IRIS 1995: Legal Developments in the Audiovisual Sector
IRIS: The essential reference guide to legal developments in the audiovisual sector

IRIS 1995: Overview of legal developments in the audiovisual sector is a special issue of the monthly newsletter IRIS - Legal Observations of the European Audiovisual Observatory. In this special issue, the editorial board of IRIS presents an informative overview from a European perspective of some of the major legal and policy developments which took place in 1995 and that are relevant to the audiovisual sector.

One of the topics concerns the "Television without Frontiers" Directive. The original intention was that all the Member States would be in a position to implement the Directive in the same year. However, the situation was such that it was not until 1997 that the Directive could be enforced. This Directive was one of the most important in the field of audiovisual communication, as it established a framework for the development of audiovisual services in the European Union, particularly in the areas of television and radio.

Another major topic covered in the special issue is the Council of Europe. The Council of Europe is an international organisation that promotes human rights, democracy, the rule of law and the protection of the environment in Europe. It includes 47 member States, which are located primarily in Europe, and has a long history dating back to the 19th century. The Council of Europe has a number of bodies and organs, including the European Court of Human Rights, which is the highest judicial body in Europe.

In addition to these main topics, the special issue also includes articles on a range of other issues, such as the development of broadcasting regulations, the protection of intellectual property, and the role of public service broadcasting. The articles are written by experts in the field and provide a comprehensive overview of the legal developments in the audiovisual sector in 1995.

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ficult to find a legitimate justification for the maintenance of broadcasting monopolies. A total exclusion of access or participation by this sector in the broadcasting system can hardly be considered as being in the public interest. Although a national broadcasting monopoly can be justified in order to guarantee the plurality and quality of public service broadcasting, this cannot be extended to licensing for excluding licences to private initiatives by means of a licence fee in order to ensure a public interest. A licensing system itself must be in accordance with paragraph 2 of Article 10 ECHR, and with the requirements of pluralism, tolerance and broad-mindedness without there is no democratic society. Monopolies in favour of public (or private) broadcasting organizations are difficult to support from the scope of Article 10 ECHR. The Court is of the opinion that as a result of the technical progress, justification for monopoly restrictions can no longer be found in considerations relating to the number of frequencies and channels available or relating to economic arguments. As a matter of fact, there are restrictive solutions in order to guarantee pluralism and quality in broadcasting programmes as the practice in several member States demonstrates. In reaching its decision, the Court emphasised the importance, especially in the audiovisual media, of the principle of pluralism, of which, the Court said, the "State is the ultimate guarantor" (par. 38).

2.6 In the Jersild judgment of 23 September 1994, the European Court underlined the importance of the role of the press as well as the importance of the audiovisual media in a democratic society (7). On several occasions, the Court has emphasised that television and radio constitute one of the essential foundations of a democratic society and that the interference with freedom of expression is of particular importance. Whilst the press must not be overstepped, the audiovisual media has to protect freedom of expression as a basic right. Not only does the press have the task of imparting information and ideas, but the audiovisual media also has a right to receive them. Were it otherwise, the press would be unable to play its role as "public watchdog". In the Jersild judgment the Court referred to this case law, considering that "although for the purposes of regulation and muted primarily with regard to print media, these principles doubtless apply also to the audiovisual media" (par. 31). The Court stated that "news reporting based on interviews, whether edited or not, constitutes one of the most important journalistic and public information activities" (par. 35).

At the same time the Court noticed that in considering the duties and responsibilities of the media, a journalist, the potential impact of the medium concerned is an important factor and that it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media. According to the Court the "audio-visual media have means of conveying through images meanings which the print media are not in a position to convey". In the Jersild case, the Court also considered that the punishment of a journalist for assisting in the dissemination of racist statements made by another person in an interview would seriously hamper freedom of expression and would hinder the exchange of matters of public interest and should not be envisaged as a punishment of a journalist. In the context of Article 10 ECHR, the Court considered whether the purpose of the applicant TV-journalist in commissioning the interview was not racist, it considered his conviction as a violation of Article 10 ECHR.

2.7 The judgment in the Otto-Preimerger case (20 September 1994) demonstrates that the seizure and subsequent forfeiture of a broadcast licence can be considered as a necessary interference by public authorities and therefore is not infringing Article 10 ECHR (8). According to the Court, proactive portrayals of objects of religious veneer can be regarded as malicious violation of the spirit of the Convention and be a feature of a democratic society (par. 47). The Court was of the opinion that "in seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner", referring also to the visit of a catholic religious leader to the region of the overwhelming majority of Tyroleans (par. 55). The Court found that there was no reason to conclude that the Austrian authorities had overstepped their margin of appreciation in seizing Mr. Preimerger's right to the freedom of expression as a basic right of a democratic society as guaranteed by Article 9 of the Convention, referring also to the fact that "the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans" (par. 56) 3.

