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Freedom of expression

A guide to the implementation of Article 10 of the European Convention on Human Rights

Monica Macovei

Human rights handbooks, No. 2

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2nd edition

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Directorate General of Human Rights
Council of Europe
F-67075 Strasbourg Cedex

1st impression, November 2001
2nd impression (with corrections), February 2003
2nd edition, January 2004

Printed in Germany

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Introduction

The European Convention on Human Rights is the most important form of expression of the attachment of the member states of the Council of Europe to the values of democracy, of peace and justice, and, through them, to the respect of the fundamental rights and freedoms of the individuals living in these societies.[1]

The European Convention on Human Rights ("the Convention") was signed on 4 November 1950 in Rome. Over the last fifty years the Convention has progressed both by the interpretation given to its texts by the European Court of Human Rights and the European Commission of Human Rights[2] and by the work of the Council of Europe. The Council has adopted additional protocols that have broadened the scope of the Convention, resolutions and recommendations that have developed and proposed to the member states standards of behaviour, and imposed sanctions on the states failing to comply with the provisions of the Convention.

Almost all the States Party to the European Convention on Human Rights have integrated the Convention into their national legislation. The Convention is thus part of the internal legal system and is binding on the domestic courts and all public authorities. It further follows that all individuals in the states concerned derive rights and duties from the Convention, so that in the national procedure they may directly invoke its text and case-law, which must be applied by the national courts. Moreover, the national authorities, including the courts, must give priority to the Convention over any national law conflicting with the Convention and its case-law.

The text of the Convention may not be read outside its case-law. The Convention functions under the common law system. The judgments of the European Court of Human Rights ("the Court") explain and interpret the text. They are binding precedents whose legal status is that of mandatory legal norms. Therefore, once the Convention is ratified, the national authorities of all signatory States, including those that practise a civil (continental) law system must consider the Court's judgments as binding law. For this reason this handbook refers extensively to the Court's jurisprudence. In this respect, one must understand that nowadays even the traditionally civil legal systems practise a mixed civil and common law system where the jurisprudence is given equal value to that of the laws enacted by the Parliament.

The interpretation of the Convention's text is dynamic and evolutive, making the Convention a living

1. Introduction to *European Convention on Human Rights – Collected texts*, Council of Europe, 1994.
2. In accordance with Protocol No.11, the European Commission and the European Court on Human Rights joined together in a single body, the European Court of Human Rights.

instrument which must be interpreted in the light of the present day conditions. Accordingly, the Court is (and must be) influenced by the developments and commonly accepted standards in the member states of the Council of Europe.

The overall scheme of the Convention is that the initial and primary responsibility for the protection of the rights set forth in it lies with the Contracting States. The Court is there to monitor states' action, exercising the power of review. The domestic margin of appreciation thus goes hand in hand with the European supervision. The doctrine of the margin of appreciation is applied differently, and the degree of discretion allowed to the states varies according to the context. A state is allowed a considerable discretion in cases of public emergency arising under Article 15 or where there is little common ground between the contracting parties, while the discretion is reduced almost to vanishing point in certain areas, such as the protection of freedom of expression.

This handbook is designed to assist judges at all levels in ensuring that all cases involving freedom of expression are handled in conformity with states' obligations under Article 10 of the Convention as developed by the Court in Strasbourg.

General considerations on Article 10

In the context of effective political democracy and respect for human rights mentioned in the Preamble to the Convention, freedom of expression is not only important in its own right, but also it plays a central part in the protection of other rights under the Convention. Without a broad guarantee of the right to freedom of expression protected by independent and impartial courts, there is no free country, there is no democracy. This general proposition is undeniable.[3]

Freedom of expression is a right in itself as well as a component of other rights protected under the Convention, such as freedom of assembly. At the same time, freedom of expression can conflict with other rights protected by the Convention, such as the right to a fair trial, to respect for private life, to freedom of conscience and religion. When such conflict occurs, the Court strikes a balance in order to establish the pre-eminence of one right over the other. The balance of the conflicting interests, one of which is freedom of expression, takes into account the importance of the other. The Court has repeatedly stated that

> *Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual's self-fulfilment.*[4]

3. Jochen Abr. Frowein, "Freedom of expression under the European Convention on Human Rights", in Monitor/Inf (97) 3, Council of Europe.

And,

the press plays a pre-eminent role in a State governed by the rule of law.[5]

The democratic political process and the development of every human being are options for which the protection of freedom of expression is essential. As a matter of principle, the protection given by Article 10 extends to any expression notwithstanding its content, disseminated by any individual, group or type of media. The only content-based restriction applied by the Commission has dealt with the dissemination of ideas promoting racism and the Nazi ideology, and inciting to hatred and racial discrimination. The Commission relied on Article 17 of the Convention and held that freedom of expression may not be used in order to lead to the destruction of the rights and freedoms granted by the Convention.[6] Such decisions apply the theory of the paradox of tolerance: an absolute tolerance may lead to the tolerance of the ideas promoting intolerance, and the latter could then destroy the tolerance.

States are compelled to justify any interference in any kind of expression. In order to decide the extent to which a particular form of expression should be protected, the Court examines the type of expression (political, commercial, artistic, etc.), the means by which the expression is disseminated (personal, written media, television, etc.), and its audience (adults, children, the entire public, a particular group). Even the "truth" of the expression has a different significance according to these criteria.

In taking its decisions, the Court in Strasbourg has paid attention to national constitutional practices, including the constitutional practice of the United States, which grants a strong protection to freedom of expression. However, domestic decisions – even those with legal force – have a limited utility for an international body such as the Court, which applies and construes an international treaty. In some cases the Commission and the Court have referred to the International Covenant on Civil and Political Rights or other international documents protecting freedom of expression.

Article 10 of the Convention is structured in two paragraphs.

- The first paragraph defines the freedoms protected.
- The second stipulates the circumstances in which a state may legitimately interfere with the exercise of freedom of expression.

4. Lingens v. Austria, 1986; Sener v. Turkey, 2000; Thoma v. Luxembourg, 2001; Maronek v. Slovakia, 2001; Dichand and Others v. Austria, 2002, etc. A table of cases cited in this study appears on page 61.
5. Castells v. Spain, 1992; Prager and Oberschlick v. Austria, 1995.
6. Kühnen v. the Federal Republic of Germany, 1988; D.I. v. Germany, 1996.

Protection of freedom of expression – 1st paragraph

Article 10, paragraph 1

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

Paragraph 1 provides for three components of the right to freedom of expression:

- freedom to hold opinions;
- freedom to impart information and ideas; and
- freedom to receive information and ideas.

These freedoms must be exercised freely, without interference by public authorities[7] and regardless of frontiers.

Freedom to hold opinions

Freedom to hold opinions is a prior condition to the other freedoms guaranteed by Article 10, and it almost enjoys an absolute protection in the sense that the possible restrictions set forth in paragraph 2 are inapplicable. As stated by the Committee of Ministers, "any restrictions to this right will be inconsistent with the nature of a democratic society".[8]

States must not try to indoctrinate their citizens and should not be allowed to operate distinctions between individuals holding one opinion or another. Moreover, the promotion of one-sided information by the State may constitute a serious and unacceptable obstacle to the freedom to hold opinions.

