink from acting upon their opinions, and allow doctrines, which they honestly think dangerous to the

⁸⁵⁰ *Otto-Preminger-Institute v. Austria*, *supra* note 72.

⁸⁵¹ *Ibid.*, *Otto-Preminger-Institute*; *Wingrove v. the United Kingdom*, *supra* note 108, p. 1937.

⁸⁵² *Cf. Jersild v. Denmark*, *supra* note 84, joint dissenting opinion of Judges Ryssdal, Bernhardt, Spielmann and Loizou, p. 29.

⁸⁵³ *Müller and Others v. Switzerland*, *supra* note 57, § 30 and § 35; *Otto Preminger-Institute v. Austria*, *supra* note 72, § 47 and § 50.

⁸⁵⁴ This is not excluding that morals and religious matters in particular, do not fall under the rubric of political speech. Rather it is being accentuated how the highest value that the Court attaches to political speech is indicative of the meaning of press freedom and its function in forming public opinion in democracy.

⁸⁵⁵ *Cf.* discussion on Harry Kalven’s theory in Rawls, *supra* note 540, p. 342.

⁸⁵⁶ Kalven quoted in A. Lewis, *Make No Law: The Sullivan Case and the First Amendment*, 1992 Vintage Books, p. 53.

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welfare of mankind, either in this life or in another, to be scattered abroad without restraint.⁸⁵⁷

Forming an opinion in the sense of Mill is a right not to be coerced by anyone, government or groups in society. Secondly, it is a duty to form an opinion for the sake of the 'welfare of mankind', which is analogous to the further realization of human rights in today's rhetoric, the words in the Convention's Preamble. Individuals and governments do not only have the duty to form an opinion but also the responsibility of taking pains in so doing. The political indifference of those who only seek to cultivate their gardens is a threat to the politically active citizens facilitating the realization of human rights.⁸⁵⁸ The concern of Mill was not only to prevent the opinion-formation from any coercion, be it from government or society, but also in the responsibility of all to form opinions that have social values for the benefit of mankind. The Convention's case-law certainly confirms Mill's theory in ascribing to the press the responsibility of not only imparting information and ideas to the public but also in enlightening it.⁸⁵⁹ The Universal Declaration of Human Rights is the paradigm of the European Convention as evident from the latter's Preamble. Article 29 of the UDHR states: 'Everyone has duties to the community in which alone the free and full development of his personality is possible'.

In the case of *Hoffman v. Austria*, the applicant mother complained that she was denied custody of her children on the ground of her religious convictions.⁸⁶⁰ She invoked her right to respect for her family life under Article 8, her right to freedom of religion under Article 9 and her right to ensure the education of her children in conformity with her religious convictions.⁸⁶¹ The Austrian Supreme Court transferred custody to the father and his mother overturning two lower courts' decisions, providing that if the children were brought up in their mother's religion 'they will become social outcasts'. The European Court of Human Rights held by a majority of five against four that there had been a violation of Article 8 in conjunction with Article 14 by transferring custody from the mother, with whom the children had been living for two years. The *Hoffman* case illustrates that the 'social outcast theory' due to a minority status in beliefs or opinions is not tolerable under the Convention. People's opinions are not to be streamlined according to the 'social tyranny' of the majority.

'Men might as well be imprisoned as excluded from the means of earning their bread', said John Stuart Mill.⁸⁶² The serious matter of self-censorship exercised

⁸⁵⁷ J. S. Mill, *supra* note 13, p. 23.

⁸⁵⁸ Bobbio, *supra* note 496, p. 57.

⁸⁵⁹ *Sunday Times v. the United Kingdom*, *supra* note 60, § 65.

⁸⁶⁰ *Hoffman v. Austria*, 23 June 1993, Series A no. 255. Cf. *Palau-Martinez v. France*, application no. 64927/01, 16 December 2003.

⁸⁶¹ There are about 4 million Jehovah's witnesses worldwide. A central feature is that the Holy Scripture in the original Hebrew and Greek reveal the word of Jehovah God and must therefore be taken as literal truth. The religion bans blood transfusion, which the children's father claimed might give rise to life or health crisis.

⁸⁶² J. S. Mill, *supra* note 13, p. 38.

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within the media and its grave consequences for democracy are explored in chapter 5 in relation to journalism. The individual freedom of opinion is the right to have an opinion without fearing the consequences to one's career, or facing social misery,⁸⁶³ especially if one has a family to support.⁸⁶⁴

In at least one member state of the Council of Europe people fear for their lives if they have political opinions that authorities find unpleasant. In the case of *Tepe v. Turkey* the applicant's son had been unlawfully killed.⁸⁶⁵ He subsequently alleged violations of many provisions of the Convention, the right to life (Article 2), to be free of torture (Article 3) and Articles 5, 10, 13, 14 and 18. As to Article 10 he alleged a violation on account of torture and killing designed to deter the lawful exercise of freedom of expression. The applicant, Isak Tepe, was the provincial leader of the DEP (Democratic Party) and spoke in support of the cultural and democratic rights of the people of Kurdish origin in Turkey. The tragic facts of this case where a man's son was killed because of his political activities is a barbaric example of the potential deterrence exercised on people with political opinions, not accepted by the authorities. In the face of such threats most people would choose to remain silent. This application came in the wake of another application from an editor-in-chief, assistant editor-in-chief and owners of the newspaper *Ösgür Gündem* in Istanbul, concerning allegations of assault on freedom of expression and targeting journalists and others involved with the newspaper, where young Ferhat Tepe was a correspondent.⁸⁶⁶ It was uncontested that seven persons were killed; six journalists were shot dead and Tepe's body was found dead after his abduction.⁸⁶⁷ The applicants complained that the newspaper was forced to cease publication due to the campaign of attacks on journalists and others associated with the newspaper, claiming that the government of Turkey had directly or indirectly sought to render impossible the production of *Ösgür Gündem* by the encouragement of or acquiescence in unlawful killings and forced disappearances, by harassment and intimidation of journalists and distributors, and by failure to provide any or adequate protection for journalists and distributors when their lives were clearly in danger and despite requests for such protection.⁸⁶⁸ The Court in its judgment in *Ösgür Gündem* provided that due to the key importance of freedom of expression for a functioning democracy:

⁸⁶³ Cf. *infra* chapter 4.4 Whistleblowers and Dissidents' Status on 'whistleblowers'.

⁸⁶⁴ As Thorsten Leander claimed in *Leander v. Sweden*, *supra* note 299, § 14.

⁸⁶⁵ *Tepe v. Turkey*, application no. 27244/95, Commission's decision of 25 November 1996, DR 87-B, p. 90, judgment 9 May 2003 (not yet published).

⁸⁶⁶ *Ösgür Gündem v. Turkey*, *supra* note 25; Cf. *Yasa v. Turkey*, 2 September 1998, RJD 1998-VI, p. 2411.

⁸⁶⁷ According to the public prosecutor and an expert doctor's report cause of death was drowning and there was no need for a systematic autopsy. No signs of blows or force on the body, which had been buried without the father's knowledge. The body was exhumed, the father washed it in preparation for the funeral and found marks on testicles and breast, and deep wounds on wrist and ankles, showing the boy had been bound hand and foot. (*Tepe v. Turkey*, *supra* note 865, p. 90.)

⁸⁶⁸ *Ösgür Gündem v. Turkey*, *supra* note 25, § 38.

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Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection even in the sphere of relations between individuals.⁸⁶⁹

Unfortunately the cases against Turkey are a horrendous testimonial of how little respect is shown to freedom of expression⁸⁷⁰ and the vital role of the media when people are faced with torture and murder for airing their convictions publicly, this is above and beyond the usual severe penalties, long imprisonments and fines which can result in job loss.⁸⁷¹ In the more 'civilized' member states of the Council of Europe, the fear of expressing anti-establishment opinions is usually not ensued with fear of losing one's life.⁸⁷² Most journalists are, however, aware of the fact that opinions not favoured by the 'establishment' may cost them their livelihood.⁸⁷³

In the case of *Leander v. Sweden* the outcome of a personnel control when the applicant applied for a job at a Naval Museum was unfavourable. Chapter 2, section 3 of the Swedish Instrument of Government,⁸⁷⁴ which forms the main constituent of the Swedish Constitution prohibits the registration of opinion, providing that 'no entry regarding a citizen in a public register may without his consent be founded exclusively on his political opinion'. Leander did not in his complaint call into question the government's power within the limits set by Articles 8 and 10 of the Convention, to bar sympathizers of certain extreme political ideologies from security-sensitive positions and to file information on such persons in the register kept by the Security Department of the National Police Board.⁸⁷⁵ Leander, however, claimed that the personnel control procedure, as applied in his case, gave rise to a breach of Article 8. He contended that nothing in his personal or political background could be regarded of such a nature as to exclude him from the

⁸⁶⁹ *Ibid.*, § 42.

⁸⁷⁰ Cf. Committee of Ministers Interim Resolution Res DH (2001) 106: The Court or the Committee of Ministers have notably found that the criminal convictions of the applicants [in several cases against Turkey], on account of statements contained in articles, books, leaflets or messages addressed to, or prepared for, a public audience, had violated their freedom of expression guaranteed by Article 10 of the Convention.

⁸⁷¹ Cf. *Ceylan v. Turkey*, *supra* note 109; *Karatas v. Turkey*, *supra* note 801.

⁸⁷² Evidently journalists have been killed in other member states of the Council of Europe.

⁸⁷³ The term '*establishment*' is used here to emphasize the connected interests of politics and dominant economic forces in society forming an establishment, which not only determines access to public positions but often also individual opportunities in the private domain. Complying with the expectations of the establishment may be so repressive as to amount to an intrusion in a parallel manner as when public authorities in authoritarian regimes try to regulate the minds of their subjects. (The Oxford Advanced Learner's Dictionary defines '*establishment*' as 'those persons in positions of power and authority, exercising influence in background of public life or other field of activity'.)

⁸⁷⁴ Regeringformen, (SFS 1974:152) 2 kap. 3 §: *Anteckning om medborgare i allmänt register får ej utan hans samtycke grundas enbart på hans politiska åskådning.*

⁸⁷⁵ *Leander v. Sweden*, *supra* note 299, § 47.

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employment in question.⁸⁷⁶ The Court held that it was uncontested that the storing of information and releasing coupled with the refusal to allow Mr. Leander an opportunity to refute it amounted to an interference with his right to a private life as guaranteed by Article 8 § 1.⁸⁷⁷ However, the Court unanimously, went on to find that the registering of such information by the secret police was necessary for national security and had sufficient procedural safeguards to satisfy the requirements of Article 8 § 2. Accordingly there had not been a breach of Article 8 nor of Article 10. The Court emphasized that 'access to the civil service is not as such enshrined in the Convention'⁸⁷⁸ and then added 'apart from those consequences the interference did not constitute an obstacle to his leading a private life of his own choosing'.⁸⁷⁹ The Court seems unversed in what constitutes normal family life in assuming that an individual who has to decide between suppressing his political opinions or provide for his children can live his private life as he chooses. To face such consequences, as seriously diminishing one's opportunities on the job market due to political convictions, is a cause for concern for most people.

An individual may be faced with the option of leading a life of material security or face crisis if he sticks to his civic integrity. Politically active individuals are often relegated from the 'establishment', if their opinions are not approved of by the system of institutionalized 'right thinking'. In his work, 'One Dimensional Man' Herbert Marcuse describes this problem, saying that the rights, which were vital factors in the earlier stages of modern societies, have lost their traditional rationale and content:

Freedom of thought, speech and conscience were – just as free enterprise, which they served to promote and protect – essentially *critical* ideas, designed to replace an obsolescent material and intellectual culture by a more productive and rational one. Once institutionalized, these rights and liberties share the fate of the society of which they had become an integral part. The achievement cancels the premises.⁸⁸⁰

Kloepfer, a German law professor, reduces the right to opinion to 'an (*inner*) freedom of (holding an) opinion', equating it with the freedom of thought, protected by Article 9 § 1 of the Convention. In his view opinion is not protected as such by Article 10 of the Convention but on the contrary it is covered by Article 9 § 1. The reasoning he provides is:

⁸⁷⁶ *Ibid.*, § 17. Earlier he had been a member of the Swedish Communist Party, and a member of an association publishing a radical review, had been active in the Swedish Building Worker's Association and he had travelled a couple of times to Eastern Europe. A criminal conviction stemmed from his time in military service and consisted of a fine of 10 SEK for having been late for a military parade.

⁸⁷⁷ *Leander v. Sweden*, *supra* note 299, § 48.

⁸⁷⁸ *Cf. Kosiek v. the Federal Republic of Germany*, *supra* note 245, §§ 34–35.

⁸⁷⁹ *Leander v. Sweden*, *supra* note 299, § 59.

⁸⁸⁰ Marcuse, *supra* note 829, p. 1.

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If one understood the freedom of (holding) an opinion as being under the area of protection of Article 10 § 1, it would be covered equally by the possibilities of restriction of Article 10 § 2. This result, however, would be unacceptable, as the freedom of (holding) opinion with reservations is simply inconceivable⁸⁸¹ in democratic states under the rule of law.⁸⁸²

The fact is that freedom of opinion is subject to restrictions according to Article 10 § 2 while freedom of thought and conscience are absolute and not subject to the restrictions in Article 9 § 2 but solely the freedom to manifest one's belief.

An example of the fact that freedom of opinion can be subject to reservations in a democratic state under the rule of law is the Basic Law of Germany where those publicly employed must comply with a duty of loyalty to the Constitution. Germany was found in breach of Article 10 in the case of Dorothea Vogt,⁸⁸³ who was dismissed from her post as a secondary school teacher, of German and French, on account of her membership of the German Communist Party (DKP). The duty of political loyalty, which admittedly restricts civil servants' fundamental rights, is one of the traditional principles of the civil service and has constitutional status by virtue of Article 33 § 5 of the Basic Law.⁸⁸⁴ Ms. Vogt was appointed as a permanent civil servant in 1979 notwithstanding that the authorities were aware at the time that she was a member of the DKP. However, disciplinary proceedings were commenced against her in 1982 on the grounds that she had failed to comply with her duty of political loyalty as a result of her activities with the DKP since 1980. She was dismissed in October 1987 on the grounds that associating herself with the DKP she had betrayed the relationship of trust between herself and her employer. Ms. Vogt maintained that her dismissal from the civil service on account of her political activities as a member of the DKP had infringed her right to freedom of expression secured under Article 10. The applicant disputed the necessity of the interference. Since the DKP had not been banned by the Federal Constitutional Court, her activities on behalf of that party, which had been the basis of the 'charges' brought against her, had been lawful political activities for a lawful party and could not therefore amount to a failure to fulfil her duty of political loyalty.⁸⁸⁵ Compliance with that obligation had to be assessed not in terms of the abstract aims of a party, but with reference to individual conduct. In an assessment report drawn up in March 1981 her capabilities and work were described as entirely satisfactory. It was stated that she was held in high regard by her pupils and their parents and by her colleagues. From this point of view she had always been beyond reproach, both in

⁸⁸¹ The Court's conclusion in *Kosiek v. the Federal Republic of Germany*, *supra* note 245, confirms that restriction of opinion is not unacceptable. Apart from overlooking that, how would Kloepfer (*supra* note 415) define economic pressure influencing opinion? What are the subliminal forms of influence that he recognizes threaten opinion-formation at the same time he thinks that the protection of opinion in Article 10 is a redundancy?

⁸⁸² Kloepfer, *supra* note 415, p. 18.

⁸⁸³ *Vogt v. Germany*, *supra* note 99.

⁸⁸⁴ *Ibid.*, § 25

⁸⁸⁵ *Ibid.*, § 19.

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the performance of her duties, in the course of which she had never sought to indoctrinate her pupils, and outside her professional activities, where she had never made any statement that could have been considered anti-constitutional.

A bare majority of the Court, ten against nine, considered that it was not 'necessary in a democratic society' for Ms. Vogt to have been dismissed and it did not withhold its view that German authorities had shown fanaticism in this case. The Court found the absolute nature of that duty as construed by the German courts striking:

It is owed equally by every civil servant, regardless of his or her function and rank. It implies that every civil servant, whatever his or her own opinion on the matter, must unambiguously renounce all groups and movements which the competent authorities hold to be inimical to the Constitution. It does not allow for distinctions between service and private life; the duty is always owed, in every context.⁸⁸⁶

In two prior German cases where applicants complained of opinion oppression, *Kosiek*⁸⁸⁷ and *Glase nepp*, the Court held that access to the civil service lay at the heart of the issue, not restriction of freedom of opinion.⁸⁸⁸ It was palpable in both cases, that the applicants (both teachers) could only have access to the desired posts by accepting certain restrictions on their freedom of opinion and expression. Consequently the Court should have examined whether these resulting restrictions were justified under Article 10 § 2.⁸⁸⁹ The Court should have scrutinized the effect of the German law on the freedom of opinion and expression of individuals in the civil service as decisive for the question of Article 10 applicability. As it is now, the fear of losing one's job or not gaining access will undoubtedly compel individuals to censor themselves in order to get a job. The decision of the Court in *Vogt* may be interpreted as a warning against the chilling effect of this German law when interpreted too broadly. The Court had previously pronounced the requirement to prove value judgments, (opinions) 'impossible of fulfilment and in itself an infringement of freedom of opinion'.⁸⁹⁰ In none of the German cases was there a question of 'clear and present danger' involved, as is the yardstick on the other side of the Atlantic when the expression of political opinion is restricted.

At the heart of Article 10 case-law is the protection of political debate, which may be restricted if found to incite violence in a situation where necessary, not least

⁸⁸⁶ *Ibid.*, § 59. The Court took note of Germany's experience under the Weimar Republic, which, when the Federal Republic was founded after the nightmare of Nazism, led to its Constitution being based on the principle of a 'democracy capable of defending itself' (*wehrhafte Demokratie*).

⁸⁸⁷ *Kosiek v. Federal Republic of Germany*, *supra* note 245.

⁸⁸⁸ *Glase nepp v. Federal Republic of Germany*, *supra* note 816.

⁸⁸⁹ *Cf. Van Dijk and van Hoof*, *supra* note 203, p. 564. They hold this criticism also to be true with regard to the *Leander* judgment, *supra* note 299.

⁸⁹⁰ *Lingens v. Austria*, *supra* note 85.

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in situations where terrorism is probable.⁸⁹¹ Mill warned that to refuse hearing an opinion, because ‘they’ are sure that it is false, is to assume that their certainty is the same as absolute certainty.⁸⁹² Kalven argued that to repress revolutionary and subversive advocacy is to suppress the discussion of the underlying reasoning and that is equivalent to restricting the discourse with eliminating the reason in judging the justice of the basic structure and the social policies. Thus, the basic liberty of freedom of opinion is violated.⁸⁹³

The Court is not, however, able to detect the quasi-conscious mechanisms by which individuals voluntarily restrict and confine their expression. This is a known syndrome with civil servants, journalists and careerists in most countries. When such self-censorship occurs within the media it is a grave threat to democracy, as the press is not adhering to its vital role of informing the electorate. The damage is manifold as it impinges on the public’s right to know and it is hurtful to the individual dignity of the person who is not free to form an opinion and cannot express it without reserve. It has in the words of Mill ‘baneful consequences to the intellectual’⁸⁹⁴ and hence to the mental condition of the country. Every voluntary restriction of expression for fear of the consequences may be likened to the spreading of metastasis in a cancerous body.

Article 29 of the UDHR is a good reminder of the corollary duties to the rights, as is Article 10 § 2 of the Convention. Rawls speaks of the capacity for a sense of justice and a capacity for the conception of the good and the powers of reason.⁸⁹⁵ This is in essence the prerequisite for co-operation in society where the furtherance of human rights and democracy is the goal. In the Preamble of the Convention the European governments are required to take steps in the ‘collective enforcement’ of certain rights in the Universal Declaration. Article 29 § 2 UDHR states:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and *respect for the rights and freedoms of others* and of *meeting the just requirements of morality, public order and the general welfare in a democratic society.*⁸⁹⁶

Civic responsibility requires that an individual must be able to speak up in the face of much wrongdoing without fear of losing his position. Justice Brandeis accentuated the essence of liberty is courage.⁸⁹⁷ Democracy requires courageous and self-reliant individuals, people who develop their own opinions and do not fear entering the public sphere. It is also a duty not to tolerate wrongdoing or indirectly

⁸⁹¹ *Karatas v. Turkey*, *supra* note 801, §§ 50–51.

⁸⁹² J. S. Mill, *supra* note 13, p. 21. False statements of facts are another story and not protected. *Cf.*, *Prager and Oberschlick v. Austria*, *supra* note 62, § 37.

⁸⁹³ H. Kalven, quoted in Rawls, *supra* note 540, p. 346.

⁸⁹⁴ J. Gray, *Mill on Liberty: A Defense*, 1983 Routledge, p. 103.

⁸⁹⁵ Rawls, *supra* note 540, p. 19.

⁸⁹⁶ Emphasis added.

⁸⁹⁷ *Whitney v. People of the State of California*, *supra* note 394.

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allow it by not trying to prevent it. The Preambles of the 1966 UN International Covenants of Civil and Political Rights and of Economic, Social and Cultural Rights, refer to the individual's 'duties to other individuals and to the community to which he belongs'.⁸⁹⁸ The African Charter on Human and Peoples' Rights has for instance codified such duties essential for individual responsibility in society. One of these duties is to 'respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance'.⁸⁹⁹

The duty and responsibility of having an opinion in Article 10 § 2 subject to certain restrictions, which every right holder has the corollary duty to respect, is the basic condition for the progress of democratic society and the development of every man, as the Court determined in *Handyside*.⁹⁰⁰ The Court's case-law implies that the technical means used determines the scope of responsibility.⁹⁰¹ It is therefore a breach of duty if the media suppresses information that the public is dependent on. It is the task of the media and society to permit everyone to develop their personalities and constantly suppressing opinions for fear – not of direct public oppression – but for fear of indirect revenge is harmful to the dignity of everyone and encompasses critical consequences for society as a whole. Dignity precedes individual autonomy and creating a community requires autonomous individuals but not individuals created by 'ready made general ideas', as Tocqueville cautioned in *Democracy in America* more than century ago.⁹⁰²

3.3 DIGNITY AND SELF-REALIZATION

The Court has submitted that 'the very essence of the Convention is respect for human dignity'.⁹⁰³ As evident from the '*Handyside-formula*' one of the underlying reasons for protecting the principle of freedom of expression and opinion is to protect individual self-realization.⁹⁰⁴ Individual dignity is to a large extent dependent on the perception of one's standard. One's dignity is lost if one is ridiculed and one's self-worth is impeached. The further realization of human rights is not a realistic goal if individuals or groups in society are discriminated against with impunity and their dignity is not respected.

The Preamble to the UDHR speaks of the 'inherent dignity and the equal and inalienable rights of all members of the human family.' A rationalization of that concept as a viable legal concept requires that it is set in context with the process of

⁸⁹⁸ Fifth preambular paragraph in both the ICCPR and the ICESCR.

⁸⁹⁹ Cf. T. Opsahl and V. Dimitijevic 'Articles 29 and 30' in Alfredsson and Eide, *supra* note 200, pp. 633–652.

⁹⁰⁰ *Handyside v. the United Kingdom*, *supra* note 87, § 49.

⁹⁰¹ *Ibid.*

⁹⁰² A. de Tocqueville, *Democracy in America*, 1981 Random House, p. 309.

⁹⁰³ *Pretty v. the United Kingdom*, *supra* note 296, § 65; *Kokkinakis v. Greece*, *supra* note 780, partly dissenting opinion of Judge Martens, p. 37.

⁹⁰⁴ *Handyside v. the United Kingdom*, *supra* note 87, § 49.

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opinion-formation and media conduct looked at from an Article 10 perspective.⁹⁰⁵ The Convention does not specifically protect the right to dignity unless as a general principle. The new EU Charter of Fundamental Rights states this explicitly in Article 1: 'Human dignity is inviolable. It must be respected and protected.' Article 1 of the 1948 UDHR states: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards another in a spirit of brotherhood.'

The Preamble to the ICCPR states: 'Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' According to Article 31 of the VCLT, the provisions of international treaties are not to be interpreted in isolation but rather in context. The legal significance of the Preamble has been generally recognized under international law and is emphasized by the organs of the Convention.⁹⁰⁶

Focusing on dignity in relation to freedom of opinion is an acknowledgement of the fact that the legal approaches are not discharged of political values. An example is the indictment of MacKinnon that absolute protection of free speech, applied hypocritically and inconsistently to protect pornography and other disparaging speech, is an act of inequality. Underlying the restrictions on hate-speech, pornography and other material is the reasoning that without such restraints much harm may be caused to the forming of public opinion, morals, the self-consciousness and the dignity of the individual. The approach that favours regulation to protect equality of treatment of such an intangible phenomenon as someone's dignity is indicative of an affirmative understanding of Article 10 rights. The provision in the context of the Convention is seen as chartering legal intervention for social change rather than merely as commanding a policy of non-intervention. The affirmative understanding is based on the view that discriminative media coverage of minorities is silencing and subordinating which leads to apathy and general stultification. Although tolerance is an indissoluble aspect of democracy it may not breed broadmindedness if it turns into 'a speech-you-hate-test' in the words of MacKinnon, i.e. the worse the speech protected the more principled the result.⁹⁰⁷

The theory favouring absolute protection warns against the slippery-slope hazard meaning that once content regulation starts there may be no end to it.⁹⁰⁸ What this view does not take into account is what Mill warned against almost one and a half centuries ago, that the oppression of individuals and views in society does not merely occur in civil punishments but in the privileging of powerful groups and viewpoints. Mill spoke of 'social tyranny' more formidable than many kinds of

⁹⁰⁵ Nayar, *supra* note 821, p. 170.

⁹⁰⁶ Nowak, *supra* note 819, p. 2.

⁹⁰⁷ C. A. MacKinnon, *Only Words*, 1993 Harvard University Press, p. 75.

⁹⁰⁸ *Ibid.*, pp. 75–76; Cf. F. Schauer, Slippery Slopes, 99 *Harvard Law Review*, 361 (1985), pp. 75–76.

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political oppression.⁹⁰⁹ The inclination was to stress the power of society over the individual.⁹¹⁰ As a 19th century ‘feminist’ Mill would have been dismayed with the power of the fashion industry over the female image at the dawn of the 21st century appearing in the widespread occurrence of anorexia, which results in the deaths of thousands of young women every year. A modern feminist view on this eating disorder is that it is a means to maintain the unequal distribution of power in society. Constant fashion coverage is oppressive to the political self-realization of women, who are preoccupied with starving themselves to measure up to fashion standards while men retain their social dominance.

Opinion is a construction built on dialogue and exposure to information and ideas in all kinds of forms. It is logical to assume that freedom of opinion entails the right to *form* an opinion otherwise it would not be protected other than as a thought, an internal process irrelevant to any supervision. Journalistic conduct is partly regulated with regard to this. States must, in accordance with international human rights obligations, take measures, which *inter alia* prohibit the discrimination in the media of certain groups on ground of sex, race and other factors. Article 10 protects not only the individual right to express an opinion subject to the formalities, conditions and restrictions enlisted in Article 10 § 2 but also the right not to have one’s dignity sabotaged by journalistic conduct, although the *Jersild* judgment discussed below may indicate the opposite. Protecting freedom of opinion is a part of the political equality of democracy, the entitlement of every individual to self-development with dignity in order to participate in the political process on an equal basis. Hence, Article 10 either alone or in conjunction with Article 17 and Article 14 would prohibit racial discrimination in the forum of media, unless, it is deemed to be part of journalistic conduct that may not be subject to the chilling effect of legal sanctions.⁹¹¹

Protection of reputation is not a new concept and neither is punishment for those who defame. Reputation is one’s honour in the eyes of others and thus an objective paradigm. Defamation is communication, which exposes persons to hatred, ridicule, or contempt, lowers them in the esteem of others, causes them to be shunned, or injures them in their business or calling.⁹¹² Dignity is more subjective, however, as it concerns the pride and self-esteem of an individual in his own conception. When one’s dignity is hurt in a general manner it is not as palpable as direct defamation, which is justiciable, as one can start proceedings and seek, even a high amount of, damages. It is difficult to accurately define the characteristics of an offence on the dignity of a group of people. An injury on human dignity via opinion-

⁹⁰⁹ J. S. Mill, *supra* note 13, p. 7.

⁹¹⁰ *Ibid.*, p. 17.

⁹¹¹ The Court’s adjudication in the area of hate speech and group defamation is analyzed *infra* 3.3.1 Hate-Speech: Defamation and Discrimination.

⁹¹² Teeter, Le Duc and Loving, *supra* note 809, p. 140.

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formation is not 'a wrong which directly results in the violation of a legal right' to quote US justice Frankfurter from another context.⁹¹³

3.3.1 Hate-Speech: Defamation and Discrimination

The way minorities, immigrants, ethnic groups and even women are portrayed in the media, has a significant influence on public opinion. Although the media constitute an important means of combating racist and xenophobic views, prejudices and preconceived ideas, it can also have a role in the emergence or strengthening of such views.⁹¹⁴ One of the most complex dilemmas in international human rights law and public policy is how to protect minority groups from the harm, both direct and indirect caused by hate-speech.⁹¹⁵ Speech that expresses racial hatred or degrading attitude toward women is seen by many as too much freedom at the cost of the dignity of others.⁹¹⁶ Others say that tolerating such speech, albeit hateful and degrading, is the high, 'sometimes, nearly unbearable cost of freedom'.⁹¹⁷ Making it a criminal offence to impart such speech is accordingly seen as constituting a chilling effect on journalism, deterring journalists from mediating matters of public interest.

The way other people see an individual affects his perception of his own self. Hate-speech is a form of expression that denigrates the value and worth of its victims and the groups to which they belong. It is the cause of much agitation if media presentation of racial prejudice is infringing the dignity and rights of others or if an indictment on grounds of such speech contravenes freedom of expression principles. Those who claim the latter maintain that attempts to control racial hate-speech aim to impede political speech airing controversial views. A pragmatic reason against suppressing hate-speech in the public sphere is that such measures may cause more harm than good, as racism may manifest itself in a different way, in the form of physical violence. Such reasoning says that exposing racism in the media may be crucial for the public interest as it bears on the political process. Furthermore, it can be argued that the answer to hateful and degrading speech is more speech to overcome the prejudices. This view, however, does not take into account the silencing effect, which actuates the inferiority complex of those who suffer it and hence works to the opposite effect. Instead of eliciting response it

⁹¹³ *Anti-Fascist Committee v. McGrath*, 341 U.S. 123. Justice Felix Frankfurter's concurring opinion, pp. 149–174.

⁹¹⁴ Parliamentary Assembly Report of the Committee on Migration, Refugees and Demography (Rapporteurs Mrs. Aguiar and Mr. Vasquez) Assembly debate on 30 June 1995 (24th Sitting). Doc. 7322.

⁹¹⁵ Cf. J. Cooper and A. Marshall, 'Hate Speech, Holocaust Denial and International Human Rights Law', 6 *E.H.R.L.R.*, Sweet & Maxwell (1999), p. 593.

⁹¹⁶ Hate-speech is usually perceived of as referring to speech containing racial hatred but is applicable to any form of expression which denigrates the value of others, such as misogynists' views directed at women or hatred of homosexuals (homophobia) and others who suffer discrimination in modern societies.

⁹¹⁷ Dworkin, *supra* note 399, p. 226.

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silences and kills initiative – with long-standing consequences. Stereotyping on the basis of race, ethnicity or sex need not be defamatory but it is certainly discriminatory.

A sensitive balancing act is required in weighing up the individual's right to freedom of opinion and expression against the rights of groups and minorities not to be discriminated against. The right to non-discrimination may involve prohibiting hate-speech as a right to equality of concern and respect. Invective directed against minority groups and racist speech in general may create fear of physical violation, exclusion and subordination. Harmful speech is hence plausibly antithetical to political equality, which is a precondition for an 'effective, political democracy', the stated objective of the Convention. In many of the member states of the Council of Europe racist speech is a criminal offence, even though the Convention does not contain a free standing right not to be discriminated against on the grounds of race. The new Protocol 12 to the Convention requires that 'the enjoyment of any right set forth by law shall be secured without discrimination'.⁹¹⁸ Article 14 on the other hand relates solely to rights set forth in the Convention. A measure, which in itself is in conformity with the requirement of, for example, Article 10 may be a discriminatory restriction all the same, when read in conjunction with Article 14.⁹¹⁹

The impact of racial hate-speech both on race relations and on specific target groups has long been recognized and there are already a number of initiatives aimed at combating racism. The new Protocol 12 to the Convention is intended to give greater protection and equality rights. The impact of degrading speech, as an obstacle to equality has gotten less attention, albeit pointed out by some feminists and academics, especially in the United States, that such speech – ranging from pornography to stereotyping women in the media – may itself be 'silencing' resulting in individuals being prevented from exercising their right to express themselves.⁹²⁰ An individual's dignity hinges on not being discriminated against by the media to the extent that it affects his self-esteem through an *unfair* portrayal by the media of groups in society. Self-esteem refers to an individual's goals and life-

⁹¹⁸ Agreed 26 June 2000 by the Committee of Ministers, open for signature on 4 November 2000 and requires ten ratifications for entry into force; the list of grounds constituting unlawful discrimination in Article 1 of the Twelfth Protocol are the same as in Article 14 of the Convention. Two expert groups were the contemporary forces behind this Protocol. The Steering Committee for equality between women and men proposed the inclusion of a fundamental right of women and men to equality in the Convention (on the grounds that this was one of the prerequisites of acquiring *de jure* and *de facto* equality). Also the European Commission against Racism and Intolerance, recommended the drafting of an additional Protocol containing a general prohibition of discrimination on the grounds of race colour, language, religion or national or ethnic origin. Cf. A. Mowbray, *Cases and Material on the European Convention on Human Rights*, 2001 Butterworths, p. 619.

⁹¹⁹ Application no. 4045/69, *X v. the Federal Republic of Germany*, ECHR Yearbook XIII (1970), p. 698 (704–706).

⁹²⁰ MacKinnon, *supra* note 907; F. Michelman, 'Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation', 56 *Tennessee Law Review*, No. 292 (1989), pp. 303–304.

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plans, sense of being worthwhile and that one has talents and other characteristics sufficient to make their accomplishment possible.⁹²¹ Loss of self-esteem might therefore constitute harm because it reduces motivation and willingness to put forth effort. If victims of hate-speech feel that they have fewer opportunities due to media coverage of them or their 'likes' then they have been caused harm. Hate-speech has the cumulative effect of reducing self-esteem.⁹²² What constitutes harassment is not a subjective view of the one accused of it but an objective evaluation of the coverage if it helps to perpetuate the view that a certain group – due to race, wealth, sex or other status – is superior to others, and should have control for that reason.