3. 1995 developments in Article 10 case law and its impact on the audiovisual media.

3.1. The overview of the 1995 Article 10 case law was accorded with regard to audiovisual media could be a very short one. Whereas in preceding years the Commision and the Court on several occasions had to decide on questions which directly related to the regulation and modulation primary with regard to print media, these principles doubtless apply also to the audiovisual media (cfr., supra). The 1995 case law is not dealing with the traditional audiovisual media (cfr. supra), but with other audiovisual media as a "new" form of expressing issues which are also relevant for the freedom of expression as guaranteed by Article 10 ECHR and deal with other audiovisual media. Hence, these judgments the Court (again) emphasised that freedom of expression is applicable not only to "classical" or "old" media, but also to those new media that have been developed or regarded as ineffective or as a matter of necessity. The Court also pointed out that it was not a matter to disturb the State or any section of the community.

3.2. Let's first refer to the last judgment of the Court on this subject of 21 September 1995, the Schreiber Soldaten (Österreichs and Barthold Gubi v. Austria) (9). In this case concerning the right to disbelieve, the Court had to consider whether the army barracks, the Court had to decide if the measure complained of was necessary in a democratic society with a view to preserving order in the armed forces. In its judgment of 19 December 1994 the Court found a violation of Article 10. The Court was of the opinion that despite the polemical tenor of some of the journal's contributions it did not appear to have) overstepped the bounds of what is permissible in the context of a more discussion of ideas, which must be tolerated in the army of a democratic State just as it must be in society that such an army serves" (par. 38). The Court also observed that "these Articles were written in a criteria or even satirical style and were quite ready to make demands or put forward proposals for reform, yet they did not call into question the duty of obedience or the purpose of service in the armed forces" (par. 49). Enough reasons why the journal could not be estimated as a real threat to military discipline and why the interference by the military authorities was the infringement of Article 10 ECHR. The Court dismissed the decision in Engel v. the Netherlands, where the banned journal had been linked to the armed forces in the interest and problems of military discipline occurred (10).

3.3. In the Bluf case the Court had to decide whether the seizure of footage from a circulation of a magazine containing a survey was necessary in order to protect the "public interest in the facts as an element of the administrative process" (par. 38). The Court held that it was necessary to hold an infringement of Article 10 ECHR (11). The question was whether the interference with the freedom of expression concerned was necessary in a democratic society. The facts of the case included the seizure of national security, was necessary in a democratic society. Another judgment of the Court's judgment of 9 February 1995 refers to the fact that the confidential document referred only to a degree of secrecy and the seizure and withdrawal of the magazine were not necessary. As the seizure had been carried out, the number of copies of the survey were widely distributed. In other words, the usual measures were taken at all. However, some of these recent judgments of the Court have a general importance with regard to the Court's judgments in Article 10 ECHR are dealing with other issues which are also relevant for the freedom of expression as guaranteed by Article 10 ECHR and through audiovisual media. It is important e.g. to underline that in

the Court came to the conclusion that the measure was not necessary in a democratic society and that there had been a breach of Article 10 by the Netherlands authorities.

3.4. The Prager and Oberschlick case concerns a journalist who was convicted in Austria of defamation on the basis of an article that the journalist had written concerning a judge. In the article at issue the journalist, Mr. Prager, criticized judge J. sharply and accused him of bias. The conviction of the journalist and the editor could be held to pursue a legitimate aim, namely, the protection of others and the maintenance of the authority of the judiciary. In its judgment of 26 September 1995 the Court reiterates that the press plays a pre-eminent role in a State governed by the rule of law and that it is the role of the press to impart information and ideas on political questions and on other matters of public interest, including "questions concerning the functioning of the system of justice, an institution that is essential for any democratic society. The press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them" (par. 34). According to the Court, regard must however be had to "the special role of the judiciary in society. As the guardian of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties". From this point of view, it may be necessary "to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying" (par. 34). Although the Court underlines that it is aware of the fact that "journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation" (par. 36), it observes that the allegations against judge J. were extremely serious, in absence of a sufficient factual basis. In the Court's view, Mr. Prager could not invoke his good faith or compliance with the ethics of journalism, referring to the fact that the journalist had not even attended a single criminal trial before judge J. and the judge wasn't given the opportunity to comment on the accusations levelled by him (par. 37). The Court finally is of the opinion that in the case the conviction was necessary in a democratic society "regard being had to all the circumstances described above and to the margin of appreciation that is to be left to the Contracting States" (par. 38).