Under the freedom to hold opinions, individuals are also protected against possible negative consequences in cases where particular opinions are attributed to them following previous public expressions.

The freedom to hold opinions includes the negative freedom of not being compelled to communicate one's own opinions.[9]

Freedom to impart information and ideas

Freedom to impart information and ideas is of the greatest importance for the political life and the democratic structure of a country. Meaningful free elections are not possible in the absence of this freedom. Moreover, a full

7. Except under the requirements of paragraph 2.
8. Report of the Committee of Ministers, in *Theory and Practice of the European Convention on Human Rights*, Van Dijk and Van Hoof, Kluwer, 1990, p. 413.
9. Vogt v. Germany, 1995.

exercise of the freedom to impart information and ideas allows for a free criticism of the government, which is the main indicator of a free and democratic government. As the Court stated as early as 1976:

> *The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising 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.*[10]

The freedom to criticise the government was explicitly upheld by the Court in 1986: it is incumbent on the press

> *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.*[11]

Obviously, the freedom to **impart** information and ideas is complementary to the freedom to **receive** information and ideas. This is true with respect to printed media as well as to broadcast media. Regarding the latter, the Court has held that states may not intervene between the transmitter and the receiver, as they have the right to get into direct contact with each other according to their will.[12]

Freedom to impart information and ideas on economic matters (known as *commercial speech*) is also guaranteed under Article 10. However, the Court decided that in economic matters domestic authorities enjoy a broader margin of appreciation.[13]

Artistic creation and performance as well as its distribution is seen by the Court as a major contribution to the exchange of ideas and opinions, a crucial component of a democratic society. Stating that artistic freedom and the free circulation of art is restricted only in undemocratic societies, the Commission argued:

> *Through his creative work, the artist expresses not only a personal vision of the world but also his view of the society in which he lives. To that extent art not only helps shape public opinion but is also an expression of it and can confront the public with the major issues of the day.*[14]

Distinction between facts and opinions

Since the freedom discussed refers to imparting both information and ideas, the distinction made by the Court becomes relevant at this early stage. Making a clear distinction between information (facts) and opinions (value judgments), the Court has stated that

> *the existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. … As regards value judgments this requirement is impossible of fulfilment and it*

10. Handyside v. the United Kingdom, 1976.
11. Lingens v. Austria, 1986; Sener v. Turkey, 2000; Thoma v. Luxembourg, 2001; Dichand and Others v. Austria, 2002, etc.
12. Groppera Radio AG and Others v. Switzerland, 1990; Casado Coca v. Spain, 1994.
13. Markt Intern Verlag GmbH and Klaus Beermann v. the Federal Republic of Germany, 1989.
14. Otto-Preminger Institut v. Austria, 1994.

infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention.[15]

While the opinions are viewpoints or personal assessments of an event or situation and are not susceptible of being proven true or false, the underlying facts on which the opinion is based may be capable of being proven true or false. Equally, in *Dalban*, the Court held:

> *It would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth.*[16]

Consequently, along with information or data that could be verified, opinions, critics or speculations that may not be subjected to the truth proof are also protected under Article 10. Moreover, value judgments, in particular those expressed in the political field, enjoy a special protection as a requirement of the pluralism of opinions, crucial for a democratic society.

The distinction between facts and opinions, and the prohibition of the truth proof with regard to the latter become very important in the domestic legal systems that still require the truth proof for the crime of "insult", which concerns the expression of ideas and opinions. Moreover, even with regards to facts, the Court has recognised the defence of good faith as leaving the media "a breathing space for error". For instance, in *Dalban*[17] the Court observed that

> *there is no proof that the description of events given in the articles was totally untrue and was designed to fuel a defamation campaign against* GS …

Basically, the good faith defence comes in exchange for the truth proof. Where a journalist or a publication has a legitimate purpose, the matter is of public concern, and reasonable efforts have been made to verify the facts, the press shall not be liable even if the respective facts prove untrue.

However, a sufficient factual basis must support value judgments. As the Court pointed out

> *even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive.*[18]

Freedom to receive information and ideas

The freedom to receive information includes the right to gather information and to seek information through all possible lawful sources. The freedom to receive information also covers international television broadcasts.[19]

15. Lingens v. Austria, 1986; Jerusalem v. Austria, 2001; Dichand and Others v. Austria, 2002.
16. Dalban v. Romania, 1999.
17. Ibidem.
18. Jerusalem v. Austria, 2001; Dichand and Others v. Austria, 2002.

While the freedom to receive information and opinions relates to the media in that it enables them to impart such information and ideas to the public, the Court also read in this freedom the right of the public to be adequately informed, in particular on matters of public interest.

Freedom of the press

Although Article 10 does not explicitly mention the freedom of the press, the Court has developed extensive case-law providing a body of principles and rules granting the press a special status in the enjoyment of the freedoms contained in Article 10. This is why we think that freedom of the press deserves additional comments under the scope of Article 10. Another argument for a special treatment of freedom of the press is given by national practices: to a large extent, the victims of the infringement of the right to freedom of expression by public authorities are journalists rather than other individuals.

The role of the press as political watchdog was first emphasised by the Court in the *Lingens* case.[20] In newspaper articles the journalist had criticised the then Austrian Federal Chancellor for a particular political move consisting of announcing a coalition with a party led by a person with a Nazi background. The journalist (Mr Lingens) had referred to the Chancellor's behaviour as "immoral", "undignified", demonstrating "the lowest opportunism".

Following a private prosecution brought by the Chancellor, the Austrian courts found these statements to be defamatory and imposed a fine on the journalist. While debating the question of guilt, the courts also found that the journalist could not prove the truth of his allegations.

With regard to the latter issue, the European Court found the national courts' approach to be wrong, as opinions (value judgments) cannot be demonstrated and are not susceptible of being proven.[21] Looking at the grounds of the journalist's conviction, the Court underlined the importance of freedom of the press in the political debate:

> … *These principles are of particular importance as far as the press is concerned. While 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* […] *In this connection, the Court cannot accept the opinion, expressed in the judgment of the Vienna Court of Appeal, to the effect that the task of the press was to impart information, the interpretation of which had to be left primarily to the reader* …

19. Autronic AG v. Switzerland, 1990.
20. Lingens v. Austria, 1986.
21. See below, page 12.

In the same judgment the Court argued that freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders and consequently, the freedom of political debate is at the very core of the concept of a democratic society. This is why the Court affords political debate by the press a very strong protection under Article 10.

Freedom of the press also enjoys a special status where other matters of public concern are at stake. In the T*horgeirson* case[22] the applicant (Mr Thorgeirson) had made allegations in the press of widespread police brutality in Iceland. He referred to police officers as "beasts in uniform" and "individuals reduced to a mental age of a newborn child as a result of strangle-holds that policemen and bouncers learn and use with brutal spontaneity" and described the police force defending itself as "bullying, forgery, unlawful actions, superstitions, rashness and ineptitude". At the domestic level, Mr Thorgeirson was prosecuted and fined for defaming unspecified members of the police. The European Court found that the applicant raised the issue of police brutality in his country and

> *… it is incumbent on the press to impart information and ideas on matters of public interest.*

The Court further stated that

> *there is no warrant in its case-law to distinguish … between political discussion and discussion of other matters of public concern.*

Finally, the Court characterised the conviction as

> *capable of discouraging open discussion of matters of public concern.*

In M*aronek* the Court viewed the Slovakian housing policy at a period when state-owned apartments were about to be denationalised as a matter of general interest, and afforded the applicant's freedom of expression a stronger protection.[23] Other examples can be found in many of the cases against Turkey, where the conflict in south-east Turkey and all the related issues, including the "separatist propaganda" or the question of federalisation, raised in writing or orally, have been matters of public interest.[24]

Undoubtedly, the Court affords the freedom of the press a strong protection where matters of public interest, other than political, are publicly debated.

