Media & democracy

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Chapter 2 – Guaranteeing the freedom and independence of the media

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1. Introduction

The oppression of press freedom in history

Since the invention of the printing press in Europe in the fifteenth century, the press was dominated by the powerful elite. The state (and/or the church) controlled the exchange of opinions and information in the political, religious, cultural and scientific domain. The press was considered a tool for enhancing the power, ideology and legitimacy of the dominant or absolutist elite. The main instruments the state used to develop control over public communication were censorship and prior restraint, monopolistic licences for publishers, taxes on newspapers ("stamp tax"), severe repression of published criticism against the state or the political or religious elites, the seizure and confiscation of opposition newspapers, imprisonment, exile and even the death penalty for printers, publishers, authors or journalists who were held responsible for illegal publications or writings that could harm the state or were hostile to the government or the church.

The freedom of expression as a human right

At the end of the seventeenth and in the eighteenth centuries, under the influence of the new political theories and the philosophy of the Enlightenment, arguments were developed as to why the freedom of the press was a necessary instrument in the struggle against despotic government and the oppression of the people (De Spinoza, J. Milton, J. Locke). It is only after a period of social and political struggle, however, that at the end of the eighteenth century de jure the freedom of expression and the freedom of the press were recognised as fundamental rights in a democratic society, both in Europe as in the United States of America.

In the Declaration of Rights of the State of Virginia in 1776 it was mentioned in Article 12 “that the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic government”. Freedom of speech and of the press was also formally recognised in the First Amendment of the US Constitution (1791), in the “Déclaration des Droits de l’Homme et du Citoyen” in France (1789), in the Royal Decree on the Freedom of the Press in Sweden (1766, the Tryckfrihetsförordningen) and in the constitutions of the parliamentary democracies in Europe as e.g. in Holland (1815) and Belgium (1831) in the first half of the nineteenth century. Article 11 of the French Declaration of 1789 is incorporated into the Preamble of the French constitution (1958) which provides: “Free communication of ideas and opinions is one of the most precious rights of man. Consequently, every citizen may speak, write and print freely, although he may have to answer for the abuse of that liberty in the cases determined by law.” Article 25 of the Belgian Constitution (1831) stipulates firmly: “The press is free; Censorship can never be introduced (...)”. Article 5 of the German Basic Law (Grundgesetz).
in an analogous way guarantees that "there shall be no censorship." More recent Constitutions reflect a similar guarantee in favour of the freedom of the press, such as Article 39, paragraph 1 of the Slovenian Constitution: "Freedom of expression of thought, freedom of speech and freedom to associate in public, together with the freedom of the press and other forms of public communication and expression, shall be guaranteed. Each person may freely collect, receive and circulate information and opinions."

Although there has always been a tension between the constitutional guarantees in favour of the freedom of expression and the practice of interference by public authorities in this field, there is, at least in Europe, nevertheless a general tendency ever since towards a higher level of press freedom and freedom of public communication. Due to these constitutional guarantees there is less direct state interference with the content of the media and the information flow in society.

**Freedom of expression and the state**

In the late twentieth century freedom of expression and information is generally considered as one of the essential principles of a democratic society and one of the basic conditions for its progress and for the development of every man and woman. National and international law is protecting freedom of the press against censorship or interference by public authorities. Several kinds of regulations are aimed at guaranteeing free and pluralistic media. Legal frameworks are developed in order to guarantee access to information and news gathering.

Specific rules protect the work of journalists (protection of the confidentiality of sources, legal protection of the title of professional journalist). The French Code of Criminal Procedure for example provides that "any journalist who appears as a witness concerning information gathered by him in the course of his journalistic activity is free not to disclose his source" (Article 109, paragraph 2). At the same time Article 56, paragraph 2 provides: "Searches of the premises of a press or broadcasting company may be conducted only by a judge or a state prosecutor, who must ensure that the investigations do not endanger the free exercise of the profession of journalism and do not obstruct or cause an unjustified delay to the distribution of information."

The protection of the journalist's sources is also recognised in Article 10 of the United Kingdom Contempt of Court Act 1981: "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 be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime." The German press laws explicitly protect the journalist's sources, a privilege which is reflected in the German Civil Procedure Code and especially in the Criminal Procedure Code (Articles 53, 97, 103 and 111). The protection of the journalist's sources in Germany is qualified as the "Zeugnisverweigerungsrecht der Mitarbeiter von Presse und Rundfunk". Other countries with legal standards for the protection of the journalist's sources are Austria, Finland, Lithuania, Norway, Poland, Portugal, Spain, Switzerland and Sweden.

In many countries there is state aid for the media in different forms. Different types of direct subsidies exist: general or selective, long-term or occasional, for starting up newspapers or to support existing newspapers and pluralism, investment subsi-

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| dies, subsidies for distribution of newspapers, training of journalists. There are also indirect support measures such as reduced or zero-rated VAT rate for newspapers, fiscal incentives for investments in the media sector, preferential distribution and telecommunications charges, etc. Merger laws or anti-competition legislation and transparency rules are considered as guarantees against oligopolies or abuse of dominant positions. In some countries a right of reply or a right of rectification is organised by law as a corrective to (the freedom of the press. Many countries in their constitution guarantee public access to information. Most European countries also have specific legislation in order effectively to guarantee access and disclosure of official documents, court proceedings, legislative proceedings, administrative documents, etc.: such legislation may be very important for investigative reporting and critical journalism vis-à-vis the authorities.

Public broadcasting monopolies are abolished and private national, regional or local radio and TV organisations are guaranteed freedom of broadcasting, albeit under a system of licences. In the audiovisual sector, all kinds of regulatory and more or less independent bodies are organised and are taking over some power of government in the licensing and supervision of broadcasting.

All these measures and regulations are to be understood as a function of a pluralistic media landscape in the promotion of the freedom of expression and information and the right of the public to be properly informed on matters of public interest (the "res publica").

**The freedom of the media is not an absolute one**

The freedom of expression and information being the principle in European countries, there is nevertheless also an assortment of legislation (and jurisprudence applying this legislation) restricting the freedom of expression and the freedom of the media.