Is freedom of expression important enough to justify sacrifices that really hurt? The two approaches taken here, the chilling effect and silencing effect, reflect two schools of thought with regard to journalism. The Court refers to the chilling effect when it considers it necessary to protect journalists in doing their job.⁹²³ The Court has, however, not used the term 'silencing effect', which does not merely depict subordination but *is* subordination because of its harmful effects. Catherine MacKinnon takes the example of the epithet 'nigger' and the fact that the disproportionate numbers of children who go to bed hungry every night in the United States are African-American.⁹²⁴ Pornography is seen as an aspect of dominance like racial hate-speech.⁹²⁵ From this standpoint sexist or racist journalism constitutes *an act* of injury – discrimination – rather than 'merely' harmful speech. The chilling effect is recognition in the case-law that journalism may become tepid out of fear of legal sanctions. The silencing effect concerns the impact of discriminating journalism on minorities, not only numerical ones. An example is misogynist journalism, which may enhance male dominance and hold women down with the concurrent effect of increased violence within the domestic sphere. Racial contempt preserves an inferiority complex among large sections of society, clearly an abiding obstacle to an effective democracy. Such portrayal enfeebles the 'political self-image' of the groups in question by discouraging them from participation in the political process. It is hence an act of discrimination. So insidious is the silencing effect that sometimes journalism bursting with sexism or obscenity is protected under the 'pretence' of serving the robust public debate, as was the case of *Hustler Magazine v. Falwell* before the US Supreme Court in 1988.⁹²⁶ The Supreme Court held that the First Amendment protects parodies – even *Hustler* magazine's mock ad, which said fundamental minister Jerry Falwell's first sexual experience was in an outhouse with his mother while she was drunk. Many saw the *Falwell* decision as a ringing affirmation of the principles of uninhibited,

⁹²¹ R. Langton, 'Sticks and Stones' in H. LaFollette (ed.), *Ethics in Practice: An Anthology*, 1997 Blackwell, p. 357.

⁹²² *Ibid.*

⁹²³ Cf. *Jersild v. Denmark*, *supra* note 84.

⁹²⁴ MacKinnon, *supra* note 907, p. 74.

⁹²⁵ *Ibid.*; Dworkin, *supra* note 399; S. Fish, *There is No Such Thing as Free Speech and it is a Good Thing Too*, 1994 Oxford University Press, pp. 120–133.

⁹²⁶ *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

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robust and wide open debate, instigated in *New York Times v. Sullivan*.⁹²⁷ It is however questionable whether the press should breathe a sigh of relief in the wake of such a decision, as journalism of this kind, a paid advertisement attacking a public figure⁹²⁸ – and his mother – has little to do with the much cherished robust, political debate. It is highly questionable, although the readers of *Hustler* magazine find it funny, that an ad of this kind promotes the democratic debate. Such journalism has much less to do with individual dignity. It is precisely because of such rulings, as in the case of *Hustler v. Falwell* that it may be questioned if regulation of journalism that is subversive of the values of democracy should not be regarded as an exception to the principle of freedom of expression but as a fulfilment of its mandate.⁹²⁹ In this context Stanley Fish discussing the *Hustler v. Falwell* case says that there are worse things than life without this ‘freedom’ and some of these things the First Amendment as it is now interpreted, allows and by allowing, encourages. ‘If she were alive’, he quips, ‘you could ask Jerry Falwell’s mother?’⁹³⁰

3.3.2 Prohibition in Public International Law

The Convention does not contain a free standing right not to be discriminated against on unlawful grounds, such as race, sex, colour, political or other opinion and so forth. The Convention thus lags behind the global level, where the elimination of discrimination of racism and sexual prejudices has received a good deal of attention. Considering the fact that the Convention was in part a reaction to the serious human rights violations of the holocaust it is surprising that it does not entail a parallel provision explicitly prohibiting hate-speech, such as Article 20 § 2 of the ICCPR and Article 4 of the International Convention on Elimination of All Forms of Racial Discrimination⁹³¹ to which the Court has referred in its case-law submitting that there is no conflict between Article 10 and the aforementioned Convention.⁹³² Article 20 of the ICCPR does not set forth a subjective right, but states:

⁹²⁷ Teeter, Le Duc and Loving, *supra* note 809, p. 370.

⁹²⁸ Reverend Jerry Falwell was a candidate for President of the United States.

⁹²⁹ Justice Scalia made this observation in the *Hustler* case: ‘[t]he First Amendment is not everything. It’s a very important value, but it’s not the only value in our society, certainly . . . The rule you give us says that if you stand for public office, or become a public figure in any way, you cannot protect yourself or, indeed, your mother, against a parody of your committing incest with your mother in an outhouse.’ Quoted in Lewis, *supra* note 856, pp. 231–232.

⁹³⁰ Fish, *supra* note 925, p. 133.

⁹³¹ Hereinafter referred to as ICERD.

⁹³² Prohibition of racial discrimination is to be found in a number of international instruments, for example the United Nations Charter (§ 2 of the Preamble, Articles 1 § 3, 13 § 1(b), 55 (c) and 76 (c); the Universal Declaration of Human Rights (Articles 1, 2 and 7) and the ICCPR (Articles 2 § 1, 20 § 2 and 26). The most directly relevant treaty is the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, which has been ratified by a large majority of the contracting states to the European Convention.

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

Article 20 of the ICCPR⁹³³ is *lex specialis* of Article 19 of the ICCPR providing for freedom of expression.⁹³⁴ It not only authorizes interference with the freedom of expression but also obligates states parties to provide for corresponding restrictions.

Sixteen Western states expressed their rejection of Article 20 generally or in relation to the prohibition during war specifically, not simply by their negative voting conduct in the 3rd Committee of the GA⁹³⁵ but also by reservations or declarations of interpretation. The United States, ‘the tolerant society’⁹³⁶ made a reservation when ratifying Article 20 of the ICCPR.⁹³⁷ The provision was seen as conflicting with the First Amendment where no law is to abridge the freedom of speech. The United Kingdom also made a reservation that Article 20 must be interpreted in conformity with freedom of expression principles. The five Nordic states, Ireland and the Netherlands, however, only made a reservation with Article 20 § 1, prohibiting by law any propaganda for war. The reason was, as expressed by the members of Finland, that the provision came in conflict with the freedom of expression principle protected in Article 19 § 2 ICCPR. The concept of war is vague and hence difficult to draw a definitive line between lawful expression of opinion and ideas on the one hand, and forbidden propaganda on the other. Secondly, a prohibition by law, in order to be effective should be sanctioned by penalizing the breach against it. This would cause difficulties since, according to the principles recognized in criminal law, the characteristics of a punishable crime or offence must be accurately defined. The provision contained in Article 20 § 1 did not fulfil this requirement.⁹³⁸

The obligation of Article 20 § 2, which the Nordic states made no reservation to, imposes a similar obligation on them and is, as has been pointed out, equally difficult to define and punish.⁹³⁹ Finland like other Nordic countries was able to accept Article 20 § 2 because it had adopted provisions in its Penal Code to comply

⁹³³ The ICCPR was signed by the US in 1977, eleven years after the U.N. General Assembly had adopted it. The US ratification in 1992 was conditioned on number of reservations. In particular Article 20 was directly seen as conflicting with the First Amendment, which provides that Congress shall make no law in abridging the freedom of speech. Cf. D. P. Stewart, ‘U.S. ratification of the Covenant on Civil and Political Rights: The Significance of the reservations, understandings and declarations’ in 14 *HRLJ*, No. 3-4, 30 April 1993, p. 77.

⁹³⁴ Nowak, *supra* note 819.

⁹³⁵ *Ibid.*, p. 369; E/1371, 39 f.; E/CN.4/223; E/CN.4/365; McGoldrick, *supra* note 161.

⁹³⁶ L. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America*, 1986 Oxford University Press.

⁹³⁷ Along with fifteen other industrialized states, the reservations of Australia, Malta, New Zealand, the United Kingdom and the USA went the furthest.

⁹³⁸ Doc. CCPR/C/1/Add. 10. p. 4 (1977). See SR 30; McGoldrick, *supra* note 161, p. 482.

⁹³⁹ *Ibid.*

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with the terms of the ICERD. Article 20 § 2 of the ICCPR mirrors Article 4 of the ICERD. That provision condemns group defamation, language that incites racial hatred, and outlaws those organizations that disseminate literature that espouses ideas based on theories of racial superiority. Racial defamatory acts that promote racial hatred and discrimination are punishable by law. These proscriptions are laid down with due regard to the principles expressed in the UDHR and Article 5 of the ICERD.

Article 13 § 5 of the ACHR prohibits at the same time any propaganda for war and any advocacy of national, racial or religious hatred. Article 10 § 2 can be taken to set restrictions on group defamation by reference to the 'rights of others', which constitute a legitimate aim of restriction if necessary in a democratic society. The prohibition of propaganda for war is compatible with Article 10 § 2 where a few legitimate conditions for restriction may serve the purpose of banning such propaganda, i.e. national security, territorial integrity or public safety, for the prevention of disorder or crime, if passing the proportionality test. In thirteen cases against Turkey decided by the Court on 8 July 1999 concerning writings, interviews or editorials on the Kurdish issue, the Court held that restrictions on expression due to incitement to violence were incompatible with Article 10 except in two cases. In both cases the Court found the texts 'capable of inciting to further violence'. It characterized the article in the first case as 'incitement to violence'⁹⁴⁰ and the letters in the second as 'hate-speech and the glorification of violence'.⁹⁴¹

Article 17 of the Convention allows action to be taken against an individual if he uses his right to freedom of expression in a subversive way. The state may interfere with the freedom of expression rights of individuals if those freedoms facilitate an attempt to derive from there a right to engage in activities aimed at the destruction of the rights of others. In such cases Article 17 would not permit media owners to order journalists to spread ideas, which are discriminatory to sections of society.⁹⁴² Article 17 is relevant when the subjective aim of expression is the degradation of others. Article 17 states:

Nothing in the 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 their limitation to a greater extent than is provided for in the Convention.

It may be reasoned that laws prohibiting hate-speech are not abridging freedom of speech. On the contrary such laws may reinforce the speech rights of minorities, by affording them protection from prevailing, unbridled prejudice in the media. The silencing effect approach on speech focuses on this aspect when balancing individual rights against community rights.

⁹⁴⁰ *Sürek v. Turkey* (no. 3), 8. 7. 1999, (not yet published), § 40.

⁹⁴¹ *Sürek v. Turkey* (no. 1), *supra* note 356, § 62. These were letters to the editors from readers not the writings of professional journalists.

⁹⁴² Application no. 8348/78 and 8406/78, *supra* note 110, p. 187.

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In *Glimmerveen and Hagenbeek v. the Netherlands*, politically extreme speech (or fighting words) was seen as falling outside the protection of Article 10.⁹⁴³ The Commission found inadmissible a complaint by extremist right-wing Dutch politicians that their conviction for distributing leaflets advocating racial discrimination and the repatriation of non-whites from the Netherlands violated Article 10. The Commission invoked Article 17, which precludes anyone from relying on the Convention for a right to engage in activities 'aimed at the destruction of any of the rights or freedoms set forth in the Convention'. The Commission stated that the purpose of Article 17 was to 'prevent totalitarian groups from exploiting, in their own interests, the principles enunciated in the Convention'. It found that the expression of these ideas constituted an activity within the meaning of Article 17, which is prohibited under the Convention and other international instruments. Accordingly, such expression fell outside the scope of Article 10 altogether. In the case of *Kühnen v. the Federal Republic of Germany*, the Commission rejected the applicant's complaint, which contended that Article 17 did not apply in his case as he had only advocated the reinstatement of the Nazi party (NSDAP) as a constitutional party by legal means. The Commission declared the application of the Neo-Nazi journalist to be manifestly ill-founded. It considered that the applicant was indeed trying to use Article 10 in a way prohibited by Article 17 because he, as the criminal court had found, by the very act of advocating Nazism in his publications aimed at impairing the basic order of freedom and democracy.⁹⁴⁴

Before the case of *Jersild* in 1994 many conceived the Convention's case-law as treating racist expression as akin to using defensive weapons and that the Convention had much more respect for the dignity of the individual and concern for the right of minorities than the American constitutional doctrine with its commitment to the market place trading freely in competing ideas.⁹⁴⁵ The US Supreme Court confirmed in 1952 that under some circumstances *groups* could be libelled and that the state could bring criminal action against the libeller. The case involved a leaflet attack on the African Americans in Chicago.⁹⁴⁶ By 1992 hate-crime legislation was adopted in most states in the US, usually calling for both criminal sanctions and civil penalties. In 1992⁹⁴⁷ the Supreme Court declared a 'Bias Motivated Crime Ordinance' unconstitutional because it prohibited permitted speech solely on the basis of the subject it addresses. Hate-speech was legitimized as a form of public debate.⁹⁴⁸

The *Jersild* judgment came two decades after the Commission had held that racial discrimination could constitute 'degrading treatment' for the purposes of

⁹⁴³ *Ibid.*

⁹⁴⁴ Application no. 12194/86, *supra* note 509.

⁹⁴⁵ A. Lester, 'Freedom of Expression', in R. St. J. MacDonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights*, 1993 Kluwer Law International, p. 473.

⁹⁴⁶ *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

⁹⁴⁷ *R. A. V. v. St. Paul*, 505 U.S. 377 (1992).

⁹⁴⁸ Teeter, Le Duc and Loving, *supra* note 809, p. 77.

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Article 3 of the Convention, which provides: ‘No one shall be subjected to torture or inhuman or degrading treatment or punishment’.⁹⁴⁹ The Court, in another context, considered Article 3 with regard to racial discrimination, and held that the differences of treatment relied upon would have to be so extreme as to denote ‘contempt’ or to be designed to ‘humiliate or debase’.⁹⁵⁰ Inexplicitly the Court referred to the ‘silencing effect’ by providing that if the conduct complained of had the object of debasement of another’s personality so as to adversely affect that personality it would be incompatible with Article 3.⁹⁵¹ Article 3, as the Court has reiterated, enshrines one of the most fundamental values of democratic societies. The contracting parties are under an obligation to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention according to Article 1 of the Convention and hence must take measures designed to ensure that individuals within their jurisdiction are not subjected to degrading treatment, including such ill-treatment administered by private individuals.⁹⁵² As the Court submitted recently: ‘These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge’.⁹⁵³

The new Court having taken over the role of assessing admissibility has taken up the Commission’s approach that freedom of expression guaranteed under Article 10 § 1 may not be invoked in a sense contrary to Article 17.⁹⁵⁴

3.3.3 Holocaust Denial

Holocaust denial is considered a special feature of hate-speech, defined as contesting the central historical facts of the Holocaust. A significant number of countries in Europe have enacted ‘Holocaust-denial-laws’, making such speech a criminal offence. A series of Court and Commission decisions have adopted the approach that Article 17 removes any denial of the objectively established facts of the Holocaust from the protection of Article 10.⁹⁵⁵ The Court has provided that any negation or revision of clearly established historical facts such as the Holocaust would be removed from the protection of Article 10 by Article 17.⁹⁵⁶ The media has a decisive

⁹⁴⁹ Applications nos. 4403/70, 4422/70, 4423/70, 4434/70, 4443/70, 4476/70–4478/70, 4486/70, 4501/70 and 4526/70–4530/70, *East Asian African Asians v. the United Kingdom*, Commission’s report 14 December 1973, DR 78-4, § 208.

⁹⁵⁰ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, *supra* note 294, § 91.

⁹⁵¹ *Albert and Le Compte v. Belgium*, 10 February 1983, Series A no. 58, § 22.

⁹⁵² *Z and Others v. the United Kingdom*, *supra* note 564; *A. v. the United Kingdom*, 23. 9. 1998, RJD 1998–VI, § 22.

⁹⁵³ *Ibid.*, *Z and Others; Osman v. the United Kingdom*, *supra* note 311, § 116.

⁹⁵⁴ Application no. 32307/96, *Schimanek v. Austria*, 1 February 2000 (inadmissible); *United Communist Party of Turkey and Others v. Turkey*, *supra* note 507, p. 27 § 60; *Lawless v. Ireland*, *supra* note 137, pp. 45–46 § 60.

⁹⁵⁵ Application no. 25062/94; *Honsik v. Austria*, Commission’s decision 18 October 1995, 83-A DR.

⁹⁵⁶ *Lehideux and Isorni v. France*, 23. 9. 1998, RJD 1998–VII, p. 2864, § 47.

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role in establishing historical facts and negating them or revising them. A complete silence of subjects may also cause their renunciation.

In the case of *Lehideux and Isorni v. France*,⁹⁵⁷ the Court overturned a conviction of the two applicants for ‘public defence of war crimes or the crimes of collaboration’ following an appearance in the *Le Monde* of an advertisement presenting in a positive light certain acts of Marshal Pétain, the leader of the wartime Vichy government. They argued that Pétain had been playing a ‘double game’ in the interest of the French people. The Court said it was not its task to settle the dispute of the so-called ‘double game’ theory, which was a part of an ongoing debate and did not belong to the category of clearly established historical facts such as the Holocaust. Any justification of a pro-Nazi policy or denial of ‘clearly established’ historical facts, such as the Holocaust, would be removed from the protection of Article 10 by Article 17.⁹⁵⁸ The Court noted that the applicants had not attempted to deny or revise what they themselves had had referred to as ‘Nazi atrocities and persecutions’ or ‘German omnipotence and barbarism’. The applicants had not so much praised a policy as the person Pétain, and had done so for a purpose whose pertinence and legitimacy had been recognized by Court of Appeal, to promote a revision of Pétain’s conviction. Omissions for which the authors of the text were criticized concerned events directly linked to the Holocaust but as they had taken place more than forty years ago they were not considered as painful for others because of the passage of time. Furthermore, subject to Article 10 § 2 information and ideas that offended, shocked and disturbed were part of enhancing pluralism, broadmindedness and tolerance – in this instance a part of an effort to facilitate historical debate.⁹⁵⁹ A bare majority of the Court distinguished debate over the aims and policies of Pétain from a justification of pro-Nazi policy, which could not be allowed the protection of Article 10.⁹⁶⁰

3.3.4 The Chilling Effect: *Jersild v. Denmark*

Inspired by an article in a newspaper, the applicant Jens Olof Jersild, decided to make a television programme, which would describe the attitudes of a group of young people. In the course of the interview, which was conducted beforehand, the ‘green-jackets’ spoke in abusive and derogatory terms about immigrants and ethnic groups in Denmark.⁹⁶¹ The applicant subsequently cut and edited the interview, which was broadcast in Denmark’s radio news magazine. The applicant was charged with aiding and abetting the youths in the dissemination of racist statements in

⁹⁵⁷ *Ibid.*

⁹⁵⁸ *Ibid.*, § 47 and § 53.

⁹⁵⁹ *Ibid.*, § 55.

⁹⁶⁰ *Ibid.*, § 53.

⁹⁶¹ Using epithets as ‘niggers’, ‘Negro’, ‘gorillas’ – ‘a nigger isn’t a person – it’s an animal – and so are the other alien workers – Turks and Yugoslavs – and whatever they are called.’ The ‘green-jackets’ accused them of selling drugs.

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violation of the Penal Code.⁹⁶² The applicant submitted that in pursuit of the legitimate aim of protecting the reputation and rights of others it was not necessary in a democratic society to penalize a journalist who was conveying to the public an appreciation of images and words reflecting racism in society. The intention had not been to insult or degrade the groups attacked but if the programme had been cut and edited to exclude all the derogatory terms the aim of communicating to the public the group's attitude would not have gotten across. In the Commission's view the reporter had not intended to disseminate racist ideology but rather to counter it through exposure and concluded by twelve votes to four that Danish authorities had violated Article 10.⁹⁶³ The Court emphasized that this was also a question of a 'technique of reporting' and that it is neither for the Court nor national courts to substitute their own views for those of the press as to what techniques to use.⁹⁶⁴ Article 10 protects not only the substance of ideas and information but also the form in which they are conveyed.⁹⁶⁵ Furthermore, the Court added, 'it must be borne in mind that the item was broadcast as a part of a serious Danish news-programme and was intended for a well-informed audience'.⁹⁶⁶ The applicant's conduct during the interview was seen as disassociating him from the persons interviewed and that the programme had in fact reflected an anti-social attitude among certain groups of people.⁹⁶⁷ Interviews, whether edited or not, in the Court's opinion constitute one of the most important means whereby the press is able to play its vital role of Public Watchdog. The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview may seriously hamper the contribution of the press to the discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. The Court in this regard did not accept the Danish government's argument that the limited nature of the fine was relevant.⁹⁶⁸ The Court held that the reasons adduced in support of the applicant's conviction and sentence was not sufficient to establish convincingly that the interference was necessary. Accordingly the measures gave rise to a breach of Article 10. The dissenting judges in the *Jersild* case, which was the first case before the Court, dealing with the dissemination of racist remarks, stated in their opinion:

This is the first time that the Court has been concerned with a case of dissemination of racist remarks which deny to a large group of persons the quality of 'human beings'. In earlier decisions the Court has – in our view, rightly – underlined the great importance of the freedom of the

⁹⁶² Section 266 (b) of the Danish Penal Code and section 23 (1).

⁹⁶³ *Jersild v. Denmark*, *supra* note 84, Commission's report 8. 7. 1993, § 44.

⁹⁶⁴ *Ibid.*, § 31.

⁹⁶⁵ *Ibid.*

⁹⁶⁶ *Ibid.*, § 34.

⁹⁶⁷ *Ibid.*

⁹⁶⁸ DKK200. Cf. *Lopez Gomes da Silva v. Portugal*, *supra* note 832, § 36 where Court held that what matters is not that the applicant journalist was sentenced to a minor penalty, but that he was convicted at all.

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press and the media in general for a democratic society, but it has never had to consider a situation in which ‘the reputation or rights of others’ (art. 10-2) were endangered to such an extent as here.⁹⁶⁹

These judges reasoned that the protection of racial minorities could not have less weight than the right to impart information. In the view of the majority the essence of the decision was to prevent a chilling effect on journalism. It is hence doubtful to infer from this decision that the Court is in favour of complete press autonomy, although it eludes the impact of derogatory comments on the dignity of the minorities attacked. The Court was not emphasizing the principle of freedom of expression as a constitutive end but rather as an instrumental interpretation of Article 10. The Court clearly wanted to shelter journalism from the pitfall of self-censorship in its coverage of controversial issues. It probably made the right decision in this case by distinguishing between a presentation, which is shocking and offensive – as the *Handyside-formula* submits – and the chilling effect of punishing journalists. Sometimes a provocative presentation of that kind is the only way to stir the public to do something about the problem and may in the end do more for the cause than a journalist hostage to censorship.

3.4 THE SILENCING EFFECT OF DISCRIMINATORY JOURNALISM

The presence of women in media is minute. The Court has reiterated that the advancement of the equality of sexes is today a major goal in the member states of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference in treatment on the grounds of sex could be regarded as compatible with the Convention.⁹⁷⁰ Ways to combat what Dworkin terms ‘the shaming inequalities women still suffer’,⁹⁷¹ will not be found if women do not get a fair share in the public debate. Women are in a minority of those occupying editorial posts within the media, which impinges on their struggle for equality because of the male-biased presentation of social and political issues in the forum of the media.⁹⁷² The paucity of women imparting information and ideas of political concern and women interviewed on the news has elicited concern in the Council of Europe forum, as it is a common feature of most of the member states. Evidently this portrayal of the ‘second sex’ facilitates the stereotyping of women and may reduce

⁹⁶⁹ *Jersild v. Denmark*, *supra* note 84, joint dissenting opinion of Judges Ryssdal, Bernhardt, Spielmann and Loizou, p. 29.

⁹⁷⁰ *Dahlab v. Switzerland*, 15 February 2001, RJD 2001–V, p. 464, referring to *Abdualiz, Cabales and Balkandali v. the United Kingdom*, *supra* note 294, pp. 37–38, § 78, and *Schuler-Zgraggen v. Switzerland*, 26 June 1993, Series A no. 263, pp. 21–22, § 67.

⁹⁷¹ Dworkin, *supra* note 399, p. 221.

⁹⁷² At present women in media management are less than 15 per cent in Europe. Report of a Committee on Women and the Media issued by the Ministry of Education in Iceland, February 2001.

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political awareness on equality.⁹⁷³ The public debate is controlled by men, leaving out the feminist angle towards societal issues, *inter alia* from the standpoint of violence. The way women are all too often portrayed may indeed be of greater damage, than sadistic pornography, to the way they are understood and allowed to be influential in politics.⁹⁷⁴

The 4th European Ministerial Conference on Equality between Women and Men in 1997 expressed 'grave concern that, in spite of the significant changes in the status, the role and the contributions of women in society during the second half of this century, the distribution of power, responsibilities and access to resources between women and men is still very unequal'.⁹⁷⁵ It urged governments, political parties, employers, unions and non-governmental organizations to follow an action plan designed to help create a fairer, more democratic continent. Without equality, it was agreed, there could be no democracy or social justice. For this reason it is necessary to promote gender balance in all financial institutions funded by governments and to encourage and promote an increase in numbers of women in management in the media.⁹⁷⁶ The Parliamentary Assembly stated earlier that it is indispensable for governments of member states to take initiatives 'to remove progressively any obstacles which at present obstruct the appointment of women to positions of responsibility in equal proportion to men, especially in key areas of decision-making – subject to comparable qualifications and experience'.⁹⁷⁷

The diversity required in media conduct, has been explicitly interpreted as involving 'gender equality within broadcasting' in a joint declaration by three international mandate-holders on freedom of expression.⁹⁷⁸ The Committee of Ministers in a recommendation on the elimination of sexism from language stressed the fundamental role of language in forming an individual's social identity, and of the interaction between language and social attitudes stated that 'the sexism characterizing the current linguistic usages in most Council of Europe member states – whereby the masculine prevails over the feminine – is hindering the establishment of equality between women and men, since it obscures the existence of women as half of humanity, while denying the equality of women and men'. Hence the recommendation encouraged the use of non-sexist language in the media.⁹⁷⁹

⁹⁷³ Cf. Parliamentary Assembly Resolution 855 (1986) on equality between men and women. ECHR Yearbook 1986, p. 251.

⁹⁷⁴ Dworkin, *supra* note 399, p. 220.

⁹⁷⁵ Press release from 4th European Ministerial Conference on Equality between Women and Men, 13–14 November 1997 Istanbul.

⁹⁷⁶ *Ibid.*

⁹⁷⁷ Cf. Parliamentary Assembly Recommendation 1146 (1991) *on equal opportunities and equal treatment for women and men on the labour-market*, adopted by the Standing Committee, acting on behalf of the Assembly on 11 March 1991, ECHR Yearbook 34 (1991), p. 353.

⁹⁷⁸ Joint Statements of the International Mechanisms for Promoting Freedom of Expression, *supra* note 145.

⁹⁷⁹ Recommendation No. R (90) 4 adopted by the Committee of Ministers on 21 February 1990 at the 434th meeting of the Ministers' Deputies, ECHR Yearbook 33 (1990), p. 265.

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Article 1 of the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women submits that the term ‘discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’. Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The question of legislating on the ‘gender balance’ within the media has been raised on the Council of Europe agenda. The Committee of Ministers admits that gender balance within a media enterprise can be promoted by legislation concerning, for example sex discrimination and equal opportunity but that different considerations apply to the promotion of equality between women and men through the media. The primary goals reside with the media professionals themselves. Given the importance of editorial independence, the Committee of Ministers would caution against legislative solutions and would advocate instead codes of conduct being drawn up by the professionals themselves.⁹⁸⁰

The Parliamentary Assembly sees the matter as more urgent, recommending in 2002 that governments of member states adopt a law on gender equality in the media.⁹⁸¹ At present there appear to be no legal responses to the conduct of a newspaper or a broadcasting station that has on its agenda only interviews with men concerning issues of public interest. Nor does it seem in conflict with any law if most of the reporters are males with similar backgrounds and political outlooks. Neither would it seem to constitute ‘group defamation’ if a reporter interviewed a group of men who share chauvinistic characteristics and describe their misogynist attitudes towards women. The Danish reporter Jersild was convicted for interviewing men airing their racist views. It is, however, unlikely that he would have been convicted if the targeted group had been women and the objective of the interviewees to provoke chauvinism and subsequently inflict injury.

Prima facie Article 10 affords protection from harmful media content but not necessarily from harmful *media conduct*, exemplified in non-coverage by ignoring sections of society to the extent that their chances of enjoying the rights and freedoms set forth in the Convention are diminished and their dignity harmed. A distinction needs to be made between occurrences, like the interview Jersild was prosecuted for and the unrelenting negligence of the positive requirements imposed

⁹⁸⁰ Committee of Ministers’ Declaration on *Equality of Women and Men* (Adopted by the Committee of Ministers on 16 November 1988 at its 83rd Session).

⁹⁸¹ Parliamentary Assembly Doc. 9394 (25 March 2002): *Images of Women in the Media*.

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on the media in upholding a standard compatible with an enlightened debate. In the case of *Bergens Tidende and others v. Norway*, the newspaper's editor-in-chief and journalist were required to pay a cosmetic surgeon 4.7 million Norwegian crowns for damages and costs from a Supreme Court judgment in defamation proceedings instituted by the surgeon following publications of articles on 'beautification resulting in disfigurement'.⁹⁸² The articles were based on interviews with women who had undergone breast surgery at the specialist's clinic and wanted to warn other women of the extremely bad results. The applicants, the newspaper, its former editor-in-chief and a journalist claimed that their case did not only concern freedom of the press to cover matters of public interest but also the right of women to express their own situation and feelings. The latter could only have been exercised effectively through the media. Issues relating to breast enlargements and adjustments were of the most intimate character and many women would not feel at ease to discuss such matters even with close family and friends.⁹⁸³ The Court did not accept the government's submission that the grievances of a few women concerning the standard of healthcare afforded by a particular surgeon are matters between the patient and surgeon themselves and are not matters in which the community at large has an interest.⁹⁸⁴ It did not accept the government's 'male-biased' reasoning and held that there had not been sufficient reasons to show that interference had been necessary in a democratic society, although relevant to protect the personal reputation of the surgeon.

MacKinnon speaks of 'expressive means of practicing inequality'.⁹⁸⁵ The press may be accused of practicing inequality when men dominate the public discourse with greater access to the media and the agenda is male-biased.⁹⁸⁶ Such male dominance over journalism cannot be brushed off as being in congruity with the freedom of expression as an individual right. The more dominant the already influential forces become, the less is heard from those subordinated. Consequently, the more detached is the goal set forth in Article 1 of the UDHR that: 'All human beings are born free and equal in dignity and rights'.

A recent recommendation of the Committee of Ministers⁹⁸⁷ emphasized the Council of Europe's commitment to guarantee the equal dignity of all individuals

⁹⁸² *Bergens Tidende and Others v. Norway*, 2 May 2000, RJD 2000-IV, § 35.

⁹⁸³ *Ibid.*

⁹⁸⁴ *Ibid.*, § 51.

⁹⁸⁵ MacKinnon, *supra* note 907, p. 107.

⁹⁸⁶ The situation in Iceland according to a Report of a Committee on Women and the Media (February 2001), issued by the Ministry of Education, shows that women are a minority in the media. The proportion of women during prime time on television is 30 per cent. Women are a minority of those interviewed on the news. Female reporters are usually under the age of 35 while male reporters are generally older. Men have greater access to the media and their chances increase after 35. They dominate the discussion. (A Committee on Women and the Media, February 2001, pp. 5–8).

⁹⁸⁷ Recommendation No. (97) 21 of the Committee of Ministers to Member States *on the Media and the Promotion of a Culture of Tolerance* (Adopted by the Committee of Ministers on 30 October 1997, at the 607th meeting of the Ministers' Deputies).

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and the enjoyment of rights and freedoms without discrimination on any ground such as those listed in Article 14 of the Convention. Subsequently it may be reasoned that Article 10 is being breached, read in conjunction with Article 14, when the media is ‘practicing inequality’. To take the argument further, using the media to sustain the domination of women with excessive sexism⁹⁸⁸ – which also contributes to the unequal representation of women and female views – may amount to a breach of Article 17. If freedom of expression of male chauvinistic views is used to limit, to a greater extent than is provided for in the Convention, the rights of women then the function of Article 17 might be seen as ‘safeguarding the free function of democratic institutions’, of which it might be argued the media is a part.⁹⁸⁹ Evidently the text of Article 17 was originally concerned with the potential threat of totalitarian forces to the democratic order.⁹⁹⁰ The interpretation of the Convention is, however, to keep phase with changing circumstances. As frequently stressed on the agenda of the Council of Europe, democracy is not conceivable without equality. Balancing the representation of women and men in political and public life is one of the objectives of the Council of Europe, as women are still marginalized in the member states and they are paid less for work of equal value. Women find themselves victims of poverty and unemployment and are frequently subjected to violence.⁹⁹¹

Examination of the present political landscape in the different Council of Europe member states reveals that women are under-represented in the political institutions: parliaments, governments, local and regional authorities. The role and responsibility of the media in the protection of human dignity has long been recognized on the Council of Europe agenda. Already in 1983 the Steering Committee on the Mass Media (CDMM) organized a seminar on the contribution of the promotion of equality between men and women.

The Committee of Ministers has in recent years emphasized the importance of equality in democracy and the role and responsibility of the media in the protection of human dignity. The 6th European Ministerial Conference on Mass Media Policy, held in Krakow on 15 and 16 June 2000, agreed that the human and democratic dimension of communication should be at the core of the Council of Europe media policy. The 3rd Ministerial Conference on Equality between Women and Men in Rome in 1993 considered the media as a means to eliminate violence against women in society. The yardstick of the Court, that public authorities may interfere and restrict political speech if it is inciting violence, provided that it is necessary in a democratic society, is well-established in Convention jurisprudence.⁹⁹² The relevant paradigm in American jurisprudence is the ‘clear and present danger’ test, which

⁹⁸⁸ Parliamentary Assembly Doc. 9394 (25 March 2002): Images of Women in the Media.

⁹⁸⁹ Application no. 250/57, *supra* note 675, at § 223.

⁹⁹⁰ Application no. 32307/96, *supra* note 954, (inadmissible).

⁹⁹¹ Council of Europe, Directorate General of Human Rights; http://www.coe.int/T/e/human_rights/equality/.

⁹⁹² Thirteen cases decided on 8 July 1999 against Turkey. In eleven of these, the Turkish state’s restrictions of dissent speech on the basis of ‘incitement to violence’ were found incompatible with Article 10.

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asks judges to assess the likelihood that vehement political speech would be transmitted into illegal action.⁹⁹³ Physical violence against women is a much more actual threat in most Council of Europe member states than a *coup d'état*. Within the Council of Europe member states, one out of five women experiences during her lifetime, violence in some form.⁹⁹⁴ Violence affects women of all age groups, social strata and cultures. If it is shown that the media advances misogynist and sexist opinions towards women the question arises if member states will have to resort to legislative measures to redress the problem of such massive discrimination. If racial discrimination constitutes degrading treatment does not discrimination against women fall under the same rubric?⁹⁹⁵ Thomas Emerson⁹⁹⁶ made a distinction between speech and action and said that imposing 'erotic material' on individuals against their will is a form of action that has all the characteristics of a physical assault. Feminists who oppose pornography do not do so on the grounds of morals but on the grounds of equality.

Pornographic speech subordinates women, according to MacKinnon, by determining their civil status. Subordinating someone is to put them in a position of inferiority or loss of power, or to demean or denigrate them.⁹⁹⁷ Pornography reduces women to sexual objects and 'erotizes' their domination but discriminatory speech need not go as far as pornography as it can be in the form of portraying women in a stereotyped manner.⁹⁹⁸ Such journalism if contested should not be contested on the grounds of morals or 'sexual morality' but on the grounds of the rights of others in relation to Article 14. Discriminatory speech subordinates in three ways:

1. It legitimizes discriminatory behaviour on the part of those exercising it.
2. It deprives minorities or those attacked with 'words' of important powers.
3. Discriminatory speech is a discriminatory act when used by someone in a position of authority.⁹⁹⁹

The media is in a position of authority versus individuals and various groups existing in society. A typical case of a discriminating presentation of female perspectives and human rights interests of women occurs when victims of sexual crimes are portrayed as having themselves to blame. Often coverage of prostitution

⁹⁹³ *Schenck v. United States*, *supra* note 26.