Another important issue in the context of the freedom of the press is the publication of rumours and allegations which journalists are not able to prove. As mentioned above,[25] the Court has stated that value judgments must not be subject to any proof requirement. In the Thorgeirson case[26] the allegations against the police were collected from various sources; basically, the article had mentioned

22. Thorgeir Thorgeirson v. Iceland, 1992.
23. Maronek v. Slovakia, 2001.
24. Sürek and Özdemir v. Turkey, 1999; Sener v. Turkey, 2000; Özgür Gündem v. Turkey, 2000.
25. See above, page 11.
26. See above, page 12.

rumours coming from the public. While the respondent state argued that the applicant's articles lacked an objective and factual basis, since he could not prove the truth of the allegations, the Court found the truth requirement to be an unreasonable, even impossible task, and stated that the press would be able to publish almost nothing if it were required to publish only fully proven facts. Obviously, the Court's considerations have to be placed in the context of public debates on matters of public concern.

Dissemination in the media of statements made by other persons was considered by the Court. In *Jersild* and *Thoma*, the Court stated that

> *punishment of a journalist for assisting in the dissemination made by another person … would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly string reasons for doing so.*[27]

Further, in *Thoma*, where the government reproached the applicant journalist that he did not distance himself from the statements in the quotation, the Court held:

> A *general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation was not reconcilable with the press's role of providing information on current event, opinions and ideas.*

Journalistic sources are also protected under Article 10. The Court explained that the protection of the journalistic sources is one of the basic conditions of the press freedom. In the Goodwin case[28] the Court argued that

> *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.*

Freedom of radio and television broadcasting

According to the last sentence of paragraph 1, the right to receive and impart information and ideas "shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises." This provision was included at an advanced stage of the preparatory work on the Convention, being determined by technical reasons: the limited number of available frequencies and the fact that, at that time, most European states had a monopoly of broadcasting and television. However, the progress in broadcasting techniques has made these reasons disappear. In *Informationsverein Lentia*[29] the Court held that following

27. Jersild v. Denmark, 1994; Thoma v. Luxembourg, 2001.
28. Goodwin v. the United Kingdom, 1996.
29. Informationsverein Lentia and Others v. Austria, 1993.

the technical progress in the last decades, the justification of these restrictions cannot be made by reference to the number of available frequencies and channels.

Satellite transmissions and cable television have resulted in a virtually unlimited number of available frequencies. In this context, the State's right to license the media companies received a new sense and purpose, namely the guarantee of liberty and pluralism of information in order to fulfil public demand.[30]

The Court held that the power of the domestic authorities to regulate the licensing system may not be exercised for other than technical purposes and not in a way which interferes with freedom of expression contrary to the requirements of the second paragraph of Article 10. In the Groppera case[31] the Court held:

> *… the purpose of the third sentence of* Article 10 (1) *of the Convention is to make it clear that states are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of* Article 10 (2), *for that would lead to a result contrary to the object and purpose of* Article 10 *taken as a whole.*

In *Autronic* AG[32] the Court held that devices for receiving broadcasting information, such as satellite dishes, do not fall under the restriction provided for in the last sentence of the first paragraph. In *Tele 1 Privatfernsehgesellschaft* MBH, the Court found Austria in violation of Article 10 in view of the lack of any legal basis to granting licenses to set up and operate a television transmitter to any station other than the Austrian Broadcasting Corporation.[33]

The public monopolies within the audiovisual media were seen by the Court as contrary to Article 10, primarily because they cannot provide a plurality of sources of information. Such a monopoly is not necessary in a democratic society, and it could only be justified by pressing social needs. However, in modern societies, the multiplication of methods of broadcast communication and the growth of transfrontier television make it impossible to justify the existence of monopolies. On the contrary, the diversity of the public's requirement cannot be covered by only one broadcasting company.[34]

Commercial advertising by the audiovisual media is also protected by Article 10, even though the domestic authorities enjoy a wide margin of appreciation as regards the necessity of restraining it.[35] In principle, advertising

30. Observer and Guardian v. the United Kingdom, 1995; Informationsverein Lentia and Others v. Austria, 1993.
31. Groppera Radio AG and Others v. Switzerland, 1990.
32. Autronic AG v.Switzerland, 1990.
33. Tele 1 Privatfernsehgesellschaft MBH v. Austria, 2001
34. Informationaverein Lentia and Others v. Austria, 1993.
35. Markt Intern Verlag GmbH and Klaus Beermann v. the Federal Republic of Germany, 1989.

should be prepared with responsibility towards society, and the moral values forming the basis of any democracy should be given particular attention. Any advertising aimed at children should avoid information which could harm their interests, and should respect their physical, mental and moral development.

What is protected under paragraph 1? The Court's jurisprudence on specific issues

The "expression" protected under Article 10 is not limited to words, written or spoken, but it extends to pictures,[36] images[37] and actions intended to express an idea or to present information. In some circumstances dress might also fall under Article 10.[38]

Moreover, Article 10 protects not only the substance of the information and ideas but also the form in which they are expressed.[39] Therefore, printed documents,[40] radio broadcasts,[41] paintings,[42] films[43] or electronic information systems are also protected under this article. It follows that the means for the production and communication, transmission or distribution of information and ideas are covered by Article 10, and the Court must be aware of the rapid developments of such means in many areas.

Freedom of expression includes the negative freedom not to speak. The Commission invoked this type of right in K. *v.* A*ustria*, protecting the applicant against self-incrimination in connection with criminal proceedings.

It is characteristic for Article 10 to protect expression which carries a risk of damaging or actually damages the interests of others. Usually, the opinions shared by the majority or by large groups do not run the risk of interference by the states. This is why the protection afforded by Article 10 also covers information and opinions expressed by small groups or one individual even where such expression shocks the majority.

The tolerance of individual points of view is an important component of the democratic political system.

36. Müller and Others v. Switzerland, 1988.
37. Chorherr v. Austria, 1993.
38. Stevens v. the United Kingdom, 1986.
39. Oberschlick v. Austria, 1991; Thoma v. Luxembourg, 2001; Dichand and Others v. Austria, 2002; Nikula v. Finland, 2002.
40. Handyside v. the United Kingdom, 1976.
41. Groppera Radio AG and Others v. Switzerland, 1990.
42. Müller and Others v. Switzerland, 1988.
43. Otto-Preminger Institut v. Austria, 1994.