As Article 5, paragraph 1-2 of the German Basic Law (Grundgesetz) stipulates: "(1) Everyone shall have the right freely to express and disseminate his or her opinions in speech, writing and pictures and freely to obtain information from generally accessible sources. Freedom of the press and freedom of reporting on radio and in films shall be guaranteed. There shall be no censorship. (2) These rights shall be subject to the limitations laid down by the provisions of the general laws and by statutory provisions aimed at protecting young people and to the obligations to respect personal honour."

Article 7, paragraph 1 of the Constitution of the Netherlands in an analogous way stipulates the principle and at the same time the possibility of restrictions on the freedom of expression: "No one shall need prior authorisation in order to express his opinions or ideas through the press, subject to each person's liability under the law" (see also Article 11 of the French Declaration, cited above).

In all countries several kinds of restrictions which are prescribed by law are based on national security or public order. Three examples may be given.

Article 191, paragraph 1 of the Greek Criminal Code: "It shall be an offence, punishable by not less than three months' imprisonment and a fine, to spread by any means false information or rumours calculated to provoke anxiety or fear among the citizens or to undermine confidence in the state (..) or to disturb the country's international relations."
Article 98 of the Criminal Code of the Netherlands: “Anyone who deliberately communicates or puts, at the disposal of a person or organisation not authorised to have knowledge of it, any information whose secrecy is necessary in the interests of the state or its allies, or any item from which it is possible to extract such information, shall, if he knows or should reasonably suspect that the information is of this kind, be liable to imprisonment for a period not exceeding six years or a fine (…) .”

Article 142 of the Criminal Code of Turkey: “It shall be an offence, punishable by five to ten years’ imprisonment, to disseminate propaganda, in any manner and under any name whatsoever, with the aim of establishing the domination of one social class over the others, bringing about the disappearance of any social class, overthrowing the country’s fundamental social or economic order, or totally destroying the State’s political or legal system.”

Some legislation restricts the freedom of expression in order to protect the authority or the independence of the judiciary. Very well known in this perspective is the Contempt of Court Act 1981 in the United Kingdom. From the same perspective, Article 226 of the French Criminal Code stipulates that “anyone who by his acts or by means of the written or spoken word has publicly attempted to bring discredit on any action or decision taken by a court, in a manner likely to impair the authority or independence of the judiciary, shall be liable to imprisonment (…) and a fine (…) .”

Other restrictions are aimed at protecting the reputation or rights of others (defamation, racism and incitement to hatred, the protection of public morals, etc.). I shall quote one example of each.

Defamation: Article 141, paragraph 1 of the Austrian Criminal Code: “Anyone who, in such a way that it may be noticed by a third person, attributes to another a contemptible characteristic or sentiment or accuses him of behaving contrary to honour or morality and such as to make him contemptible or otherwise lower him in public esteem shall be liable to imprisonment not exceeding six months or a fine (…) .”

Racism or incitement to hatred: the Belgian Law of 30 July 1981 against racism and xenophobia (Article 1) states that the following “Shall be punished to imprisonment of one month to one year and with a fine (…) .”

1. anyone who in the circumstances of Article 444 of the Criminal Code [which means] “publicly”, incites to discrimination, hatred or violence towards a person on account of his race, colour, descent or his national or ethnic origin;
2. anyone who in the circumstances of Article 444 of the Criminal Code incites to discrimination, segregation, hatred or violence towards a group, a community or its members, on account of the race, colour, descent or the national or ethnic origin of (some of) its members (…) .”

Public morals: Article 204, paragraph 1 of the Swiss Penal Code: “Anyone who makes or has in his possession any writings, pictures, films or other items which are obscene, with a view to trading in them, distributing them or displaying them in public, or who, for the above purposes, imports, transports or exports such items or puts them into circulation in any way, or who openly or secretly deals in them or publically distributes or displays them or by way of trade supplies them for hire, or who announces or makes known in any way, with a view to facilitating such prohibited circulation or trade (…) shall be imprisoned or fined.”

Some restrictions on the freedom of expression and the freedom of the press protect other human rights such as the right to privacy, the right to a fair trial or the presumption of innocence.

Article 30, paragraph 6 of the Romanian Constitution for example proclaims: “Freedom of expression must not violate the dignity, honour or privacy of the individual or the latter’s right to his or her own image.”

Article 23 of the Austrian Media Act (Mediengesetz) especially deals with the right to a fair trial: “Anyone who discusses, subsequent to the indictment (…) and before the judgment at first instance in criminal proceedings, the probable outcome of those proceedings or the value of evidence in a way capable of influencing the outcome of the proceedings shall be punished by the court with up to 180 day-fines.”

Specific rules aim at the protection of children, especially with regard to film and video. A typical example is the Video Recordings Act 1984 of the United Kingdom or the Belgian Law of 1 September 1920 by which minors under 16 years old are not allowed to enter cinemas (unless the film is classified by a commission as suitable for children). The member states of the European Union are also forced to implement in their national broadcasting legislation specific rules in order to protect minors. Article 22, paragraph 1-2 of the television directive stipulates:

1. “Member states shall take appropriate measures to ensure that television broadcasts, by broadcasters under their jurisdiction, do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence.
2. The measures provided for in paragraph 1 shall also extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure that minors in the area or transmission will not normally hear or see such broadcasts.”

Despite the constitutional and other juridical guarantees in the European countries in favour of the freedom of expression and the freedom of the press, the practice of a free press, openly critical of the government, state authorities or powerful political or socio-economic groups, can be threatened. The restrictive legislation on the protection of national security or public order or the legislation on defamation and on the protection of the judiciary can be (mis)used to counter criticism and investigative reporting.

A second menace is the market: market competition gave birth to extended press enterprises and multi-media concerns. The ultimate economic logic is maximising the audiences and minimising the costs, which makes the media content shift away from diversity to standardisation, to light entertainment, to human interest news and “infotainment”, more sensational attention towards crime and violence. The incentive is not the quality of the information, but the quantity of the audience that can be served.