⁹⁹⁴ Parliamentary Assembly Recommendation 1450 (2000) Violence against women in Europe

⁹⁹⁵ Cf. D. Nolan, 'A Right to Meritorious Treatment' in Gearty and Tomkins (eds.), *Understanding Human Rights*, 1999 Pinter, p. 244.

⁹⁹⁶ MacKinnon, *supra* note 907, p. 108.

⁹⁹⁷ *Ibid.*, p. 176.

⁹⁹⁸ *Ibid.*

⁹⁹⁹ R. Langton, 'Pornography, Speech Acts, and Silence' in H. LaFollette, (ed.), *Ethics in Practice: An Anthology*, 1997 Blackwell Publishers, p. 341.

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and trafficking for the sex trade shows men as consumers and women as victims – with sensational images being used for otherwise factual stories. It has been pointed out on the Council of Europe agenda how journalism ‘seeking’ to raise awareness on cases of sexual exploitation could prove to be ‘a two-edged sword’ by sensationalizing and creating more tolerant attitudes toward child pornography and prostitution.

A Council of Europe workshop for media professionals in 1998 called on journalists to make careful choices in the way they portrayed women.¹⁰⁰⁰ The workshop concluded that images of women in the media reflected a reality that was twenty years out of date, with women still consistently sidelined and stereo-typed. Researchers studying 500 hours of television from Finland, Sweden, Norway, Germany, the Netherlands and Denmark found that only a third of the speakers were women and men had three-quarters of the speaking time. Experts for interviews and on discussion panels were almost always men. Highly qualified women were mainly asked to speak on ‘feminine’ topics such as relationships and social issues.

According to recent case-law¹⁰⁰¹ concerning equality it is acknowledged that special treatment may be required in certain circumstances to achieve equality of results.¹⁰⁰² The question arises in this context whether states are not obliged to take legal measures to correct this obvious discrimination and to bring about the structural changes necessary for an ‘effective political democracy’. As long as women have lesser access to the public forum and a lower voice in the public debate the progress to the achievement of equality is halted. In *Thlimmenos v. Greece*,¹⁰⁰³ a decision significant for its expansion of the concept of discrimination under the Convention, the Court held that the failure to treat persons in different situations differently would also potentially be unlawful. Women as half of the human race are in a position of substantial social and economic disadvantage, although they have achieved formal equality before the law. The principle of equality must be oriented towards equality of results. That approach, unlike *de jure* or formal equality, requires that practices and policies, which keep women and other groups in a position of subordination, must be eliminated. Media practices are crucial in this context. The policies of member states ought to take aim at this and take affirmative action where needed in order to overcome the structural inertia to an ‘effective political democracy’.

¹⁰⁰⁰ Workshop on ‘good’ and ‘bad’ practices regarding the image of women in the media: the case of trafficking in human beings for the purpose of sexual exploitation Strasbourg, 28–29 September.

¹⁰⁰¹ *Thlimmenos v. Greece*, 6 April 2000, RJD 2000–IV.

¹⁰⁰² Catherine MacKinnon is the originator of this interpretation; Cf. C. MacKinnon; *Toward a Feminist Theory of the State*, 1990 Harvard University Press, 1990; ‘Reflections on Sex Equality under the Law’, 100 *Yale Law Journal* (1991), 1281; Cf. C. J. M Kimber, ‘Equality or Self-determination?’ in Gearty and Tomkins (eds.), *Understanding Human Rights*, 1999 Pinter (first published 1996), p. 273.

¹⁰⁰³ *Ibid.*

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3.4.1 Sexism in Journalism

Unfortunately the Court has not gotten a chance to adjudicate on such matters as discussed here but came close in the case of *Familapresse Zeitungs-GmbH v. Austria*,¹⁰⁰⁴ which was struck off the list in line with Article 30 § 2 of the Convention.¹⁰⁰⁵ In May 1989 the *Kronenzeitung* ('Krone'),¹⁰⁰⁶ a Viennese newspaper reported on an attempted rape and on the same page, reproduced a poem entitled 'Rhymed in the Wind', which read:

Woe betide you, if you grasp today – ban office colleague's bottom! – But
if she herself flutters around someone – And bills and coos and teases
him, – With unsupported breasts, – Is that not pestering, too?"

In June 1989, a journalist of another newspaper commented on the above poem as follows:

The old men of the 'Krone' – Are itched by leftover hormones. – Breasts
without support: Hurra! They feel a hardening. – If just once – The page 5
nude – Would grab the slobbering old men in their office: O warm hand
on a cold behind! – The very winds that break would rhyme. – If it didn't
make you laugh, you had to cry. – O fear! O lust! But such a nuisance,
too: – Yesterday's men, forever randy.

In December 1989, in the context of a criminal proceeding for defamation brought by the editor of the newspaper 'Krone', the journalist was acquitted by the Vienna Court of Appeal. A few days later the 'Arbeitszeitung', reported that the presiding judge had said the journalist's answer had not gone beyond the limit of acceptable journalistic expression reacting to a particularly tasteless report which had amounted to an immense provocation for any defender of women's rights.

In January 1990 the applicant weekly magazine published in its comic series a cartoon entitled 'Slimed in the Wind', showing a raven and an old man, both reading a newspaper and commenting on its content:

The themes this tabloid's verse-smith has – are most odd. – If a man
forces a woman's favour, – mostly she has herself to blame! – The
poetess, he boldly claims, – lives like the maggots in the ham! – But as I

¹⁰⁰⁴ Application no. 20915/92, Commission's report 3 March 1995 on the application of Article 30 § 2 of the Convention, DR 80–B, p. 74. (*Avocat de la requérant ayant divulgué, aux fins d'une procédure interne connexe à laquelle la requérante est partie, l'avis provisoire de la Commission sur une violation de l'article 10. Compte tenu de cette grave violation injustifiée de la confidentialité de la procédure de la Commission, la poursuite de l'examen de la requête ne se justifie plus. Absence d'intérêt général. Requête rayée du rôle.*)

¹⁰⁰⁵ Article 30 of the Convention holds that the Commission may at any stage of the proceedings decide to strike a petition out of its lists of cases where the circumstances lead to the conclusion that as in this case in line with paragraph c) for any other reason established by the Commission, it is no longer justified to continue the examination of the petition.

¹⁰⁰⁶ The largest daily in Austria, with a circulation of 40 per cent.

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read all this – I can't help thinking – that just those who have no joy with women – have 'farted' in the 'Krone'.

After the editor of the '*Krone*' brought injunction proceedings under the Unfair Competition Act, the Vienna Commercial Court issued a preliminary injunction order against the applicant prohibiting it from further publishing this statement: 'Those who have no joy with women have farted in the "*Krone*" '. The Commercial Court held that as there was no ongoing journalistic controversy between the weekly magazine and the '*Krone*', there was no justification for the statement about old men farting as seven months had passed since the controversial poem was published on the newspaper's front page. If such a statement was permitted as an aspect of press freedom it would further a low-level of political culture in Austria. The Court of Appeal quashed this decision and held that there had been an ideological controversy between the applicant and the '*Krone*'. The incriminated statement was directed against the hints in the paper that rapes were in most cases women's own fault. The comic strip was an attempt to convert public opinion from the opinions of women-haters and sexists reflected in the '*Krone*'. The Supreme Court quashed this decision, submitting that the seven months which had passed between the rape issue on the front page of '*Krone*' and the statement about old men farting their sexist views therein had rendered the motive of converting public opinion incredible. The employees of the '*Krone*' had been insulted and the contents of the newspaper generally depreciated. This kind of defamatory publication was in the view of the Austrian Supreme Court not protected under Article 10 of the Convention.

The applicant submitted that the interference with its right to freedom of expression was not necessary within the meaning of Article 10 § 2. In particular, the present case concerned a dispute in the media about a topic of general interest, namely sexism in today's society. The Commission declared the application admissible and took a provisional vote on the question of a violation of Article 10. The Commission later decided to strike the case out of its list in accordance with Article 30 § 1 (c) of the Convention, as the applicant had not respected the confidentiality of its proceedings. This was unfortunate as an opinion on the merits by the Commission and later a judgment by the Court might have clarified the controversial topic of sexism in journalism, which the large daily '*Krone*' was seen by the Court of Appeal in Austria to have practiced in this case. Perhaps it would have answered the question which lowers the political culture more, vulgar criticism of the editors of the largest newspaper in Austria or contemptible 'debasement' of victims in rape cases?

3.5 CHILDREN: PROTECTION AGAINST EXPLOITATION

Young children are particularly impressionable. They wonder about many things and are more easily influenced than older children.¹⁰⁰⁷ That the media has an educational role for youth in society is frequently reiterated at the Council of Europe at various

¹⁰⁰⁷ Cf. *Dahlab v. Switzerland*, *supra* note 970, p. 463.

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levels. Children are right holders of freedom of expression and opinion in Article 10. Article 17 of the Convention on the Rights of the Child recognizes the important function of the mass media.¹⁰⁰⁸ It provides that states parties shall ensure that the child has access to information and material from a diversity of national or international sources, especially aimed at the promotion of his social, spiritual and moral well-being and physical and mental health. To this end state parties shall encourage the mass media to disseminate information and material of social and cultural benefit to the child.

The European Convention on Transfrontier Television prohibits certain advertisements from being directed at minors or too frequently intercepting children's programmes.¹⁰⁰⁹ Article 13 of the Children's Convention provides the child the right to freedom of expression in a similar wording as afforded to everyone in Article 10 of the Convention. Children have the same right to freedom of expression, including freedom to form an opinion as grown ups. The main difference is that children are undoubtedly defenceless with regard to the media as they are not in a position to judge for themselves, hence a special treatment may be required by the legislator to ensure equality of results in respecting the right of children to form an opinion. According to the Court's jurisprudence there is increased responsibility on the imparting side when children are on the receiving end.¹⁰¹⁰ Recently the Committee of Ministers recognized the role that advertising and the media, particularly the Internet, can play, in the spreading as well as in the prevention of sexual exploitation of children.¹⁰¹¹ It urged member states to take effective measures to protect children against sexual exploitation and encouraged them to review their legislation in that respect. It was stressed that the freedom to use the NITs should not prejudice the human dignity, human rights and fundamental freedoms of others – especially of minors.¹⁰¹²

In the case of *Handyside*¹⁰¹³ the Court dealt with matters concerning dissemination of sexual matters to youngsters and submitted that the right of the state to intervene was enhanced because the material was aimed at children. In *Otto Preminger v. Austria* the Court reiterated its general principles, stating *inter alia*: that according to Article 10 § 2 whoever exercises the rights and freedoms in the

¹⁰⁰⁸ *X, Y and Z v. the United Kingdom*, 20 March 1997, RJD 1997–IV. Judge Pettiti submitted in a concurring opinion, that the Court should take into consideration the interests of children and to give priority to the interests of the child in complex situations of modern life – with regard to Article 8 to protect family life.

¹⁰⁰⁹ Council of Europe, European Treaties, ETS No. 132.

¹⁰¹⁰ *Handyside v. the United Kingdom*, *supra* note 87, § 49.

¹⁰¹¹ Council of Europe Committee of Ministers, Recommendation (2001) 16 *On the protection of children against sexual exploitation* (Adopted by the Committee of Ministers on 31 October 2001 at the 771st meeting of the Ministers' Deputies).

¹⁰¹² Committee of Ministers Recommendation (2001) 8 *On self-regulation and user protection against illegal or harmful content on new communication and information services* (Adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers' Deputies).

¹⁰¹³ *Handyside v. the United Kingdom*, *supra* note 87, § 49.

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first paragraph of that Article undertakes ‘duties and responsibilities’. In this context the duties may legitimately include 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.¹⁰¹⁴ The Court submitted that,

It is somewhat artificial . . . to draw a rigid distinction between ‘protection of the rights and freedoms of others’ and ‘protection of morals’. The latter may imply safeguarding moral ethos or moral standards of a society as whole, but may also cover protection of moral interests and welfare of a particular section of society, for example schoolchildren. Thus, ‘protection of the rights and freedoms of others’, when meaning the safeguarding of moral interests and welfare of certain individuals or classes of individuals who are in need of special protection for lack of maturity, mental disability or state of dependence, amounts to one aspect of ‘protection of morals’.¹⁰¹⁵

The Court has held that the state has an obligation to secure to children their right to education under Article 2 of Protocol 1.¹⁰¹⁶ The right to be educated is a fundamental right and as the Convention must be read as a whole, the two sentences in Article 2 of Protocol 1 ‘must be read not only in light of each other but also, in particular, of Articles 8, 9 and 10 of the Convention, which proclaim the right of everyone, including parents and children, “to respect for his private and family life”, to “freedom of thought, conscience and religion”, and to “freedom to receive and impart information and ideas”’.¹⁰¹⁷ The Court has furthermore emphasized that those responsible as representatives of the state must be mindful of the rights of children not to be exposed to influences which are hard to square with the principle of gender equality.¹⁰¹⁸

The Commission has linked freedom of opinion in Article 10 with the right to privacy in Article 8 by stating that ‘the concept of privacy in Article 8 also includes, to a certain extent, the right to establish and maintain relations with other human beings for the fulfilment of one’s personality’.¹⁰¹⁹ This gives rise to the question of whether the state may have a positive obligation under Article 8 to give protection against intrusions by the media, which might be said to be in an analogous position to ‘public authorities’. The implication of the opening words of Article 8 § 2 might be that only public bodies need comply with the right to respect for private life and that the right does not have horizontal effect by limiting the freedom of privately

¹⁰¹⁴ *Otto-Preminger-Institut v. Austria*, *supra* note 72, § 49.

¹⁰¹⁵ *Dudgeon v. Ireland*, *supra* note 339, § 47.

¹⁰¹⁶ *Costello-Roberts v. the United Kingdom*, *supra* note 218, §§ 25–28.

¹⁰¹⁷ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, *supra* note 243, § 52.

¹⁰¹⁸ *Cf. Dahlab v. Switzerland*, *supra* note 970, p. 463.

¹⁰¹⁹ Application no. 8962/80, *X and Y v. Belgium*, 28 DR, p. 112.

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owned newspapers and other commercial media.¹⁰²⁰ The development of a positive obligation in the case-law indicates that contracting states are also under an obligation to actively protect the right to privacy against infringement by private parties.¹⁰²¹ As the Court has submitted, although

the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations of individuals between themselves.¹⁰²²

As early as 1970 the Parliamentary Assembly in Resolution 428 accentuated that the ‘right to privacy afforded by Article 8 of the Convention on Human Rights should not only protect an individual against interference by public authorities but also against interference including the mass media. National legislation should comprise provisions guaranteeing this protection.’¹⁰²³

In 1998 the Parliamentary Assembly emphasized that children need to be protected from harmful media content as today’s citizens and they have the right to quality media as tomorrow’s society-caretakers.¹⁰²⁴ Noting the need to promote from early childhood onwards a policy of equality between girls and boys, and women and men, the media is encouraged to place greater emphasis on the production of information and educational programmes seeking to promote the participation of children in family and social life. The Parliamentary Assembly has asked member states to take appropriate measures to ensure that broadcasting companies give particular attention to means of protecting sensitive people, especially children from prolonged media violence and expressed concern that artistic freedom should not be

¹⁰²⁰ Article 8 § 1: Everyone has the right to respect for his private and family life, his home and his correspondence. Article 8 § 2: There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

¹⁰²¹ *Rees v. the United Kingdom*, *supra* note 258, *cf.*, Recommendation No. R (97) 5 and Explanatory Memorandum of the Committee of Ministers to Member States on the protection of medical data (Adopted by the Committee of Ministers on 13 February 1997 at the 584th meeting of the Ministers’ Deputies); Article 3 of the 1981 Council of Europe Convention for the Protection of Personal Data (ETS No. 108) stipulates: ‘The Parties undertake to apply the Convention to automated personal files and automatic processing of personal data in the public and private sectors.’

¹⁰²² *X and Y v. the Netherlands*, *supra* note 122, citing *Airey v. Ireland*, *supra* note 377, § 32.

¹⁰²³ *Cf.* Parliamentary Assembly Resolution 1165 (1998), Right to Privacy (Assembly debate on 26 June 1998) (24th Sitting), *cf.* Doc. 8130.

¹⁰²⁴ Parliamentary Assembly Recommendation 1371 (1998).

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used as an alibi for purely commercial interests.¹⁰²⁵ The Court has held that the rights of the holder of parental authority (schools) are not unlimited and that the state must provide safeguards against abuse.¹⁰²⁶ Given the reiterated recognition of interpreting the Convention in light of present day conditions – the television is widely recognized as the ‘babysitter’ – where children watch unattended while parents are making dinner or running errands. This is a fact known in most households although the television cannot in virtue of the ‘*in loco parentis*’ doctrine be held responsible. The authorities in the member states on the other hand, have an obligation under Article 1 as frequently reiterated to secure that children, even within their homes, are not exposed to treatment contrary to Article 3 of the Convention.¹⁰²⁷ The Court has referred to the United Nations Convention on the Rights of the Child to illustrate the responsibility of the state where children’s dignity is concerned.¹⁰²⁸

Children have an inalienable right to privacy from harmful media conduct and they also have a right under Article 10 to develop their personality in harmony with the objectives of the Convention. How are children as tomorrow’s society-caretakers to shoulder the responsibility of further realizing human rights if they are brought up with constant exposure to violence? Imposing ‘obscene’ material on those who cannot oppose it is according to Emerson and McKinnon a form of physical assault.¹⁰²⁹ A child exposed to violence in the form of vulgar covers on magazines in supermarkets or obscene sexual programmes on television has his moral integrity invaded and is also suffering an attack on his moral integrity in the sanctity of the home,¹⁰³⁰ as the concept of private life in the case-law covers physical and moral integrity.¹⁰³¹ According to Convention jurisprudence with regard to Article 8 the state may have a positive obligation in protecting individuals, in this context, from media conduct that does not take into account their moral integrity.¹⁰³²

In the *Müller* case, the Court took into consideration the ‘violent reaction’ of a young girl exposed to paintings in an art gallery in the attendance of her father – a much more unusual setting than the living room with the television. The government in Switzerland contended that the aim of the interference of the freedom of expression of the artist was to protect the morals and the rights of others, relying above all on the reaction of a man and his daughter. In this case the Court linked the protection of morals with the rights of others to be guarded against vulgarity. On the basis of an implicit value-judgment of the Swiss judges’ attitudes about morality, the

¹⁰²⁵ Parliamentary Assembly Recommendation 963 (1983) *on cultural and educational means of reducing violence* (Assembly debate on 28 January 1983) (28th Sitting), cf. Doc. 5013.

¹⁰²⁶ *Costello-Roberts v. the United Kingdom*, *supra* note 218, § 28.

¹⁰²⁷ Cf., *Costello-Roberts v. the United Kingdom*, Commission’s report 8. 10. 1991, Series A no. 247, § 37.

¹⁰²⁸ *Costello-Roberts v. United Kingdom*, *supra* note 218, § 27.

¹⁰²⁹ Cf. MacKinnon, *supra* note 907, p. 108.

¹⁰³⁰ Cf. *Costello-Roberts v. the United Kingdom*, *supra* note 218, § 34.

¹⁰³¹ *X and Y v. the Netherlands*, *supra* note 122, pp. 11–13, §§ 22–27.

¹⁰³² *Ibid.*, § 23; *Airey v. Ireland*, *supra* note 377, § 32.

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Court held that the necessity test had been met and the measures adopted were proportional.¹⁰³³ The Court held that freedom of artistic expression is protected under Article 10 but it overruled the Commission's finding of a breach of the right to free expression referring to the 'duties and responsibilities' of the holder of the right where the scope depends on the situation and the means he uses.¹⁰³⁴ Referring to *Handyside* the Court placed the burden of duties and responsibilities on private individuals using means, which could reach the morally sensitive, young people at a critical stage of their development. Adolescents could have interpreted the material as an encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offences.¹⁰³⁵ Restrictions of such material are hence conducive to the protection of morals necessary in a democratic society.¹⁰³⁶ The Court confirmed that the state can enforce such laws as it deems necessary to control the use of property in accordance with the general interest – if the aim is the protection of morals as used in Article 10 § 2 of the Convention – and is encompassed in the much wider notion of the 'general interest' within the meaning of the second paragraph Article 1 Protocol 1.

In Mill's theory on liberty, the only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. Immune from this principle are children and young persons below the age, which the law may fix as that of manhood or womanhood. They need protection against external injury.¹⁰³⁷ The guileless paradigm used by Mill needs to be reconsidered in light of modern day media and the programmes and paradigms the 'defenceless' are exposed to.

3.6 CONCLUSION: A MEDIA PRACTICING (IN)EQUALITY?

Of interest in *Jersild v. Denmark* is that the case touches upon the negative requirements made to the press, the '*faux-pas*' dilemma and its direct and manifest effects, which as in this instance led to the prosecution of the TV reporter.¹⁰³⁸ The Court decided in favour of journalism to avert the chilling effect of legal sanctions which would bring about self-censorship within the media. There is another side to journalism, which in a subtle way may go unnoticed even though it is practiced on a regular basis, although it need not be intentional. This is discriminating journalism. Debasing a rape victim on the front page of the largest newspaper in Austria is not only humiliating for the victim in question but may also have an extensive and

¹⁰³³ Cf. Macdonald, *supra* note 367, p. 89.

¹⁰³⁴ *Müller v. Switzerland*, *supra* note 57, § 34.

¹⁰³⁵ *Handyside v. the United Kingdom*, *supra* note 87, § 52.

¹⁰³⁶ *Ibid.*, § 49.

¹⁰³⁷ J. S. Mill, *supra* note 13, p. 13. Mill, for the same reason, thought it essential to protect the 'backward stages of society in which the race itself may be considered in its non age' (around the middle of the 19th century). Mill thought that tyranny was a legitimate mode of government in dealing with barbarians (uncultured or uncivilized persons), 'provided the end be their improvement, and the means justified by actually effecting that end'.

¹⁰³⁸ *Jersild v. Denmark*, *supra* note 84.

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enduring silencing effect on women.¹⁰³⁹ The media is a powerful institution in society in shaping public opinion. The media practicing inequality has a silencing effect on large sections of society with contingent consequences for the political process. It effects the way men understand women and how women perceive themselves. It discredits them in their own eyes as political beings. This type of media behaviour is hardly contested in a court of law – unless it elicits a response, which may be punishable and draws attention to what provoked it in the first place. *De facto* equality requires that media practices of this kind be eliminated but not necessarily by content regulation. The prohibition of using certain speech based on sex, race, ethnicity or opinion is impossible, impractical and even undesirable. ‘The character of every act depends upon the circumstances in which it is done’ as Oliver Wendell Holmes pointed out in 1917.¹⁰⁴⁰ The contextual approach has been increasingly acknowledged by the European Court of Human Rights in recent years.¹⁰⁴¹

This chapter has attempted to construe how the negative requirements of the press, e.g. the restrictions that in the Convention’s case-law have come to define the boundaries that journalism is not to overstep in order to protect dignity and the right to form an opinion. This brings into focus that it is not necessarily the noticeable acts transgressing the law that shape our views of ourselves and society – but rather the media’s performance on a day to day basis that gradually depicts a picture of reality and the external world that becomes a frame of reference, not only for political outlooks but in the shaping of one’s self-image in this context.

With regard to morals the Court’s case-law has been criticized for not exhibiting the values it preaches, e.g. of ‘pluralism, tolerance and broadmindedness’. The prerequisites of democratic society such as the above-mentioned values ‘work both ways’.¹⁰⁴² Opposite the widespread and powerful media the ‘defenceless’ are inferior. Victims of hate-speech, prejudice, sexism and other discriminating conduct are not in a position to oppose or even repair the damage done. The Court has by now given its view on the chilling effect of punishing journalists, which may result in self-censorship within the media to the detriment of the public interest. Article 10 case-law has, however, not yet provided an answer to the dilemma of the silencing effect – although the soft-law of the Convention mechanisms would denounce journalism demeaning individuals and groups in their social esteem.

There are many wolves wrapped in the cloth of freedom of the press principles. One is that prohibiting pornography and racism – which is much debated, particularly in US jurisprudence – leads one down the ‘slippery slope’ where once there is regulation of some speech there is no end to it. Given the danger of going down the regulatory road it is safer never to begin. This view accentuates that the

¹⁰³⁹ Application no. 20915/92, *supra* note 206. Cf. *supra* 3.4.1 Sexism in Journalism.

¹⁰⁴⁰ *Schenck v. United States*, *supra* note 26, 52.

¹⁰⁴¹ Cf. *Ceylan v. Turkey*, *supra* note 109, joint concurring opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve, p. 44.

¹⁰⁴² *Otto-Preminger-Institute v. Austria*, *supra* note 72, joint dissenting opinion of Judges Palm, Pekkanen and Makarczyk, p. 24 § 6.

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answer to speech that may have harmful real-world effects is more speech rather than content regulation. According to Justice Brandeis in his famous opinion in the 1927 US Supreme Court decision in *Whitney*: ‘The remedy to be applied is more speech, not enforced silence’.¹⁰⁴³ In principle this argument is loaded with common sense. It must, however, be kept in mind that economic and social disparities exclude the ‘defenceless’ from combating the effects of injurious speech by additional speech. At the dawn of a new millennium, with new dimensions in rights-thinking from the perspective of minorities, it seems rather conclusive that the consequence of discriminating journalistic practices is more likely ‘enforced silence’ than remonstrance.

Starting from the proposition that all individuals have an equal right to respect and concern where individual rights enjoy a strict priority over collective goals, socio-economic interests and utilitarian considerations, is a valid perspective. The Convention is, however, based on a collective goal of an ‘effective political democracy’ and the ‘further realization of human rights’. This means that the individual right to speak one’s mind is restricted when the rights and reputations of others are at stake. When dignity of individuals and groups is attacked with disesteeming journalism the danger is that prejudiced and preconceived ideas can also have a role in the emergence or strengthening of such views.¹⁰⁴⁴ Line drawing in content regulation is not a feasible choice. Such line drawing may, however, be taking place with discriminating journalism if it does not meet with resistance – which appears to be the case with the ‘defenceless’ who on account of this type of journalism have less self-esteem and no strength to reply. One scale is sure to go up and the other down if standing antagonisms of practical life are not expressed with equal freedom, and enforced and defended with equal talent and energy as Mill cautioned.¹⁰⁴⁵ If minorities are not empowered and the basis of the present social hierarchy, reflected in control of the media, altered – there will be no strenuous criticisms of prevailing opinion but enforced silence.

Judge Schermers said in a dissenting opinion, as a member of the Commission, in a case of the seizure of a blasphemous film in Austria that: ‘One is free not to believe in God, but if one does not believe in God one cannot make a film about him’.¹⁰⁴⁶ This view does not reflect a principle of content neutrality as in American legal doctrine.¹⁰⁴⁷ According to this view, the state may control access to information and ideas if it perceives of some ideas as affecting the freedom of others. From Judge Schermers standpoint, *mutatis mutandis*, racially prejudiced and

¹⁰⁴³ *Whitney v. People of the State of California*, *supra* note 394, at 377, quoted by Judge Bonello in a separate concurring opinion *Ceylan v. Turkey*, *supra* note 109, p. 73.

¹⁰⁴⁴ Doc. 7322 Assembly debate on 30 June 1995, report of the Committee on Migration, Refugees and Demography *supra*.

¹⁰⁴⁵ J. S. Mill, *supra* note 13, p. 55.

¹⁰⁴⁶ *Otto-Preminger-Institute v. Austria*, Commission’s report 14 January 1993, dissenting opinion of Mr. Schermers, Series A no. 295, p. 37.

¹⁰⁴⁷ O. M. Fiss, *supra* note 52, p. 21.

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sexist individuals are not to be in charge of the public debate. And he has a point there.

The demands of pluralism, tolerance and broadmindedness without which there is no democratic society, exclude strict content regulation. Sanitizing speech violates the principle of freedom of expression. Instead, as the Court has reiterated, it is borne out of the wording itself of Article 10 § 2 that whoever exercises the rights and freedoms enshrined in the first paragraph of that Article undertakes ‘duties and responsibilities’ and among them to take care in the presence of others. Journalists are to avoid offensive portrayals, which may hurt others without contributing to any form of public debate capable of furthering progress in human affairs.¹⁰⁴⁸ Elaborate and professional journalism is essential to the objectives of democracy and human dignity. The remedy is thus not to prohibit the exposure of certain views and opinions – but to make sure that when they are carried forward in the public sphere, independent of their substance, that their conveyance is not discriminating. Such journalism entails not dishonouring the dignity of others on the basis of qualities that cannot be attributed to anyone in particular or altered by the ones that they characterize.

Article 10 case-law links the protection it provides with the objective of dignity and democracy, individual self-fulfilment and public interest. There is, however, no such thing as unregulated speech. Article 10 has a purpose and in light of that purpose some contested speech must be tolerated while expression subversive of Article 10 values is not to be tolerated. The conclusion of this chapter concerning content regulation, opinion-formation and human dignity is that the balancing approach used by the Convention authorities would confirm what Stanley Fish says is a rule of thumb: ‘Don’t regulate unless you have to’.¹⁰⁴⁹ Or in the words of another famous American First Amendment scholar: ‘Honour the counter values’.¹⁰⁵⁰ These phrases taken together are reflective of the Court’s case-law so far. Inherent in Article 10 § 2 are potential restrictions providing basis for legal safeguards in domestic legislation but such measures must be kept in harmony with the principle of ‘pluralism, broadmindedness and tolerance’.

In carefully not overstepping the ‘bounds’ set forth in the restrictions clause, the golden mean of journalism with regard to human dignity requires intellectual journalists who are able to carry out the positive requirements expected of the press and sustain a level of political culture in their work. It cannot be expected that the media act like the goddess of justice, blindfolded and graciously holding its scale. The media is a different institution. It is the nature of that institution that needs to be analyzed in order to further proscribe how it can best gain ground in an environment, which at present, is not making it easy on the media to be the Public Watchdog.

Opinion-formation is a delicate process. Content regulation is not the answer to protecting that process unless to an extent already well-established in public

¹⁰⁴⁸ *Otto-Preminger-Institut v. Austria*, *supra* note 72, § 49.

¹⁰⁴⁹ Fish, *supra* note 925, p. 130.

¹⁰⁵⁰ H. Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America*, 1988 Harper & Row, New York, p. xxii.

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international law. What matters is the excellence of those exercising journalism that they can handle this immense responsibility in a manner without being regulated from above or constantly facing the chilling effect of overstepping some legal threshold. What is imperative and will gradually be reasoned in this study (see Part II) is that the standard of the profession is heightened, making content police unnecessary as those in charge are competent to apply the rules and principles in a manner befitting the objectives of the Convention.

CHAPTER 4

THE VITAL ROLE OF IMPARTING

Revealing the truth is a *sine qua non* if shortcomings are to be eliminated and the interests of society defended . . . As the active conscience of the nation, a journalist has both the right and the duty to question institutions and those who run them, as to monitor whether they are working satisfactorily, whether they deserve the authority with which they have been vested and whether the prestige is deserved or not.¹⁰⁵¹ – *A Romanian judge*

Since the press has a democratic mission in society its obligations give rise to questions that normally do not arise in relation to individuals. The imparting process has been a neglected area of research. Although journalists or the press are not explicitly mentioned in Article 10 § 1 (unless in the last sentence where broadcasting is mentioned in relation to licensing), a great deal of the case-law of the European Court of Human Rights concerns journalists and the proper functioning of the mass media. ‘Journalists are the shields of democracy’ as stated in a joint statement of the UN, OSCE and OAS.¹⁰⁵² Journalists have a weighty responsibility and must not be deterred in carrying it out. This chapter focuses on to what extent the special status of the ‘vital role’ of the Public Watchdog is recognized. It traces how the preferred position of the press in First Amendment jurisprudence and in Convention case-law has incrementally led to a conceptual distinction between the organized press and the individual freedom of expression. This has resulted in special legal safeguards awarded to the press in fulfilling its obligations. The ‘newsgathering privileges’ that have been recognized as vital for the press in undertaking its responsibility do not, however, solve the problems faced by the press or remove the greatest obstacles to responsible journalism. In their limited scope they acknowledge the unique position of the press – paving the way for further elaboration of how the press must be administered in order to live up to its role.

4.1 AN ORGANIZED BUSINESS CALLED THE PRESS

The media’s activities can be protected following two different approaches, a ‘unitary’ approach as in Article 10 or a ‘fragmented’ approach.¹⁰⁵³ Most

¹⁰⁵¹ *Dalban v. Romania*, 28 September 1999, RJD 1999–VI, p. 231, § 21, quoting dissenting Judge M. C. in delivering a minority judgment, 7 December 1994 in Neamt County Court, Romania.

¹⁰⁵² Joint Statements of the International Mechanisms for Promoting Freedom of Expression, *supra* note 145.

¹⁰⁵³ Cf. Malinverni, *supra* note 588, pp. 443–444.

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constitutions¹⁰⁵⁴ contain provisions relating either to freedom of opinion, freedom of expression, freedom of speech, or freedom of the press, or a combination of these.¹⁰⁵⁵ Many legal systems, including those of the United States, Canada and Germany, protect press freedom separately, giving it specific protection by name, which Article 10 does not. The special protection afforded to the press as opposed to individual freedom of speech is an indication that distinct principles govern each right. Privileges, immunities and obligations that define each of them may not be identical.¹⁰⁵⁶ Article 5 § 1 of the German Basic Law reads:

Everybody has the right freely to express and disseminate their opinions orally, in writing or visually and to obtain information from generally accessible sources without hindrance. Freedom of the press and freedom of reporting through audiovisual media shall be guaranteed. There shall be no censorship.

Under Article 10 the freedom to impart and to receive adapts to distinct features of each media and special freedoms have no independent status.¹⁰⁵⁷ Article 10 draws no distinction between different media, subject to the third sentence of paragraph 1 where states are not prevented from requiring licensing of broadcasting. It is, however clear from the case-law that the right to receive is more than a corollary of the right to impart. The right to receive has an autonomous existence in the case-law.¹⁰⁵⁸ Article 19 of the ICCPR provides that freedom of expression may be exercised either orally, in writing or in print, in the form of art, or through any other media. Neither Article 10 nor Article 19 guarantees press freedom explicitly.

Article 13 of the American Convention on Human Rights follows the unitary approach in listing the rights in paragraph 1 (the same wording as in Article 19 § 1 of the ICCPR) but states explicitly in its paragraph 3 that indirect control of the press and any means used to disseminate information, opinion and ideas is prohibited.¹⁰⁵⁹ It hence confirms the significance of this right in relation to the media.

Article 11 § 1 of the Charter of Fundamental Rights for the European Union provides in similar wording as Article 10 § 1 of the Convention, that everyone has the right to freedom of expression, including freedom to hold opinions, and to receive and impart information and ideas without interference by public authority

¹⁰⁵⁴ A 1978 survey of 142 world constitutions found that 124 or 87.3 per cent contained a free expression guarantee. Cf. Janis, Kay and Bradley, *supra* note 490, p. 157.

¹⁰⁵⁵ Document E/2629, Legal aspects of the rights and responsibilities of media of information. Study prepared by the Secretary General, 14 March 1955.

¹⁰⁵⁶ G. Marshall, 'Press freedom and free speech theory' in *Public Law*, 1992, p. 40–60.