Denouncing the tyranny of the majority, John Stuart Mill stated:

> *if all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.*[44]

In this respect, the Court has stated that Article 10 protects not only

> *the information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broad-mindedness without which there is no democratic society.*[45]

Opinions expressed in strong or exaggerated language are also protected; the extent of protection depends on the context and the aim of the criticism. In matters of public controversy or public interest, during political debate, in electoral campaigns or where the criticism is levelled at Government, politicians or public authorities, strong words and harsh criticism may be expected and will be tolerated to a greater degree by the Court. In *Thorgeirson*,[46] for instance, the Court found that although the articles contained very strong terms – the police officers were described as "beasts in uniform", "individuals reduced to a mental age of a new-born child as a result of strangle-holds that policemen and bouncers learn and use with brutal spontaneity" and the references to the police force were "bullying, forgery, unlawful actions, superstitions, rashness and ineptitude" – the language could not be viewed as excessive, having in view the aim of urging reform of police. Equally, in the *Jersild* case,[47] the fact that an interview containing racist statements was carried in a serious news programme was significant since the programme was designed to inform a serious audience about events in the community or from abroad. In *Dalban*, where a journalist accused a politician of corruption and of mismanagement of state's assets, the Court held that

> *journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.*[48]

In *Arslan*, the applicant criticised the action of the Turkish authorities in the south-east of the country using a wording described by the Court as of an "undeniable virulence" which "confers a certain amount of vehemence to this criticism". The Court decided however that the applicant's conviction for criticising the government was disproportionate and not necessary in a democratic society.[49]

44. *On Liberty* (1859), Penguin Classics, 1985, p. 76.
45. Handyside v. the United Kingdom, 1976; Sunday Times v. the United Kingdom, 1979; Lingens v. Austria, 1986; Oberschlick v. Austria, 1991; Thorgeir Thorgeirson v. Iceland, 1992; Jersild v. Denmark, 1994; Goodwin v. the United Kingdom, 1996; De Haes and Gijsels v. Belgium, 1997; Dalban v. Romania, 1999; Arslan v. Turkey, 1999; Thoma v. Luxembourg, 2001; Jerusalem v. Austria, 2001; Maronek v. Slovakia, 2001; Dichand and Others v. Austria, 2002.
46. Thorgeir Thorgeirson v. Iceland, 1992.
47. Jersild v. Denmark, 1994.
48. Dalban v. Romania, 1999. Similarly in Prager and Oberschlick v. Austria, 1995; Dichand and Others v. Austria, 2002.
49. Arslan v. Turkey, 1999.

The use of violent terms is given more protection when it comes as a reply to provocation. In *Lopes Gomes da Silva*, the journalist criticised the political beliefs of Mr Resende, a candidate for the municipality, and called him "grotesque", "buffoonish" and "coarse". The criticism followed statements of Mr Resende where he had referred to a number of public figures in a very incisive manner, including by attacking their physical features (for instance, he called a former prime minister of France a "bald-headed Jew"). The Court held that the journalist's conviction violated Article 10, and found that

> *the opinions expressed by* Mr Resende *and reproduced alongside the impugned editorial are themselves worded incisively, provocatively and at the very least polemically. It is not unreasonable to conclude that the style of the applicant's article was influenced by that of* Mr Resende.[50]

In *Oberschlick* (No. 2) the journalist referred to Mr Haider (leader of the Austrian Freedom Party and Governor) as "an idiot" ("…he is not a Nazi … he is, however, an idiot"), following Haider's statement that in the second world war the German soldiers fought for peace and freedom. The Court found that Mr Haider's speech was itself provocative, and therefore the word "idiot" did not seem disproportionate to the indignation knowingly aroused by Mr Haider.[51]

Incitement to violence falls outside the protection conferred by Article 10 where an intentional and direct wording incites violence and where there is a real possibility that the violence may occur. In *Sürek* (No. 3), while describing the Kurds' national liberation struggle as a "war directed against the forces of the Republic of Turkey" the article asserted that "we want to wage a total liberation struggle". In the Court's view,

> *the impugned article associated itself with the* PKK *and expressed a call for the use of armed forces as a means to achieve the national independence of* Kurdistan.

The Court further noted that the article was published in the context of serious disturbances between the security forces and the members of the PKK involving heavy loss of life and the imposition of emergency rule in a large part of south-east Turkey. In such a context

> *the content of the article must be seen as capable of inciting to further violence in the region. Indeed the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor.*

Following this assessment, the Court found that the conviction of the applicant was not contrary to Article 10.[52] By contrast, in *Sürek* (No. 4), where the impugned articles described Turkey as "the real terrorist" and as "the enemy" the Court found that the

50. Lopes Gomes da Silva v. Portugal, 2000.
51. Oberschlick v. Austria (No. 2), 1997.
52. Sürek v. Turkey (No. 3), 1999.

hard criticism of the Turkish authorities … is more a reflection of the hardened attitude of one side to the conflict, rather than a call to violence. … On the whole, the content of the articles cannot be construed as being capable of inciting to further violence.

The Court also argued that the public has the right

to be informed of a different perspective on the situation in the south-east Turkey, irrespective of how unpalatable that perspective may be for them.[53]

The Court concluded that the conviction and sentencing of the applicant were contrary to Article 10. Equally, in *Karataş*, the Court found that

even though some of the passages from the poems seem very aggressive in tone and to call for the use of violence … the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation.[54]

Speech promoting Nazi ideology, denying the Holocaust and inciting to hatred and racial discrimination falls outside the protection of Article 10.

In *Kühnen* the applicant was leading an organisation which tried to bring back into the political scene the National Socialist Party, prohibited in Germany. He wrote and disseminated publications where he encouraged the fight for a socialist and independent Greater Germany, stating that his organisation was "against capitalism, communism, Zionism, estrangement by means of masses of foreign workers, destruction of the environment" and in favour of "German unity, social justice, racial pride, community of the people and camaraderie". In another publication, he stated "whoever serves this aim can act, whoever obstructs will be fought against and eventually eliminated".

Relying on Article 10, Mr Kühnen complained against his conviction by the German courts. The Commission declared the complaint inadmissible, referring to Article 17 of the Convention which prohibits any activity "aimed at the destruction of any of the rights and freedoms set forth herein". The Commission observed that freedom of expression may not be used for the destruction of the rights and freedoms set forth in the Convention. It considered that the applicant's proposals, which advocated national socialism aimed at impairing the basic order of freedom and democracy, ran counter to one of the basic values expressed in the Preamble to the Convention: the fundamental freedoms enshrined in the Convention "are best maintained … by an effective political democracy". In addition, the Commission found that the applicant's policy clearly contained elements of racial and religious discrimination. Consequently, the Commission decided that the applicant was seeking to use freedom of information set forth in Article 10 as a basis for activities which are contrary to the text and spirit of the Convention, and

53. Sürek v. Turkey (No. 4), 1999.
54. Karataş v. Turkey, 1999.

which, if admitted, would contribute to the destruction of the rights and freedoms set forth in the Convention.[55]

The denial of the Holocaust[56] as a subject of public discourse was also denied the protection of Article 10. In D.I. *v. Germany* the applicant, an historian, was fined for having made statements at a public meetings where he had denied the existence of the gas chambers in Auschwitz, stating that these gas chambers were fakes built up in the early post-war days and that the German tax-payers paid about 16 billion German marks for fakes. The Commission found the complaint inadmissible, noting that the applicant's statements were contrary to the principles of peace and justice expressed in the Preamble to the Convention, and that they have advocated racial and religious discrimination.[57]

The right to vote is not protected under Article 10. The right to vote is considered a component of States' duty to hold "free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."[58]

The Strasbourg institutions were not receptive to the idea of including the access to information under Article 10's protection. For instance, in *Leander*[59] the applicant sought confidential information from official files belonging to the government. He believed that he was denied a job on account of information in the files, and wanted to challenge that information. The Court decided that the applicant enjoyed no protection under Article 10.