In what follows we shall focus on the issue of state interference and the legal problems with regard to the freedom of expression and information, the “media economics” being analysed in Chapter 5 by Karol Iakubowicz. The legal framework of the relationship between a democratic society and media freedom will be analysed from the perspective of the freedom of expression and information as it is.

2. The European Convention on Human Rights and the freedom of expression and information

The European Convention and Article 10

Shortly after the second world war the European Convention on Human Rights was adopted as a response to current and past events in Europe. It stemmed from the wish to provide a bulwark against communism and fascism and was a reaction against human rights' violations in Europe. The Convention was built up with a strong enforcement mechanism as a function of the effective respect by the member states for the democratic principles and the individual human rights. One of the basic human rights protected by the Convention is the freedom of expression and information. As a fundamental right the freedom of expression and information is considered to be a necessary instrument for the development of human rights and genuine democracy.

This right is guaranteed in Article 10 of the Convention, which provides:

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

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

The structure of Article 10 of the Convention at first sight differs clearly from that of the absolutist provision in the United States First Amendment according to which freedom of speech or of the press may not be abridged. "Congress shall make no law", the First Amendment says, "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press (...)". Despite this categorical prohibition against interference by public authorities (government, parliament, etc.), the freedom to speak and publish is not absolute in the United States. Sometimes the government may bar dissemination of expression that threatens national security or public order.2 More frequently

expression will be punished after dissemination because of the damages or harm that speech or writing has caused. The principle, however, is the freedom of speech and of the press. Restrictions and sanctions are to remain exceptional. According to the case-law of the United States Supreme Court political, cultural and social expression enjoy maximum protection. Restrictions are allowed only when there is objective evidence of an imminent danger ("clear and present danger test").

Article 10 of the European Convention, however, fulfils a very analogous guarantee in favour of freedom of speech and of the press within the European legal order. The first paragraph of Article 10 establishes the principle: public authorities are not allowed to interfere with the freedom of expression and information of the citizens of and of the press. The second paragraph allows the state various kinds of control or restriction, but only in exceptional circumstances and under strict conditions. An interference by state authorities (government, administration, police, courts, etc.) can only be legitimate in so far as the interference is "necessary in a democratic society". In other words there must be "a pressing social need" for such an interference. Article 10 of the Convention, in contrast to the United States First Amendment, contains the criteria and guidelines for the process of balancing free speech and press freedom against other compelling interests or other human rights.

Over the years and especially since 1990, a substantial body of case-law has been established by the European Court with regard to Article 10 ECHR (see References). In the legal order of the Council of Europe and its member states, media law, broadcasting regulations and rules on journalistic freedom are developed and applied within this framework of Article 10 of the Convention. It is often emphasised that Article 10 not only guarantees freedom of expression and information as a fundamental right per se, but also facilitates or even guarantees the exercise of other fundamental rights within the legal order of the European Convention on Human Rights.

The implementation of Article 10 in the member states and the supervision by the European Commission and the European Court

As part of the European Convention Article 10 is a binding legal instrument for its member states. Article 1 of the Convention requires member states to secure for everyone within their jurisdiction the rights and freedoms guaranteed by the Convention. In principle the rights and freedoms of the Convention are directly enforceable before the national courts (self-executing character of the Convention, internal and direct effect of the Convention in the member states). This is an important dimension for the effectiveness of the Convention, particularly in the states that lack their own national bill of rights or that have only a lower degree of human rights' protection by their own constitution.

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1. At present 40 member states have ratified the Convention of the Council of Europe: Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republik, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, The Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Slovakia, Slovenia, Spain, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine and the United Kingdom.

The application of the Convention in the member states at the same time is supervised by the organs of the European Convention: the European Commission of Human Rights, the Committee of Ministers and the European Court of Human Rights. After exhaustion of all domestic remedies, an application can be made to the Commission. A person or group who alleges that he or she is a victim of a violation of the Convention may bring a claim to the Commission, whilst the Commission has the power to refer the case to the Court or to transmit its report to the Committee of Ministers. The judgments of the European Court of Human Rights, as well as the decisions of the Committee of Ministers, are decisions with a binding character in international law. A judgment by the European Court, deciding that there is a breach of a human right as protected by the Convention, may make changes in domestic law, administrative practice or national jurisprudence in the member states necessary.1

This means that a person, an author, a journalist, a publisher, a radio or television station who or which alleges that his, her or its freedom of expression and information is interfered with by a public authority, may bring a claim to the Commission because of violation of Article 10 of the Convention, after exhaustion of all remedies before the national courts. The supervisory bodies of the Convention will then examine the case and will decide on the question whether or not the application of national law is to be considered as a breach of the freedom of expression and information.

Article 10 and the state’s responsibilities

Besides this direct legal or juridical effect of Article 10 ECHR on the protection of the freedom of expression and information, it is generally recognised that Article 10 also offers a general framework for the member states of the Council of Europe to defend and to promote journalistic freedoms and media pluralism. Although this article has the character of an "abstention right" prohibiting state interference, to some extent it also impels a duty, an obligation for public authorities to take measures in order to ensure or to stimulate freedom of expression and information.

This "positive action" approach was clearly reflected in the final report of the Seville Colloquium of 1985 on the European Convention on Human Rights, in which it was stated:

4. Given the socio-economic conditions of our society, which do not favour equality and in which organised groups hold important portions of power, it is the State’s responsibility to ensure the effectiveness of the implementation of freedom of expression and information in practice.

5. The notion ‘necessary in a democratic society’, as such, is not only fundamental in the supervision of the duty of public authorities not to damage or interfere in the exercise of the right to freedom of expression and information, but also implies the obligation to State Parties to ensure plurality and to correct inequalities.