As in the Barford judgment (14) the Court made it clear that defamation of the judiciary is reviewed more strictly than defamation of politicians or public-office holders. The Court however reached this decision only with the narrowest possible majority, namely a 4/5 decision.

3.5. The Pierrmont judgment of 27 April 1995 deals with a measure expelling a German national, member of the European Parliament, from French Polynesia and a measure prohibiting her from entering New Caledonia. According to Mrs. Pierrmont, the expulsion measure coupled with the ban of entering New Caledonia was intended to curb her political opinions and the expression of them on Polynesian and Caledonian soil. The measures were taken after Mrs. Pierrmont took part in a public meeting just outside Papeete, a meeting which was organised by the independence anti-nuclear movement. During this public demonstration Mrs. Pierrmont stated in favour of the territory's independence and against nuclear testing at Mururoa.

After rejecting the argument that the interference in the applicant's freedom of expression could be justified under Article 63 or Article 16 of the Convention (15), the Court accepts that the interference pursued two legitimate aims under para. 2 of Article 10: the prevention of disorder and the protection of territorial integrity. However, the Court comes to the conclusion that the measures were not "necessary in a democratic society".

After referring to its constant case law with regard to the importance of freedom of expression and information in a democratic society and the related demands of pluralism, tolerance and broadmindedness, the Court emphasises that "a person opposed to official ideas and positions must be able to find a place in the political arena. While freedom of expression is important for everybody, it is especially so for an elected representative of the people... Accordingly, interferences with his freedom of expression (…) call for the closest scrutiny by the Court" (par. 76). The Court specifically refers to the fact that Mrs. Pierrmont participated in a peaceful, authorised demonstration and that at no time she called for violence or disorder. Furthermore, she "spoke in support of the anti-nuclear and independence demands made by several political parties... Her speech was therefore a contribution to a democratic debate in Polynesia". A fair balance was accordingly not struck between on the one hand, the public interest requiring the prevention of disorder and the upholding of territorial integrity, and, on the other hand, Mrs. Pierrmont's freedom of expression (par. 77). Hence the conclusion that there was a breach of Article 10.

3.6. The Tolstoy Milioulovi case deals with the question of proportionality of the embargo damages awarded (16). The Court starts from the principle that under the Convention, an award of damages for libel or defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered (par. 49). The Court observed that the sum awarded (1 000 000 francs) was three times as large as the highest libel award previously made in France and no comparable award has been made since. Having regard to the size of the award in conjunction with the lack of adequate and effective safeguards against a disproportionately large award, the Court in its judgment of 13 July 1995 finds that there has been a violation under Article 10. The judgment at the other hand to prevent the applicant from repea-
ting the libellous allegations did not give rise to any breach of Article 10 (par. 54).

3.7. The most recent judgment (26 September 1995) of the Court on Article 10 deals with a dis-
missal of a teacher from civil service account of her political activities on behalf of the German Com-
munist Party (17). The dismissal is consid-
ered by the Court as an interference in the freedom of expression of the applicant (18). After reiterating the general principles laid down in its preceding judgments concerning Article 10 (par. 52) and after examining the circumstances of the case (par. 57-60), the Court concludes that there are not sufficient reasons to establish conver-
gence that it was necessary in a democratic society to dismiss Mrs. Vogt. The disciplinary sanction to dismiss Mrs. Vogt from her post as secondary school teacher was disproportionate to the legiti-
mate aim pursued. Accordingly the dismissal is considered by the Court as a violation of Article 10 and 11 ECHR (19). The Court reached this decision in "Grand Chamber", with a 10 to 9 majority.

3.8. As a general remark with regard to the 1995 cases, it is to be underlined that in only one case the Court relies heavily on the doctrine of the states' "margin of appreciation" (Prager and Oberschlick), while in the other judgments the Court is effectively exercising its supervisory jurisdiction and is substituting its own evaluation for that of the national courts. Some judgments however reflect a deep division between the majority and the minority of the Court. The future development of this inter-
national discourse on the application of the principle of appreciation and the effective European super-
vision will be crucial and decisive for the further implementation of the European Convention in general and Article 10 ECHR in particular. The future impact of Article 10 on media law in Europe will, to a considerable extent, depend on the manner in which the European Court leaves a nar-
row or a wide margin of appreciation to the contrac-
ting States with regard to the justification of the "pressing social need" or the "necessity in a demo-
cratic society".