While access to information was found to fall outside Article 10's protection, the Court decided that other provisions of the Convention may protect such a right in certain circumstances. In *Gaskin*[60] the Court found an Article 8 violation where the applicant was denied access to information concerning his private life, in particular the period when he had been in public child care. The Court argued its findings by the importance of such information to the private life of the applicant.

However, the Court stated that

> *this finding is reached without expressing any opinion on whether general right of access to personal data and information may be derived from Article 8 of the Convention.*

55. Kühnen v. the Federal Republic of Germany, 1988.
56. The Holocaust is defined as "the state-sponsored, systematic persecution and annihilation of European Jewry by Nazi Germany and its collaborators between 1933 and 1945. Jews were the primary victims – 6 million were murdered; Gypsies, the handicapped, and Poles were also targeted for destruction or decimation for racial, ethnic, or national reasons. Millions more, including homosexuals, Jehovah's Witnesses, Soviet prisoners of war, and political dissidents also suffered grievous oppression and death under Nazi tyranny." http://www.ushmm.org/education/foreducators/guidelines/.
57. D.I. v. Germany, 1996. Similar decisions in Honsik v. Austria, 1995 and Ochensberger v. Austria, 1994.
58. Article 3 of the Protocol to the Convention.
59. Leander v. Sweden, 1987.
60. Gaskin v. the United Kingdom, 1989.

Elsewhere, the Commission has said that states may not obstruct by positive action the access to information which is available and to the general sources of information.[61]

In addition, Resolution 428 (1970) of the Parliamentary Assembly of the Council of Europe reads that the right to the freedom of expression "includes the right to seek, receive, impart, make public or distribute information of public interest" and that the media has the duty to disseminate general and complete information on matters of public interest. In addition, public authorities must make accessible, in reasonable limits, information of public interest.

The system of restrictions with the exercise of the right to freedom of expression – 2nd paragraph

Article 10 paragraph 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 exercise of these freedoms … may be subject to …"

Any restriction, condition, limitation or any form of interference with freedom of expression may only be applied to a particular exercise of this freedom. The content of the right to freedom of expression may never be touched. In this respect, Article 17 reads that

> *nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*

Obviously, a limitation on the content of one right is similar to the destruction of the said right.

Equally, the national authorities are not required to interfere with the exercise of freedom of expression every time one of the grounds enumerated by paragraph 2 is at stake, as this would lead to a limitation of the content of this right. For instance, damaging one's reputation or honour must not be seen as criminal and/or requiring civil redress in all cases. Similarly, public expression putting at

61. Z. v. Austria, 1988.

risk the authority of the judiciary must not be punished each time such a criticism occurs. In other words, the public authorities have only the possibility and not the obligation to order and/or enforce a restrictive or punitive measure to the exercise of the right to freedom of expression. A different approach would lead to a hierarchy of rights and values or interests, placing freedom of expression at the bottom of the list after, for instance, the right to dignity and honour, morals or public order. Moreover, such a hierarchy would contravene all international treaties which provide for the equality of rights and do not allow permanent limitations on the exercise of one right, since this would be similar to denial of that right.

"The exercise of these freedoms, since it carries with it duties and responsibilities …"

The idea according to which the exercise of freedom of expression carries with it duties and responsibilities is unique in the Convention, and it cannot be found in any of the other provisions regulating rights and freedoms.

This text was not interpreted as a separate circumstance automatically limiting the freedom of expression of individuals belonging to certain professional categories that may carry with it "duties and responsibilities". The Court's judgments reflect various views on the "duties and responsibilities" of some civil servants when exercising their freedom of expression. In addition, the jurisprudence has developed from a rather conservative approach giving states stronger powers to a more liberal approach where states enjoy less discretion.

For instance, in *Engel and Others*[62] a ban on the publication and distribution by soldiers of a paper criticising certain senior officers was found by the Court as a justified interference with freedom of expression; however, the Court also held that

> *there was no question of depriving them of their freedom of expression but only of punishing the abusive exercise of that freedom on their part.*

In *Hadjianastassiou*[63] an officer was convicted for having disclosed information classified as secret. He disclosed information on a given weapon and corresponding technical knowledge capable of causing considerable damage to national security. The Court decided that the conviction was an interference with the officer's freedom of expression which was, however, justified under paragraph 2:

> *It is … necessary to take into account the special conditions attaching to military life and the specific "duties" and "responsibilities" incumbent on the members of the armed forces … The applicant, as an officer at the* KETA *in charge of an experimental missile programme, was bound by an obligation of discretion in relation to anything concerning the performance of his duties.*

62. Engel and Others v. the Netherlands, 1976.
63. Hadjianastassiou v. Greece, 1992.

Almost twenty years after the judgment in *Engel and Others*, in a similar case, the Court changed its view and issued an opposite ruling. In *Vereinigung Demokratischer Soldaten Österreichs und Gubi*[64] the authorities prohibited the distribution to servicemen of a private periodical critical of the military administration. The Austrian Government argued that the applicants' periodical threatened the country's system of defence and the effectiveness of the army. The Court did not agree to the government's submissions and held that most of the items in the periodical

> *… set out complaints, put forward proposals for reforms or encourage the readers to institute legal complaints of appeals proceedings. However, despite the often polemical tenor, it does not appear that they overstepped the bounds of what is permissible in the context of a mere discussion of ideas, which must be tolerated in the army of a democratic State just as it must be in the society that such an army serves.*

In *Rommelfanger*[65] the Commission said that states had the positive duty to ensure that the exercise of freedom of expression by a civil servant is not subject to restrictions which would affect the substance of this right. Even where the existence of a category of civil servants with special "duties and responsibilities" is accepted, the restrictions applied on their right to freedom of expression must be examined on the same criteria as the restriction applied to others' freedom of expression.

In the *Vogt* case[66] the Court held that the way a duty of discretion was imposed on a civil servant was in breach of Article 10. In 1987 Mrs Vogt was fired from the school where she had taught for about twelve years because she was an activist in the German Communist Party, and she refused to dissociate herself from that party. The duty of discretion was introduced after the experience of the Weimar Republic, and it had been justified by the need to prohibit public employees from taking part in political activities contrary to constitutional provisions. Mrs Vogt's superiors decided that she failed to comply with the duty owed by every civil servant to uphold the free democratic system within the meaning of the Constitution and sacked her. The Court held 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 …*

Further on, the Court stated that it understood the arguments recalling the history of Germany; however, taking into the absolute nature of the duty of discretion, its general applicability to all civil servants and the absence of a distinction among the private and professional domains, the German authorities had violated both freedom of expression and freedom of assembly.