Several resolutions and recommendations adopted by the Parliamentary Assembly and by the Committee of Ministers as a matter of fact do emphasise the importance of the active implementation of Article 10 ECHR for the proper functioning of free and autonomous media and for the availability of a plurality of information sources. The resolutions of the 4th European Ministerial Conference on Mass Media Policy (Prague 1994, "The Media in a Democratic Society") in this perspective clearly reflect the influence of Article 10 ECHR as a basis for policy-making. While the first resolution underlines the vital function of public service broadcasting as an essential factor of pluralistic communication accessible for everyone and works out a policy framework for public service broadcasting, the second resolution enumerates the basic principles on journalistic freedoms and human rights. Agreement was reached on the following basic principles:

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 journalism 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;
   - allow both individuals and groups to express opinions, thus contributing to keeping public and private powers, as well as society in general, informed of their opinions;
   - submit the exercise of the various types of powers to continuous and critical examination.

2. The practice of journalism in the different electronic and print media is rooted in particular in the fundamental right to freedom of expression guaranteed by Article 10 of the European Convention on Human Rights, as interpreted through the case-law of the Convention’s organs.

3. The following enables journalism to contribute to the maintenance and development of genuine democracy:
   - unrestricted access to the journalistic profession;
   - genuine editorial independence vis-à-vis political power and pressures exerted by private interest groups or by public authorities;
   - access to information held by public authorities, granted on an equitable and impartial basis, in the pursuit of an open information policy;
   - the protection of the confidentiality of the sources used by journalists.

The resolution also invites the member states to encourage "high systems of professional training for journalists; dialogue between journalists, editors, publishers, directors and media owners in the different electronic and print media and the authorities responsible for media policy at the governmental and intergovernmental levels; the creation or maintenance of conditions which protect journalists (national or foreign) engaged in dangerous missions or involved in dangerous situations, including by means of bilateral or multilateral agreements; transparency in regard to the ownership structures of the various media enterprises and the relationships with third parties who have influence on the editorial independence of the media."1

Article 10 of the Convention in other words is a guarantee against interference by public authorities in the field of freedom of expression and information, while at the same time this article supports and even requires a positive action approach to achieve pluralism in the media or to limit the effects of market pressure or monopolistic tendencies in the media sector. State action and regulations in order to create the conditions needed to ensure and stimulate freedom of public speech and of the press should, however, stay within the framework of Article 10, paragraph 2.

We shall now take a closer look at Article 10 of the Convention.

3. Europe's First Amendment: Article 10 of the European Convention on Human Rights

3.1 Article 10, paragraph 1: the principle

The relevance of Article 10 for journalists and the media

Article 10 of the European Convention guarantees freedom of expression and information to everyone. Individuals, non-governmental organisations or groups of individuals can invoke the protection of Article 10 of the Convention. On several occasions the Court has held that Article 10 is applicable to individuals as well as to private or commercial mass media.

The case-law of the European Court of Human Rights (ECHR) clearly recognises the importance of the application of Article 10 towards journalism and the media. According to the Court's case-law, the press is considered to have an important role as a purveyor of information and as a "public watchdog". Journalists are considered to contribute in an important way to public debate which legitimates a high standard of protection of their freedom of expression and information. In the Lingens case for example, the Court expressed the opinion that the penalty imposed on a journalist due to the criticism he published and his critical attack on an important politician reveals the danger of a kind of censure which would be likely to discourage the journalist from publishing criticism of that kind in the future. According to the Court, in the context of public debate, such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community (ECHR, 8 July 1986, Lingens). This was one of the considerations which led to the conclusion that the conviction of a journalist was a violation of Article 10 of the Convention.

* The Lingens case (ECHR, 8 July 1986)

In 1975, the applicant journalist was fined for criminal defamation of Bruno Kreisky, the Chancellor of Austria at that time. Lingens had published two articles in the Vienna magazine Pfalz in which he had criticised Kreisky for having protected former members of the SS for political reasons and for his accommodating attitude towards former Nazis in Austrian politics. Lingens was convicted because he had used certain very negative expressions apropos Mr. Kreisky, such as "basest opportunism", "immoral" and "undignified". These articles were published in the context of a post-election political controversy. According to the European Court however, Lingens' conviction was a breach of Article 10 of the Convention.

The Court reiterated the crucial importance of freedom of political debate and press freedom in a democratic society:

"Whilst the press must not overstep the bounds set, inter alia, for the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas 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."

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

In the Court's view, the facts on which Lingens founded his negative value judgments vis-à-vis Kreisky were undisputed, as was also the journalist's good faith. According to the Court, the requirement of the Austrian Criminal Code that the journalist had to prove the truth of his statements was impossible to fulfill and infringed the freedom of opinion itself, which is a fundamental part of the right secured by Article 10. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof.

Facts and value judgments

Article 10 of the Convention gives protection to ideas as well as to all kinds of information. Not only opinions, philosophical ideas or political speech are protected by Article 10, but also facts and news or even factual data. In the Court's view, a careful distinction needs to be made between facts and value judgments. As was mentioned in the Lingens judgment, the existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof, which gives these opinions and value judgments an even larger scope of protection within the framework of Article 10. In the Thorgeirsson judgment the Court decided that in so far as the applicant was required to establish the truth of his statements, he was faced with an unreasonable, if not impossible task (ECHR, 25 June 1992, Thorgeirsson). The Court was of the opinion that the applicant was essentially reporting what was being said by others about police brutality. The allegations of police brutality by some members of the Reykjavik police force were so similar and numerous that they could hardly be treated as mere lies.

* The Thorgeirsson case (ECHR, 25 June 1992)

Thorgeir Thorgeirsson is the author of two articles published in the Reykjavik daily newspaper Morgunbladid. In these articles Thorgeirsson commented on alleged police brutality by the metropolitan police. He was convicted for defamation.

According to the European Court of Human Rights, this conviction and sentence for defamation was a violation of Article 10 of the Convention.

The Court once more referred to the "pre-eminent role of the press in a state governed by the rule of law" and to the vital role of the press as a "public watchdog". The Court emphasised that Article 10 gives protection to freedom of expression in the context of political discussion, as well as in discussion of
other matters of public concern. The Court was of the opinion that the critical articles published by the applicant were not aimed at damaging the reputation of the Reykjavik police: it was Thorgeirson's intention to urge the Minister of Justice to set up an independent and impartial body to investigate complaints of police brutality. The Court admitted that the articles were "framed in particularly strong terms", but regarding their purpose and intention, the Court was of the opinion that the language used could not be estimated as excessive. Finally, the Court considered that the conviction and sentence were capable of discouraging open discussion of matters of public concern.