¹⁰⁵⁷ Malinverni, *supra* note 588, p. 447.

¹⁰⁵⁸ Cf. *Sunday Times v. the United Kingdom*, *supra* note 60, § 65: 'Not only do the media have the task of imparting such and ideas, the public *also* has a right to receive them.' (Emphasis added).

¹⁰⁵⁹ See *supra* 1.2 A Comparison with Other Instruments

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and regardless of frontiers.¹⁰⁶⁰ It is Article 11 § 2 of the Charter, however, which is a clear indicator of how these freedoms are wedded to the notion of the media as it states: 'The freedom and pluralism of the media shall be respected'.¹⁰⁶¹

The First Amendment to the US Constitution makes a distinction between the individual right to free speech and the freedom of the press and is thus unique in the US Constitution. It states:

Congress shall make no Law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for redress of grievances.

A leading authority on the history of the First Amendment, Leonard Levy has concluded that the writers of the United States Constitution used the term 'freedom of speech synonymously with freedom of the press', and that the constitutional guarantee of freedom of the press signified nothing new.¹⁰⁶² It recognized and perpetuated an existing condition. Freedom of the press meant, in part, an exemption from prior restraint and continued to mean that.¹⁰⁶³ The two phrases seemed to be viewed as conceptual twins as noted in the language of the Constitution of Pennsylvania 1776, which provided '[t]hat the people have a right to freedom of speech, and of writing and of publishing their sentiments; therefore the freedom of the press ought not to be restrained'.¹⁰⁶⁴

'Abridgement' was not intended to signify 'deprivation' or 'limitation' but to forbid any novel form of legislative punishment outside the range of that traditionally imposed by the common law.¹⁰⁶⁵ This old fashioned interpretation does not take into account later problems in jurisprudence concerning the question of 'abridgment' of press freedom when the newsgathering process, essential to the function of the press, is dependant on the goodwill of authorities or other elites.

¹⁰⁶⁰ Charter of Fundamental Rights of the European Union. On 7 December 2000, at the European Council in Nice, the European Parliament, the Council of the European Union and the European Commission solemnly proclaimed the Charter of Fundamental Rights of the European Union (*cf.* 21 *HRLJ*, 12 (2000) p. 473).

¹⁰⁶¹ This is an implicit recognition of the basic principle bequeathed to Madison and Jefferson from their French and English predecessors that strict non-interference by the state would produce not wholesome competition but an outcropping of brutal monopolies. Heirs of Locke and Montesquieu cannot lose sight of extra-political or non-state forms of oppression. (*cf.* S. Holmes, *supra* note 693).

¹⁰⁶² L. Levy, *Emergence of a Free Press: Revised and Enlarged Edition of Legacy of Suppression: Freedom of Speech and Press in Early American History*, 1985 Oxford University Press, p. 272.

¹⁰⁶³ *Ibid.*

¹⁰⁶⁴ F. Haiman (quoting Melville Nimmer), *Speech and Law in a Free Society*, 1981 University of Chicago Press, p. 10.

¹⁰⁶⁵ L. Levy, 'Freedom of Speech in Seventeenth Century Political Thought', in *Constitutional Opinions: Aspects of the Bill of Rights* (1986), p. 4, quoted in Marshall, *supra* note 1056, p. 41.

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The traditional conception of the eighteenth century press freedom is liberty of writing and publishing one's opinions without prior restraint, i.e. the imposition of restraint on a publication in advance. Such official censorship involves licensing the press and court ordered injunctions against journalistic conduct. An invalid prior restraint in US jurisprudence is an infringement of a fundamental right to disseminate matters ordinarily protected by the First Amendment without there being a judicial determination that the material does not qualify for constitutional protection. Rejecting a system of prior restraints is in congruity with the classical perception of press freedom as being in Madison's words, 'the censorial power [is] in the people over the Government, and not in the Government over the people'.¹⁰⁶⁶ The traditional focus is on official attempts to suppress the dissemination of contested material but not on the press' negligence in performing the task expected of it, not least in later jurisprudence. Sunstein is of the opinion that the understanding of the founding fathers of the US Constitution was narrower than 'ours'. As a guide to 'our current dilemmas, insistence on the text [first amendment] is basically unhelpful, even fraudulent'.¹⁰⁶⁷ He points to such controversial issues of today as campaign financing, rights of access to media, scientific speech, pornography, hate-speech and commercial speech, maintaining that the legal text is no longer sufficient. Due to the more complicated structure of Article 10 of the Convention the legal text is apt to a wider interpretation – albeit the same controversial issues, such as those mentioned by Sunstein, need further scrutiny under the Convention.

The position of the press as the forum of public debate is acknowledged but the 'extra' protection needed for the press to perform its task is still debated. In US jurisprudence there is different understanding of the uniqueness of the press clause in the First Amendment, whether it is simple redundancy or if it implies an organized and structured understanding requiring wider protection for the press, paving the way for complex questions and problems as to what constitutes the press and what the wider protection should entail? A re-conceptualization of the 'press clause' may mean that the protection should be applied to the function of the press in modern understanding rather than to the entity as a 'lonely pamphleteer'. Consequently it may be asked if press freedom is important enough to categorically allow restrictions on the individual freedom of expression. The 'no law' means no law abridging freedom of speech and the press but what of law that ensures the robust wide-open debate?

In 1974 one of the Justices of the US Supreme Court pointed out that the press clause in the First Amendment was in essence a structural provision, extending protection to an institution, adding: 'The publishing business is, in short, the only organized business that is given constitutional protection'.¹⁰⁶⁸ The Constitutional

¹⁰⁶⁶ 4 Annals of Congress, p. 934 (1794), quoted in *New York Times v. Sullivan*, *supra* note 6.

¹⁰⁶⁷ Sunstein, *supra* note 632, xiv.

¹⁰⁶⁸ P. Stewart, 'Of the Press' *Hastings Law Journal* 26 (1975): 631, reprinted in *Freedom of Expression, A collection of best writings*, K. Middleton and R. Mersky (eds.), 1981 Buffalo, New York, p. 425.

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guarantee was not merely to guarantee newspaper publishers freedom of expression. If the free press guarantee meant no more than freedom of expression or the same as individual freedom of speech it would be a constitutional redundancy. The primary purpose of the press clause, according to Justice Stewart was 'to create a fourth institution outside the government as an additional check on the three official branches', the relevant metaphor being the Fourth Estate.¹⁰⁶⁹ Inherent in this view is the notion of the press as an institution with an obligation, as a legally guaranteed opposition in society. Individuals on the other hand may freely express themselves. It is not their duty, however, to inform others. As will be discussed below the Convention's jurisprudence has adopted a similar approach.

The press has long been referred to as the Fourth Estate, a term originating in England in the middle of the 19th century.¹⁰⁷⁰ The term Fourth Estate originated from a reference to the reporter's gallery of the British Parliament whose influence on public policy was said to equal that of Parliament's three traditional estates, the clergy, nobility and commons.¹⁰⁷¹ The function of the Fourth Estate is to check the three official branches of government by exposing misdeeds and policies contrary to the public interest. Additionally, freedom of the press had come to mean that the system of popular government could not effectively operate unless the press discharged its obligations to the electorate by judging office holders and candidates for office.¹⁰⁷² The premise is that representative government, critically depends upon an informed electorate, therefore, on a free and unfettered press bringing to it all worthwhile ideas and views.

This is the noble goal underlying protection. Furthermore, there is a pragmatic reason underlying protection. Press freedom may also serve the authorities as those in power need the press both to maintain their influence, increase their popularity and for this reason try to keep the press on their side and try to manipulate it when and if possible.¹⁰⁷³ The concept of the Fourth Estate is not used in Convention jurisprudence and ironically if one not is not familiar with Burke's original analysis

¹⁰⁶⁹ *Ibid.*, the quoted excerpt is in Haiman, *supra* note 1064, p. 11.

¹⁰⁷⁰ It was John Delane, editor of *The Times*, who in 1852 outlined the application of the principle of the role and conduct of the press in relation to the political process. (See: George Boyce, Curran, Wingate, 'Newspaper history: From the 17th century to the present day', 1978 Constable, London, p. 26.) Delane became editor of *The Times* in 1840, only 23 years old (his father was the financial manager). In his long career he built the paper's prestige to unprecedented heights. He had been born into the ruling establishment and was a frequent confidant of cabinet ministers and accused of subservience to the government.

¹⁰⁷¹ *Black's Law Dictionary*, 1991 West Publishing.

¹⁰⁷² L. Levy, *supra* note 1062, xii.

¹⁰⁷³ Recent emphasis in international organizations (like the World Bank, the IMF, UNDP and OECD) in focusing on the level of press freedom in many Third World countries is an aspect in enhancing good governance and transparency in an effort to undermine corruption. Good governance is analogous to the social control function, emphasized by First Amendment scholar T. Emerson.

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of the concept one could take it as meaning a part of the establishment.¹⁰⁷⁴ Just like the watchdog may in fact be watching over the interests of the establishment and not of the public. Hobbes in his time pointed out how a king can govern his subjects by the psychological manipulation of his soldiers' beliefs.¹⁰⁷⁵ Power holders can use the press as a weapon in order to perpetuate their authority and preserve their present situation. This is why it is essential to divorce the concept of press freedom from the individual freedom of expression. The instrumental value of the press means that it can work both for and against the objectives of democracy.

The practical value of the press as a barometer of undercurrents in society has long been recognized. The press can function as a safety valve for letting out the steam of frustrations and discontents, which if ventilated now and then, may prevent massive outbursts. According to Hume, a free press strengthens the government by making magistrates aware of 'murmurs or secret discontents' before they become unmanageable.¹⁰⁷⁶ According to Kant, reducing the freedom of speech resulted in a decline in state power, because denying the citizen the 'freedom of the pen' meant withholding from the ruler all the knowledge of those matters which, if he knew about them, he would rectify, so he is thereby put in a self-stultifying position.¹⁰⁷⁷ Locke drew attention to advantages of making political decisions in an atmosphere of uninhibited public disagreement. If legislators are exposed to 'all sides' of a controversial question they are more likely to make intelligent decisions.¹⁰⁷⁸

In his theory of the First Amendment, leading US scholar Thomas Emerson¹⁰⁷⁹ spoke of the theory of social control with regard to the press. An open discussion is a method of achieving a more adaptable and at the same time a more stable community and the role of the press is then to maintain a precarious balance between healthy cleavage and necessary consensus. As Bagehot, editor of the *Economist* and the most influential journalist in the mid-Victorian period wrote: 'Persecution in intellectual countries produces a superficial conformity but also underneath an intense, incessant, implacable doubt'.¹⁰⁸⁰ Milton's *Areopagitica* both begins and ends with the observation that while 'errors in a good government and in a bad are equally almost incident', what distinguishes a wise ruler is the ability to perceive and correct errors, to accept criticism and to change. The epigraph, loosely

¹⁰⁷⁴ Cf. *supra* note 829, Marcuse's theory on how rights lose their meaning when they become institutionalized.

¹⁰⁷⁵ In S. Holmes, *Passions and Constraint: On the theory of Liberal Democracy*, 1995 University of Chicago p. 91.

¹⁰⁷⁶ D. Hume, 'Of the Liberty of the Press', *Essays: Moral, Political and Literary*, 1985 Indianapolis: Liberty Classics, p. 11. Quoted in Holmes, *supra* note 1075, p. 132.

¹⁰⁷⁷ *Ibid.*

¹⁰⁷⁸ J. Locke, A Letter on Toleration, p. 45; Two Treaties of Government, II, § 222. Cf. S. Holmes, *supra* note 1075, p. 169.

¹⁰⁷⁹ T. Emerson, 'Toward a General Theory of the First Amendment', 72 *Yale Law Journal* (1963), pp. 877–956, reprinted in *Freedom of Expression, A collection of best writings*, K. Middleton and R. Mersky (eds.), 1981 Buffalo, New York.

¹⁰⁸⁰ *Ibid.*, p. 142 (W. Bagehot, *The Metaphysical Basis of Toleration*, in 2 Works of Bagehot 339, 357 (Hutton ed. 1889)).

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translated from Euripides' *Suppliant Women*, proclaims that advice from private citizens can contribute to the process of governmental adaptation and self-correction.¹⁰⁸¹

Historically the press has had an instrumental role, albeit no clear distinction has been made in the legal protection. The theory of Emerson that the free speech guarantees have to be interpreted in light of the fundamental distinction between 'expression' and 'action' is an indicator of the press' instrumental value.¹⁰⁸² It is undoubted that the press has a special role in the jurisprudence of the European Convention reflecting the ideal version of the press as a civic educator and guardian of democracy. The news media may, however, fall short of this ideal version due to failure in theory and legal analysis to adequately reflect the problems that affront journalism and recognize the need for wider protection of professionals within the press.

4.1.1 The Nature of the Modern Press

The word 'press' has undergone a transformation in meaning. It no longer refers to any form of printing as it did in the 17th and 18th centuries to distinguish it from oral speech and handwritten letters. Thus 'press' included not only newspapers but also books and pamphlets.¹⁰⁸³ Freedom of the press was generally thought of in terms of the lone pamphleteer or the *homme de lettres* and not the freedom of the modern day newspaper or the media empires, which have merged together with major film studios, music organizations, publishing companies of magazines, books, newspapers, software companies and even theme parks. It is well-established, in jurisprudence as well as practice, that media power is political power and that only a small group of corporations has real opportunities to control most of what the world sees, hears and reads. The largest media conglomerates are key actors on the global scene.¹⁰⁸⁴ The modern press consists largely of vast and complex institutions that essentially differ both from individuals and from the early press, around which the concept of freedom of the press grew. Long gone are the days that de Tocqueville

¹⁰⁸¹ J. Milton, *Areopagitica* (1644), *Areopagitica and of Education*, Sabine, George H. (ed.) 1951 Harlan Davidson, p. 1.

¹⁰⁸² T. Emerson, *The System of Freedom of Expression*, 1970 Random House, p. 18. Catherine MacKinnon has elaborated this theory in relation to the media practicing inequality. See *supra* note 908.

¹⁰⁸³ Schauer, *supra* note 822.

¹⁰⁸⁴ Time-Warner has become the largest media conglomerate in the world, generating global annual entertainment revenues of USD 9 billion, Bertelsmann, the German media conglomerate that also owns RCA Music, Doubleday Publishing, Bantam Books and Dell is in second place, and closing rapidly on Time-Warner. In third place is Berlusconi's Italian media organization Fininvest, with an American entity, Capital Cities/ABC in fourth place. Thomson, the Canadian publisher is the world's fifth largest media corporation while Rupert Murdoch's News Corporation, owner of the Fox Network, TV Guide and Harper & Row, among other American magazines and book publishers, trails Thompson by a small margin. (Cf. Teeter, Le Duc, Loving, *supra* note 809, p. 799).

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described in 'Democracy in America' (1835) when nothing 'is easier than to set up a newspaper, as a small number of subscribers suffice to defray the expenses'.¹⁰⁸⁵

Due to the nature of the modern press, the claim that defending freedom of the press is tantamount to defending the individual right of expression is no longer relevant. When newspapers were aligned to political movements and trade unions, journalists perceived of themselves as activists rather than professionals, as do the journalists of later times.¹⁰⁸⁶ The rooting of the press within the establishment in different countries is characterized by the less militant tone, of even the radical press, as newspapers of today are primarily business ventures closely corresponding to the prevailing political climate. The established press is a powerful organization in society and may have more in common with those running government and the corporate world than the 'defenceless' public.¹⁰⁸⁷ As the media is owned by an increasingly smaller number of conglomerates it spends correspondingly smaller amounts of energies looking at societal problems.¹⁰⁸⁸ In that sense it may be compared to a corrupt police officer cooperating with forces underground instead of suppressing them. The press is in a way like multiple souls, a complex set of psychic interrelations.¹⁰⁸⁹ Few really trust it, yet everyone depends on it. It is like a split personality to the extent that parts of it aim to serve the public interest and other parts are controlled by opposite interests. Considering the power of modern day press enterprises it is no coincidence that its potential in abusing this power in co-operation with power holders, instead of working as the public's agent, has called into question the need for a special status of press freedom from the paradigm of editorial independence. The recognition of the special status of the press has in turn led to claims that individuals normally do not require rights such as access to information for purposes of newsgathering, legal privileges from revealing confidential sources and protection of these sources.

While many perceive of the media as the 'consciousness industry' due to its role in shaping public opinion often in insidious ways, others take the straight forward liberal approach that the market based media is reflective of the surroundings it is

¹⁰⁸⁵ Tocqueville, *supra* note 902, p. 97.

¹⁰⁸⁶ J. Curran, *Power without Responsibility, The Press and Broadcasting in Britain*, 5th edition, 1997, Routledge, p. 5.

¹⁰⁸⁷ Morgunbladid, the main daily in Iceland is practically the only surviving newspaper of the 20th century. Its editor M. Johannessen who just retired at the age of 70 had been editor for 41 years (1959–2000). The remaining editor, S. Gunnarsson, has held his post for three decades while nine prime ministers have come and gone – and five to six daily newspapers have died. Not until 2001 with the launching of a morning publication, Frettabladid, distributed freely into every household in urban areas, has the dominant position of Morgunbladid been seriously threatened. Frettabladid is owned by a financially powerful group, funded by advertising revenues and has in the three years since become the largest daily, buying the only remaining afternoon publication DV and merging with a private broadcasting corporation and entertainment company – forming the first media conglomeration of its kind in Iceland.

¹⁰⁸⁸ Teeter, Le Duc, Loving, *supra* note 809, p. 381.

¹⁰⁸⁹ Cf. an old Hitchcock film, 'The three faces of Eve' dealt with the phenomenon of multiple souls.

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entrenched in and hence reflects the prevailing ideology of market politics.¹⁰⁹⁰ Independent of such views, a common misperception is that of ‘objective’ journalism as a question of gathering ‘newsworthy’ information and imparting it like cutting and gathering of food crops to sell on a market. Journalism is more complex. It involves research and/or investigative work based on a thorough knowledge of current affairs, access to information sources and contacts. It requires an outlook based on an ideology of what is newsworthy – what is seen fit to print, what is called news, the weight it is given – and subsequently the ethical question to what extent the topic should be exposed. The media is a dealer in public opinion and for that reason the paramount importance of the editorial function should not be undervalued.

The modern media has outwitted the classical notion of freedom of the press as an individual freedom. The corporate press has great powers in shaping public opinion without being accountable for the end result, as if the only meaning underlying freedom of expression of the press is to be given its chance and have its way. Entry into publishing is prohibited to all but a few, which was not the case in earlier times. For this reason growing concern over ‘whose’ freedom this really is led Harvard law professor Jerome A. Barron, as early as 1967, to suggest legal intervention to ensure a forum for novel, unpopular or unorthodox points of view due to the monopolistic situation of the media.¹⁰⁹¹ Barron’s theory is that the First Amendment compels the government to act affirmatively to insure freedom of expression by requiring citizen access to the media.¹⁰⁹² The solution Barron foresaw was a legal obligation for newspapers to publish letters on the basis of a legal creation of a right of access.¹⁰⁹³ Such letters could provide a valuable counterbalance to the publisher’s dominating voice, particularly in the ‘one newspaper city’.¹⁰⁹⁴ Barron’s concern was opening up the newspapers for the public to an extent, which the American Supreme Court in the case of *Miami Herald v. Tornillo*¹⁰⁹⁵ saw as an intrusion into the function of the editors.

Enhancing the press’ role as a sounding board of public opinion is certainly a way of ensuring that the press adheres to its positive requirements but it does not solve the problem of freedom within or ensure responsible journalism. Due to the instrumental role of the press in society it may be argued that it needs protection to ‘speak up’ as a ‘professional forum’ – while it is doubtful to rely on individual initiative to send letters to the editor, it is also problematic since if the press

¹⁰⁹⁰ Cf. McQuail, *infra* note 1100, p. 96.

¹⁰⁹¹ J. A. Barron, ‘Access to the Press – A New First Amendment Right’, 80 *Harvard Law Review* (1967), pp. 1641–1678.

¹⁰⁹² Cf. T. Barton Carter, J. Lushbough Dee, M. J. Gaynes, H. I. Zuckman, *Mass Communication Law*, 1994 West Publishing Co., p. 43.

¹⁰⁹³ Barron, *supra* note 273, p. 22.

¹⁰⁹⁴ *Ibid.*, p. 44.

¹⁰⁹⁵ *Miami Herald Pub. Co. v. Tornillo*, *supra* note 24. J. A. Barron represented the defendant Pat Tornillo.

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deliberately shuns important issues individuals outside it will not have the opportunity to be provoked to remonstrate or contest the press' portrayal.

Barendt has argued that the recipient interests of the general public do not compel individual rights to use the media, nor does the public's right to know.¹⁰⁹⁶ There are furthermore practical reasons for the impossibility of a wide-open media. Rawls speaks of the self-limiting nature of basic liberties, excluding the possibility of unimpeded access to public places and to the free use of social resources to express political views. These extensions of liberty, when granted to all, are so unworkable and socially divisive that they would actually greatly reduce the freedom of speech.¹⁰⁹⁷

It is not denied that freedom of expression is an individual right essential for each and everyone to develop. The press plays a fundamental role in the process of individual self-development just like it plays an essential role for the maintenance of an open society. Granting the press extra protection is hence in proportion with its obligations towards society and each individual. It is primarily in terms of the 20th century conception of the press that arguments have been made for the recognition of a distinct principle of press freedom. The press, in the modern usage of the term, refers to the medium imparting news and news related analysis, be it television, radio, newspapers, weeklies, political periodicals or news on the Internet. The meaning is not entirely settled in ordinary usage. The Internet certainly grants countless opportunities for recreating the time when 'anyone' could become a pamphleteer and may prove to be an excellent new dimension to a democratic dialogue. Fragmentation of readers and audiences is, however, a fact of the NITs and the traditional media is still the main forum of the political dialogue locally as well as on the global scene. Society needs a robust debate but as in earlier times the need for control and cohesion is also essential to the integrity of societies and public safety, one of the conditions listed in the restriction clause of Article 10 § 2.

If at the dawn of the 21st century emphasis is shifting away from the classical conception of the press as an institution in society to more anarchic and open access with the advent of the Internet, the concept of Public Watchdog as used in Convention case-law is with reference to the news media as an organized enterprise – a legal person.¹⁰⁹⁸ The Commission has submitted that the necessity test of interference may depend on the scope of the disseminated material on the market, where liability or responsibility of the medium is proportional to its extension on the market.¹⁰⁹⁹

Access requirements serve the same objectives as guaranteeing the right to impart from within, to widen the variety of views and opinions. While access rights serve the citizenry in democracy, an essential precondition for press freedom is guaranteeing its operation from within. If the press is to operate professionally and fulfil its positive duties, protection must be warranted to those who are responsible

¹⁰⁹⁶ E. Barendt, *Freedom of Speech*, 1996 Oxford University Press, pp. 81–83.

¹⁰⁹⁷ Rawls, *supra* note 540, p. 341.

¹⁰⁹⁸ *Autronic AC v. Switzerland*, *supra* note 724, § 47.

¹⁰⁹⁹ *Wingrove v. the United Kingdom*, *supra* note 108, § 55.

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for carrying out journalism in a complex modern society. The press cannot be open to all in the sense that there must be a distinction between journalism and the individual freedom of expression. In a specialized society, where people develop expertise in various and different disciplines — journalism is an exacting, full-time profession, demanding devotion, skills and special qualifications. Leaving aside any theories of open access to the media, ‘journalism of conversation’ instead of simply ‘journalism of information’ or journalism as the main pillar of the democratic dialogue, the constitutional right of freedom of expression applies to everyone.¹¹⁰⁰ It is, however, necessary to distinguish between the individual right to freedom of expression on the one hand and professional requirements made to the press on the other.¹¹⁰¹

As public discussion is perceived of as a political duty, fears of making a distinction between the organized press and the ordinary citizen in his criticism of government have been expressed in writings on the legal status of the organized press, not least in light of its immense obligations towards society.¹¹⁰² It seems, however, that in the modern context a distinction must be made between press freedom and the individual freedom of expression, not to curtail the citizen’s right to criticize but to aid the press in the unflinching discharge of its duties.

4.1.2 Enhanced Expectations and Conflict of Interests

The special status of the press stems from what it does but is not meant to elevate those who work within it to a higher position. In order for this freedom to be effective and to serve the ‘collective’ whole, there are certain elements that have to be taken into consideration. Citizens rely on the media to receive social, political and economic information. There is a division of labour in society, which means that ordinary people do not have the time, means or skills to search for themselves for the relevant information, which the media processes. Expertise within the media is necessary if journalism is to hold those in power accountable. The investigative purpose of journalism has in recent decades become more evident and the emergence of NITs has not mitigated its importance.

That there are claims to be made to the press is inherent in the whole reasoning underlying protection. Yet, as has already been discussed there is a difference in increased autonomy of an ever more powerful press on the one hand and a responsible press on the other hand. The media is not just a private enterprise, due to its political impact in society, where the outcome of the choice of legislator is to a large extent determined by media coverage; the press represents the private exercise

¹¹⁰⁰ D. McQuail, *McQuails Mass Communication Theory*, 4th edition, 2000 Sage Publications, p. 159.

¹¹⁰¹ W. F. Korthals-Altes, ‘The Journalistic Privilege: A Dutch Proposal for Legislation’ in 1992 *Public Law*, p. 89.

¹¹⁰² Cf. Brandeis in *Whitney v. People of the State of California*, *supra* note 394; *Feldek v. Slovakia*, *supra* note 312, § 83.

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of a public function.¹¹⁰³ It is the potentially *mediating* character of the media, which makes it important and distinguishes it from a simple information service.¹¹⁰⁴ The media organization, where media content is ‘made’, is an essential link in the process of mediation by which society addresses itself.

The so-called Hutchins Commission of 1947 attributed to Robert Maynard Hutchins, who with twelve other well-known intellectuals, came up with five recommendations for a responsible press. The aim of the Commission was to look into the failures of the media to meet the needs of society. What is remarkable with the 1947 Commission was that it did not preclude the possibility of public action to put right the ills of the press – and this was in the heartland of capitalism. The findings of the report contributed something of substance to subsequent theorizing and to the practice of accountability.

The report coined the notion of social responsibility, interpreted by Siebert and others as positive liberty, possibly calling for legislation to prevent abuses of this freedom. One of the members of the Commission, W. Hockin, spoke of ‘the right of the people to have an adequate press’.¹¹⁰⁵ The requirements set forth were *inter alia* that:

1. The media should provide a truthful, comprehensive and intelligent account of the day’s events in a context, which gives it meaning.
2. The media should serve as a forum for the exchange of comment and criticism
3. The media should project a representative picture of the constituent groups in the society.
4. The media should present and clarify the goals and values of society.
5. The media should provide full access to the day’s intelligence.¹¹⁰⁶

A journalistic code of ethics, a set of principles of professional conduct, adopted and controlled by journalists, reveal what professional demands are publicly proclaimed as guidelines. Journalism has the constitutive end of truth telling about significant contemporary events, but many journalists find themselves forced to compromise these constitutive values.¹¹⁰⁷ Due to the changed composition of the profession, many do not even pin down these problems. Those who do and demand that some standards be enforced constantly face the countervailing tendencies of the corporate-political interests. The influence of the philosophy of the free market resulting in a free press has lead to a general misunderstanding of public efforts to regulate this

¹¹⁰³ E/3443, *supra* note 272, p. 24.

¹¹⁰⁴ Gibbons, *supra* note 637, p. 301.

¹¹⁰⁵ McQuail, *supra* note 1100, p. 149.

¹¹⁰⁶ J. C. Merrill, *Journalism Ethics*, 1997 St. Martins Press, New York, p.17.

¹¹⁰⁷ Cf. *Bladet Tromsø and Stensaas v. Norway*, *supra* note 11, §§ 65–66; *Lingens v. Austria*, *supra* note 85.

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important sphere. Thus many media people speak with apprehension about calls for an international charter of the rights and duties of journalists.

There is a level of hypocrisy in the conflicting requirements made of the press. It is generally acknowledged that newsgathering and reporting requires professionalism but there is no coherent legal doctrine stipulating what this process requires in terms of protection. Writing political analysis is demanding and carries with it enormous public responsibility. Milton would have no problem with describing how a professional journalist ought to approach his work:

When a man writes to the world, he summons up all his reason and deliberation to assist him; he searches, meditates, is industrious, and likely consults and confers with his judicious friends; after all which done he takes himself to be informed in what he writes.¹¹⁰⁸

The freedom Milton spoke of defending was for scholars, not for ‘children or childish men’.¹¹⁰⁹ But it is not enough that the journalist is willing to make an effort if access to information is blocked or if he encounters scepticism instead of apprehension in his work.

In 1977 Vincent Blasi, in an instructive essay, ‘The Checking Value in First Amendment Theory’, classified the First Amendment values under the heading of individual autonomy, diversity and self-government, in addition to what he calls ‘the checking value’, referring to the significance of journalism.¹¹¹⁰ He argues that since the First Amendment protects political expression, primarily expression critical of official conduct, communications on the subject of official behaviour ought to receive more constitutional protection than coverage of other topics and that there were ways in which such a subject-oriented preference might be implemented. Blasi concluded from US Supreme Court jurisprudence in cases concerning newsgathering privileges, that the Supreme Court viewed the press as a private interest group rather than an institution, in the constitutional system, of checks and balances. Blasi emphasized that the professional press should be viewed as an institution deserving of constitutional recognition in its own right, so that particular claims of individuals who belong to the institution and considerations relating to the viability of the institution itself should be accorded special weight in the constitutional calculus.¹¹¹¹ The inevitable size and complexity of modern government calls for journalism, which checks the abuse of official power. Underlying this understanding of the contemporary significance of the ‘checking value’ is the need for:

¹¹⁰⁸ Milton, *supra* note 1081, p. 22.

¹¹⁰⁹ *Ibid.*

¹¹¹⁰ V. Blasi, ‘The Checking Value in First Amendment Theory’ *American Bar Foundation Research Journal* (1977), reprinted in K. Middleton and R. M. Mersky, *Freedom of Expression: A Collection of Best Writings*, 1981 Williams, Hein & Co. New York, pp. 295–423.

¹¹¹¹ *Ibid.*, p. 406.

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Well-organized, well-financed, professional critics to serve as a counterforce to government, critics capable of acquiring enough information to pass judgment on the actions of government, and also capable of disseminating their information to the general public. It may have been possible in the eighteenth century to arouse the populace against a particular official or policy by amateur, makeshift protest methods. Today however, it is virtually impossible to do so, at least beyond the local level.¹¹¹²

Blasi takes as an example the protests against the war in Vietnam in the 1960s which amounted to little until academic, journalistic and eventually political elites took up the cause.¹¹¹³ Even protests that have deeply held 'grassroots' sentiments tend to have little impact until the protesters gain access to channels of mass communication.¹¹¹⁴ He touches upon one of the prerequisites for professional criticism, which is finance. Such concerns are even more relevant and recognizable in the media environment of today where a vast amount of money is available for public relations purposes to defend corporate/political interests.¹¹¹⁵ So-called 'spin-doctors' are specialists on all levels of administration and within the corporate world who are paid to manage publicity surrounding events, and can easily mislead journalists who due to lack of time, expertise and even experience are susceptible to professional fabrication serving other interests than the public's. There is considerable evidence that a good deal of what is supplied by public relations agencies to the news media does get used.¹¹¹⁶ Affronted with 'spin-doctors' and paid expertise on every level of the administrative and corporate bureaucracy, the quest for granting high level investigative journalism full legal protection seems imperative.

Journalists of today need to be on the look out for other power holders than merely the state. Justice Black, in his last decision in 1971 said: 'The Government's power to censor the press was abolished so that the press would remain forever free to censor the Government'.¹¹¹⁷ The 'forever free' notion of the press is an oversimplification. The US Supreme Court in 1973 noticed that: 'Newspapers have

¹¹¹² *Ibid.*

¹¹¹³ During the 1970s there began to grow a generation of more educated journalists. The movement towards professionalization was a global phenomenon. Cf. I. Grundberg, 'Investigative journalism in the 1990s: increased power, professionalization or defence against commercialism' in J. Koivisto and E. Lauk, *Journalism at the Crossroads: Perspectives on Research*, 1997 University of Tartu, University of Tampere, p. 78.

¹¹¹⁴ Blasi, *supra* note 1110, pp. 315–316.

¹¹¹⁵ To provide an example; the revenues of top media companies in the world, published in *Newsweek*, 20 September 1999, from latest annual reports (USD billion): Time Warner 26.8, Disney 23, Newscorp 13.6, Bertelsmann 12.7, Seagram 12.3.

¹¹¹⁶ McQuail, *supra* note 1100, p. 290.

¹¹¹⁷ Justice Hugo Black in: *The New York Times Co. v. United States*, *supra* note 6.

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become big business and there are far fewer of them . . . There tends to be homogeneity of editorial opinion, commentary, and interpretive analysis'.¹¹¹⁸

Justice Douglas of the US Supreme Court stated in the case of *Miami Herald*:

Where one paper has a monopoly in an area, it seldom presents two sides of an issue. It too often hammers away on the ideological or political line using its monopoly position, not to educate people, not to promote debate, but to inculcate to its readers one philosophy, one attitude – and to make money.¹¹¹⁹

In 2001 the Parliamentary Assembly of the Council of Europe Report accused the media for its 'stupid Big-brother-style editorials'.¹¹²⁰ Bobbio spoke in the 1980s of the impact of the 'survival of the invisible power as one of the broken promises of democracy along with the persistence of oligarchies and the suppression of mediating bodies'.¹¹²¹ The traditional division of public and private abuse no longer holds, so the absolutist claim that public authorities are the main threat to journalism is far too simplistic. Journalists today are confronted with secrecy of private and public power, intertwined interests that make up an insurmountable obstacle in newsgathering and research. Journalists are faced not only with the threat of state interference but also with the 'double state',¹¹²² the invisible state alongside the visible state.¹¹²³

The 'checking' role of the media does not happen automatically. The journalist needs the same latitude as a scholar to do research without unreasonable interference or pressure. If the journalist is to impart to the public 'information and ideas of all matters of public interest' as the European Court of Human Rights has reiterated in its general principles, he needs to have a broad overview in order to set things in context.¹¹²⁴ He needs to know where to seek information, how to use it and which aspects of the problem are of relevance and which 'judicious friends' to discuss the matter with in order to be informed on what he writes.¹¹²⁵ Hence, a person who is only promoting a commercial interest and does not adhere to the basic codes of journalism, as regards truthfulness of information and defence of public rights,

¹¹¹⁸ *Miami Herald Publishing Company v. Tornillo*, *supra* note 24.

¹¹¹⁹ *Ibid.*

¹¹²⁰ Parliamentary Assembly Doc. 9000, *supra* note 705.

¹¹²¹ Bobbio, *supra* note 496, p. 33.

¹¹²² A concept used by A. Wolfe, 'The Limits of Legitimacy', quoted in Bobbio, *supra* note 496, p. 33.

¹¹²³ When Milton was fighting for freedom of the press in the 17th century – his growing concern over church-state relations may be seen as analogous to the corporate-state alliance today.

¹¹²⁴ *De Haes and Gijssels v. Belgium*, *supra* note 113, § 37.