64. Vereinigung Demokratischer Soldaten Österreichs und Gubi v. Austria, 1994.
65. Rommelfanger v. the Federal Republic of Germany, 1989.
66. Vogt v. Germany, 1995.

The "duties and responsibilities" of judges were considered by the Court in the *Wille* case,[67] where the applicant, a high-ranking judge, received a letter from the Prince of Liechtenstein criticising the applicant's statement during an academic lecture on a constitutional issue and announcing his intention not to appoint the applicant to a public post following that statement. At the beginning of its assessment, the Court noted that it

> *must bear in mind that, whenever the right to freedom of expression of persons in such a position is at issue, the "duties and responsibilities" referred to in* Article 10 § 2 *assume a 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 the judiciary are likely to be called in question.*

The Court further noted that although the constitutional issue raised by the applicant had political implications, this element alone should not prevent the applicant from discussing this matter. In finding a violation of Article 10, the Court observed that on a previous occasion the Liechtenstein Government had held a similar view to that of the applicant, and that the opinion expressed by the applicant was shared by a considerable number of people in the country and therefore was not an untenable proposition.

It follows that any national laws or other regulations imposing absolute and unlimited fidelity or confidentiality restrictions on particular categories of civil servants, such as those employed by the intelligence services, army, etc., or the members of the judiciary, would violate Article 10. Such restrictions may be adopted by the member states only where they do not have an overall character but are limited to particular categories of information whose secrecy must be examined periodically, to specific categories of civil servants or only to some individuals belonging to such categories, and are temporary. Where it is argued that the fidelity or confidentiality duty is justified by the interest of defending "national security", member states must define this latter concept in a strict and narrow way, avoiding the inclusion of areas which fall outside the real scope of national security. Equally, states must prove the existence of a real danger against the protected interest, such as national security, and must also take into account the interest of the public in being given certain information. If all these are ignored, such limitations on the freedom of expression have an absolute nature and are inconsistent with Article 10, paragraph 2.

Under the "duties and responsibilities" approach, the Court also argued that the fact that a person belongs to a particular category is a basis for limiting rather than increasing the public authorities' powers to restrict the exercise of that person's rights. Editors and journalists would fall into this category. In the case of the *Observer and Guardian*[68] the national courts issued an injunction prohibiting the publication of specific articles on the ground that

67. Wille v. Liechtenstein, 1999.

they would endanger national security. The Court referred to "the duty of the press to impart information and ideas on matters of public concern", adding that the right of the public to receive such information corresponds to the duty of the press to impart such information. Consequently, by having granted the right and the duty to impart information and ideas, the press gained a greater freedom, reducing the state's possibilities of limiting its interventions. Elsewhere, the Court has stated that by reason of the "duties and responsibilities" inherent in the exercise of freedom of expression, the protection of journalists under Article 10 is subject to the proviso that they

> *are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.*[69]

In *Sener* the Court stressed that the "duties and responsibilities" of media professionals

> *assume special significance in situations of conflict and tension.*[70]

Further, the Court held:

> *Particular caution is called for when consideration is being given to the publication of views which contain incitement to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence.*[71]

Nevertheless, the Court also stressed that

> *At the same time, where such views cannot be so categorised, 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 the criminal law to bear on the media.*[72]

In the instant case, the Court noted that the review published by the applicant – the owner and editor of a weekly review – contained a sharp criticism of the government's policy and of the action of their security forces with regard to the Kurds in south-east Turkey and that certain phrases seemed aggressive in tone. However, the Court found that the article did not glorify violence and did not incite to revenge or armed resistance, and therefore the criminal conviction of the applicant infringed Article 10. The applicant did not overstep the limits of his duties and responsibilities in conflict and tensions, but he offered the public a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for the public.

"Formalities, conditions, restrictions or penalties"

The range of possible interference (formalities, conditions, restrictions or penalties) with the exercise of the

68. Observer and Guardian v. the United Kingdom, 1991.
69. Fressoz and Roire v. France, 1999; Bergens Tidende and Others v. Norway, 2000.
70. Sener v. Turkey, 2000.
71. Ibidem.
72. Ibidem.

right to freedom of expression is very wide, and there are no pre-established limits. The Court examines and decides in each particular case whether an interference exists, looking at the restrictive impact over the exercise of the right to freedom of expression of the specific measure adopted by the national authorities. Such interference could be: criminal convictions[73] (with fine or imprisonment), obligations to pay civil damages,[74] prohibition of publication[75] or of publishing one's picture in the newspaper,[76] confiscation of publications or of any other means through which an opinion is being expressed or an information transmitted,[77] refusal to grant a broadcasting license,[78] prohibition on exercising the profession of journalist, the order of a court or other authority to reveal journalistic sources and/or the imposition of a penalty for not doing so,[79] the announcement by a head of state that a civil servant will not be appointed to a public post following a public statement by the civil servant,[80] etc.

Among the different forms of interference, censorship prior to publication is seen by the Court as the most dangerous as it stops the transmission of information and ideas to those who want to receive them. This is why measures undertaken prior to publication, such as the licensing of journalists, the examination of an article by an official before its publication or the prohibition of publication are subjected by the Court to a very strict control. Even if such limitations are temporary they can reduce consistently the value of the information. Confronted with prohibitions on publishing certain articles in a newspaper, the Court held:

> *Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publication, as such. … 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 all its value and interest.*

The prior authorisation of publication, typical for dictatorships, has never been accepted in the democratic societies, and it is in general incompatible with Article 10.

The refusal to register the title of a periodical is a distinct form of censorship prior to publication. As the Court stated, such a measure "is tantamount to a refusal to publish it." In *Gaweda* the applicant was refused by the domestic courts the right to register two publications on the

73. Barfod v. Denmark, 1989; Lingens v. Austria, 1986; Dalban v. Romania, 1999.
74. Müller and Others v. Switzerland, 1988.
75. Sunday Times (No. 2) v. the United Kingdom, 1991; Observer and Guardian v. the United Kingdom, 1991.
76. News Verlags GmbH & CoKG v. Austria, 2000.
77. Handyside v. the United Kingdom, 1976; Müller and Others v. Switzerland, 1988.
78. Autronic AG v. Switzerland, 1990.
79. Goodwin v. the United Kingdom, 1996.
80. Wille v. Liechtenstein, 1999.

ground that their titles "would be in conflict with reality". The Court found a violation of Article 10 on the basis that the law regulating the registration of periodicals was not sufficiently clear and foreseeable. In this context, the Court held:

> *the relevant law must provide a clear indication of the circumstances where such restraints are permissible, and, a fortiori, when the consequences of the restraint, as in the present case, are to block completely publication of a periodical. This is so because of the potential threat that such prior restraints, by their very nature, pose to the freedom of expression guaranteed by* Article 10.[81]

Among the variety of post-expression interference with the freedom of expression, criminal conviction and sentence would probably be the most dangerous for this freedom. In the case of *Castells*, the applicant (a member of the parliamentary opposition) was sentenced to a term in prison for offending the Spanish Government, which he accused in a newspaper of being "criminal" and of hiding the perpetrators of crimes against people in the Basque Country. On this factual background, the Court held that

> *the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries in the media.*[82]