The freedom of public debate

Information and ideas are especially given a high level of protection when they are related to political debate. Public speech is accorded a high degree of protection. It has been emphasised several times by the Court that freedom of expression constitutes one of the essential foundations of a democratic society, in particular freedom of political and public debate.

* The Oberschlick case (ECHR, 23 May 1991)

The applicant is an Austrian journalist, residing in Vienna. In the periodical Forum he published the full text of a criminal complaint which he and other persons had laid against an Austrian politician, Mr Graber-Meyer. In an election campaign, this politician had made certain discriminatory or even racist statements concerning migrant workers and family allowances. Oberschlick expressed the opinion that the statements of Graber-Meyer corresponded to the philosophy and the aims of National Socialism. The politician thereupon instituted a private prosecution for defamation. Oberschlick was convicted and fined and the seizure of the relevant issue of Forum was ordered.

According to the European Court, the task of the media is to impart information and ideas on political issues and on other matters of general interest. It is underlined that the freedom of public debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The Court notes that a politician must display a greater degree of tolerance with regard to criticism, especially when he himself makes public statements that are susceptible of criticism: "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 interest of open discussion of political issues." Court is of the opinion that "the insertion of the text of the said information in Forum contributed to a public debate on a political question of general importance. In particular, the issue of different treatment of nationals and foreigners in the social field has given rise to considerable discussion not only in Austria but also in other member states of the Council of Europe. Mr Oberschlick's criticism (...) sought to draw the public's attention in a provocative manner to a politician which was likely to shock the people. A politician who expresses himself in such terms exposes himself to a strong reaction on the part of journalists and the public."

(See also ECHR, 1 July 1997, Oberschlick n°. 2.)

Reporting justice

The reporting on the administration of justice is also given a high level of Article 10 protection. On several occasions the Court stated that the press plays a pre-eminent role in a state governed by the rule of law and that it is incumbent on it to impart — in a way consistent with its duties and responsibilities — information and ideas on political questions and on other matters of public interest. According to the Court, "this undoubtedly includes 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 aims which is the basis of the task entrusted to them." (ECHR, 25 April 1995, Prager and Oberschlick. See also ECHR, 24 February 1997, De Haes and Gijse's.)

The protection of critical and offensive speech

Article 10 envisages the protection of every kind of expression and information, but the effect of Article 10 of the Convention is especially important for the protection of critical and non-conformist speech. The freedom of expression and information as guaranteed by Article 10 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". According to the European Court "such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society". This means that Article 10 has to be interpreted from a perspective of a high level of protection of freedom of expression, even if this information is harmful to the state or some groups, enterprises or organisations and public figures, such as politicians and even judges.

* The De Haes and Gijse's case (ECHR, 24 February 1997)

In Belgium, two journalists of the weekly magazine Humo were convicted by a civil court for abuse of freedom of the press and for having exceeded the limits of acceptable criticism by insulting or defaming four members of the judiciary. In several articles, De Haes and Gijse's had accused three judges and an Advocate-General of marked bias and cowardice. The two journalists especially expressed the opinion that the judges had not been impartial in their handling of a case on the custody and sexual abuse of children (case of Mr. X).

The Court, however, is of the opinion that the conviction of the two journalists on account of their accusations of bias and lack of independence against the judges and the Advocate-General is a breach of Article 10 of the Convention.

The Court considers that "the articles contain a mass of detailed information about the circumstances in which the decisions and the custody of Mr. X's children were taken. That information was based on thorough research into the allegations against Mr. X and the opinions of several experts who were said to have advised the applicants to disclose them in the interests of the children (...)." Hence the journalists "cannot be accused of having failed their professional obligations by publishing what they had learned about the case. It is incumbent on the press to impart information and ideas of public interest."
Even the revelation by the journalists of the political sympathies of the judges in itself was not to be seen as defamatory. As the Court notes: “the facts which they believed they were in a position to allege concerning those persons’ political sympathies could be regarded as potentially lending credibility to the idea that those sympathies were not irrelevant to the decisions in question.”

The Court also decides: “Looked at against the background of the case, the accusations in question amount to an opinion, whose truth, by definition, is not susceptible of proof. Such an opinion may, however, be excessive, in particular in the absence of any factual basis, but it was not so in this instance (…) although Mr. De Haes and Mr. Gijls’s comments were without doubt severely critical, they nevertheless appear proportionate to the stir and indignation caused by the matters alleged in their articles. As to the journalists’ polemical and even aggressive tone, which the Court should not be taken to approve, it must be remembered that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed.” And the Court added this: “Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.”

The freedom of artistic expression and the freedom of commercial speech

The European Court’s case-law also gives support to the freedom of artistic expression, which, in the Court’s view, affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. The Court is of the opinion that those who create, interpret, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation for the state not to encroach unduly on their freedom of expression (ECHR, 24 February 1988, Müller).

Article 10 gives protection to commercial information as well. On several occasions it is recognised by the European Commission and the Court that “information of a commercial nature” falls within the scope of protection of Article 10 of the Convention, albeit that commercial speech is offered only a low level of Article 10 protection (ECHR, 20 November 1989, Markt Intern and K. Beermann; ECHR, 24 February 1994, Casado Coca).

Protection of the integral process of communication

One of the main characteristics of Article 10 consists in its general and far-reaching protection of the different aspects of the process of freedom of communication. This means that Article 10 gives protection to the freedom of expression, that is the freedom of speech, the freedom to impart information and ideas, to the freedom of distribution and transmission of information and ideas and also the right for the citizen to receive information (ECHR, 28 March 1990, Groppera Radio; ECHR, 22 May 1990, Autronic; ECHR, 9 February 1995, Vereniging Weekblad Bluf!).