¹¹²⁵ The right to 'seek' information is not explicitly protected under Article 10 of the Convention. Seeking information is, however, what the journalist needs to do. He cannot merely wait for information that others are willing to impart to him. Discussed *infra*

4.3.2 Access to Information

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should not be able to claim the title.¹¹²⁶ A critic of contemporary journalism has raised the question what becomes of journalism when it ceases to care about its democratic role?¹¹²⁷ Journalism can be destroyed by forces other than the totalitarian state. The exigency to manipulate the media is an attribute of most power holders due to the nature of things. If the press cannot be aligned to the particular interests the objective would be to neutralize it to passivity or conformity. One of the solutions that has been proposed is so-called 'civic' or 'public' journalism, originating within the journalistic community in the United States.¹¹²⁸

Some maintain the technological revolution with the Internet is changing the profession of journalism, making the journalist as an intermediary force in democracy superfluous.¹¹²⁹ Others emphasize that with the Internet journalists have become more important than ever because they will have to select the 'newsworthy' events out of an endless, chaotic information flow and set it in context.¹¹³⁰ Bardoel opines that the profession is one of the last strongholds of generality in an increasingly specialized and fragmented society. He stresses the social cohesion factor of the media, emphasizing that the greater individual freedom for citizens produces, more than ever, the need for common orientation. This might be the most important mission for journalists in the future – a mission that calls for responsibilities and skills beyond the present journalistic practice.¹¹³¹

The traditional media are still the main producers of news. The Internet is mainly a new 'distribution channel', providing a new form for conveying information.¹¹³² The emergence of on-line-journalism does not change the nature of the role to an extent to alter the requirements of the right to impart and receive in the public interest. In order to inform adequately as the European Court of Human Rights requires the journalist of today must not appear like an unqualified weakling in the face of the power of expertise existing at all levels of public administration and private corporations.¹¹³³

4.2 THE FIDUCIARY DUTY

Institutionalizing the press in order to protect it to undertake its task was the idea of US Supreme Court Justice Stewart and it kindled harsh polemics, as many were quick to point out that it might lead to press autonomy rather than press responsibility. The whole idea of treating the press as an 'institution' according to

¹¹²⁶ *Bladet Tromsø Stensaa v. Norway*, *supra* note 11, §§ 64–65.

¹¹²⁷ J. Carey, quoted in McQuail, *supra* note 1100 p. 159.

¹¹²⁸ *Ibid.*

¹¹²⁹ Cf. M. Dueze, 'Journalism and the Net: Thinking about global standards'. Napier University Journalism conference in Edinburgh, 4–5 September 1998.

¹¹³⁰ De Bens and Mazzoleni, *supra* note 728, p. 176.

¹¹³¹ J. Bardoel, 'Beyond Journalism: a Profession Between Information Society and Civil Society' 11 *European Journal of Communication*, No. 3 (1996), pp. 283–302.

¹¹³² 'Media Giants: What is the Point?' *Economist*, 25 May 2002, p. 12.

¹¹³³ Cf. *Sunday Times v. the United Kingdom*, *supra* note 60.

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Anthony Lewis, in a response to Justice Stewart's theory would make it subject to external checks.¹¹³⁴ 'The press has operated as a freebooter outside the system. The more formally it is treated as a fourth branch of government the more pressing will be demands that it is made formally accountable.'¹¹³⁵ A special status for the press is in the eyes of many a further recognition of its exclusivity in society – as if the press is first and foremost preoccupied with its own interests – primarily seeking autonomy to increase its influence for the sake of commercial purposes. Dissenting in *Branzburg v. Hayes*, US Supreme Court Justice Douglas sensibly reasoned that:

[T]he press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favoured class, but to bring fulfilment to the public's right to know.¹¹³⁶

The press as an institution in society has a purpose, to foster participation and debate.¹¹³⁷ Broadcasting regulation has, from the outset, not only been charged with the pragmatic role of traffic police but in addition by reference to the public interest.¹¹³⁸ The European tradition of public service broadcasting is based on the trustee model, where broadcasting has a fiduciary role and that model is also widely thought of in relation to the printed press. Chief Justice Burger of the US Supreme Court described the fiduciary duty of the press in 1976:

That the extraordinary protections afforded by the First Amendment carry with them something in the nature of a *fiduciary duty* to exercise the protected rights responsibly – a duty widely acknowledged but not always observed by editors and publishers.¹¹³⁹

Due to the changed nature of the modern media, the claim that newspapers must be surrogates of the public interest carries with it a concomitant fiduciary obligation to account for that stewardship.

The fiduciary role in earlier times was ascribed to the rulers or government as in Locke's Second Treatise of Government. Locke's idea was that government was the trust of the people. Rulers in Locke's theory had a 'fiduciary power' or 'trust' to be exercised solely for the good of the community.¹¹⁴⁰ Where the trust exists the rights are all on the side of the beneficiary (the community) and the duties all on the side of the trustees. At the same time the trustees may be properly allowed a wide sphere

¹¹³⁴ A. Lewis, 'A Preferred Position for Journalism?' 7 *Hofstra Law Review* (1979). pp. 595–627, reprinted in K. Middleton and R. M. Mersky, *Freedom of Expression: A Collection of Best Writings*, 1981 Williams, Hein & Co. New York, p. 447.

¹¹³⁵ *Ibid.*

¹¹³⁶ *Branzburg v. Hayes*, 408 U.S. 665 (1972), at 726, no. 2, Justice Douglas' dissenting opinion.

¹¹³⁷ Cf. D. McQuail, *supra* note 1100, p. 159.

¹¹³⁸ Hoffman-Riem, *supra* note 9, p. 336.

¹¹³⁹ *Nebraska Association v. Stuart*, 427 U.S. 539 (1976). Emphasis added.

¹¹⁴⁰ T. P. Peardon, *Introduction*, John Locke, *The Second Treaties of Government*, 1952 The Liberal Arts Press, New York, p. xv.

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within which they may act freely as long as they are faithful to their trusteeship. With the notion of democracy where the sovereignty of the people ostensibly prevail¹¹⁴¹ – the press as the Public Watchdog has this ‘fiduciary duty’ and is a public trustee in, ‘ensuring the proper functioning of democracy’.¹¹⁴²

The US Supreme Court in the landmark case of *New York Times v. Sullivan* threw constitutional protection around newspapers engaged in good-faith criticism of public officials.¹¹⁴³ Many view this decision as the largest symbol of broad immunity for criticism of public officials.¹¹⁴⁴ The emergence of multiple suits with unheard of amounts of libel damages threatened newspapers with losses high enough so as to turn the ‘Watchdog’ into a sheep. This evolution was seen as endangering the public interest in ‘uninhibited, robust and wide open’ debate as it chilled journalism by fear of libel awards.¹¹⁴⁵ The *Sullivan* decision introduced a new application of the First Amendment as hence forth public officials would have to show that the news medium published the offending words with actual malice – knowledge of falsity, or reckless disregard for falsity.¹¹⁴⁶ The US Supreme Court reversed an Alabama court ruling requiring the New York Times to pay USD 500,000 to Sullivan, an Alabama police commissioner, because it published certain fairly minor errors in an advertisement from a civil rights organization. From then on the Constitution itself, through the First Amendment, provided the shield for a vigorous political debate in the press. The self-censorship and ‘chill’ that the *Sullivan* decision was intended to avert has nevertheless continued penetrating newsrooms and editorial offices, diluting investigative journalism. The impact of the decision is, however, more comprehensive. It confirmed the status of the press as serving the public interest; it drew a striking analogy between the press and public officials. The Supreme Court had already submitted that in order to ensure vigorous prosecution of public business, federal officials are granted immunity from libel actions for statements made pursuing their duty. In *Barr v. Matteo*,¹¹⁴⁷ Justice Brennan said that the reason for this privilege was that the threat of lawsuits would otherwise inhibit officials from fearless performance of their duties.¹¹⁴⁸ The press, or so the Court argued in *Sullivan*, should be given the same immunity so it could pursue vigorous investigative journalism.¹¹⁴⁹ The reasoning in the judgment leaves in Holmes’ words:

¹¹⁴¹ Tocqueville, *supra* note 902, p. 94.

¹¹⁴² *Ösgür Gündem v. Turkey*, *supra* note 25, § 58.

¹¹⁴³ *New York Times v. Sullivan*, *supra* note 6.

¹¹⁴⁴ Sunstein, *supra* note 632, p. 38.

¹¹⁴⁵ *New York Times Co. v. Sullivan*, *supra* note 6.

¹¹⁴⁶ Cf. Teeter, Le Duc and Loving, *supra* note 809, p. 207. Since then, the Sullivan doctrine has been much debated as some hold it to grant too much autonomy to the press and not necessarily in the public interest.

¹¹⁴⁷ *Barr v. Matteo*, 360 U.S. 564, 575 (1959). The Court held that the utterance of a federal official to be absolutely privileged if made ‘within the perimeter’ of his duties unless actual malice can be proved.

¹¹⁴⁸ Cf. Lewis, *supra* note 856, p. 147.

¹¹⁴⁹ Holmes, *supra* note 693, p. 35.

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[T]he impression that an adversary journalist is a public official or that the media should be considered an official ‘fourth branch’ of the American government. Freedom of the press, on this understanding, protects not a private right but rather a public function.¹¹⁵⁰

Journalists are the professionals who carry out the fiduciary role – ‘holding citizenship in trust for us’.¹¹⁵¹ The *Sullivan* decision with its now classic phrase of the ‘uninhibited, robust and wide-open’ debate has become the guiding purpose of the First Amendment – and even of Article 10 of the Convention – making one contemplate whether the state might have more of a role to play in regulating the press than had been previously allowed.¹¹⁵²

There have been two major concerns related to this discussion. One concern is that the media due to its role in conducting investigative journalism needs added protection. The other concern is that ‘a higher constitutional status’ for the established press ‘would present practical and conceptual difficulties’ and go against the constitutional guarantee of freedom of expression for all.¹¹⁵³ Anthony Lewis, an advocate against any preferred position for the press points to the ‘American constitutional premise, that the citizen is sovereign’, pointing to Justice Brandeis’ famous opinion in *Whitney v. California*, ‘that public discussion is a political duty’.¹¹⁵⁴

The view that citizens are on equal footing with the press in debating matters is highly doubtful, as the public is not incited to participate in the political discourse if the press fails in provoking such debate. In a dissenting opinion in 1974, US Supreme Court Justice Powell provided that in seeking out the news the press acts as an agent of the public at large. By enabling the public to assert meaningful control over the political process, the press performs a critical function in effecting the societal purpose of the First Amendment.¹¹⁵⁵ Justice White in *Cox Broadcasting v. Cohn* accentuated the special role of the press as a vital instrument for the public in democratic control. In a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in, convenient form, the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most individuals would be unable to vote intelligently and chose their representatives or to register opinion on the administration of government generally.¹¹⁵⁶

¹¹⁵⁰ *Ibid.*

¹¹⁵¹ Schudson, quoted in McQuail, *supra* note 1100, p. 159.

¹¹⁵² Cf. Fiss, *supra* note 52, p. 52.

¹¹⁵³ Justice White in *Branzburg v. Hayes*, *supra* note 1136.

¹¹⁵⁴ Lewis, *supra* note 856, p. 147.

¹¹⁵⁵ *Pell v. Procunier*, 417 U.S. 843 (1974) at 860–874.

¹¹⁵⁶ *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975) at 491–92.

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Investigative journalism came increasingly into focus in the 1970s. The throttling abuse of power in Vietnam and Watergate scandals had an impact on both sides of the Atlantic, as evident in the UNESCO-report on the role of media and communication in the New World Information Order.¹¹⁵⁷ The report emphasized that the journalistic imparting process had not gotten the attention needed in the increased acknowledgement of the democratic role of the media. In recent decades the emphasis had been on guaranteeing the structural environment to safeguard pluralism with the focus on the recipients. The obstacles within the media itself in imparting and acting as the Public Watchdog had been overlooked. The report emphasized that it was a matter of great urgency for the public interest that the law showed concern for an effective utilization of media for the expression of diverse points of view.

To explain why there is increased recognition that press freedom or journalistic activities differ from the individual freedom of expression we need to look into what is expected of the press and hence its journalists? Have changed circumstances called for a different type of protection and is this problem adequately realized in jurisprudence? The speech of Justice Stewart in the 1970s contributed to the determination of the news organizations in the US to fight cases on access to news,¹¹⁵⁸ searches of news premises, protection of confidential sources¹¹⁵⁹ and the confidentiality of the editorial process.¹¹⁶⁰ Protection of the editorial process, to enable the press to exercise its fiduciary role was gradually gaining recognition along with investigative journalism. The dominant view, however, was that the adoption of statutes on newsgathering privileges was contrary to the principle of freedom of expression.

The US Supreme Court was in these cases presented with the question of whether the press clause of the First Amendment protected something different from that protected by the speech clause. In these cases, the Court was not concerned with defining the press, but with determining which journalistic activities might receive

¹¹⁵⁷ The issue presented before the US Supreme Court in the case of *New York Times Co. v. United States*, *supra* note 6, concerned the publication of the so called Pentagon Papers by two major newspapers and efforts by the federal government to prevent them from publishing the secret documents that would allegedly endanger national security. The majority of the Court held that the government carried the heavy burden of showing justification for the imposition of such a restraint and it had not succeeded in showing sufficient reason to impose prior restraint. (Later it became apparent that the Pentagon Papers contained a historical documentation of US involvement in Vietnam and no 'new' or stability threatening information).

¹¹⁵⁸ See *Gannett Co. v. DePasquale*, 443 U.S. 36 (1979), where Supreme Court ruled that judges may close pre-trial hearings; *Houchins v. KQED, Inc.* 438 U.S. 553 (1978), where it ruled that journalists had no more right of access to prisons than the general public but they should be allowed to use their 'tools of trade'.

¹¹⁵⁹ Cf. *In re Farber*, 439 U.S. 997 (1978).

¹¹⁶⁰ Cf. *Herbert v. Lando*, 441 U.S. 153 (1979).

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constitutional protection.¹¹⁶¹ The so-called shield laws in most jurisdictions in the United States afford privileges to journalists not to disclose in legal proceedings confidential information or sources of information obtained by them in their professional capacities. The general evolution in US jurisprudence is that journalists have no special privilege in gaining access to prisons or courtrooms if judges decide to close the doors. Journalists are not protected from testifying as to the editorial process where such testimony is material to the proof of a critical element of the plaintiff's actions, such as a defendant's malice, i.e. knowing untruthfulness.¹¹⁶² It seems that the Supreme Court prefers to look at freedom of the press, as not just the right of reporters and editors, but as it stated in the *Red Lion* case, 'it is the people's "collective right" . . . to receive suitable access to social, political, aesthetic, moral and other ideas and experiences'.¹¹⁶³

A journalist adhering to the fiduciary duty parts company with the deceiving tradition of neutrality and objective reporting without returning to politicized or advocacy journalism.¹¹⁶⁴ This is not to say that journalists are to avoid having opinions, being political or supporting a cause. It would be unreal to make such demands nor would it be beneficial to the political debate. Professionalism ought to mean loyalty to the legal and ethical standards of the profession. Christopher Lasch has criticized modern day journalism for its cult of professionalism saying that newspapers might have served as extensions of the town meeting. 'Instead they embraced the misguided ideal of objectivity and defined their goal as the circulation of reliable information – the kind of information that tends not to promote debate but to circumvent it.'¹¹⁶⁵ Lasch's description is befitting for 'establishment' journalism that has no intention of rocking the boat. The journalist working within such an environment is not prepared to take on such a task on his own. He not only lacks time but also an overview and expertise in an increasingly complex environment *vis-à-vis* sophisticated expertise of not only government agencies but corporations and other power centres that these journalists on an individual basis do not have the professional capacity to deal with – not to mention to confront or to contest the information handed to them. For this reason hiding behind the professional cult of objectivity is a guise for lack of intellectual capacity to enter into a debate with the experts that they are constantly confronted with on every level of the system. Conformity and passivity shield the journalist from an inquiry, which demands diving into murky waters without any actual protection.

Inherent in professionalism when dealing with political, economic, social, ecological, biotechnological and legal matters is a requirement of intellectual capacity. Journalism requires, in addition to hard-hitting reporters, knowledgeable and critical individuals. Foucault described the purview of intellectuals, which is

¹¹⁶¹ P. M. Garry, *The New Media and the First Amendment*, 1994 University of Pittsburgh Press, p. 84.

¹¹⁶² *Herbert v. Lando*, *supra* note 1160.

¹¹⁶³ *Red Lion Broadcasting co. v. FCC*, *supra* note 619.

¹¹⁶⁴ *Ibid.*, p. 160.

¹¹⁶⁵ Lasch, *supra* note 511, p. 11.

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quite applicable for journalism in the modern media context. He provides that the role of the intellectual is not to tell others what they have to do:

The work of an intellectual is not to shape others' political will, it is, through the analysis that he carries out in his own field, to question over and over again what is postulated as self-evident, to disturb people's mental habits, the way they do and think things, to dissipate what is familiar and accepted, to re-examine rules and institutions and on the basis of this re-problematization . . . to participate in the formation of a political will (in which he has his role as a citizen to play).¹¹⁶⁶

At least some of the media staff have to be capable of setting things in an intellectual context in today's complex society. The fiduciary duty requires that journalists provide news and analysis according to what they as a professional group view as setting things in context for the public interest. Objectivity of listing what, when, where and how is in line with the detachment of a journalist when imparting matters of political and other interest that the public is entitled to receive. The search for truth is an element of investigative journalism. Drawing conclusions, as did two journalists, from the political sympathies of judges and determining that those might not be irrelevant to the decision in question, is analytical journalism whose truth by definition is not susceptible to proof.¹¹⁶⁷ The origin of political or societal analysis is always occasioned in a subjective assessment, although supported with factual basis.

4.2.1 The Public Watchdog

Analogous to the Fourth Estate is the concept of the Public Watchdog in Convention jurisprudence. The core of both concepts is the implicit notion of what has become known as investigative journalism. *Prima facie* the imparting process seems to succumb to the same principles as the more general individual freedom of expression, that no one is punishable except for a distinct breach of the law. The Court has consistently emphasized 'the pre-eminent role of the press in a state governed by the rule of law'.¹¹⁶⁸ Press freedom is certainly part of the overall protection offered by Article 10 and rests on the same foundation as the individual freedom of expression. The imparting process itself, however, requires a separate theory and justification.¹¹⁶⁹

When the case-law is scrutinized with regard to Article 10 it becomes clear that freedom of the press is not merely the freedom to found a newspaper free of licensing, or to be free from discriminatory taxation or public interference. The press is more than a marketable commodity. There is much tension between the

¹¹⁶⁶ M. Foucault, *Politics, Philosophy, Culture – Interviews and Other Writings*, L. K. Kritzman (ed.), 1988 Routledge, New York, p. 265.

¹¹⁶⁷ *De Haes and Gijssels v. Belgium*, *supra* note 113, §§ 44–48.

¹¹⁶⁸ *Cf. Castells v. Spain*, *supra* note 484, § 43; *Thorgeir Thorgeirson v. Iceland*, *supra* note 226, § 63.

¹¹⁶⁹ *Cf. Marshall*, *supra* note 1056, p. 40.

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conception of the press as a private enterprise subject to the logic of the market and the press as an instrument of democracy. The instrumental value of press freedom is to begin with defined in terms of the paramount protection that the Court has afforded to political speech.¹¹⁷⁰ The press may not overstep certain bounds at the same time, as it must adhere to its duty of informing the public. The press has the task of informing the public properly¹¹⁷¹ and to that extent set things in an analytical context.¹¹⁷² In order to do so journalism must be daring and not hesitate to go against accepted views,¹¹⁷³ as the importance of political opposition is crucial in democracy.¹¹⁷⁴ Journalistic conduct involves shocking and disturbing sections of the population to shed light on various sides of reality. According to a recent declaration by the Committee of Ministers political debate requires that the public is informed about matters of public concern, which includes the right of the media to disseminate negative information and critical opinions concerning political figures and public officials, as well as the right of the public to receive them.¹¹⁷⁵

Concerning the importance in processing information or putting it into perspective, the Court has expressly rejected the contention that ‘the task of the press [is] to impart information, the interpretation of which ha[s] to be left primarily to the reader’.¹¹⁷⁶ This is a notable description of the role of the press, assigning an active role of interpretation of facts to the journalists. It is accordingly not enough to submit the information in the form of news as spare parts on a conveyor belt. The media is responsible for putting facts into context within an analytical framework, grasping a complex situation in a nutshell. Subsequently this not only requires a voluntary press, but is also a requisition on journalists and their capability, skilfulness and competence. The Court attaches the highest importance to the freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech.¹¹⁷⁷ The media cannot achieve its democratic goals without representing conflicting views in society.¹¹⁷⁸ The Commission has submitted that the very function of the press in a democratic society is to ‘participate in the political process’.¹¹⁷⁹ The Committee of Ministers has also stressed that states should promote political and cultural pluralism by developing their media policy in line with Article 10 of the European Convention

¹¹⁷⁰ *Lingens v. Austria*, *supra* note 85; *Observer and Guardian v. the United Kingdom*, *supra* note 59.

¹¹⁷¹ *Sunday Times v. the United Kingdom*, *supra* note 60.

¹¹⁷² *Lingens v. Austria*, *supra* note 85, § 30.

¹¹⁷³ *Handyside v. the United Kingdom*, *supra* note 87, § 49.

¹¹⁷⁴ *Castells v. Spain*, *supra* note 484.

¹¹⁷⁵ *Declaration on freedom of political debate in the media*, adopted by the Committee of Ministers on 12 February 2004 at the 872nd meeting of the Ministers’ Deputies.

¹¹⁷⁶ *Lingens v. Austria*, *supra* note 85, § 30.

¹¹⁷⁷ *Feldek v. Slovakia*, *supra* note 312, § 83. *Cf.*, *supra* note 1176.

¹¹⁷⁸ *Handyside v. the United Kingdom*, *supra* note 87.

¹¹⁷⁹ Application no. 10343/83, *Z v. Switzerland*, Commission’s decision 6 October 1983, DR 35.

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on Human Rights, which guarantees freedom of expression and information, and due respect for the principle of independence of the media.¹¹⁸⁰

The Court has emphasized the role of political parties under Article 11 in conjunction with Article 10 saying that ‘the protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11’.¹¹⁸¹ It has furthermore held that ‘one of the principle characteristics of democracy is the possibility it offers of resolving a country’s problems through dialogue . . . even when they are irksome’.¹¹⁸² In the recent case of *Sener v. Turkey* the Court emphasized the essential role of the press in ensuring the proper functioning of a political democracy¹¹⁸³ when the domestic authorities in the instant case failed to give sufficient weight to the public’s right to be informed of different perspectives of the situation, referring to intellectual analysis on relevant political problems and the ability of the editor to offer his public views in a political debate.¹¹⁸⁴ The Court has emphasized the relevance of Article 11 with regard to the political debate on the forum of the media, which must then be read in light of Article 10, as the essence of democracy is to allow diverse political projects to be proposed and debated, even when they call into question the existing organization of the state, provided they do not harm democracy itself.¹¹⁸⁵

The Court speaks of the ‘vital role’¹¹⁸⁶ of the Public Watchdog and its rightful role.¹¹⁸⁷ The concept of the Public Watchdog has, however, evaded a clear legal definition, despite its recurrent usage in Convention jurisprudence. The media in a democratic society is ‘a purveyor of information and public watchdog’.¹¹⁸⁸ By demarcating the role of the media with such a distinctive term the Court is accordingly assigning a role to journalism, which is to be taken seriously, in particular where through the press, it serves to impart information and ideas of general interest.¹¹⁸⁹ A fundamental principle in interpreting Article 10 is that the press has a duty to impart – in a manner consistent with its obligations and responsibilities – matters of public concern, hence freedom within the press ‘affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders’.¹¹⁹⁰ This is underlined by the wording of Article 10

¹¹⁸⁰ Recommendation no. R (99) 1 of the Committee of Ministers to Member States *on Measures to Promote Media Pluralism* (Adopted by the Committee of Ministers on 19 January 1999, at the 656th meeting of the Ministers’ Deputies).

¹¹⁸¹ *Socialist Party and Others v. Turkey*, *supra* note 135, § 42.

¹¹⁸² *Ibid.*, § 45.

¹¹⁸³ *Sener v. Turkey*, *supra* note 533, § 41.

¹¹⁸⁴ *Ibid.*, § 45.

¹¹⁸⁵ *Freedom and Democracy Party (ÖZDEP) v. Turkey*, *supra* note 528.

¹¹⁸⁶ *Observer and Guardian v. the United Kingdom*, *supra* note 59, § 59 (b).

¹¹⁸⁷ *Cf. Dalban v. Romania*, *supra* note 1051, § 49; *Bladet Tromsø and Stensaas v. Norway*, *supra* note 11, § 59.

¹¹⁸⁸ *Lingens v. Austria*, *supra* note 85, § 44.

¹¹⁸⁹ *Informationsverein Lentia and Others v. Austria*, *supra* note 271, § 38.

¹¹⁹⁰ *Fressos and Roire v. France*, *supra* note 495, § 45.

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where the right to receive information and ideas is expressly mentioned.¹¹⁹¹ In the case of the *Sunday Times v. the United Kingdom* in 1979, the Court indirectly acknowledged that the organized press is an indispensable part of the democratic system, given its task of enlightening the public.¹¹⁹²

4.2.2 Investigative Journalism

The label of the Public Watchdog that the Court has designated to the press entails a claim on journalists to call attention to that which goes awry. The Public Watchdog is to be a relentless adversary of the powerful as the lifeline of democracy hinges on that type of media conduct. Journalism is to be a sharp-edged sword to agitate public consciousness of misuse or abuse of power. Investigative journalism means calling attention to the breakdown of social systems and disorder within public institutions that cause injury and injustice; in turn, their stories implicitly demand reaction of public officials and the public itself.¹¹⁹³ The obvious purpose of investigative journalism is to bring relevant problems to public attention.

It is not only the right of the press to hold those in power accountable to the public – but ‘may even be considered a “duty and responsibility” of the press in a democratic state’.¹¹⁹⁴ The Court frequently refers to the fact that it attaches particular importance to the duties and responsibilities of those who avail themselves of their right to freedom of expression, ‘and in particular journalists’.¹¹⁹⁵ Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.¹¹⁹⁶ Journalistic freedom in particular also covers possible recourse to a degree of exaggeration, or even provocation.¹¹⁹⁷

The Court has submitted that the degree of precision for establishing the well-foundedness of a criminal charge by a competent court can hardly be compared to that which ought to be observed by a journalist when expressing his opinion on a matter of public concern. A fair comment on a matter of public interest, that is a value judgment, may be excessive and if so subject to restrictions but otherwise it is an aspect of the special role of the Public Watchdog.¹¹⁹⁸ Hard-hitting criticism involving allegations of police brutality, based on what is being said by others does not require proof, if there seems to be an objective and factual basis underlying the writing.¹¹⁹⁹ A distinction is made between insulting statements and those grossly

¹¹⁹¹ *Oberschlick v. Austria*, *supra* note 519, § 58.

¹¹⁹² *Sunday Times v. the United Kingdom*, *supra* note 60, § 65.

¹¹⁹³ Cf. J. S. Ettema and T. L. Glasser, *Custodians of Conscience*, 1998 Columbia University Press, p. 3.

¹¹⁹⁴ *Lingens v. Austria*, Commission’s report, 11 October 1984, Series A no. 103, § 74.

¹¹⁹⁵ *Jersild v. Denmark*, *supra* note 84, § 31; *Unabhängige Initiative Informationsvielfalt v. Austria*, application no. 28525/95, judgment 26 February 2002 (not yet published), § 43.

¹¹⁹⁶ *Prager and Oberschlick v. Austria*, *supra* note 62, § 57; *De Haes and Gijssels v. Belgium*, *supra* note 113, § 48.

¹¹⁹⁷ *Prager ibid.*, § 38; *Thoma v. Luxembourg*, *supra* note 328, §§ 43-45.

¹¹⁹⁸ *Unabhängige Initiative Informationsvielfalt v. Austria*, *supra* note 1195.

¹¹⁹⁹ *Thorgeirson v. Iceland*, *supra* note 226, §§ 65-66.

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offensive.¹²⁰⁰ Polemical attack on judges where the fate of young, sexually abused children is at stake enjoys protection under Article 10, as the factual foundation for criticism is not lacking.¹²⁰¹

The Court has ascribed to journalists the task of imparting matters of public interest and therein included open criticism of government,¹²⁰² politicians,¹²⁰³ and other walks of life that deserve scrutiny to retain public control over officials, preventing usurpation of power, and acting as a check on the establishment as a whole.¹²⁰⁴ The Commission accepted the argument in a case involving two investigative journalists against Belgium¹²⁰⁵ that the determination of the 'judicial truth' in a Court decision did not mean that any other opinion had to be considered wrong when the exercise of the freedom of the press was being reviewed.¹²⁰⁶ It submitted that the general interest in a public debate outweighs the legitimate aim of protecting the reputation of others, even if such debate involves the use of wounding or offensive language.¹²⁰⁷ The Court acknowledges that 'political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society'.¹²⁰⁸

The Court regards news reporting based on interviews as one of the most important means whereby the press is able to play its vital role of Public Watchdog. The methods of objective and balanced reporting may vary considerably, depending on among other things the medium in question. It is not for the Court nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the Court recalls that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.¹²⁰⁹

In the case of *Prager and Oberschlick v. Austria* the government accused the journalist of neglecting 'the most elementary rules of journalism, in particular those which require a journalist to verify personally the truth of information obtained and to give the persons concerned by such information the opportunity to comment on it'.¹²¹⁰ Judges subject to a duty of discretion and hence precluded from replying cannot expect to be devoid of journalistic criticism altogether. The Court provided, however, that 'excessive accusations must have *sufficient* factual basis'.¹²¹¹ The Court came to the conclusion that Article 10 had not been violated, albeit by a bare

¹²⁰⁰ *Yankov v. Bulgaria*, application no. 39084/97, judgment 11 December 2003, § 137 (not yet published).

¹²⁰¹ *De Haes and Gijssels v. Belgium*, *supra* note 113, §§ 39 and 47.

¹²⁰² *Castells v. Spain*, *supra* note 484.

¹²⁰³ *Lingens v. Austria*, *supra* note 85, § 42; *Oberschlick v. Austria*, *supra* note 519, § 59.

¹²⁰⁴ *Thorgeirson v. Iceland*, *supra* note 226.

¹²⁰⁵ *De Haes and Gijssels v. Belgium*, Commission's report 29 November 1995, RJD 1997-I.

¹²⁰⁶ *De Haes and Gijssels v. Belgium*, *supra* note 113, §§ 34–35.

¹²⁰⁷ *Ibid.*, § 63.

¹²⁰⁸ *Lopez Gomes da Silva v. Portugal*, *supra* note 832, § 34.

¹²⁰⁹ *Oberschlick v. Austria*, *supra* note 519, § 67; *Jersild v. Denmark*, *supra* note 84, § 31.

¹²¹⁰ *Prager and Oberschlick v. Austria*, 26. *supra* note 62, § 33.

¹²¹¹ *Ibid.*, § 37.

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majority of five against four. Judge Martens joined by two others dissenting, questioned that it might perhaps be queried whether or to what extent the burden of proof, in cases like this, on the journalist is compatible with Article 10.¹²¹²

Conducting investigative journalism is impossible if it requires that the journalist verify every statement made to him. According to a general ethical rule the journalist must respect the truth and he must respect the right of the public to the truth.¹²¹³ This rule has inherent contradictions within it. Respecting the truth to the extent of double-checking every fact may delay the publishing of the story to the detriment of the public's right to receive. News is a perishable commodity and its value may disappear if delayed.¹²¹⁴ Meeting a deadline and verifying numerous statements, made by various individuals, along with writing the story may 'kill' it. Derogatory accusations, against individuals, will require that the journalist invites the defendant to comment on allegations made,¹²¹⁵ which must be a question of technique that without doubt requires that the journalist rises to the occasion, a crucial matter, and that he complies with the code of ethics of the profession.¹²¹⁶

Investigative journalism is highly treasured by the Court although it states 'even with respect to press coverage of matters of serious public concern, Article 10 of the Convention does not guarantee *wholly unrestricted* freedom of expression'.¹²¹⁷ Inherent in investigative journalism are allegations concerning the abuse of power. The Court does not go so far as to describe which technique the investigative journalist is to adopt but emphasizes time and again that, by reason of 'the "duties and responsibilities" inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 to journalists is to provide accurate and reliable information in accordance with the ethics of journalism'.¹²¹⁸

A publication of a picture of a suspect falls under the rubric of technique¹²¹⁹ although the legitimate aim of prohibiting such publication is 'the reputation or rights of others' against insult and defamation and against violations of the presumption of innocence; and also 'the authority and impartiality of the judiciary' in so far as that term has been interpreted to include the protection of the rights of litigants in general.¹²²⁰ Authorities must show relevant and sufficient reasons in prohibiting such a publication against the ascribed legal role of the media of imparting information and ideas and the public's right to receive,¹²²¹ in addition to

¹²¹² *Ibid.*, dissenting opinion of Judge Martens, joined by Judges Pekkanen and Makarczyk, p. 28.

¹²¹³ International Federation of Journalists, *Declaration of Principles on the Conduct of Journalists* (Adopted by the Second World Congress of IFJ at Bordeaux on 25–28 April 1954 and amended by the 18th IFJ World Congress in Helsingör on 2–6 June 1986).

¹²¹⁴ *Observer and Guardian v. the United Kingdom*, *supra* note 59, § 59.

¹²¹⁵ *Bergens Tidende and Others v. Norway*, *supra* note 982, §§ 57–59.

¹²¹⁶ *Bladet Tromsø and Stensaas v. Norway*, *supra* note 11, §§ 65–66.

¹²¹⁷ *Bergens Tidende and Others v. Norway*, *supra* note 982, § 53. Emphasis added.

¹²¹⁸ *Ibid.*; *Goodwin v. the United Kingdom*, *supra* note 61, § 39; *Fressos and Roire v. France* [GC], *supra* note 495, § 54.

¹²¹⁹ *News Verlags GmbH & CoKG v. Austria*, *supra* note 85.

¹²²⁰ *Sunday Times v. the United Kingdom*, *supra* note 60, § 56.

¹²²¹ *Worm v. Austria*, 29. 8. 1997, RJD 1997-V, § 50.

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the person involved who has laid himself open to public scrutiny either by his conduct, which concerns an important aspect of public interest,¹²²² or by expressing extremist views as in the case of the publication of the suspect's picture.¹²²³ The Court has recently spelled out a 'public figure' test when it held that what matters is whether a person has entered the public arena and attracted the attention of the public, albeit the individual need not be known to the public. Persons participating in a public debate or suspected of having committed offences of a political nature fall into this category.¹²²⁴ The approach that has gradually evolved in the US, distinguishes a public from a private person on either of the two bases – fame, notoriety, power or influence that render one a public figure for all purposes, or the status that makes one a public figure only for a limited range of issues.¹²²⁵ In either case the person assumes special prominence in the resolution of a public controversy. One must meet the test of thrusting oneself into the forefront of a public issue or controversy, which affects the public or some segment of it in an appreciable way. The European Court of Human Rights in a recent case submitted, 'the fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion, even where, strictly speaking, no problem of incompatibility of office under domestic law arises'.¹²²⁶ Moreover, the limit of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance. A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of the open discussion of political issues.¹²²⁷

Where a question arises of interference with private life through publication in mass media, the state must find a proper balance between the two Convention rights, namely the right to respect for private life guaranteed by Article 8 and the right to freedom of expression guaranteed by Article 10.¹²²⁸ In a case concerning reports in a general news magazine in Madrid about an alleged adulterous relationship between a duchess and a banker, the Spanish courts found that this sensational journalism was an unlawful interference with the respect for private life.¹²²⁹ The reports used

¹²²² *Bergens Tidende and Others v. Norway*, *supra* note 982, § 51.