In the case of *Okçuoğlu*, where the applicant was convicted to 1 year and 8 months' imprisonment plus a fine on the charge of "separatist propaganda", the Court held that it was

> *struck by the severity of the penalty imposed on the applicant … and the persistence of the prosecution's efforts to secure his conviction.*

Further on, the Court held that

> *the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference*

and found that the conviction and the sentencing of the applicant were contrary to Article 10.[83]

Even where the criminal penalties consisted in relatively small fines, the Court argued against such penalties as they could play the role of an implicit censorship. In more cases where journalists were fined the Court held:

> *"…although the penalty imposed on the author did not strictly speaking prevent him from expressing himself, it nonetheless amounted to a kind of censure, which would be likely to discourage him from making criticism of that kind again in future* […]. *In the context of the political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper*

81. Gaweda v. Poland, 2002.
82. Castells v. Spain, 1992.
83. Okçuoğlu v. Turkey, 1999.

the press in performing its tasks as purveyor of information and public watchdog.[84]

In addition, fines and trial expenses may constitute an interference with the right to freedom of expression where their amount raises the question of the financial survival of the person that is ordered to pay it.[85]

Civil damages granted for the damages caused to others' dignity or honour may constitute a distinctive interference with the exercise of freedom of expression, regardless of a criminal conviction. In the case of *Tolstoy Miloslavsky* the applicant was found by the national courts (based on the jury system) to have written a defamatory article, and was asked (together with the distributor of the article) to pay the victim civil damages amounting to 1500000 pounds sterling.[86] Finding that the amount of the civil damages was in itself an infringement of Article 10, the European Court held:

> *… it does not mean that the jury was free to make any award it saw fit since, under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered. The jury had been directed not to punish the applicant but only to award an amount that would compensate the non-pecuniary damage to Lord Aldington [the victim].*

In addition, the Court found that

> *the scope of the judicial control … at the time of the applicant's case did not offer adequate and effective safeguards against a disproportionately large award.*

Consequently,

> *having regard to the size of the award in the applicant's case in conjunction with the lack of adequate and effective safeguards at the relevant time against a disproportionately large award, the Court finds that there has been a violation of the applicant's right under Article 10 of the Convention.*

Confiscation or seizure of the means through which information and ideas are disseminated is another possible interference. The time at which such measures are ordered or enforced, respectively prior to or after dissemination, is of no importance. Thus, the Court decided that the temporary confiscation of the paintings considered as obscene by the national courts constituted an interference with the painter's freedom of expression.[87] Equally, the seizure of a film seen by the domestic authorities as containing some obscene scenes was defined by the Court as an interference with the freedom of expression.[88] Seizure of books considered as including some obscene fragments received a similar treatment by the Court.[89]

84. Lingens v. Austria, 1986; Barthold v. the Federal Republic of Germany, 1985.
85. Open Door and Dublin Well Woman v. Ireland, 1992.
86. Tolstoy Miloslavsky v. the United Kingdom, 1995.
87. Müller v. Switzerland, 1986.
88. Otto-Preminger Institut v. Austria, 1994.
89. Handyside v. the United Kingdom, 1976.

Prohibition of advertising is considered by the Court, under particular circumstances, as an interference with the freedom of expression. In the *Barthold* case the applicant was the veterinary surgeon of last resort for the owners of a sick cat because he alone maintained an emergency service in Hamburg. He was interviewed by a journalist who then wrote an article about this lacuna affecting animal welfare in the region. Barthold's fellow veterinarians initiated an action against him under the unfair competition law alleging that he had instigated or tolerated publicity on his own behalf. The Court held that this case was about public discussion of a matter of concern rather than commercial advertising, and found the applicant's conviction unjustified:

> [*Barthold's conviction*] *risks discouraging members of the liberal professions from contributing to public debate on topics affecting the life of the community if even there is the slightest likelihood of their utterances being treated as entailing, to some degree, an advertising effect*. By *the same token, application of a criterion such as this is liable to hamper the press in the performance of its tasks of purveyor of information and public watchdog*.[90]

Certainly, a newspaper item could be tantamount to advertising. Items which are based on public relations profiles would rather be seen as commercial expression. For instance, in the case of *Casado Coca*, the distribution of advertising material by a barrister which had resulted in disciplinary proceedings against him was seen by the Court as commercial expression.[91] Although protected by Article 10, commercial expression is subject to different standards of control than other expressions. For instance, in the case of *Markt Intern*,[92] the Court upheld an injunction against a trade magazine prohibiting it from publishing information about an enterprise operating in its market. Arguing that this was an interference with the exercise of the commercial expression, the Court allowed the national authorities a wider margin of appreciation and found the injunction to be compatible with the requirements of paragraph 2 of Article 10:

> *… even the publication of items which are true and describe real events may under certain circumstances be prohibited: the obligation to respect privacy of others or the duty to respect the confidentiality of certain commercial information are examples*.

However, some dissenting opinions argued that there was no ground for extending the state's margin of appreciation:

> *Only in the rarest cases can censorship or prohibition of publications be accepted* […] *This is particularly true in relation to commercial advertising or questions of economic or commercial policy* […] *The protection of the interests of users and consumers in the face of dominant positions depend on the freedom to publish even the harshest criticism of products* […].[93]

90. Barthold v. Germany, 1985.
91. Casado Coca v. Spain, 1994.
92. Markt Intern Verlag GmbH and Klaus Beermann v. the Federal Republic of Germany, 1989.

Independently of a decision based on paragraph 2, commercial expression may be protected under Article 10, and therefore its prohibition or sanction constitutes an interference with freedom of expression.

An order to reveal journalistic sources and documents as well as the punishment imposed for having refused to do so is seen by the Court as an interference with the exercise of the freedom of expression. In the *Goodwin* case the Court noticed that such measures were indisputably interfering with the freedom of the press, and decided in the favour of the journalist.[94]

The search of newspaper or broadcasting premises is another form of interference with the freedom of the press. Whether justified or not by a legal warrant, such a search would not only endanger the confidentiality of the journalistic sources, but it would place at risk the entire media and it would function as a censorship for all journalists in the country.

Three requirements for legitimate interference with the exercise of freedom of expression

According to paragraph 2, domestic authorities in any of the Contracting States may interfere with the exercise of freedom of expression where three cumulative conditions are fulfilled:

- the interference (meaning "formality", "condition", "restriction" or "penalty") is prescribed by law;
- the interference is aimed at protecting one or more of the following interests or values: national security; territorial integrity; public safety; prevention of disorder or crime; protection of health; morals; reputation or rights of others; preventing the disclosure of information received in confidence, and; maintaining the authority and impartiality of the judiciary;
- the interference is necessary in a democratic society.

The primary role of Article 10 is to protect everyone's freedom of expression. Therefore, the Court has established rules of strict interpretation of the possible restrictions provided for in paragraph 2. In the *Sunday Times* case[95] the Court held:

> *Strict interpretation means that no other criteria than those mentioned in the exception clause itself may be at the basis of any restrictions, and these criteria, in turn, must be understood in such a way that the language is not extended beyond its ordinary meaning. In the case of exceptional clauses … the principle of strict interpretation meets certain difficulties because of the broad meaning of the clause itself. It nevertheless imposes a number of clearly defined obligations on the authorities ….*

93. Judge Pettiti, dissenting opinion.
94. Goodwin v. the United Kingdom, 1996.
95. Sunday Times v. the United Kingdom, 1979.