In several judgments the Court expressed the view that the media not only have the task of imparting information and ideas on areas of public interest, but that “the public also has a right to receive them”. Article 10 not only guarantees the freedom to inform the public but also the right of the public to be properly informed. Not only the individual has the right to express his opinion, the public also has the right to be informed. Not only the source, the communicator is the subject of the right of freedom of expression and information, but also the citizen as a receiver of information, the individual as part of the public opinion, is the subject of this freedom (ECHR, 26 April 1979, Sunday Times).

Activities of newsgathering which have a direct effect on the freedom of expression are also protected under Article 10 of the Convention. In its recent judgments of the Court it is recognised that the journalist’s sources are protected by Article 10 as otherwise sources of information may dry up. In a judgment of 24 February 1997 the Court considered that “the journalists’ concern not to risk compromising their sources of information by lodging (before the tribunal or the court) the documents in question themselves is legitimate.” The argument of the importance for journalists to keep their sources secret and its protection by Article 10 of the Convention was based on the Court’s judgment in the Goodwin case.

* The Goodwin case (ECHR, 27 March, 1996)

In 1990 William Goodwin, a trainee-journalist working for The Engineer (London, UK) was found guilty by the House of Lords of contempt of court because he refused to disclose the identity of a person who previously supplied him with financial information derived from a confidential corporate plan of a private company. The disclosure order was estimated to be in conformity with Section 10 of the Contempt of Court Act of 1981, as the disclosure was held to be necessary in the interest of justice.

The European Court, however, is of the opinion that the impugned disclosure order is in breach of Article 10 of the Convention. The Court firmly underlines the principle that “protection of journalistic sources is one of the basic conditions for press freedom” and that “without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest”. The Court emphasises that without protection of a journalist’s sources “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”. The Court considers that a disclosure order cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest. As the Court pointed out: “In sum, limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court”. The European Court in casu is of the opinion that the interests of the private company in eliminating, by proceedings against the source, the (residual) threat of damage through dissemination of the confidential information, are not sufficient to outweigh the vital public interest in the protection of the applicant journalist’s source.

Freedom of expression and information is guaranteed by Article 10 “regardless of frontiers”. Reception or retransmission of radio or television programmes from non-domestic broadcasting organisations comes within the right laid down in Article 10, paragraph 1 (ECHR, 28 March 1990, Groppera Radio and ECHR, 22 May 1990, Autronic).

The application of Article 10 in the field of audiovisual media

Paragraph 1 of Article 10 also contains a specific clause with regard to the licensing of broadcasting, television or cinema enterprises. Article 10 thus allows the
affords important protection against undemocratic interferences by public authorities in the field of freedom of expression and information.

Formalities, conditions, restrictions or penalties with regard to the exercise of the freedom of expression and information are only legitimate in so far as they are compatible with the criteria set forth in paragraph 2 of Article 10. The second paragraph of Article 10 enumerates the exceptions allowed on the freedom of communication. With regard to the evaluation of these restrictions, according to the European case-law “the Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.” So the freedom is the fundamental principle, restrictions must be considered as exceptional. The necessity of restricting the fundamental right to freedom of expression and information must be "convincingly established".

The triple test

According to Article 10, paragraph 2, three conditions must be cumulatively fulfilled. If one of these conditions is neglected, the restricting condition, rule or sanction with regard to the freedom of communication must be regarded as an infringement of Article 10 of the Convention.

Prescribed by law

Firstly, restrictions must be "prescribed by law", which means, according to the European Court's case-law, that any restricting rule must meet the criteria of precision and accessibility. The Sunday Times judgment of 1979 makes up the basis for the interpretation of this criterion. Firstly, the law must be adequately accessible: the citizen must be able to have an adequate indication of the legal rules applicable to a given case. Secondly, any restricting norm must be formulated with sufficient precision so that the citizen is able, if need be with appropriate advice, to foresee the consequences which a given action may entail to a degree that is reasonable in the circumstances. It is not necessary that the restricting rule is a formal law, directly emanating from Parliament. Not only written statutes, but also rules of common or other customary law may provide a sufficient legal basis. Additionally codes of professional ethics, which find their basis in an act of a parliamentary delegation, the application of which is exercised under the control of the state, are to be regarded as "law" within the meaning of Article 10, paragraph 2 of the Convention.

Of course the European Court is aware of the fact that laws are framed in a manner that is not absolutely precise and that the interpretation and application of the constantly changing legislation in the mass media field are inevitably questions of practice. In so far as there is a clear and consistent case-law on the matter, this case-law is seen as enabling journalists, publishers, media companies, commercial operators and their advisers to regulate their conduct in the relevant sphere. The mere fact that a legislative provision may give rise to problems of interpretation does not mean that it is so vague and imprecise as to lack the quality of law. However, if the legal basis shows deficiency with respect to the required clarity and precision because no criteria are indicated for the application of the law, this restriction will not achieve the status of "law" within the meaning of Article 10. If the restrictions on the freedom of expression and information do not offer the minimum degree of protection against arbitrariness required by the rule of law, such kind of restriction

member states to control the way in which broadcasting is organised in their territories – particularly where the technical aspects are concerned – by means of a licensing system. A licensing system itself must be in accordance however with paragraph 2 of Article 10 and must respect the requirements of pluralism, tolerance and broadmindedness which are essential to democratic society (ECHR, 28 March 1980, Gröppel Radio and ECHR, 24 November 1993 Informationsverein Lentia; see also ECHR, 9 June 1997, Telesystem Tirol Kabeltelevisiun).

No discrimination, no anti-democratic application

Finally it is to be underlined that under the European Convention the enjoyment of the freedom of expression and information is secured without discrimination on any grounds 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 (Article 13 of the Convention).

Special attention also is to be drawn to Article 17 of the Convention, according to which "nothing in this Convention may be interpreted as implying, for any state, group or person, any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." The general purpose of Article 17 is to prevent totalitarian or anti-democratic groups from exploiting, in their own interests, the principles enunciated by the Convention. Groups or persons who are responsible for the publication and distribution of articles, information, books or leaflets inciting racial discrimination and whose policy clearly contains elements of racial discrimination cannot find any support in Article 10 ECHR. In such circumstances these persons or groups are essentially seeking to use Article 10 to provide a basis under the Convention for a right to engage in those activities which are contrary to the text and spirit of the Convention and the right of which, if granted, would contribute to the destruction of the rights and freedoms of the European Convention. On several occasions the European Commission has decided that the freedom of expression enshrined in Article 10 of the Convention may not be invoked in a sense contrary to Article 17 (e.g. incitement to racism, neo-nazi propaganda, negationism). In these cases the Commission on this ground excluded the applicants from protection of Article 10.