¹²²³ *News Verlags GmbH & CoKG v. Austria*, *supra* note 85, §§ 58–60.

¹²²⁴ *Krone Verlag GmbH & Co. Kg. v. Austria*, application no. 34315/96, judgement 12 February 2002 (not yet published), § 37.

¹²²⁵ *Gertz v. Robert Welch, Inc.* 418 U.S. 323, at 352.

¹²²⁶ *Dichand and Others v. Austria*, application no. 29271/95, judgment of 26 February 2002 (not yet published), § 51.

¹²²⁷ *Ibid.*, § 39, § 51; *Lingens v. Austria*, *supra* note 85, § 42; *Oberschlick v. Austria*, *supra* note 519, § 59.

¹²²⁸ Application no. 11366/85, *N. v. Sweden*, *supra* note 308, p. 173.

¹²²⁹ *Campany y Diez de Revenga and Lopez-Gallacho Perona v. Spain*, 12 December 2000, RJD 2000-XII.

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provocative terms and innuendo concerning matters of which there was not a shred of evidence. The European Court of Human Rights held that the restriction had been necessary because although the persons concerned were known to the public the reports in issue could not be regarded as having contributed to a debate on a matter of general interest to society.¹²³⁰

As the press is the forum of political and public debate it has a legitimate interest in reporting on and drawing the public's attention to deficiencies in the operation of government services, including, as the Commission has stated, possible illegal activities.¹²³¹ The threat of corruption came increasingly into focus during the last decades of the 20th century. The Committee of Ministers called attention to the role of journalism in fighting corruption in a recommendation in 2000: '[C]orruption represents a serious threat to the rule of law, democracy, human rights, equity and social justice; it hinders economic development and endangers the stability of democratic institutions and the moral foundations of society'.¹²³²

Investigative journalism of the established press has become recognized as one of the main tools in fighting corruption, at the same time it is almost a contradiction in terms as corruption or deference to establishment-interests infiltrates the media like other institutions in society. Any interference with journalistic effort to reveal corruption in high places is acknowledged by the Court as requiring strict scrutiny. In the case of *Perna v. Italy* where a journalist was accused of defaming a public prosecutor the Court provided that the press is one of the means to verify that those with official duties are discharging their responsibilities.¹²³³ There is little scope under Article 10 § 2 for restrictions of political speech or debates on questions of public interest.¹²³⁴ Political debate enjoys the highest protection under Article 10. In the case of *Thorgeirson v. Iceland*, the Court rejected the Icelandic government's contention that political discussion concerned mainly high politics; it also covered other matters of public concern.¹²³⁵ In March 2002 the Court made clear that the scope of political debate and public matters includes corporate matters. When the ties between political and business activities overlap it may give rise to public discussion – even when writings in the press are based on slim factual bases.¹²³⁶

The media frequently argue that their freedom to publish material of real public interest is deterred or chilled by defamation law.¹²³⁷ The Court has recognized the

¹²³⁰ *Ibid.* (See also recent case of *Von Hannover v. Germany*, application no. 5932/00, judgment 24 June 2004 (not yet published)).

¹²³¹ *Observer and Guardian v. the United Kingdom*, Commission's report 12 July 1990, Series A. No. 216, § 75.

¹²³² Recommendation No. R (2000) 10 of the Committee of Ministers to Member States on codes of conducts for public officials (Adopted by the Committee of Ministers at its 106th session on 11 May 2000).

¹²³³ *Perna v. Italy*, *supra* note 525, § 41. Citations omitted.

¹²³⁴ *Sürek v. Turkey* (no. 1), *supra* note 356, § 61.

¹²³⁵ *Thorgeirson v. Iceland*, *supra* note 226, § 64.

¹²³⁶ *Dichand and Others v. Austria*, *supra* note 1226, § 52.

¹²³⁷ Cf., E. Barendt, L. Lustgarten, K. Norrie and H. Stephenson, *Libel and the Media: The Chilling Effect*, 1997 Oxford University Press, pp. 189–194.

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chilling effect of high level damages on freedom of journalists.¹²³⁸ In the context of a political debate, sentencing journalists to a fine would be likely to deter them from contributing to a public discussion of issues affecting the life of the community. By the same token such sanctions are liable to hamper the press in performing its task as purveyor of information and Public Watchdog.¹²³⁹ In principle the legitimate aim of protecting the reputation and rights of others is usually not difficult to demonstrate, it is, however, well-established in case-law that the press enjoys a sufficient degree of protection to harass public servants and politicians who abuse their positions.¹²⁴⁰ The Court's case-law is rather consistent in its acknowledgement of the press' unique position and the significance of critical journalism.

4.3 SAFEGUARDS

The safeguards to be afforded to the press are of particular importance.¹²⁴¹ Were it otherwise, the press would be unable to play its vital role of Public Watchdog.¹²⁴² The press enjoys protection as a legal person.¹²⁴³ The source of that protection is not rooted in property rights of the owners but in recognition of its paramount role as the Public Watchdog.¹²⁴⁴ The Commission in 1979 expressed the view that the press is not protected because of its commercial activities.¹²⁴⁵ With regard to another organization in society, the Church, the Commission originally applied the rule according to which a corporation being a legal and not a natural person is incapable of having or exercising the rights of thought and conscience and religion mentioned in Article 9.¹²⁴⁶ It later changed this jurisprudence.¹²⁴⁷ The striking distinction between the original jurisprudence regarding the Church and the unique position granted to the press primordially – as a key actor in exercising Article 10 rights – confirms its touchstone role in democracy.

The press as an institution in society needs protection designed to ensure that its operation promotes its purposes. Any measures against newspaper publications must be seen in the light of the essential role played by the press for ensuring the proper functioning of democracy.¹²⁴⁸ Media professionals are typically the main

¹²³⁸ *Tolstoy Miloslavsky v. the United Kingdom*, *supra* note 307.

¹²³⁹ *Lingens v. Austria*, *supra* note 85, § 44.

¹²⁴⁰ *Thorgeirson v. Iceland*, *supra* note 226; *De Haes and Gijssels v. Belgium*, *supra* note 113; *Janowski v. Poland* [GC], *supra* note 85.

¹²⁴¹ *Jersild v. Denmark*, *supra* note 84; *Bladet Tromsø and Stensaas v. Norway*, *supra* note 11, § 59.

¹²⁴² *Ibid.*, *Bladet Tromsø*, *supra* note 11, § 62; *Thorgeirson v. Iceland*, *supra* note 226 § 63.

¹²⁴³ *Autronic AG v. Switzerland*, *supra* note 724.

¹²⁴⁴ *Cf. Appelby and Others v. the United Kingdom*, application no. 44306/98, judgment 6 May 2003, partly dissenting opinion of Judge Maruste.

¹²⁴⁵ Application no. 5178/71, *supra* note 55.

¹²⁴⁶ Application, no. 3798/68, Collection of Decisions 29, p. 70, *cf. infra* 6.2.2 Economic Concerns of Owners.

¹²⁴⁷ Application no. 7805/77, *supra* note 64.

¹²⁴⁸ *Ösgur Gundem v. Turkey*, *supra* note 25, § 58.

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beneficiaries of the exercise of this freedom as well as the most frequent victims. In its body of case-law the Court has laid down several principles that apply in cases concerning journalists and the media. Such cases involve, for example, the conviction of a journalist at the national level for defamation, for propaganda against the integrity of the state and for undermining the authority and impartiality of the judiciary. In these cases the Court must balance the freedom of the journalist against the rights of others or against the general interest. The Court has in most cases decided in favour of press freedom due to its unique position as a Watchdog and to avert the chilling effect of interference. Journalists have considerable latitude in the methods they use to convey their material. In order to practice investigative journalism more protection is, however, needed. News is a perishable commodity as the Court has noted¹²⁴⁹ and any interference, albeit temporary may reduce the value of information.

The case-law provides that courts as guarantors of justice 'have a fundamental role in a state governed by the rule of law [and] need to enjoy public confidence. They should therefore be protected against unfounded attacks, especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying.'¹²⁵⁰ In the same manner the Court views press freedom as an essential part of a well-functioning democracy, making it incumbent on both the printed press as well as broadcasting to attend to this function.¹²⁵¹ The press is, in an analogous manner to the courts, vital to democracy and the rule of law but the former has no comparable institutional framework. In a sense it is just a 'happening' on the market without veritable public confidence. The positive duties imposed on the press, encumbering a private enterprise with a public function, seem visionary in light of this.

The press and broadcasting, although privately owned, according to the Court's main principles are not to curb delivery of any information essential to the public welfare and enlightenment. Investigative journalism is a part of the machinery of democratic governance and a stricter test of necessity must be applied where the government seeks to restrict such conduct.¹²⁵² The Watchdog function of the press is a legally guaranteed right of opposition and therefore a fundamental norm of democratic government. A staple theme of classical liberal thought, reflected in Article 10 case-law, is that an open society is not conceivable if government is not prevented from silencing its critics.

The Committee of Ministers in a recommendation in 2000 recognized 'that the free and unhindered exercise of journalism is enshrined in the right to freedom of expression and that it is a fundamental prerequisite to the right of the public to be

¹²⁴⁹ *Observer and Guardian v. the United Kingdom*, *supra* note 59, § 59.

¹²⁵⁰ *Perna v. Italy*, *supra* note 525, § 38.

¹²⁵¹ *Jersild v. Denmark*, *supra* note 84.

¹²⁵² *Cf. Thoma v. Luxembourg*, *supra* note 328, § 48.

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informed on matters of public concern'.¹²⁵³ The Ministers' recommendation was set forth in connection with the need to legally protect journalists from revealing their sources but the same principle is bound to apply if journalists are hindered in the exercise of the right enshrined in Article 10 even on a wider scale. The request is an acknowledgement of the fact that journalism is such a difficult task that it almost requires individual heroism at times to be the 'active conscience' in the Watchdog role.¹²⁵⁴ Not only does the Court reiterate the role and function of the press but also the need to protect it as an institution in society.¹²⁵⁵ It has held that the press cannot undertake the role of investigative journalism successfully unless the state guarantees pluralism¹²⁵⁶ with measures preventing the development of private monopolies.¹²⁵⁷ The safeguards to be afforded to the press are of particular importance.¹²⁵⁸ The Committee of Ministers recommended¹²⁵⁹ to member states that they secure adequate means of promoting free, independent and pluralist media.¹²⁶⁰

The obligations the Court has ascribed to the press do not come naturally to it. The corporate press is a business empire and as will be explored in Part II of this study market forces have contributed to a different kind of censorship within the media – self-censorship – thus standing in the way of a free flow of information and ideas. Apart from the inherent obstacle of the inner logic of the media, as a corporation with other interests to attend to than risking its livelihood, journalists meeting deadlines are faced with various obstacles and threats. They fear damages for libel in writings on matters of general concern and they need a quick and trouble-free access to information on controversial issues. They do not want to reveal the confidentiality of sources. So-called whistleblowers are often the only sources that journalists can rely on to verify abuse of authority. If the state can create legal

¹²⁵³ Recommendation No. R (2000) 7 of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information (Adopted by the Committee of Ministers on 8 March 2000 at the 701st meeting of the Ministers' Deputies).

¹²⁵⁴ *Dalban v. Romania*, *supra* note 1051, § 21, a quote from a dissenting judge of the domestic court describing the role of the press with these words.

¹²⁵⁵ *Autronic AG v. Switzerland*, *supra* note 724.

¹²⁵⁶ *Informationsverein Lentia and Others v. Austria*, *supra* note 271, § 38.

¹²⁵⁷ *Ibid.*, § 42.

¹²⁵⁸ *Jersild v. Denmark*, *supra* note 84.

¹²⁵⁹ Recommendation No. R (2000) 7 of the Committee of Ministers on the right of journalists not to disclose their sources of information (Adopted by the Committee of Ministers on 8 March 2000 at the 701st meeting of the Ministers' Deputies).

¹²⁶⁰ In order to promote the functioning of independent and pluralist media in Europe the Council of Europe has since 1989 offered programmes of assistance. Those programmes take place within the broader framework of the Activities for the Development and Consolidation of Democratic Stability (ADACS), which also cover other elements necessary in a democratic society. The media programmes cover a large range of questions such as the rights and responsibilities of journalists; regulation of sectors of press, radio and television; access to information etc. They are addressed to representatives of official circles concerned with media-related questions (political decision-makers, magistrates, civil servants, representatives of regulatory bodies, etc).

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obligations on the press it must also be prepared to proceed in compliance with such claims, supporting the Public Watchdog, and provide for remedy where it is essential for investigative journalism.

4.3.1 The Question of Extra Legal Protection

A common complaint of the media is that they should enjoy immunity from the standard police powers of search and seizure. They claim that their ability to report stories and publish photographs might be jeopardized, if the police were free to search their premises and seize notes, e-mails, photographs and other material in order to obtain evidence of criminal offences. The independence of the press from public authorities means that journalism should not be 'annexed to the investigative arm of government', as US Supreme Court Justice Stewart once submitted.¹²⁶¹ He based this argument on the same reasoning as the European Court of Human Rights, the principle that the debate on public issues and imparting thereof may not be impeded. In some countries the concept 'journalistic privilege' is used in relation to laws intended to further newsgathering.¹²⁶²

Access to government information is one of the basic requirements of journalism and was a topic of special discussion during the Sixth International Colloquy about the European Convention on Human Rights in Sevilla in 1985 with regard to the duty to inform.¹²⁶³ Doubts were raised that in the field of media, governments should refrain from affirmative state action and trust instead the powers of the market. Such a view could only be defended if the markets in question were governed by free competition. Since, as Carillo stated, the market of information in fact has deviated significantly from this pattern, states have the duty under Article 10 to take legal action.¹²⁶⁴ In certain member states authorities are obliged to disclose information to the press to enable it to fulfil its public function.¹²⁶⁵ Others do not distinguish between access of the press or public to official records, which are always subject to qualified exceptions. In an era increasingly characterized by privatization, a grey sphere¹²⁶⁶ has evolved with a great volume of information of legitimate concern for the public interest. Such information, however, is not easily accessible to the Public Watchdog.

¹²⁶¹ *Branzburg v. Hayes*, *supra* note 1136.

¹²⁶² Korthals-Altes, *supra* note 1101, pp. 72–91. (Article 53, para. 1 nr. 5 of the Code of Criminal Procedure (St. PO) and Article 383 para. 1 no. 5 of the Code of Civil Procedure (ZPO)).

¹²⁶³ Cf. Documentation in 7 *HRLJ*, No. 1 (1986), p. 118; comment of D. Driscoll, p. 118.

¹²⁶⁴ *Ibid.*, comment by J. A. Carillo Salcedo, p. 119.

¹²⁶⁵ Section 3 and 4 of all Länder Press Law. Cf. U. Karpen, 'Freedom of the Press in Germany' in S. Coliver (ed.), *Press Law and Practice*, 1993 Article 19 International Centre Against Censorship, p. 89.

¹²⁶⁶ Corruption seems extensive where state properties are changing hands.

4.3.2 Access to Information

Openness in democratic government is one of the principles that define societies and their culture of political democracy. In order to dictate the course of their government people need to have access to information. Of the various legal battles modern journalists must fight, the struggle for obtaining information is frustrating and it seems that despite the adoption of information acts, authorities always find ways to conceal important information from public scrutiny.¹²⁶⁷ The media would not be able to publish anything nor would it be able to adhere to its duty of democratic accountability if it did not have access to information. As stated in the Preamble to the Johannesburg principles on National Security, Freedom of Expression and Access to Information: 'Bearing in mind that it is imperative, if people are to be able to monitor the conduct of their government and to participate fully in a democratic society, that they have access to government-held information'. For this matter, Principle 13 states that in 'all law and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration'.¹²⁶⁸ The Final Act of the CSCE Helsinki Conference 1975 includes provisions on the circulation, access, exchange of information and co-operation in the field of information, as well as on the improvement of working conditions for journalists.¹²⁶⁹

Obtaining information is an essential part of the job of any investigative journalist or political commentator and therefore an important incident of the freedom of imparting information and ideas. It is vital for journalists to have access to information held by public authorities and that they are not discriminated against in that process.¹²⁷⁰ The public in complex, large and modern societies does not have the time to sort out what it needs to know from 'generally accessible resources'. This is where the function of journalism comes in. According to Downs economic theory of democracy people do not invest the amount of time needed to enlighten themselves and are thus dependent on professionals in the information process.¹²⁷¹

As described in chapter 2.3.1 the Council of Europe information strategy is based on the principle that 'transparency is the rule and confidentiality the exception'. In 1982 the Committee of Ministers emphasized that freedom of expression and information are fundamental elements of the principles of genuine

¹²⁶⁷ The US Congress enacted the federal Freedom of Information Act in 1966. The Icelandic Parliament enacted such legislation thirty years later, in 1996.

¹²⁶⁸ The Principles were adopted on 1 October 1995 by a group of experts in international law, national security and human rights convened by Article 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of Witwatersand in Johannesburg, 20 *Human Rights Quarterly* (1998) 1–11.

¹²⁶⁹ Cf. A. Gerrits and J. Prakken, 'Helsinki, Madrid and the Working Conditions for Western Journalists in Eastern Europe' in A. Bloed and P. van Dijk (eds.), *Essays on Human Rights in the Helsinki Process*, 1985 Kluwer Law International.

¹²⁷⁰ Cf. Principle No. 3 in Resolution No. 2 on Journalistic Freedoms and Human Rights.

¹²⁷¹ A. Downs, *An Economic Theory of Democracy*, 1957 Harper & Row, pp. 212–215.

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democracy, the rule of law and respect for human rights, that had been proclaimed in national constitutions and international instruments; in particular Article 19 of the UDHR and Article 10 of the Convention. The pursuit of an open information policy in the public sector was urged, including access to information in order to enhance the individual's understanding of, and his ability to freely discuss political, social and cultural matters. The absence of censorship or constraints on participants in the information and imparting process was required. The existence of a wide variety of independent and autonomous media, permitting the reflection of diversity of ideas and opinions was called for.¹²⁷² The Parliamentary Assembly in 1993 emphasized that information is a fundamental right that has been highlighted by the case-law of the European Commission and Court of Human Rights relating to Article 10 of the Convention and recognized under Article 9 of the European Convention on Transfrontier Television, as well as in all democratic constitutions. The public authorities must not consider that they own information.¹²⁷³ The right to receive is recognized in the general scheme of the Convention.¹²⁷⁴

As governments have expanded in size, their sheer vastness has made it easy to conceal important information from the public.¹²⁷⁵ For this reason it is essential for journalists to have access and know how to use information if the media is not to circulate undocumented opinions or deprive the public of valuable knowledge. It may be argued that if governments are deliberately concealing information – either by hiding behind formalities such as national security or public safety, as provided for in Article 10 § 2, or evading documentation of important information due to the mandatory disclosure provided by information acts – it is a form of positive action restricting the right of others to receive. The latter may furthermore be interpreted as direct public interference in curtailing the components of political speech, which demands strict scrutiny in the case of authorities. Article 19, an NGO (the International Centre Against Censorship), suggests that destruction of records is a criminal offence and that the laws should establish minimum standards regarding the maintenance and preservation of records by public bodies. Such bodies should be required to allocate sufficient resources and attention to ensuring that public record keeping is adequate. In addition, to prevent any attempt to doctor or otherwise alter records, the obligation to disclose should apply to records themselves and not just the information they contain.¹²⁷⁶

¹²⁷² Committee of Ministers: *Declaration on the Freedom of Expression and Information* (Adopted by the Committee of Ministers on 29 April 1982 at its 70th session).

¹²⁷³ Parliamentary Assembly of the Council of Europe, Resolution 1003 (1993) on the ethics of journalism (Assembly debate on 1 July 1993. Text adopted by the Assembly on 1 July 1993, 42nd sitting) Doc. 6854.

¹²⁷⁴ Cf. dissenting opinion of Judge Wildhaber et al., in *Odievre v. France*, *supra* note 723, para 7, referring to *Johansen v. Norway*, *supra* note 295; *Kützner v. Germany*, 26 February 2002.

¹²⁷⁵ Cf. Overbeck, *supra* note 595, p. 310.

¹²⁷⁶ Article 19, *The International Centre Against Censorship*, principles drafted by Toby Mendel, Head of Article 19's Law Programme, June 1999.

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Article 10 does not, as does its counterpart, Article 19 of the ICCPR, include the word 'seek' with the right to impart and receive. The right to seek may be interpreted as being implicit in the right to impart and receive information and the freedom to take notice of information and freedom to seek information and ideas, which can lead to the possible extension of the right to information, akin to information acts in domestic law.¹²⁷⁷ The preparatory work of the Convention suggests that it was not the intention to connect Article 10 to the right to access to information held by public authorities. There are divergent views on whether the Convention's case-law allows one to draw the conclusion from Article 10 that it guarantees the right of access to public information.¹²⁷⁸ In a report for the Council of Europe on the subject, Article 10 case-law on access to official information is seen as leading to an indirect fundamental right, dependant on the general accessibility of the information under domestic law.¹²⁷⁹

The Commission has submitted that the freedom to receive information guaranteed by Article 10 § 1 is primarily a freedom of access to general sources of information, which may not be restricted by positive action of the state.¹²⁸⁰ From the case-law it may be gathered that the state is not obliged to impart information in certain circumstances.¹²⁸¹ According to the same reasoning, there might be other circumstances in which other types of official information come under the guarantee of Article 10.¹²⁸²

The case-law makes a distinction between potential recipients of information. The Commission held that it was not a violation of Article 10 to deny an imprisoned murderer of several children to be informed of the identity of the members of a special administrative committee concerned with penal matters. It did not consider the concept of information within the meaning of Article 10 § 1 to be so extensive as to oblige such divulgence.¹²⁸³

In the case of *Leander v. Sweden* the applicant complained that he had been prevented from obtaining permanent employment and dismissed from provisional employment on account of certain secret information, which allegedly made him a security risk. Leander claimed this was an attack on his reputation and sought access to government files, in order that he could effectively challenge the information. The Court maintained that:

[T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in

¹²⁷⁷ M. Bullinger, *supra* note 558, p. 340.

¹²⁷⁸ Voorhoof, *supra* note 63, p. 565.

¹²⁷⁹ Council of Europe, Steering Committee on the Mass Media, *Study on access to official information*, Strasbourg 15 April 1995, CDMM (95) 15 Def., p. 39.

¹²⁸⁰ Application no. 10392/83, *Z v. Austria*, Commission's decision of 13 April 1988.

¹²⁸¹ Cf. *Leander v. Sweden*, *supra* note 299; *Gaskin v. the United Kingdom*, *supra* note 561.

¹²⁸² Cf. Voorhoof, *supra* note 63, p. 45.

¹²⁸³ Application no. 8575/79, *X v. the United Kingdom*, Commission's decision 14 December 1979, DR 20.

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circumstances such as those of the present case, confer on an individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.¹²⁸⁴

This view was confirmed in the case of *Gaskin*, a man who had been brought up in the voluntary care of a local authority. As an adult he sought access to the case records regarding severe psychological problems he had experienced as a child, which he ascribed to the way he had been treated. This case differed from the *Leander* case as far as the character of the information concerned. Gaskin did not complain that there existed a file with stored information on him nor did he complain that such storage was to his detriment. The Court held Article 8 to be relevant in this case as the stored information concerned highly personal aspects of the applicant's childhood. Lack of access thereto raised an issue under Article 8 and the positive obligation on the part of the contracting state flowing from Article 8. It found a breach of Article 8 because the defendant state had not struck a fair balance between the individual interest and the general interest. The British system makes access to records dependant on the consent of the contributor. The Court provided that:

Under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent. No such procedure was available to the applicant in the present case. Accordingly, the procedure followed failed to secure respect for Mr. Gaskin's private and family life, as required by Article 8 of the Convention. There has therefore been a breach of that provision.¹²⁸⁵

The lenient attitude reflected in the Court's view with regard to Article 10 as not embodying the obligation to impart the information in question was queried in the *Guerra* case in 1998 where the Court rejected the applicability of Article 10,¹²⁸⁶ although it acknowledged that 'public access to clear and full information . . . must be viewed as a basic human right'.¹²⁸⁷

The paradox in the Court's approach is that it expects journalists to impart everything of legitimate concern, which the public is moreover entitled to receive but allows states a great margin in its discretion concerning informing its subjects on important matters.

¹²⁸⁴ *Leander v. Sweden*, *supra* note 299, § 74.

¹²⁸⁵ *Gaskin v. the United Kingdom*, *supra* note 561, § 49.

¹²⁸⁶ *Guerra and Others v. Italy*, *supra* note 299.

¹²⁸⁷ *Ibid.*, § 34. Emphasis added.

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The Court has, however, submitted that injunctions on information may threaten the welfare and health of citizens. In *Open Door Counselling and Dublin Well Women v. Ireland*, the Court ruled that an injunction imposed by the Irish court on the corporate applicant who was not advocating abortion, only providing information, was contrary to Article 10.¹²⁸⁸ The injunction effectively restrained staff at the applicants' clinic from imparting information to pregnant women concerning abortion facilities outside Ireland. In assessing the proportionality of the restriction, the Court held that the injunction created a risk to the health of women seeking abortion at the later stages of their pregnancy, due to lack of proper counselling. The Court furthermore took into account that such an injunction works against the public interest as there are people who are not sufficiently resourceful or do not have the necessary level of education to have access to alternative sources of information.¹²⁸⁹ This conclusion is extremely relevant with regard to the function of journalists in imparting information to the public that is not sufficiently resourceful and cannot be expected to have the time or resources to seek the relevant information on numerous matters that affect the way of life of people in society. The majority of people depend on the press to seek information from various sources and set it in context in order to represent society to readers and audiences and provide the cement for social cohesion. Few if anyone outside the media are in a position to puzzle together all the information pieces 'to provide full access to the day's intelligence'.¹²⁹⁰ People should not be condemned to ignorance and deprived of vital information just because they lack financial resources or education.¹²⁹¹

It has been suggested that discriminatory denial of access to information might involve a breach of the Convention but it is not with regard to classes of information¹²⁹² but with recipients.¹²⁹³ Principle 14 of the Johannesburg Principles¹²⁹⁴ tackles the 'Right to Independent Review of Denial of Information'. This principle is crucial in the sense that it recognizes that the ability of people to actually obtain information is only as strong as their right to have denials of such information reviewed by an independent authority.

The government may according to Article 10 keep information secret in the interest of national security, territorial integrity, and public safety and is under no obligation to make information available to the public, even though it has no valid reason for maintaining secrecy. The Court says that the right to receive cannot be construed as imposing on the state positive obligations to collect and disseminate

¹²⁸⁸ *Open Door and Dublin Well Woman v. Ireland*, *supra* note 82.

¹²⁸⁹ *Ibid.*, § 77.

¹²⁹⁰ As stated in the Hutchins' Report, cf. Merrill, *supra* note 1106, p.17.

¹²⁹¹ Cf. *Odievre v. France*, *supra* note 723, joint dissenting opinion of Judges Wildhaber, Bratza, Bonello, Loucaides, Cabral, Barreto, Tulkens and Pellonpää (not yet published).

¹²⁹² Application no. 5178/71, *supra* note 55, p. 13.

¹²⁹³ Application no. 4515/70, *supra* note 654, p. 538.

¹²⁹⁴ S. Coliver, 'Commentary to the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, 20 *HRQ*, No. 1 (February 1998).

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information of its own motion.¹²⁹⁵ There is ‘no active transparency’, as Voorhoof calls it,¹²⁹⁶ although the Court has made clear that the public’s right to receive is a corollary of the press’ duty to adequately inform people.¹²⁹⁷ There is a paradox in the positive duties imposed on the press and the fact that the Court cannot subscribe to the view that the state has a positive obligation to inform its subjects of relevant information that could otherwise not come to its knowledge.¹²⁹⁸

The Supreme Court of the United States has denied constitutional access to government information. Justice Potter Stewart rationalized:

[T]he press is free to battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. The public’s interest in knowing about its government is protected by the guarantee of a Free Press, but the guarantee is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.

The Constitution, in other words, establishes the contest, not its resolution. Congress may provide a resolution, at least in some instances, through carefully drawn legislation. For the rest we must rely, as so often in our system, on the tug and pull of the political forces in American Society.¹²⁹⁹

Whatever else, one thinks of this reasoning, it is pretty descriptive of the mainstream attitude in jurisprudence on both sides of the Atlantic even though the recognition has been leaning towards increased government openness in recent decades. The Court does not want to hand out any guarantees to the press despite its promises to the citizens in the ‘knowledge-based’ society. The right to know is viewed by many legal scholars as so essential as to be the very foundation of freedom of expression.¹³⁰⁰ Subsequently it appears hypocritical to speak of press freedom without guaranteeing the public’s right to know.

The reasoning of the Court that the right to receive ‘basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him’,¹³⁰¹ may be taken to mean that the state may not restrict access of journalists to information and that it must take affirmative steps in facilitating access and increasing openness with the support of legislation. The

¹²⁹⁵ *Guerra and Others v. Italy*, *supra* note 299, § 53.

¹²⁹⁶ Voorhoof, *supra* note 63, p. 45.

¹²⁹⁷ *Observer and Guardian v. the United Kingdom*, *supra* note 59, § 59 (b); *Thorgeirson v. Iceland*, *supra* note 226, § 63.

¹²⁹⁸ *Guerra and Others v. Italy*, *supra* note 299, §§ 52–53.

¹²⁹⁹ Justice Stewart, ‘Or of the Press’, *supra* note 1068, here quoted in Teeter, Le Duc, Loving, *supra* note 809, p. 389.

¹³⁰⁰ *Ibid.*; refers to e.g., Harold L. Cross and Thomas I. Emerson.

¹³⁰¹ *Leander v. Sweden*, *supra* note 299, §74; *Guerra and Others v. Italy*, *supra* note 299, § 53.

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developments in recent years at the national, regional and international levels suggest the emergence of a positive duty on governments to provide information necessary for the enjoyment of fundamental rights. As Article 10 has been considered vague on the subject, legal debates on journalistic privilege in this respect are usually held at the national level.¹³⁰²

The access right is now frequently protected in Western democracies by freedom of information statutes. These statutes do not usually confer positive rights on the state other than not standing in the way of the flow of information from central government, such as might permit an informed assessment of its performance.

Information acts and access to government documents are evidently extremely important for the functioning of the media. Requests for the use of freedom of information acts are, however, not always practical for journalists keeping up with deadlines. In the US it has been shown that the freedom of information act is most often used to obtain access on personal files rather than being used by journalists to reveal the machinery of public authorities. Most of those actually filing formal requests for information are lawyers representing private clients, not journalists representing the public interest.¹³⁰³

There may be wider access needed in order to discharge responsible journalism. Sweden has an explicit and wide reaching information act, set forth in chapter 2 of the Freedom of the Press Act, known as the Principle of Public Access to Official Records.¹³⁰⁴ This part of the Constitution has roots in the Constitution of 1766.¹³⁰⁵ The Act gives anyone the right to go to a state or municipal agency and ask to be shown any documents in the files, regardless of whether the document concerns them personally or not. Article 1, not only guarantees the right of access to official documents; it also specifies in Article 2 that any restriction shall be scrupulously specified in the provisions of a special act of law.¹³⁰⁶ These areas concern national security, foreign policy and foreign affairs, criminal investigations and the personal integrity or financial circumstances of individuals. However, Article 4 of the Press Act includes a notorious provision, providing that a letter or other communication which is addressed in person to the holder of an office in public authority shall be deemed an official document if it refers to a case or other matter, which falls within the purview of that authority, and if it is not intended for the addressee solely in his capacity as incumbent of another post.¹³⁰⁷ The Justice (or Parliamentary) Ombudsman, who is appointed by Parliament, supervises that the principle of public access to official records is complied with. Complaints against public officials who

¹³⁰² Korthals-Altes, *supra* note 1101, p. 90.

¹³⁰³ Cf. Feldman, *supra* note 253, p. 611; Overbeck, *supra* note 595, p. 311.

¹³⁰⁴ Tryckfrihetsförordning 2 kap.

¹³⁰⁵ H. G. Axberger, 'Freedom of the Press in Sweden' in S. Coliver (ed.), *Press Law and Practice*, 1993 Article 19 International Centre against Censorship, p. 160.

¹³⁰⁶ Tryckfrihetsförordning 2 kap., 1 § (Lag 1976:954).

¹³⁰⁷ E. Paraschos, *Media Law and Regulation in the European Union: National, Transnational and US Perspectives*, 1998, Iowa State University Press, p. 119.

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do not comply with the Act, for example fail to answer a request within a day without giving a reason, often lead to action by the Ombudsman.¹³⁰⁸

The Freedom of the Press Act in Sweden does not grant Swedish journalists access to the private sector, which has no obligation to give journalists the information they seek. Private companies thus get an easy ride and this may prevent investigative journalists from performing their tasks.¹³⁰⁹ There have been efforts in Sweden to bury sensitive matters to prevent public scrutiny. During the 1980s, press reports alleged that Bofors, Sweden's largest arms manufacturer, had obtained a contract with the Indian government through the payment of bribes. At the request of the Indian government the Swedish government instructed the National Audit Bureau to undertake an investigation. A report containing the investigation's findings was completed and although it found that monetary commissions had been paid to unidentified individuals it concluded that no Swedish law had been violated. The government cited bank secrecy laws to withhold sections of the report from publication. After an Indian newspaper published extracts from the report, which appeared to confirm the large, illegal payments made to anonymous Swiss bank accounts, the Swedish government was forced to release the full report.¹³¹⁰

In Germany the press has a constitutional guarantee (unlike the public) to information held by the government, parliament, courts and private parties. This guarantee of access is seen as a necessary prerequisite to the fulfilment of the press' 'public function'.¹³¹¹ This term, used in Section 3 of all Länder press law, describes the press' role in informing the public in democracy. Section 3 reads: 'The Press fulfils a public function in the matters of public interest; it collects and disseminates information, presents commentary and criticism, and otherwise contributes to the formation of public opinion'.¹³¹² In order to fulfil its public function, journalists have access privileges to information held by private persons and companies. The rights to human dignity and privacy as well as professional and property rights, however, limit these privileges. The unauthorized collection and use by the press and others of names, telephone communications, personal tape recordings and photographs is prohibited on grounds of the right to privacy.¹³¹³

Investigative journalism exploiting corruption cannot be conducted adequately if access to information in the corporate world is blocked. The question of state liability may be raised in this context as the ties between powerful corporations and the elected authorities may foster massive corruption, which would be urgent to expose but impossible to trace for journalists. The conduct of private companies is not always so 'private' in light of the give-and-take relationship with elected authorities. Politicians who smooth the progress of business are rewarded with financial support in political campaigns. The Committee of Ministers has in its

¹³⁰⁸ Axberger, *supra* note 1305, p. 161.

¹³⁰⁹ Overbeck, *supra* note 595, p. 339.

¹³¹⁰ Axberger, *supra* note 1305, p. 161.

¹³¹¹ Karpen, *supra* note 1265, p. 89.

¹³¹² *Ibid.*

¹³¹³ *Ibid.*

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resolutions and declarations on the media throughout the years emphasized the educational role of the media due to its contribution to the formation of opinions.¹³¹⁴ Resolution No. 2 on Journalistic Freedoms and Human Rights emphasized in Principle 1, '[t]he need for journalism to [*inter alia*] – inform individuals on the activities of public powers as well as on the activities of the private sector, thus providing them with the possibility of forming opinions'.¹³¹⁵

The Commission has confirmed that Article 10 does not guarantee a right of access to a public register which contains information on the assets of a third party (properties belonging to Mr. A. M., an industrialist) and access to which is subject to a legitimate interest.¹³¹⁶ A journalist complained of having been unable to consult the Land Register for Vuisternens-en-Ogoz, even though the Register is, under Swiss public law, and he had furnished evidence about his interest in consulting it. Relying on Article 10, the journalist maintained in particular that his professional duty as a journalist was to check his sources and that when the Swiss authorities made it impossible for him to do so they were in reality practicing pre-censorship of the press article he intended to publish. Furthermore, the information contained in the Land Register is public and, because it is objective, could not infringe the rights and freedoms of others – in this case of the owner concerned. The applicant then explained that if he published an article on the activities of the industrialist without having been able to check his source, he could expose himself open to defamation proceedings. The Commission held that the right to receive information mainly concerned access to general sources of information and is intended basically to prohibit a government from restricting a person from receiving information that others wish or may be willing to impart to him.¹³¹⁷ The Commission held furthermore that the Land Register did not fall under the category of 'generally accessible source' since according to Swiss Civil Code, in order to consult it; evidence of a legitimate interest must be furnished.

Ideally, statutes on access to information are in unison with the constitutional role of the media as a guardian of democracy and the primary channels for the flow to the public. This is why gaining access to information held by public authorities has been seen as especially important for the press and worth struggling for. Only by granting journalists such access can the media conduct investigative journalism, which collaterally encourages good governance and responsibility by authorities. The news media provides a forum for accessing and criticizing the work of government, and checking abuse in the public/private sphere, as expected of it. It

¹³¹⁴ European Ministerial Conferences on Mass Media Policy: 2nd European Ministerial Conference on Mass Media Policy (Stockholm, 23–24 November 1988), DH-MM (98) 4.

¹³¹⁵ European Ministerial Conferences on Mass Media Policy: 4th European Ministerial Conference on Mass Media Policy (Prague, 7–8 December 1994), DH-MM (98) 4. The Court referred to this principle in the Goodwin case. *See infra* section 4.3.3 Protection of Confidentiality of Sources.

¹³¹⁶ Application no. 11854/85, *Philippe Clavel v. Switzerland*, Commission's decision 15 October 1987, DR 54.

¹³¹⁷ Application no. 32849/96, *Grupo Interpres S. A. v. Spain*, 7 April 1997, DR 89-A, p. 150.

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seems hence logical that the press should enjoy protection in proportion to this difficult task. The problematic consequences of this situation is that when access is not easy, the co-operation of the 'establishment media' and the establishment itself may lead to a manipulation of what reaches the public – how and when – with troublesome long-term results. The media is widely discriminated against in its access to information on procedures at the highest levels, where arbitrary decisions may govern who is given information. Investigative journalism depends on access to the full range of information in the public domain, but hardly anywhere does the law provide for special access for journalists beyond that which would be available to any member of the public. There is however a longstanding tradition of government manipulation of the media in the forms of 'leaks', where the media is literally used by power holders for various purposes.¹³¹⁸ Leaks are used systematically to misinform the public via the media or to check in advance the public response to an intended political action or decision. 'Spin doctors' are skilled in using the media for these purposes and lead attention away from misdemeanour in high places. It is a well-known public relations trick, deceiving the public interest in an effort to protect various power holders from being exploited. Meetings or briefings with the press are also another form that authorities use in setting the agenda, taking the initiative away from the media with languishing and blunt effects on journalistic conduct.

In order to practice journalism effectively, it is essential for the journalist to have access to reliable sources within the administration, the banking and business community and wherever 'politics' in the widest sense of the word is practiced. The media cannot solely rely on press releases or handouts from public or private organizations if it is to analyze the mechanics of society. In the highly specialized, secretive, bureaucratic society, what trickles down from higher echelons serves to irrigate the grass roots, the soil of democracy. In the public domain there is a considerable amount of information, which due to practical difficulties is rarely explored by journalists. Such information differs in kind from official records and proceedings as it is kept in closed circles and only becomes available when an insider decides to release it.¹³¹⁹ The famous 'deep throat' in the film *All the Presidents Men* is an example of such an insider. The leaks that matter for the public interest usually stem from sources that are extremely vulnerable – if divulged.¹³²⁰ These are the sources, often essential for democracy, that contest the systematic 'reporting' from above, have insider's knowledge and can verify the journalists' suspicions. Hence, much is at stake for journalists to keep the confidentiality of the public-spirited individual who discloses information and hopes to remain

¹³¹⁸ Recently released private papers of James Reston, *The New York Times* top Washington Reporter from the 1940s to the 1970s reveal that Reston resisted the CIA's attempts during the 1950s to use his column to plant disinformation ('The Burdens of an Insider', *Newsweek*, 1 November 1999), p. 63.

¹³¹⁹ In most countries cabinet papers are normally exempt from disclosure under freedom of information acts.

¹³²⁰ As Russel Crowe portrayed in a convincing manner in the film 'Insider' (2000).

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anonymous. In the absence of protection the one disclosing information may have to rely on the willingness of the journalist to suffer imprisonment.

4.3.3 Protection of Confidentiality of Sources

It is important for journalists not to reveal their sources, thus some would and have rather gone to jail than naming their source. An appellate court in the US first ruled on the argument that the First Amendment constitutes a shield law in a 1958 libel decision.¹³²¹ Marie Torre, columnist for the *New York Herald Tribune*, attributed to an unnamed executive of a broadcasting company certain statements, which actress Judy Garland said libelled her. In the libel suit, Torre refused to name her source, asserting privilege under the First Amendment.¹³²² She was cited for contempt and convicted, and the appeals court upheld her conviction. ‘The concept that it is a duty of a witness to testify in a court of law’, the Second Circuit Court of Appeals said, ‘has roots fully as deep in our history as does the guarantee of a free press’.¹³²³ It added that if freedom of the press was involved here that it too must give place under the Constitution to a paramount public interest in the fair administration of justice.¹³²⁴

The US Supreme Court in 1972 ruled for the first time on whether the First Amendment protects journalists from testifying about their confidential sources and information in *Branzburg v. Hayes*. This started as three cases of reporters who had acquired knowledge of or witnessed criminal activities and were called by prosecutors to appear before grand juries and testify as to what they had seen or knew. The reporters stated that they had promised not to divulge the identity of their sources. They held that the state had to have an overriding interest in knowing their sources and that such information was unavailable from other sources. The Supreme Court consolidating the three cases said that the three reporters had to comply with the grand jury subpoenas. Four Justices held that a journalist had the same duty as any other citizen to testify when called upon to do so. However, Justice Powell provided the crucial fifth vote leaving the constitutional protection somewhat unclear saying:

The asserted claim to privilege should be judged on its facts by striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

¹³²¹ *Garland v. Torre*, 259 F.2d 545 (2d Cir.1958), *certiorari* denied 358 U.S 910 (1958).

¹³²² Cf. Overbeck, *supra* note 595, p. 284. The term privilege being used in this connection for an exemption from a citizen’s normal duty to testify when ordered to do so in court.

¹³²³ *Garland v. Torre*, *supra* note 1321.

¹³²⁴ *Ibid.*, at 548–549.

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In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.¹³²⁵

The *Branzburg* decision did not exclude possible First Amendment protection where legitimate interests so required, albeit imprecise on the subject. Journalists have been jailed and sued for refusing to identify confidential news sources and they have also been sued for identifying confidential sources. With the rise of investigative reporting in the 1960s in the United States and somewhat later on the other side of the Atlantic, journalists increasingly used inside or underground sources and got quicker tips than many law enforcement officers, civil servants or high-ranking individuals. The journalists were sometimes ahead, sometimes wrong, but the question of the protection of their sources became relevant as investigative journalism unearthed confidential information of social and political importance and often published it without revealing their sources.

It is generally recognized that the media should have some protection in this matter. As the press thrives on information it must be able to protect informants if its sources are not to dry up. Most European countries provide for the right of protection of sources in law. The anonymity of those who supply newspapers and other publications with information is fully guaranteed in Sweden with the Freedom of the Press Act. The Swedish law, which is one of the strongest, even states that a journalist who reveals his/her source of information without the consent of the source is subject to criminal liability.¹³²⁶ The constitutional protection of sources includes state and municipal employees who are free to leak information to the media without fearing legal repercussions or intimidation.¹³²⁷ In Italy, law no. 69 of 1963 guarantees journalists a broad right to professional secrecy regarding sources of information and imposes on them the duty to maintain the secrecy of their sources when their confidential character requires that.¹³²⁸

Courts in the Netherlands were for a long time called upon to recognize reporters' rights, to withhold information, without success. In 1977 the Amsterdam *Rechtbank* declined to oblige a journalist to disclose the whereabouts of a man hiding his children from their legal guardian. Finding that the father informed the reporter in confidence about their hiding place, the judge held that society generally recognized a journalist's professional duty not to divulge such information.

In Germany the right to refuse testimony is dealt with on a Federal basis, and it is contained in both paragraph 53 of the Criminal Trial Procedure and paragraph 383 of the Civil Trial Procedure. The following are entitled to refuse testimony: Persons who are or were professionally involved in the production, publication or

¹³²⁵ *Branzburg v. Hayes*, *supra* note 1136, at 708, 710.

¹³²⁶ Freedom of the Press Act, chapter 3 § 3 (Tryckfrihetsförordning, 3 kap. Om rätt till anonymitet.)

¹³²⁷ B. Peters, 'Rights and responsibilities of media professionals – law and ethics' in *Media and democracy*, 1998 Council of Europe Publishing, p. 63.

¹³²⁸ G. von Dewall, *Press Ethics: Regulation and Editorial Practice*, 1997 The European Institute for the Media with the support of the International Press Foundation, p. 101.

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distribution of periodical literature, radio or TV programmes, may refuse to give evidence as to the person of the author, sender or confidant of items or documents as well as to their contents, in so far as these items, documents and contents are intended for publication.¹³²⁹ The journalistic privilege in Germany applies no matter whether the request for information concerns a serious crime, a criminal defendant who cannot obtain release without it, or a person who is defamed by a publication based on information provided by an anonymous sources. The German law is quite clear, as it does not allow for a balancing of interests. Journalists can claim a right not only to withhold the identity of the source, but likewise any information that could lead to its disclosure.¹³³⁰ The privilege is absolute.

The media may be a beneficiary under Article 8 of the Convention, protecting the right to respect for private and family life, home and correspondence. In at least some of its aspects, Article 8 § 1 is capable of protecting the editorial office of a newspaper or the newsroom of a broadcasting channel from state intrusion, such as a search. Correspondence under Article 8 can extend to business as well as personal correspondence. In *Niemietz v. Germany* the Court was prepared to consider that some human relations in business contexts might fall under 'private life'.¹³³¹ The Court had held earlier that telephone tapping constituted interference under Article 8.¹³³² As 'it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not'.¹³³³ The literal meaning of 'correspondence' has been expanded to telephone conversations, which are not expressly mentioned in Article 8 § 1 and no reason why it should not also include e-mail.¹³³⁴ Where interference is alleged in communication of information or ideas by correspondence, Article 8 is *lex specialis*, rather than Article 10.¹³³⁵

Preventing the disclosure of information received in confidence' may be a legitimate aim of restrictions under Article 10 § 2. In the case of *Goodwin v. the United Kingdom* a journalist was fined GBP 5,000 in 1990 for contempt of court, for refusing to reveal his source for an article he intended to write for the magazine he was working for.¹³³⁶ His source had given him information about Tetra Ltd., to the effect that the company was in great financial difficulties. He contacted the company and found out that the information derived from a draft of Tetra's confidential corporate plan. In the United Kingdom, the media have the protection of the

¹³²⁹ Press Laws: Documents on Politics and Society in the Federal Republic of Germany, 3rd edition, published by Inter Nationes e.V. D-53175 Bonn, 1994.

¹³³⁰ Korthals-Altes, *supra* note 1101, pp. 72–91.

¹³³¹ *Niemietz v. the Germany*, *supra* note 129, § 29; *cf. infra* 4.4 Whistleblowers and Dissidents' Status

¹³³² *Klass and Others v. the Federal Republic of Germany*, *supra* note 120, § 41.

¹³³³ *Niemietz v. Germany*, *supra* note 129, § 29.

¹³³⁴ *Klass and Others*, *supra* note 120, § 41.

¹³³⁵ Application no. 8231/78, *T v. United Kingdom*, Commission's report adopted 12 October 1983, DR 49.

¹³³⁶ *Goodwin v. the United Kingdom*, *supra* note 61.

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Contempt of Court Act 1981, s. 10, which provides that no court may require a person to disclose, nor is a person guilty of contempt of court for refusing to disclose the source of information contained in the publication for which he is responsible; unless it is established to the satisfaction of the Court that disclosure is necessary in the interests of justice or national security for the prevention of crime or disorder.

Goodwin complained that his Article 10 rights had been infringed. The applicant and the Commission invoked the fact that Tetra had already obtained an injunction restraining all national newspapers and journals from publishing information derived from a secret business plan, which was effective in stopping dissemination, so the damage to the company had been neutralized. The further purposes of the disclosure order, namely the company's interest in eliminating residual threat of damage through dissemination otherwise than by the press or in obtaining compensation and unmasking a disloyal employee or collaborator – these, even if considered cumulatively, were not sufficient to outweigh the vital public interest in the protection of the applicant journalist's sources. The Court provided:

Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the law and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of such disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding public interest.¹³³⁷

The Court's reaction in the case of *Goodwin* confirms the instrumental approach it has adopted towards the press. The Court in this context referred to the Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy in Prague in 1994.¹³³⁸ This Resolution calls attention to the main problems facing freedom within the press, stating in its Principle 1: 'The maintenance and development of genuine democracy require the existence and strengthening of free, independent, pluralistic and responsible journalism. This requirement is reflected in the need for journalists to: inform individuals on the activities of public powers as well as on the activities of the private sector, thus providing them with the possibility of forming opinions.'¹³³⁹

The core of the matter in the *Goodwin* case is the Courts recognition of the chilling effect on journalism. The term chilling effect is of American legal origin,

¹³³⁷ *Ibid.*, § 39. Citations omitted.

¹³³⁸ *Ibid.*

¹³³⁹ Resolution No.2: Journalistic Freedoms and Human Rights DH-MM (98) 4.

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developed by the US Supreme Court in a number of areas concerning journalistic freedoms. It refers to the effects of the rules of law, whether criminal or civil, and of official practices on the exercise of journalists within the media. The threat of criminal prosecution or civil action for damages may deter the media from publishing a story, even though if a prosecution (or action) were brought, the press would be able to defend the action.¹³⁴⁰

The *Goodwin* case is thus much more than just recognition of the fact that ‘journalists are not like any other citizen’, they have a weighty responsibility and they must not be deterred in carrying it out.¹³⁴¹ The decision in *Goodwin* established that in jurisprudence there is a clear distinction between a journalist and the ordinary citizen.¹³⁴² But the matter does not concern distinguishing between the journalist and other citizens, bringing into question Article 14. The problem was not denying Mr. Goodwin freedom of expression but protecting the vital role of the Public Watchdog where the protection of confidentiality of sources is essential for investigative journalism.

In a more recent case, *Roemen and Schmitt v. Luxembourg*, the Court pointed out that it differed from *Goodwin* as the searches were carried out in the journalist’s home and workplace and hence constituted a more serious measure than an order to divulge the source’s identity.¹³⁴³ An unannounced raid of a journalist’s workplace undermined the protection of sources to an even greater extent. While the reason relied on by the authorities might be relevant, they were by no means sufficient and hence Luxembourg was found in breach of the journalist’s Article 10 rights.¹³⁴⁴

In the *De Haes and Gijssels* case the Court did not share the Brussels Court of Appeal’s opinion that the request for production of the document demonstrated the lack of care with which the journalists had written their articles. The Court considered that the concern not to risk compromising their sources of information, by lodging the documents in question themselves, was legitimate. Furthermore, their articles contained such a wealth of detail about the fate of the X children that it could not reasonably suppose otherwise than that the authors had at least had access to some relevant information.¹³⁴⁵

The Commission declared inadmissible an application from the BBC concerning a witness order for it to disclose material, which had been filmed in 1985 at the Broadwater Farm Riots.¹³⁴⁶ The BBC claimed that such disclosure violated Articles 6 and 10 of the Convention. The Commission held that the facts of the case

¹³⁴⁰ Cf. Barendt, Lustgarten, Norrie and Stephenson, *supra* note 1237, pp. 189–190.

¹³⁴¹ A headline in Clifford Chance Media Law Review, Summer 1996 (http://www.cliffordchance.com/mlr6_f04.htm).

¹³⁴² *Goodwin v. the United Kingdom*, *supra* note 61, p. 510.

¹³⁴³ *Roemen and Schmitt v. Luxembourg*, application no. 51772/99, judgment 25 February 2003 (not yet published).

¹³⁴⁴ *Ibid.*, § 58.

¹³⁴⁵ *De Haes and Gijssels v. Belgium*, *supra* note 113, § 55.

¹³⁴⁶ Application no. 25798/94, *BBC v. United Kingdom*, Commission’s decision 18 January 1996, DR 84-A, p. 129.

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differed from those in the *Goodwin* case, at the time pending before the Court. In the case of *Goodwin* the journalist had received information on a confidential and non-attributable basis, whereas the information that the BBC obtained comprised recordings of events, which took place in public and to which no particular secrecy or duty of confidentiality could possibly attach. The obligation to provide the film in response to the summons was part of the BBC's ordinary civic duty and was necessary for maintaining the authority and impartiality of the judiciary. The BBC claimed that the obligation to disclose material that had not been transmitted would increase the risk for film crews, as they will be associated with law enforcement agencies by bystanders if such material is subsequently liable to be used in court. It was for the Court and not the witness to decide on the relevance of the evidence.¹³⁴⁷ The question whether the order to disclose material in the context of criminal proceedings against a third person constituted an interference with its right to freedom of expression remained unsolved. The chilling effect of being linked to law enforcement agencies after appearing on newsworthy scenes is obvious given the crucial importance of media presence in such situations. The Committee of Ministers a few months later adopted a 'Declaration on the protection of journalists in situations of conflict and tension' where it condemns the growing number of killings, disappearances and other attacks on journalists.¹³⁴⁸ This measure cannot be interpreted otherwise than as recognition of the risk inherent in the practice of journalism.

The Committee of Ministers recently emphasized the need to safeguard the right of journalists not to disclose their sources, convinced that it was necessary for the unhindered exercise of journalism.¹³⁴⁹ The revealing of David Kelly as the source for reports of UK governmental information justifying the war in Iraq has raised awareness among journalists' associations, which contend that without this protection whistleblowers giving confidential information to journalists will be silenced.¹³⁵⁰ Justice Stewart when revoking the notion of the press as an institution said:

In the cases involving the newspaper reporters' claims that they had a constitutional privilege not to disclose their confidential news sources to a grand jury, the Court rejected the claims . . . But if freedom of the press means simply the freedom of speech for reporters, this question of a

¹³⁴⁷ On 29 August 2001 a Court in Stockholm rejected a public prosecutor's request granting a search warrant within the newsroom of TV4 to check videotapes from the protests during the EU leaders meeting in Gothenburg in June 2001 in relation to investigation of alleged police violence. The Court submitted that reporting is a fundamental aspect of democracy and hence confidentiality of sources is important. (Stockholm AP 29 August 2001).

¹³⁴⁸ Adopted by the Committee of Ministers on 3 May 1996, at its 98th session.

¹³⁴⁹ Recommendation No. R (2000) 7 of the Committee of Ministers to Member States *On the Rights of Journalists not to Disclose their Sources of Information* (Adopted by the Committee of Ministers on 8 March 2000 at the 701st meeting of the Ministers' Deputies).

¹³⁵⁰ 'European Journalists call for debate on "Sacred Principle" of protection of sources'; at <http://www.authorsrights.org/>.

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reporter's right to withhold information would have answered itself. None of us – as individuals – has a 'free speech' right to refuse to tell a grand jury the identity of someone who has given us information to the grand jury's legitimate inquiry. Only if a reporter is a representative of a protected *institution* does the question become a different one. The members of the Court disagreed in answering the question, but the question did not answer itself.¹³⁵¹

4.3.4 Authors' Rights

The International Federation of Journalists (IFJ) and its member unions like the European Federation of Journalists (EFJ) have in recent years directed attention to the problem of the lack of coherence in the regulation of moral rights or contracts. At the European level contractual agreements usually do not provide for extra remuneration for reuse of journalistic work.¹³⁵² The EFJ claims that creativity and media professionalism in Europe are under threat and the 'traditional bargaining structure between employers and authors, which deals with authors' rights because, increasingly, employers see information solely as a commodity, having no cultural, social or democratic value'.¹³⁵³ Authors' rights define and protect the intellectual property of journalists. There are two kinds of rights in this category: economic rights and moral rights. Economic rights help to determine the level of payment or wages paid to media professionals, whether freelance or employees. Moral rights give authors authority over the integrity of information they provide. Paternity, the right of publication and false attribution are all covered by moral rights.¹³⁵⁴

Journalistic associations fighting for authors' rights call for journalists to be recognized as authors of the work they create, to have further control over further use of their work and to work and to receive an equitable remuneration for it. The IFJ strongly opposes the Anglo-American system, which denies all staff and most freelance journalists these rights.¹³⁵⁵

Journalists should be committed to upholding media ethics. They are personally liable for the material they create, but to be liable they need to know how their material is going to be used. The EFJ states that to guarantee quality and authenticity of information a common set of harmonized standards should apply. Problems exist in Europe as there are two legal traditions applied to authors' rights. First there is the copyright concept. This applies in the United States where the law vests copyright in an individual author or the employer or customer if the work is created on an employment basis or is commissioned. Reporters employed by periodicals and broadcast operations will be treated as employees when they are reporting the news.

¹³⁵¹ Stewart, *supra* note 1068, p. 431.

¹³⁵² <http://www.authorsrights.org>.

¹³⁵³ European Federation of Journalists, *Journalism and Authors' Right: Setting Standards for Media Freedom in the Information Society*: Policy statement from the Journalists' Union of Europe. December 1996.

¹³⁵⁴ *Ibid.*

¹³⁵⁵ <http://www.authorsrights.org>.

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Freelance journalists will most likely sell the copyright to their works.¹³⁵⁶ Publishers are entitled to publish in both paper and electronic forms without having to get additional permission from freelance writers.¹³⁵⁷ The US system is followed in the United Kingdom and the Netherlands. The EFJ emphasizes the need to strengthen author's moral rights in the United Kingdom and the Netherlands where the Anglo-American copyright system has been adopted. According to the EFJ, the copyright concept is based on an expropriation of authors' rights. Authors are effectively denied the right to recompense for the increased economic exploitation of their work. They have little control over the manipulation of their creations.

The second tradition in the continental European system of authors' rights provides a very different approach. In most countries rights stay with the individual author. These rights are recognized and paid for. When material is used again in another media environment, authors have the right to be consulted as to how it is used and to receive extra payment. According to the EFJ this latter form of rights gives the individual creator the freedom to transfer the rights of use by contract, stating that it makes it possible for the 'journalists to live up to high personal and professional standards.'¹³⁵⁸ This latter system provides guarantee to readers and audiences of the reliability and ethical contents of information

A recent decision by the German Supreme Court reversed the previous outcome in the *Newsclub v. Mainpost* case,¹³⁵⁹ which involved the Newsclub online search engines and the German newspaper Mainpost. The Court had ruled in March 2003 on the basis of the EU Database-Directive¹³⁶⁰ that deep-linking violated authors' rights. It transpires from the recent German Federal Supreme Court's decision that Germany is paving the way for supporting the legality of deep-linking. A Swedish court ruled in favour of freelance journalist Carl Selling in a case brought against Mediearkivet, which operates a database containing articles from several Swedish newspapers and magazines. The court ordered Mediearkivet to pay EUR 1,500 to the freelance journalist for illegally using two of his articles, originally sold to the newspaper Göteborg-Posten, and available on-line for a period of five months.¹³⁶¹

The European Court of Human Rights guarantees the press the right to inform the public and the right to be properly informed and holds out a promise for journalists with regard to authors' rights as the right to impart may be restricted to the intellectual creator or owner.¹³⁶² The case of *De Geillustreerde Pers v. the Netherlands* concerned the controversial issue of copyright in broadcasting

¹³⁵⁶ Teeter, Le Duc and Loving, *supra* note 809, p. 735.

¹³⁵⁷ *Ibid.*, p. 748; *Tasini v. New York Times*, 972. Supp. 804 (S.D. N.Y. 1997).

¹³⁵⁸ European Federation of Journalists, *Journalism and Authors' Right: Setting Standards for Media Freedom in the Information Society*: Policy statement from the Journalists' Union of Europe. December 1996.

¹³⁵⁹ 315O 569/02.

¹³⁶⁰ EU Directive 2001/29/EG.

¹³⁶¹ *Carl Selling v. Mediearkivet*, judgment 7 April 2003, no. 369702.

¹³⁶² Malinverni, *supra* note 588, p. 447.

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listings.¹³⁶³ A Dutch commercial magazine publisher complained that copyright restrictions on the publication of radio and television programmes constituted interference under Article 10. Dutch law at the time restricted the power to authorize publication of broadcasting listings to the broadcasting organizations themselves. The Commission was clear in stating that the right to access to the schedule of the broadcasting company is not covered by Article 10. It made a distinction between information and ideas and came to the conclusion that the freedom to impart information (of the kind described in that special case) is only granted to the person or body who produces, provides or organizes it. 'In other words the freedom to impart such information is limited to information produced, provided or organized by the person claiming that freedom, being the author, the originator or otherwise the intellectual owner of the information concerned.'¹³⁶⁴ The Commission concluded there had been no violation of the complainant's rights to freedom of expression because of the availability of the information from an alternative source. It furthermore declared that Article 10 does not protect the commercial interests of newspapers.¹³⁶⁵ Malinverni reasoned from that decision that newspapers cannot invoke Article 10 if they are denied the right to publish radio or television programmes.¹³⁶⁶ Later case-law has confirmed that Article 10 applies to 'everyone', whether natural or legal persons such as profit-making corporate bodies.¹³⁶⁷

The Berne Copyright Convention (Article 6) provides that an author has the right, *inter alia*, to object to derogatory action in respect to his work, which would be prejudicial to his honour or reputation. The European Convention on Transfrontier Television (as well as the EC Television Directive) provides that advertising measures may only be inserted in such a way that the 'rights of rights holders are not prejudiced'.¹³⁶⁸ The EU has engaged in a process of harmonizing the copyright laws of the member states by issuing several directives requiring them to implement detailed provisions relating to specific rights or subject matter. In 2001 the European Writers' Congress,¹³⁶⁹ representing more than 50,000 authors asked the European Parliament to take the initiative of harmonizing authors' contractual rights throughout the EU, *inter-alia* preventing so-called buy-out contracts and establishing that model contracts based on these norms, as well as appropriate minimum levels of remuneration for each different type of right and use, are to be negotiated collectively between authors' societies and organizations and other parties' representatives subject to arbitration by a designated public authority.

The EU copyright directive has, however, been criticized for being of no benefit to journalists. It does not address the practice of all rights being taken on an 'offer

¹³⁶³ Application no. 5178/71, *supra* note 55.

¹³⁶⁴ *Ibid.*, § 88.

¹³⁶⁵ *Ibid.*, p. 14.

¹³⁶⁶ Malinverni, *supra* note 588, p. 447.

¹³⁶⁷ *Autronic AG v. Switzerland*, *supra* note 724, § 47.

¹³⁶⁸ ETS No. 132, European Convention on Transfrontier Television, Strasbourg, 5. V. 1989, Article 14 § 1.

¹³⁶⁹ EWC Mediterranean Forum Mare Nostrum II, Barcelona, 15–18 November 2001.

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you can't refuse' basis. It does not affect contracts so it does not impose restrictions on corporations. Using journalists' material by virtue of an employment contract may infringe Article 11 under the Convention, as the Court stated in a case against the United Kingdom. If domestic law permits 'employers to use financial incentives to induce employees to surrender important union rights, the respondent State has failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention'.¹³⁷⁰

4.4 WHISTLEBLOWERS AND DISSIDENTS' STATUS

In the *Goodwin* case the Court took the position that the interest of the company (Tetra Ltd.) to unmask a disloyal employee who had disclosed a secret plan did not constitute a sufficient reason for the disclosure order. The 'disloyal' employee is often the source, which is crucial to investigative journalism. The ruling in *Goodwin* confirms the necessity of protecting journalists from being compelled to reveal their sources in order not to impede the press in its active role as the Public Watchdog. In contrast to the importance, which the Court has placed on preserving the anonymity of sources in the interests of the unhindered exercise of journalism within the media, the Commission has been unresponsive to complaints by those insiders who have spoken out and who have suffered disciplinary action from their employers or other adverse consequences.

The term whistleblower refers to an employee who reports a matter of concern in relation to his current employer or employment.¹³⁷¹ The term refers to someone in the private or public sector that risks his career by releasing information on wrongdoing to the media. The concept can moreover apply to journalists themselves. The fact that a concept like whistleblower exists proves that the notion of freedom of expression and information is far from being absolute. The one, who needs to blow the whistle to inform others of what he knows, due to his position, is thereby intentionally 'shouting' words of warning jeopardizing his own existence.

Individuals who blow the whistle on wrongdoing should be protected from any legal, administrative or employment-related sanctions, as stated in Principle 9 on Freedom of Information Legislation from Article 19, the International Centre Against Censorship. The same text defines 'wrongdoing' as including the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body. It also includes a serious threat to the public interest.¹³⁷²

¹³⁷⁰ *Wilson & the National Union of Journalists, Palmer, Wyeth & the National Union of Rail, Maritime & Transport Workers, Doolan & Others v. the United Kingdom*, application no. 30668/96, 30671/96, 30678/96, judgment 2 July 2002, RJD 2002-V, § 48.

¹³⁷¹ J. Bowers and J. Lewis, 'Whistleblowing. Freedom of Expression in the Workplace', 6 *E.H.R.L.R.*, 1996, pp. 565–670.

¹³⁷² The Public's Right to Know: Principles on Freedom of Information Legislation, *supra* note 587.

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The whistleblower is acting counter to the epigram: *All it needs for evil to prosper is for people of goodwill to do nothing.*

One of the basic principles underlying intellectual liberty and freedom of publication in the times of Milton, Locke and later Mill was the profound moral conviction underlying political thought, expressed with such eloquence and passion in *Areopagitica*. Milton believed that it is not only the right but also the duty of every intelligent man as a rational being to know the grounds and to take responsibility for his beliefs and actions.¹³⁷³ The emphasis on political virtue, public-spiritedness, public deliberation and the relationship between character and citizenship has not surfaced in Convention jurisprudence to the same extent as in some American Supreme Court opinions.¹³⁷⁴ The Commission, found a violation of Article 10 in the *Janowski* case where a journalist acting in his capacity as a citizen, spontaneously reacted to the state authorities' interference with third parties and correctly assessed the guards' actions were unjustified. 'He acted out of genuine civic considerations.'¹³⁷⁵ Article 10 protects not only the substance of ideas, opinions or information expressed but also the form in which they are conveyed.¹³⁷⁶ The Commission considered in the *Janowski* case that 'an opinion expressed *ad hoc* in the course of a sudden event is intuitive because, as in the present case, it is provoked by the immediacy of the situation'.¹³⁷⁷ Judge Bonello dissenting with the Court's decision in not finding a violation of Article 10 provided that there was:

[N]o urgent social exigency in condemning those who attempt to prevent abuses, even through immoderate disapproval. The State has a greater necessity to silence those who usurp power than those who raise their voices when power is usurped. In this case I am aware of one manifestly pressing social need: that of curbing illegitimate excess of authority.¹³⁷⁸

The Commission declared in 1981 that there was no interference with the freedom of expression of a high official in the Ministry of Foreign Affairs, given the duties attached to his function if he is transferred as a result of, in particular, articles in the press inspired by him on an alleged surveillance which he is subjected to.¹³⁷⁹ The Court cannot be praised for encouraging in particular civic virtue. It expects journalists to be brave and go against the current when required, being provocative,¹³⁸⁰ challenging and even offensive¹³⁸¹ while the rest of the public is

¹³⁷³ G. H. Sabine, Introduction in *Areaopagitica*, 1951 Harlan Davidson.

¹³⁷⁴ Cf. Sunstein, *supra* note 632, p. 27, discussing Justice Brandeis' ideology.

¹³⁷⁵ *Janowski v. Poland*, Commission's report 3 December 1997, RDJ 1999-1, § 46.

¹³⁷⁶ *Prager and Oberschlick v. Austria*, *supra* note 62§ 34.

¹³⁷⁷ *Janowski v. Poland*, *supra* note 85, § 46.

¹³⁷⁸ *Janowski v. Poland* [GC], *supra* note 85, dissenting opinion of Judge Bonello, p. 207.

¹³⁷⁹ Application no. 9401/81, *X v. Norway*, Commission's decision 17 December 1981, DR 27.

¹³⁸⁰ *De Haes and Gijssels v. Belgium*, *supra* note 113, § 46; *Prager and Oberschlick v. Austria*, *supra* note 62, § 37.

¹³⁸¹ *Handyside v. United Kingdom*, *supra* note 87.

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expected to wait patiently for information, which others are willing to impart to them.¹³⁸² This further sheds light on the distinction the Court makes between the press and its journalists on the one hand and the general public on the other. The press has the task to impart matters of political importance whereas the individual when placed outside the press has no such obligations. The fact of the matter is that the press does not operate in a vacuum. The information flow is a two-way affair, the press imparts to the public and journalists rely on receiving information and tips from external sources, which are then extracted and set in context. Whistleblowers are often the only people with information on corruption, crime or unethical practices in corporations or public bodies. This is why Judge Bonello rightly provided that the balancing that the Court should carry out, should not endorse the protection of public officers in the course of an abuse of power. A proper equilibrium had to be calibrated between sheltering those who were abusing public order, and those who, exceeding the limits of permissible speech, abused the abusers of the law.¹³⁸³ Public officials do not own the information that they gather at public expense. The secrecy characterizing governments, albeit democratically elected, is corrosive and antithetical to democratic values.¹³⁸⁴

The Committee of Ministers has in recent years encouraged citizen participation in democracy, recognizing the action of the Council of Europe in all areas that have a bearing on fostering responsible citizenship in democratic society.¹³⁸⁵ The objective is to equip men and women to play an *active* part in public life and to shape in a responsible way their own destiny and that of their society. This means that in harmony with a dynamic interpretation of the civil and political rights under the Convention that individuals have to take the initiative to fight corruption and to stay informed at home and in the workplace. The role of the whistleblower seems in congruity with the aim 'to instil a culture of human rights which will ensure full respect for those rights and understanding of responsibilities that flow from them' as the Committee of Ministers' declaration on education for democratic citizenship states. The legal trends in member states, which often precede the Court's jurisprudence, stress the objectives of transparency and accountability as basics of good governance in public administration with the participation of other democratic institutions. The press plays a crucial role in upholding a critical, political debate and depends for that purpose on the contribution of whistleblowers.¹³⁸⁶ It is recognized on the Council of Europe agenda that corruption creates a serious threat to the rule of law, equity and social justice; it obstructs economic development, jeopardizes the

¹³⁸² Cf. *Leander v. Sweden*, *supra* note 299.