3.2 Article 10, paragraph 2: legitimate grounds for restrictions on the freedom of expression and information

Article 10, paragraph 2 stipulates that since the exercise of the freedom of expression and information carries with it duties and responsibilities ("the social responsibility of the media"), it may be subject to some kind of interference by public authorities.

As a matter of fact the principle of non-interference by public authorities as formulated in paragraph 1 of Article 10 is not an absolute one. Referring to the duties and responsibilities in relation to the exercise of freedom of expression, Article 10, paragraph 2 enumerates some possible ways of interference by public authorities in order to restrict freedom of expression and information. Regulating and restricting the information flow by public authorities is possible, but is certainly not unlimited. Any interference, any regulation restricting freedom of information, has to be in accordance with paragraph 2 of Article 10. This second paragraph of Article 10
The application of the necessity test

The criterion of “necessity” cannot be applied in absolute terms but calls for the assessment of various factors. These include the nature of the restriction in question, the degree of interference, the nature of the type of opinions or information involved, the societal or political context of the case, the persons involved, the type of medium involved, the public involved. The argument for the necessity of a restriction or sanction must be a pertinent one. Most of these elements are taken into consideration in the Court’s judgment in, for example, the Jersild case.

* The Jersild case (ECtHR, 23 September 1994)

The Jersild judgment concerns the case of a Danish journalist who was sentenced to a fine for having aided and abetted the dissemination of racist remarks made by extremist youths on a television programme he produced. As a starting point, the Court emphasises its particular consciousness of the vital importance of combating racial discrimination in all its forms and manifestations. The European Court also underlines the importance of the role of the press as well as the importance of the audiovisual media in a democratic society. The Court considers that “news reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role as public watchdog.” At the same time the Court noticed, that in considering the duties and responsibilities of 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 audiovisual media have means of conveying through images meanings which the printed media are not able to impart.”

The Court is of the opinion that the punishment of a journalist for assisting in the dissemination of racist statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. A significant feature of the case is that the applicant did not make the objectionable statements himself, but that he assisted in their dissemination in his capacity as a television journalist responsible for a news programme. Furthermore, the item was broadcast as part of a serious Danish news programme and was intended for a well-informed audience. The Court also underlines that the methods of objective and balanced reporting may vary considerably and that 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.” The Court finally recalls that Article 10 “protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.” After a thorough examination of the content of the programme the Court comes to the opinion that the purpose of the applicant television journalist in compiling the broadcast in question was not racist.


Taking into account and balancing all these elements of the case, the Court reaches the conclusion that the conviction of the journalist by the Danish courts is to be considered as a violation of Article 10 ECHR.

The European Court can also take into consideration the effectiveness of a certain restriction. When, for example, a litigious injunction aims at restricting information already available elsewhere, the Court can conclude that such interference is ineffective, and that this takes away the necessity of such a measure (ECHR, 22 May 1990, Weber; ECHR, 26 November 1991, Observer and Guardian; ECHR, 26 November 1991, Sunday Times n°. 2 and ECHR, 9 February 1995, Blufi).

* The cases of The Observer and Guardian and Sunday Times n°. 2 (ECHR, 26 November 1991).

The cases concerned the injunctions restraining British newspapers from publishing, pending trial in actions for permanent injunctions, extracts from the book “Spycatcher” of Peter Wright, a retired officer of MI5 (Security Services). The book revealed illegal activities by MI5. The injunctions remained in force even after the issue of the book in the United States. The European Court underlined that from the moment the information was published in the book, the information was no longer confidential. As a matter of fact since its publication in the United States, the book also was available in the United Kingdom and the government made no attempt to impose a ban on the importation of the book by Peter Wright. So the injunctions became ineffective and hence the interference by public authorities was therefore considered as not necessary in a democratic society.

As to the proportionality, the case as a whole has to be taken in consideration in order to determine in particular whether a sanction was proportionate to the legitimate aim pursued, having regard to the special importance of freedom of expression and information in a democratic society. In evaluating the proportionality, the Court takes into consideration the degree of interference in the applicant’s right with regard to the effect a restriction has on the exercise of his/her freedom of expression. If a restriction has only a short application, or if sufficient alternative ways exist to participate in free public debate or to impart or receive the relevant information, the Commission and the Court may take this into consideration. It must be underlined that Article 10 of the Convention does not prohibit prior restraint on the freedom of expression as such. This is shown not only by the words “conditions”, “restrictions”, “prevent”, “prevention” and “preventing” which appear in this provision, but also in the Court’s case-law. The Court, however, on several occasions explicitly considered that the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest (ECHR, 26 November 1991, Observer and Guardian and Sunday Times n°. 2).

A comparative element can also be taken into consideration. If the relevant legislation or litigious interference is in conformity with the situation in the member states of the Council of Europe, this can weigh heavily in determining its democratic necessity, as the main purpose of the Convention is to lay down certain international standards to be observed by the contracting states in their relations with persons under their jurisdiction. This does not mean, however, that absolute uniformity is required. Indeed it is recognised by the Court that the member states remain free to choose the measures which they consider appropriate. The absence of a certain kind of restriction in (all) other member states can be an indication for a lack of justification of the litigious state interference in the freedom of expression and information.

* The Informationsveren Lentia case (ECHR, 24 November 1993)

In this case the European Court decided on the unlawfulness of the Austrian Broadcasting monopoly from the scope of Article 10 of the Convention. The first applicant association, Informationsveren Lentia, was refused a request by the Austrian authorities to obtain an operating licence in order to establish an internal cable television system under the Austrian telecommunications law. The other applicants were refused their requests to allocate a frequency to establish a private radio station. The denials of the request were based on the fact that the right to set up a radio or television station was restricted to the Austrian Broadcasting Corporation.