¹³⁸³ *Janowski v. Poland* [GC], *supra* note 85, dissenting opinion of Judge Bonello, p. 207.

¹³⁸⁴ J. Stiglitz, (Senior Vice President and Chief Economist, The World Bank) 'On Liberty, the Right to Know and Public Discourse: The Role of Transparency in Public Life', Oxford Amnesty Lecture, United Kingdom, (27 January 1999).

¹³⁸⁵ Cf. Council of Europe Committee of Ministers: *Declaration and programme on education for democratic citizenship, Based on the rights and responsibilities of citizens* (Adopted by the Committee of Ministers on 7 May 1999, at its 104th session).

¹³⁸⁶ *Feldek v. Slovakia*, *supra* note 312.

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stability of democratic institutions and destroys the moral foundations of society. The existence of whistleblowers is crucial for the fight against corruption in the forum of the media. Whistleblowers come to the aid of journalism in informing others 'on the activities of public powers as well as on the activities of the private sector, thus providing them with the possibility of forming opinions'.¹³⁸⁷ The EFJ advocates for increased legal protection for whistleblowers as a part of enhancing journalistic abilities to perform their task.¹³⁸⁸

Pressure can be brought upon individuals who intend to reveal information in the media. These potential whistleblowers get cold feet at the prospect of appearing in court, even years after the original disclosure when the person's moral outrage has cooled.¹³⁸⁹ An individual that dares to draw attention to an important matter that for some reason has been silenced – knowingly takes a risk. Showing civic courage is an element of the exercise of freedom of expression, with regard to the 'duties and responsibilities' entailed in that right, according to Article 10 § 2. Whistleblowers are however often torn between this civic duty and a breach of legal or employment obligations. As Peter French points out corporations deserve loyalty because they pay salaries and provide fringe benefits and additional career training for their employees. But where do the duties of loyalty end?¹³⁹⁰ If public interest requires, would such loyalty cease where the forum of the community begins?

Whistle-blowing can be heroic but it can be motivated by other concerns and due to its nature it involves a conflict of duty.¹³⁹¹ It has been pointed out that the question of company loyalty is a question of fair exchange. 'Loyalty is a two-way affair, and it is the responsibility of the company to inspire and *deserve* loyalty.'¹³⁹² It is not that employees deliberately set out to damage a corporation's reputation. 'Judgment is given to men that they may use it. Because it may be used erroneously are men to be told that they ought not to use it at all?' asked Mill.¹³⁹³ The Commission considered the motive behind an act of disloyalty in the case of *Haseldine* (see below). Corporations almost never thank whistleblowers. No matter how high-minded and moral their motives for blowing the whistle, they are treated as traitors and cast out. Often they cannot find employment anywhere else in the industry.¹³⁹⁴ Although the law does not everywhere penalize whistleblowers, those who take on the task are taking great risks of social stigma, career opportunities and other inconveniences that come with being publicly isolated as troublemakers. The whistleblower is nonetheless crucial for society and the democratic process, as he

¹³⁸⁷ European Ministerial Conferences on Mass Media Policy: Resolution No. 2: Journalistic Freedoms and Human Rights (Prague, 7–8 December 1994).

¹³⁸⁸ Conversation with Alf Lindbergh, Swedish journalist and representative to the EFJ, May 1999.

¹³⁸⁹ Cf. Barendt, Lustgarten, Norrie and Stephenson, *supra* note 1237, pp. 69–70.

¹³⁹⁰ P. A. French, *Corporate Ethics*, 1995 Harcourt, Brace & Company, p. 161.

¹³⁹¹ Application no. 18957/91, *supra* note 105.

¹³⁹² P. A. French, *supra* note 1390, quoting *Solomon and Hansson*, p. 161. Emphasis added.

¹³⁹³ *Ibid.*, p. 23.

¹³⁹⁴ *Ibid.*, p. 178.

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has privileged access to information that outsiders do not have. Whistleblowers are not likely to run the risk of a public charge, unless endangering national security, but they are usually not protected from civil liability or job loss.

Most domestic legislation requires discreteness from civil servants concerning matters that they are made cognizant of in their work and are to be kept secret in accordance with law or instructions by their superiors. This discreteness is hence to be respected after retirement.¹³⁹⁵ In Sweden government employees are virtually immune from prosecution for disclosures made to the press, except in limited circumstances, such as where disclosure would endanger national security.¹³⁹⁶ This special privilege is called 'messenger freedom'.

Patrick Haseldine, a British diplomat was dismissed from his employment for writing to *The Guardian* accusing the British Prime Minister Margaret Thatcher of 'self-righteous invective' in foreign policy matters. The applicant supplied his work address at the Foreign and Commonwealth Office and was subsequently suspended with full pay for four months. The applicant confessed before the Diplomatic Service Appeal Board that he had written the letter in order to air his grievances and because of his fear of what might happen when the Official Secrets Act became law. Haseldine invoked Article 10.¹³⁹⁷ The Commission found that the applicant's dismissal was prescribed by law, 'and that no sanction was imposed in respect of the opinions expressed as such'.¹³⁹⁸

Considering whether the dismissal had been necessary in a democratic society, the Commission said two factors had to be taken into account: the applicant's situation as a civil servant and the nature of the means he used. Concerning the former it said that the applicant, by entering the diplomatic service, had accepted certain restrictions on the exercise of his freedom of expression as being inherent in his duties. It referred to the 'duty of moderation', a widespread feature of the regulations of the civil service of member states of the Council of Europe, arising from the duties and responsibilities, which civil servants have as agents through which the state operates. The Commission thus considered that the applicant's criticism of government policies was incompatible with his position. With regard to the second factor, the Commission noted that the applicant in expressing his opinions used means, which had a wide and immediate impact, namely a daily national newspaper with wide circulation. The Commission accentuated that the applicant was motivated by a concern to publicize his professional grievances rather than a desire to express his opinions.¹³⁹⁹ The fact that he had given his professional address drew attention to the incompatibility between his professional loyalty and the personal opinions which he wished to express. In view of the professional

¹³⁹⁵ Cf. As stipulated in the Icelandic Act on the Rights and Duties of Civil Servants 1996, no. 70, § 18; 1996 nr. 70 11.júní/Lög um réttindi og skyldur starfsmanna ríkisins, IV kafli, 18. gr.

¹³⁹⁶ Freedom of the Press Act, chapter 7, Article 3, § 1; and Secrecy Act, chapter 16, Article 1.

¹³⁹⁷ Application no. 18957/91, *supra* note 105.

¹³⁹⁸ As if dismissal is not severe punishment?

¹³⁹⁹ Application no. 18957/91, *supra* note 105.

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responsibilities incumbent on the applicant and the specific nature of his work, the authorities were reasonably justified in dismissing him.¹⁴⁰⁰

Years later the Court stated that ‘although it is legitimate for a state to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention’.¹⁴⁰¹ Since Haseldine’s application was dismissed a Public Interest Disclosure Act has been adopted in the United Kingdom (1998), which provides a degree of protection for whistleblowers.¹⁴⁰² Before the adoption, Ronald Dworkin wrote on official secrecy in Britain:

The list of liberties compromised or ignored in Britain in recent years is a long, sad one. Freedom of speech has consistently been sacrificed to liberty’s most powerful enemy: official secrecy, the value rulers put on keeping their own acts and decisions dark. Censorship is no longer an isolated event accepted with great regret and keen sense of loss in the face of some emergency. On the contrary, censorship has become routine, an inexpensive way of government’s saving itself trouble or embarrassment . . . Mrs. Thatcher’s government has indiscriminately prosecuted civil servants and others who revealed information they thought the public should know.¹⁴⁰³

In the case of *Ahmed and others v. the United Kingdom*, the applicants, public servants complained of interference of their right to freedom of expression due to regulations designed to lay down rules for a large number of local government officials restricting their participation in certain forms of political activity, which could impair their impartiality.¹⁴⁰⁴ In view of the Court, restrictions imposed on the applicants were not open to challenge on grounds of lack of proportionality. Regulations were only applied to carefully defined categories of senior officers like applicants who perform duties in respect of which political impartiality *vis-à-vis* council members and the public is of paramount consideration. The restrictions only concerned speech or writing of a politically partisan nature or activities within political parties, which would be likely to link senior officers in the eyes of the public with a particular party political line. The Court held that a recent government review of the continuing need for restrictions was justified under Article 10. In the dissenting opinion of Judges Spielmann, Pekkanen and Van Dijk, they were inclined to agree with the Canadian Supreme Court, quoted by Liberty in its submission to the Court, which held that public servants couldn’t be silent members of society and that as a general rule all members of society should be permitted to participate in

¹⁴⁰⁰ *Ibid.*

¹⁴⁰¹ *Ahmed and Others v. the United Kingdom*, *supra* note 99, § 53.

¹⁴⁰² A. Nichol, G. Millar & A. Sharland, *Media Law and Human Rights*, 2001 Blackstone’s Human Rights Series.

¹⁴⁰³ R. Dworkin, *A Bill of Rights for Britain, Why British Liberty Needs Protecting*, 1990 Chatto Counter Blasts No. 16, Chatto and Windus, London, p. 2.

¹⁴⁰⁴ *Ahmed and Others v. the United Kingdom*, *supra* note 99.

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public discussion.¹⁴⁰⁵ Justice Brandeis of the US Supreme Court said in his greatest and now famous opinion:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government . . . Those who won our independence by revolution were not cowards. They did not exalt order at the cost of liberty.¹⁴⁰⁶

There is ‘no duty of moderation’ in this outstanding opinion.¹⁴⁰⁷ Anita Whitney had been convicted for her attendance at the national convention of the Communist Labour Party, which had urged the overthrow of the American government in 1920. She was a 52-year-old social worker, daughter of a Californian state senator and niece of a Supreme Court justice – ‘scarcely the kind of person to be considered a threat to the security of state’.¹⁴⁰⁸

Neither did her pupils fear Dorothea Vogt a 38-year-old secondary school teacher in Germany.¹⁴⁰⁹ On the contrary her capabilities and work were described as entirely satisfactory and it was stated that she was held in high regard by her pupils, their parents and by her colleagues. She was dismissed in October 1937 on the grounds that by associating herself with the German Communist Party (DKP) she had betrayed the relationship of trust between herself and her employer. The Court found the German authorities to have violated the teacher’s freedom of expression. It condemned the fanatical approach of the German Court, not taking into consideration the function and rank of civil servants, despite their duty.¹⁴¹⁰ It may be, therefore, that in reality the majority decision in *Vogt* was the product of a change in judicial policy (as indeed was acknowledged by Judge Jambrek in

¹⁴⁰⁵ *Ibid.*

¹⁴⁰⁶ *Whitney v. California*, *supra* note 394.

¹⁴⁰⁷ *Cf.* Application no. 18957/91, *supra* note 105.

¹⁴⁰⁸ P. Strum, *Brandeis: Beyond Progressivism*, 1993 University Press of Kansas, 125-126, 131.

¹⁴⁰⁹ *Vogt v. Germany*, *supra* note 99. The Vogt case is summarized *supra* in section 3.4 The Silencing Effect of Discriminatory Journalism.

¹⁴¹⁰ *Ibid.*, the Court took note of Germany’s experience under the Weimar Republic, which, when the Federal Republic was founded after the nightmare of nazism, led to its Constitution being based on the principle of a ‘democracy capable of defending itself’ (*wehrhafte Demokratie*), § 59.

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Vogt).¹⁴¹¹ That change in the Court's jurisprudence establishes that freedom of expression is not eradicated when entering the workplace and that the need to address the matters raised within Article 10 § 2 cannot be evaded merely by referring to the need for maintenance of trust and confidence as a qualification for continued employment.

In the case of *Niemitz v. Germany*, the applicant was a lawyer whose offices were searched by the German police pursuant to a search warrant.¹⁴¹² The warrant ordered the search in order to obtain information, which would reveal the identity and possible whereabouts of a third party that was the subject of a criminal investigation by the state. The applicant complained that the search had violated his right to respect for his home and correspondence as guaranteed by Article 8 and that it constituted a breach of his rights under Article 1 of Protocol 1 by impairing the goodwill of his law office and his reputation as a lawyer. The Court found that the right to respect for private life includes the right to develop relationships with others. Moreover, the Court found that exclusion of professional and business activities from the notions of 'home' and 'private life' may lead to inequality of treatment under Article 8.¹⁴¹³ It may be of relevance that the Court submitted in the case of the lawyer that an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention. An encroachment on the 'professional secrecy' of a whistleblower may by parity of reasoning have serious repercussions for the operation of a free press and hence on the right to impart and receive information guaranteed under Article 10.

The Court in the case of *Vogt* sought to limit the application of the reasoning in the two prior cases where it had held that dismissal did not constitute interference with Article 10 rights. The *Kosiek* case concerned a physics lecturer who was an active member of the right wing National Democratic Party.¹⁴¹⁴ He was dismissed because of the inconsistency between his political activities and writings and the obligation of loyalty and allegiance to the Constitution, which was a condition for appointment and for continued employment in the civil service. The Commission approached the case of *Kosiek* as raising an issue under Article 10 as it was evident that *Kosiek* could have access to the desired post by censoring himself. The Court has been criticized for not examining in the same manner whether the resulted restrictions were justified under Article 10 § 2.¹⁴¹⁵ In fact the Court sends out a mixed signal to whistleblowers with its decision, an indication that exercising freedom of opinion and expression is done so at the individual's own peril. By parity of reasoning an employer – even an employer of journalists – might argue that a whistleblower had been dismissed because in speaking up he had ruined confidence

¹⁴¹¹ *Vogt v. Germany*, *supra* note 99, dissenting opinion of Judge Jambrek, p. 37.

¹⁴¹² *Niemietz v. Germany*, *supra* note 129.

¹⁴¹³ *Ibid.*, §§ 29–30.

¹⁴¹⁴ *Kosiek v. the Federal Republic of Germany*, *supra* note 245.

¹⁴¹⁵ P. van Dijk and G. J. H. van Hoof, *supra* note 203, p. 564; F. J. Jacobs and R. C. A. White, *The European Convention on Human Rights*, 1996 Oxford University Press, p. 224.

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and shown himself unfit for continued employment. The final phrase of the Court in *Kosiek*: ‘that access to the civil service lies at the heart of the issue’ is almost an endorsement for self-censorship.

In the case of *Herbert Wille*, the applicant, a high-ranking judge expressed his views in the course of public lectures at the Liechtenstein-Institute on issues of constitutional law.¹⁴¹⁶ He was consequently ‘intimidated’ by the Monarch of Liechtenstein in a letter to the applicant. His Serene Highness Prince Hans-Adam II had been annoyed by a lecture titled ‘Nature and Functions of the Liechtenstein Constitutional Court’. In the course of the lecture, the applicant expressed the view that the Constitutional Court was competent to decide on ‘the interpretation of the Constitution in case of disagreement between the Prince (Government) and the Diet’. This lecture was reported in the press. A week later the Prince wrote a letter to the applicant stating that he would not appoint him to public office, should he be proposed by the Diet or any other body, as he disagreed with his statement in the lecture.

The Court held that a person, such as the judge, had ‘duties and responsibilities’ referred to in Article 10 § 2, which assumed special significance ‘since it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of judiciary are likely to be called into question’.¹⁴¹⁷ Nevertheless the Court also found that an interference with the freedom of expression of the judge, in a position such as the applicant’s, called for close scrutiny of the Court.

The Court found that the Prince’s reaction was a violation of Article 10 and said that the ‘opinion expressed by the applicant could not be regarded as an untenable proposition since it was shared by a considerable number of persons in Liechtenstein’.¹⁴¹⁸ The Court may be suspected in the Lockean sense to have felt that ‘for an inferior to punish a superior is against nature’.¹⁴¹⁹ Acting with caution against the Prince, it justified Judge Wille’s ‘outspokenness’ on the premises that a ‘considerable number of persons’ shared his view – independent of the qualifications of the high-ranking judge to express his views on constitutional questions. This may be compared with the Court’s statement in the case of *Hertel v. Switzerland* where it held: ‘It matters little that his opinion is a minority’.¹⁴²⁰ (See below).

The conformist subservience to those in power, that sometimes turns up in the Court’s reasoning, is far away from Brandeis’ above mentioned opinion, not to mention John Stuart Mill who said: ‘If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that person, than he, if he had the power would be justified in

¹⁴¹⁶ *Wille v. Liechtenstein* [GC], 28. 10. 1999, RJD 1999-VII. This case is discussed *infra* 5.2 Self-censorship: Not a Legal Wrong? in the context of self-censorship.

¹⁴¹⁷ *Ibid.*, § 64.

¹⁴¹⁸ *Ibid.*, § 67.

¹⁴¹⁹ J. Locke, *The Second Treatise of Government*, 1952 The Liberal Arts Press, p. 132.

¹⁴²⁰ *Hertel v. Switzerland*, *supra* note 330, § 50.

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silencing mankind'.¹⁴²¹ Judge Wille's lecture, published in the press, was an obvious contribution to the public debate in Liechtenstein.

The employer has a right to the protection of his reputation according to Article 10 § 2 when an employee raises a concern about the former. According to the Court's test of justification of interference, the question of legitimate aim, such as protecting the employer's right to fidelity, confidentiality or reputation, will be balanced with the democratic necessity test. It must be shown that the interference corresponds with a pressing social need, is proportionate to the aim pursued and is justified by reasons, which are relevant and sufficient.

In the recent case of *Fuentes Bobo v. Spain*, the applicant was a producer at a state television company (TVE).¹⁴²² He was dismissed as a result of voicing offensive and insulting criticism of senior management of TVE in a labour dispute. The applicant complained to the domestic employment tribunal that his dismissal was unfair. On appeal, the Spanish courts held that the applicable employment legislation afforded no remedy. The Spanish government argued that it could not be held responsible for the producer's dismissal as private rather than public law governed the relationship between him and TVE. The Court rejected this argument because the state has a positive obligation, in certain circumstances, to protect individuals from violations by private persons.¹⁴²³ The Court held that Article 10 applied to relations between an employer and employee governed by private law. The Court concluded that domestic legislative provisions that failed to afford a remedy should themselves be regarded as interference with Article 10 rights, for which the state is responsible.

The Court has accepted vituperative language when attention has been drawn to matters of public concern – as in the case of *Thorgeirson* where the Court emphasized the wider limits of public criticism. Thorgeirson, a writer, was not a whistleblower in the sense of revealing something that he had access to due to his position, but instead a concerned individual attending to his civic duty by analyzing a situation and calling attention to things that go awry in society. Thorgeirson was probably 'filled to the brim with sincere indignation', reacting to the news on alleged police brutality as undoubtedly many others did, except he went public with his criticism.¹⁴²⁴ He brought down on himself unpopularity among a large sector of the population, generalizing about the police, calling a whole walk of life 'sadists', 'police brutes' and 'beasts in uniforms'.¹⁴²⁵ As well-established in Article 10

¹⁴²¹ J. S. Mill, *supra* note 13, p. 20.

¹⁴²² *Fuentes Bobo v. Spain*, application no. 39293/98, judgment 29 February 2000 (not yet published).

¹⁴²³ TVE is a state-run television company. In application no. 25798/94, *supra* note 1346, the question remained unsolved whether the BBC established by Royal Charter is 'a person, non-governmental organization or group of individuals' within the meaning of Article 25 of the Convention.

¹⁴²⁴ As Judge Martens in a dissenting opinion described the reaction of the journalist in *Prager and Oberschlick v. Austria*, *supra* note 62, p. 23.

¹⁴²⁵ *Thorgeirson v. Iceland*, *supra* note 226, § 64.

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jurisprudence, subject to paragraph 2 of that Article, 'it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive but also to those that defend, shock or disturb the State or any sector of the population'.¹⁴²⁶ A similar approach in US jurisprudence is reflected in the words of Justice Stewart: '[the] guarantee is not confined to the expression of ideas that are conventional or shared by the majority'.¹⁴²⁷ Thorgeirson sought just satisfaction on the basis of Article 50 of the Convention.¹⁴²⁸ He claimed pecuniary injury and sought compensation for loss of earnings for seven years resulting from his 'dissident's status'. The Court did not accept his claim in this matter, as it had 'not been established' that there was a sufficient connection between the alleged loss and the matter held in the present judgment to be in breach of Article 10.¹⁴²⁹

Had the Court accepted the claim of compensation 'due to dissident's status' and loss of earnings it would have had a significant impact for the prospects of whistleblowers or dissidents outside as well as within the media. If the Court had accepted the connection it would have provided a precedent for potential whistleblowers or journalists who censor themselves for fear of loss of livelihood. There are not many individuals strong enough to put their livelihoods at risk for the public good. It amounts to little that the Court recognizes the importance of imparting shocking and offending information and ideas that may bring unto an individual unpopularity, if it is not willing consequently to grant protection to those showing civic courage and who as a result lose their livelihood, by affording just satisfaction to the injured party. The Court has said that it 'affords just satisfaction only if necessary'.¹⁴³⁰ When civic courage, which serves the public interest, means the loss of livelihood, it seems urgent to compensate such courageous activity – also to prevent the chilling effect of a dissident's status. Domestic legislation, which fails to afford a remedy to whistleblowers, may hence be regarded as interference with Article 10 rights, for which the state is responsible.¹⁴³¹ Like many of the respectful judges, journalists and whistleblowers have families.

The Commission unanimously found a breach of Article 10 in the case of *Jacobowski v. Germany* but the Court by a majority of six against three dismissed the applicant's claim and upheld the German conviction of unfair competition.¹⁴³² The journalist, Manfred Jacobowsky, was prohibited by an injunction from

¹⁴²⁶ *Handyside v. the United Kingdom*, *supra* note 87, § 49.

¹⁴²⁷ *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688–89 (1959).

¹⁴²⁸ Article 50 of the Convention: If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court, shall, if necessary, afford just satisfaction to the injured party.

¹⁴²⁹ *Thorgeirson v. Iceland*, *supra* note 226, §§ 72–73.

¹⁴³⁰ *Ibid.*, § 72.

¹⁴³¹ *Cf. Fuentes Bobo v. Spain*, *supra* note 1422.

¹⁴³² *Jacobowski v. Germany*, *supra* note 265.

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distributing widely circulated newspaper articles on his case under the German Unfair Competition Act. His employer who held him responsible for the collapse of the news agency where he had been editor-in-chief had harshly attacked him. Jacobowski was trying to defend his reputation in the press release, as his professional abilities had been seriously questioned. Shortly after he was dismissed from all his duties without further notice.

The three dissenting Judges, Walsh, MacDonald and Wildhaber, held that the majority of the Court had reduced the principle of freedom of expression to the level of an exception and elevated a business principle to the status of a rule. The dissenting judges emphasized that Jacobowski did not know when he sent out the circulars whether the courts would grant him a right to reply. He had an obvious and pressing interest in trying to protect his impugned reputation without delay, especially as he was seeking a new job in the same sector and had to wait almost two months for his right to reply to be recognized and another month for his right to reply to be published. There was a parallel public interest to learn whether the applicant would defend himself against his former employer. The applicant was trying to secure his future career¹⁴³³ when he sent out the newspaper cuttings to the clients of his employer and added a few comments, which came nowhere close to the original attack on his own reputation.¹⁴³⁴ It was, however, interpreted that he was seeking to 'disparage' his former employer as a competitor.

In 1998 the Court held that there had been a violation of Article 10 in the case of *Hertel*, a technical adviser who published a research article in the 'Journal Franz Weber' on the effects on human health of using microwave ovens.¹⁴³⁵ Subsequently Swiss courts under the Federal Unfair Competition Act imposed a ban on him. He was prohibited from stating that food prepared in microwave ovens is a danger to health and leads to changes in the blood, which appear to indicate the initial stage of a pathological process such as that which occurs at the start of a cancerous condition.¹⁴³⁶ The Court held that the Swiss authorities had some margin to decide whether there was a 'pressing social need' to impose an injunction on the applicant. It considered, however, that this margin was reduced, as Hertel had not made purely commercial statements, but had participated in a debate affecting the general interest. Although the impact of the published article was likely to have an adverse effect on the sale of microwave ovens, the Court took into consideration that the journal was not printed in a large circulation and that it was catered to a specific readership, which would reduce its influence. It could not help but note the

¹⁴³³ *Jacobowski v. Germany*, *supra* note 265, dissenting opinion of Judges Walsh, MacDonald and Wildhaber.

¹⁴³⁴ *Ibid.*, Jacobowski was accused of 'unchanged business methods', 'inappropriate behaviour to clients', 'lack of any efficient, reliable editorial management', 'misleading the supervisory board' etc. His comments were that he was sending out the newspaper cuttings 'to throw light on certain matters that are still obscure' and that he hoped to be able to discuss past and future developments on the German 'news market' with the recipients, §§ 12–14.

¹⁴³⁵ *Hertel v. Switzerland*, *supra* note 330.

¹⁴³⁶ *Ibid.*, § 8.

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discrepancy of the injunction of the statement in the conclusion of the article as it related to the very substance of Hertel's views:

The effect of the injunction was thus partly to censor the applicant's work and substantially to reduce his ability to put forward in public views which have their place in a public debate whose existence cannot be denied. It matters little that his opinion is a minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas.¹⁴³⁷

The applicant would run the risk of penalty, which could include imprisonment if he failed to comply with the injunction, so the Court could not consider the injunction as necessary in a democratic society. The measure in question hence constituted a violation of Article 10. Hertel also submitted that the injunction prevented him from communicating to others the result of his scientific work and damaged his 'personality as a scientist' and this amounted to breach of Article 8. The Court already having found violation of Article 10 held that no separate question arose under Article 8 and thereby denied Hertel 'whistleblower-status'. Likewise under Article 50 the applicant maintained that the injunction imposed on him had entailed the closing of his laboratory and caused him damage, which he put at CHF 20,000. The Court also dismissed that claim, finding no causal link between the damage alleged by Hertel and the interference with his freedom of expression.

The consequences of blowing the whistle, such as a damaged reputation and/or a loss of income, have a deterring effect on those contemplating this course of action. The lesson from this judgment is that the Court recognizes the problem and yet is not willing to grant full protection to whistleblowers.

In the case of *Observer and Guardian v. the United Kingdom* a separate opinion to the Commission's report pointed to the fact that authorities in justifying a temporary injunction on a newspaper to prevent the dissemination of information, obtained from Mr. P. Wright a retired member of MI5, the British Security Service. The government relied on the private law concept of breach of confidence to restrict a fundamental right, e.g. information of public interest. Whilst a binding rule of confidentiality between private persons is in principle compatible with Article 10 of the Convention, since this Article guarantees individual rights *vis-à-vis* the state, a stricter test of necessity must be applied where the government seeks to restrict the right of the press to impart and the right of the public to receive by that same rule.¹⁴³⁸ Judge Pettiti in a partly dissenting opinion of the Commission stated that freedom of expression cannot be made subject to the criterion of confidentiality and a failure to comply with the duty of discretion.

Whistle-blowing is a form of expression, protected under Article 10. The case-law emphasizes that a delay in publication may deprive the news of its value and

¹⁴³⁷ *Ibid.*, § 50.

¹⁴³⁸ *Observer and Guardian v. the United Kingdom*, *supra* note 59, opinion of M. M. Frowein, Busuttil and Weitzel, p. 179; *Thoma v. Luxembourg*, *supra* note 328, § 48.

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interest.¹⁴³⁹ Furthermore to deprive the public of information on the functioning of state organs is to violate a fundamental democratic right.¹⁴⁴⁰ Given the importance of political speech under Article 10, it seems imperative that whistleblowers enjoy protection with regard to consequences of their acts, if the motive is to expose corruption undermining the rights of others; rule of law, democratic institutions, equity and social justice. Article 10 rights carry with them a duty and responsibility to call attention to serious abuses of power. The judicial recognition of this fact is of crucial importance for freedom within the media. The Johannesburg Principles (No. 16) submit that: 'No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm in disclosure'.¹⁴⁴¹ As stated in Principle 9 of Article 19's Public's Right to Know: 'Whistleblowers should benefit from protection as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing. Such protection should apply even where disclosure would otherwise be in breach of legal or employment requirement'.¹⁴⁴²

The task for the European Court of Human Rights, therefore, is to provide clear guidance as to the circumstances in which an employee can rely on these assertions and the circumstances and manner in which whistle-blowing is protected, thereby providing some reassurance to those considering raising a matter of public concern in relation to their insider's knowledge that their civic effort is rewarded and that whistle-blowing will not be met with disciplinary sanctions nor job dismissal, albeit in the private sphere.¹⁴⁴³

4.5 CONCLUSION: EMPTY, RHETORICAL TESTIMONIALS?

At the dawn of the 21st century the conception of the Public Watchdog resembles US Supreme Court Justice Potter Stewart's theory of the Fourth Estate, set forth in 1975. At the time there was no established case-law on the press in the Convention's jurisprudence.¹⁴⁴⁴ The growing case-law since has incrementally developed the substantial guarantee that Article 10 of the Convention affords the press in attending to its obligations. Given the pre-eminent role of the press in democratic society the

¹⁴³⁹ *Ibid.*, § 60.

¹⁴⁴⁰ *Ibid.*, partly dissenting opinion of Judge Pettiti, joined by Judge Pinheiro Farinha, p. 201.

¹⁴⁴¹ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by Article 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of Witwatersand, published in 20 *Human Rights Quarterly* (1998) 1–11.

¹⁴⁴² The Public's Right to Know: Principles on Freedom of Information Legislation, *supra* note 587.

¹⁴⁴³ *Cf. Fuentes Bobo v. Spain*, *supra* note 1422.

¹⁴⁴⁴ Only the case of *De Becker v. Belgium* (judgment of 27 March 1962, Series A no. 4, struck off the list) concerning a lifelong prohibition on the applicant in Belgium from exercising the professions of journalist and author.

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Court acknowledges its right to battle against authorities yet without sufficient guarantee that the press will or stands a chance to succeed. In the case of *Goodwin v. the United Kingdom*, the Court established that journalists might be distinguished from ordinary citizens when exercising Article 10 rights.¹⁴⁴⁵ This approach is in congruity with, for example, the constitutional protection enjoyed by the press to conduct its 'public function' in Germany. Around the same time the Commission rejected the BBC's complaint that a requirement to disclose filmed material at riots created risks for its journalists.¹⁴⁴⁶

There are still aspects of the press' problems that have not been dealt with by the Convention's mechanisms. It is also noteworthy that the Convention jurisprudence lags behind the US First Amendment jurisprudence in legal rhetoric concerning elaboration on the press' role but not in adjudication defining the substantial guarantee of journalistic freedoms. Neither the European Court of Human Rights nor the US Supreme Court have really given journalism the full legal status; to borrow a metaphor from Blasi criticizing the US Supreme Court in the 1970s: '[They] have glossed over the problem with empty, rhetorical testimonials to the importance of the interest'.¹⁴⁴⁷ The European Court of Human Rights may be basing its approach on rhetoric that lacks a media theory that adequately reflects the values at issue. A lack of coherent theory and a chance to apply it – are the two features that explain why the Court's jurisprudence has not advanced closer to the actual situation of the press.

Some newsgathering privileges adopted under Article 10 are compatible with the democratic mission of the press to conduct investigative journalism. In *Goodwin v. United Kingdom* the Court referred to the protection of journalistic sources as one of the basic conditions for press freedom. Such a protection is certainly an important step in underscoring that the press needs 'extra protection' to guarantee the public's right to receive information. The press has not been elevated to a 'sacred cow status' by recognizing that some affirmative action is needed to enable journalists to take on this public function.¹⁴⁴⁸ The press is special because of its Public Watchdog role, not because it is a business enterprise conducting journalism. It is safe to conclude that the emerging case-law is confirming the instrumental value of the press and journalism as means to an end. Journalists have a special status because of what they do to bring fulfilment to the public's right to know – the Court is not setting them apart for any other reason than to ensure that they can carry out this task. The Court has imposed responsibilities on the press as the Public Watchdog without perhaps taking into consideration the sacrifices that the press may have to make in order to live up to these expectations and the extent of the protection it may need if it is to measure up to the vital role. If states can create legal obligations on the press they must also be prepared to proceed in compliance with that claim by supporting the

¹⁴⁴⁵ Cf. *Roemen and Schmitt v. Luxembourg*, *supra* note 1343.

¹⁴⁴⁶ Application no. 25798/94, *supra* note 1348, Commission's decision 18 January 1996.

¹⁴⁴⁷ Blasi, *supra* note 1110, p. 376.

¹⁴⁴⁸ Cf. Description in *New York Times v. Sullivan*, *supra* note 6.

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Public Watchdog, providing for remedy where it is essential for investigative journalism.

If the press' democratic mission is to become a realistic objective, journalism must be set in the context of real life struggles. Violations of Article 10 rights, occurring now and then, illustrate the need for demarcating the bounds, which the press may not overstep due to other vital interests. The press' inadequate performance in upholding a robust, public debate is an actual problem, albeit not commonly noticed and in crying need of attention. The press may be failing in its mission due to the limited recognition of the extent of protection it needs. Consequently, the safeguards that the Court still holds to be necessary are in need of closer scrutiny. The US Supreme Court has long since acknowledged the business side of the press and the potential threats of financial interests to press freedom and ultimately democracy. The inadequate legal protection breeds fear among journalists, whistleblowers and others who are expected to reveal the darker sides of the system and give voice to public criticism when power is usurped. This is not an atmosphere in which the Public Watchdog can survive although the press may prosper as a business enterprise released from its fiduciary duty.

It seems a foregone conclusion in adjudication that the media can achieve its task of 'imparting information and ideas of all matters of public interest' without further supervision or additional protection. If the press is to play its vital role of Public Watchdog along the lines of the principles set forth in the case-law it is crucial to reconsider the conditions surrounding its operation. It is not enough to forbid the watchdog to attack innocent bystanders – it must also be trained to guard its keepers – to be a watchdog. It is not an easy role nor does it necessarily come naturally. It is inbred in dogs not corporations. The press may abide by its negative requirements while remaining incompetent in achieving its other objective of promoting political awareness in society. Evidently, such negligence does not advance human rights or enhance political equality. It is not enough to anchor the role of the Public Watchdog neatly into the elegant rhetoric of the case-law and emblazon the concept with solemn standards of democracy and dignity when in reality it proves impossible to measure press performance against any such objectives. The function of the press as a vital instrument to guarantee a more open, decent and fair society must be realizable. It is not enough to guarantee 'opportunity', so to speak, for the Public Watchdog to act on the basis of principles. In order to realize the goals that the press is to achieve, the viability of the legal framework is measured against the actual circumstances, which enable the press to actively take on this vital role for democracy.

The protection of this process as an act of expression for the purposes of this study is to enable journalists and the media to be unimpeded in imparting information and ideas, which is no small task as there are numerous obstructions in the way. In order to incrementally unfold the legal, political, economic and social obstacles that hinder the active realization of the Public Watchdog, the following chapters will explore the multifaceted interplay between legal regulation, market regulation and self-regulation.

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Despite the limited exposure the Convention mechanisms have with respect to the multifaceted reality of journalism, they have managed to come up with a broad construction of Article 10 and derivatively ensured the political ideal of the Public Watchdog. They have embarked the jurisprudence on a long journey to ‘an uncertain destination’.¹⁴⁴⁹

¹⁴⁴⁹ *Branzburg v. Hayes*, *supra* note 1136, Justice White, majority opinion.