The Court recognises that the states are permitted to organise a licensing system of broadcasting in their territories. In principle, even a monopoly system can be permitted under the last sentence of the first paragraph of Article 10. It remains, however, to be determined whether such a system also satisfies the relevant conditions of the second paragraph of Article 10. In particular it must be cleared up whether such a system is necessary in a democratic society. According to the Court, the far-reaching character of the restrictions on the freedom of expression due to a broadcasting monopoly can only be justified if they correspond to a pressing need. As justifications for a monopoly can no longer be found in considerations relating to the number of frequencies and channels available and referring to the fact that foreign television programmes can lawfully be retransmitted by the Austrian cable networks, the denial of a licence to establish a private local cable television is not necessary in a democratic society. The ultimate argument of the Austrian Government, to justify the Broadcasting monopoly on economic grounds in order to avoid private audiovisual monopolies, is also rejected by the Court. According to the Court the situation in many European states of considerable size to Austria clearly demonstrates that a coexistence of private and public broadcasting is possible and that measures can be taken to prevent the development of private monopolies. Hence the Court comes to the conclusion that the broadcasting monopoly in Austria as it existed at that time was not in accordance with Article 10 paragraph 2 of the European Convention. Such a restriction on the freedom of audiovisual expression is disproportionate to the aim pursued and accordingly is not “necessary in a democratic society”.

This judgment of the European Court also gives support to the approach that the contracting states are under a positive obligation, based on Article 10 of the Convention, to take measures to ensure pluralism, especially within the audiovisual media.

The evaluation of the necessity of a kind of interference by public authorities can vary according to the legitimate aim involved. In other words, the test of necessity by the European Court is not identical for each of the aims listed in Article 10 paragraph 2.
In its case-law the Court has consistently held that the contracting states have a
certain margin of discretion in assessing the existence and extent of the necessity
of an interference, but this margin is subject to a European supervision as regards
both the legislation and the decisions applying it. As just indicated above, the
supervision by the European court may vary according to the case and the legitimate
aim involved. There is, for example, a lower degree of supervision with regard
to the interpretation of “morals”; the national authorities are considered to be, in
principle, in a better position than the international judge to give an opinion on the
exact content of the protection of morals, which can vary strongly from state to
state. This means that restrictions on the freedom of information in order to protect
“morals” in certain member states will be easier to legitimate from the perspective
of Article 10 of the Convention (ECHR, 7 December 1976, Handyside; ECHR, 24

* The Handyside case (ECHR, 7 December 1976)

In the case of Handyside versus United Kingdom, the European Court found
that the national authorities could regard it as justified for the protection of
morals to convict the publisher of a book entitled “The Little Red School-
book”. The book was aimed at children and advocated inter alia a liberal sexual
attitude. The Court stated that “despite the variety and the constant evolution in
the United Kingdom of views on ethics and education, 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.” The deci-
dion by the British judicial authorities additionally to seize, forfeit and destroy
copies of the book was also not considered a breach of Article 10 of the Conven-
tion.

Some case-law gives a wide margin of discretion to governments and to national
public authorities with regard to sanctions and restrictions imposed on the freedom
of communication on grounds of national security and public safety or for the
prevention of disorder or crime. Recent case-law of the Court however demonstrates
that restrictions or sanctions on these grounds also need a pertinent motivation as
to the necessity-test. In the Observer/Guardian and Sunday Times case of 1991, in
the Vereinigung Demokratischer Soldaten Österreichs case of 1994 and in the Bluff
judgment of 9 February 1995 the interferences by public authorities grounded on
“national security” and on the prevention of disorder were all considered as a
breach of Article 10 of the Convention.

* The Bluff case (ECHR, 9 February 1995)

In the Bluff case the Court had to decide whether the seizure and subsequent
withdrawal from circulation of a magazine containing a survey that was classified
as “confidential” was or was not to be held as an infringement of Article
10 ECHR. The question was whether the interference with the applicant’s
rights, pursuant to the legitimate aim of protection of national security, was
necessary in a democratic society. The main argument developed in the
Court’s judgment of 9 February 1995 refers to the fact that the confidential
document represented only a low degree of secrecy and that the seizure and
withdrawal of the magazine were not effective measures. As a matter of fact,
a large number of copies of the survey were widely distributed by other chan-
nels and the content of the report was made widely known and was com-
mented on by the media. In this connection, the Court points out that it has
already held that it was unnecessary to prevent the disclosure of certain infor-
mation seeing that it had already been made public or had ceased to be con-
fidential. Hence, the Court comes to the conclusion that the measure was not
necessary in a democratic society and that there has been a breach of Article
10 by the Netherlands authorities.

The special importance of Article 10 for journalists and the media

The recent case-law of the European Court reveals the actual importance of Article
10 of the European Convention as a guarantee for freedom of expression and
information, especially with regard to journalistic freedom and media content. As
the Court again strongly emphasised in its judgment of 24 February 1997: the
press plays an essential role in a democratic society and it is even its duty “to
impair – in a manner consistent with its obligations and responsibilities – infor-
mation and ideas on all matters of public interest”. That is the basic perspective from
which the necessity in a democratic society of any interference by public authorities
is to be considered. In the same judgment the Court reiterated that the freedom of
expression is also applicable to information or ideas “that offend, shock or disturb
the State or any section of the community”. In its judgment of 1 July 1997 the
Court once more expressed the opinion that it is the task of the press “to impart
information and ideas on political issues and on other matters of general interest”.
Restrictions on the freedom of journalistic reporting “have to weighed against the
interests of open discussion of political issues, since exceptions to freedom of
expression must be interpreted narrowly” (ECtHR, 1 July 1997, Oberschlick nr. 2).

It is obviously clear that Article 10 of the Convention is a cornerstone in Europe in
favour of journalistic freedom, media pluralism and democracy. Never before in the
history of Europe has such a high level of protection of freedom of public speech
and of the press been reached. It is to be hoped that this high level of freedom of
expression is and will remain a functional guarantee for genuine democracy and
respect for human rights.
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