Basically, the Court established a legal standard that in any borderline case, the freedom of the individual must be favourably weighted against the State's claim of overriding interest.[96]

Where the Court finds that all three requirements are fulfilled, the State's interference will be considered legitimate. The burden to prove that all three requirements are fulfilled stays with the State. The Court examines the three conditions in the order provided above. Once the Court finds that the State fails to prove one of the three requirements, it will not give the case further examination and will decide that the respective interference was unjustified, and therefore freedom of expression violated.

"State's interference" must be seen as any form of interference coming from any authority exercising public power and duties or being in the public service, such as courts, prosecutors' offices, police, any law-enforcement body, intelligence services, central or local councils, government departments, army decision-making bodies, public professional structures. Far from being exhaustive, the above enumeration tries only to picture the possible national authorities whose actions would be capable of limiting the exercise of freedom of expression. It makes no difference for the Court which particular authority interferes with this right; the national government shall be considered as respondent party in all cases brought before the Court in Strasbourg.

The national courts must follow these three requirements when examining and deciding cases in any way involving freedom of expression. The primary aim of the Convention system is that the domestic courts enforce the text of the Convention as developed by the Court's jurisprudence. The European Court must only be the last resort. This is why the national courts are the first and most important instance to ensure the free exercise of freedom of expression and to make certain that eventual restrictions follow the requirements set up in paragraph 2 as explained and developed by the Court.

"The exercise of these freedoms may be subject to … restrictions or penalties as are prescribed by law"

According to this requirement, any interference with the exercise of freedom of expression must have a basis in the national law. As a rule, this would mean a written and public law adopted by the Parliament. A national Parliament must decide whether or not such a restriction should be possible. For example, in a case regarding a journalist convicted for defamation, the crime of defamation must be provided for in the national law. Or, where prohibition of publication or seizure of the means by which an expression is disseminated –such as books, newspapers or cameras – are ordered or enforced, such measures have to rely on national legal provision. Equally, where a newspaper's premises are searched or a broadcasting station is taken

96. A. Rzeplinski, "Restrictions on the expression of opinions or disclosure of information on domestic or foreign policy of the state", Budapest 1997, *CoE Monitor* (97) 3.

off air and closed, legal provisions in the national law must underlie such measures.

The Court has accepted in some very few cases that common-law rules or principles of international law did constitute a legal basis for the interference with the freedom of expression. For instance, in *Sunday Times*, the Court found that the British common-law rules on contempt of court were sufficiently precise as to fall under the requirement "provided by law".[97] Also, in *Groppera Radio AG and Others*[98] and *Autronic AG*,[99] the Court allowed the state to rely on domestically applicable rules of public international law to satisfy this requirement. Although one should not exclude that rules of common law or customary law may restrict freedom of expression, this should rather be a rare exception. Freedom of expression is such an important value that its restriction should always receive the democratic legitimacy which is only given by the parliamentary debates and vote.

This requirement also refers to the quality of the law even where adopted by the Parliament. The Court has constantly stated that a law has to be public, accessible, predictable and foreseeable. As stated in *Sunday Times*,[100]

> *Firstly, the law has to be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able –if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.*

Whereas in *Sunday Times* the Court found that the common-law rules fulfilled the "law" requirements, bearing in mind also the legal advice received by the newspaper applicant, in *Rotaru*[101] the Court found that the domestic law was not "law" because it was not

> *formulated with sufficient precision to enable any individual – if need with appropriate advice – to regulate his conduct.*

In *Petra*[102] the Court decided that

> *the domestic provisions applicable to monitoring of prisoners' correspondence … leave the national authorities too much latitude*

97. However, following the Court's judgment, formal legislation was adopted in this area.
98. Groppera Radio AG and Others v. Switzerland, 1990.
99. Autronic AG v. Switzerland, 1990.
100. Sunday Times v. the United Kingdom, 1979.
101. Rotaru v. Romania, 2000.
102. Petra v.Romania,1998.

and that the confidential implementing regulations

> *did not satisfy the requirement of accessibility … and that Romanian law did not indicate with reasonable clarity the scope and manner of exercise of the discretion conferred on public authorities."*

Although the *Rotaru* and *Petra* judgments examined and decided violations of Article 8 (the right to privacy), the Court takes the same standards when looking at national laws with respect to freedom of expression.

The most recent and important case under Article 10 on the quality of law is probably *Gaweda v. Poland*, where the courts refused the applicant the registration of two periodicals arguing that their titles were "in conflict with reality". The two titles were *The Social and Political Monthly – A European Moral Tribune* and *Germany – a Thousand-year-old Enemy of Poland*. With respect to the first publication, the domestic courts refused registration considering that the proposed title "would suggest a European institution had been established in Kety, which was clearly not true". The registration of the second publication was denied under the argument that the title "would be in conflict with reality in that it unduly concentrated on negative aspects of the Polish-German relations and thus gave an unbalanced picture of the facts". The Court noted that the domestic courts

> *have inferred from the notion of "in conflict with reality" … a power to refuse registration where they consider that a title does not satisfy the test of truth, i.e. that the proposed titles of the periodicals convey an essentially false picture.*

The requirement that a title of a magazine embody truthful information

> *is, firstly, inappropriate from the standpoint of freedom of the press. A title of a periodical is not a statement as such, since its function essentially is to identify the given periodical on the press market for its actual and prospective readers. Secondly, such interpretation would require a legislative provision which clearly authorised the courts to do so. In short, the interpretation given by the courts induced new criteria, which could not be foreseen on the basis of the text specifying situations in which the registration of a title can be refused.*

Further, the Court acknowledged that the judicial character of the registration is a valuable safeguard of freedom of the press, but it held that the decisions of the courts must also conform to the principles of Article 10. The Court found that the law, which gave the courts the power to deny registration, among others, if the registration would be "in conflict with reality" were "not formulated with sufficient precision to enable the applicant to regulate his conduct."[103]

The Court interpreted the features of the legal basis of a restriction where measures of secret surveillance were taken against individuals. Thus, in Malone,[104] the Court held that the phrase "prescribed by law"

103. Gaweda v. Poland, 2002.
104. Malone v. the United Kingdom, 1984.

does not merely refer back to domestic law, which is expressly mentioned in the preamble to the Convention … The phrase thus implies … that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded … Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident.

In the same judgment, and also in the *Leander*[105] judgment, the Court said that even in areas affecting national security or fighting organised crime where the foreseeable character of the law can be weaker (for the effectiveness of the investigations, for instance), the wording of the law must be nevertheless sufficiently clear as to give individuals an adequate indication of the legal conduct and the consequences of acting unlawfully. In addition, in the latter judgment, the Court said that

in assessing whether the criterion of foreseeability is satisfied, account may also be taken of instructions or administrative practices which do not have the status of substantive law, in so far those concerned are made sufficiently aware of their contents.

The Court held further that

where the implementation of the law consists of secret measures, not open to scrutiny by the individuals concerned or by the public at large, the law itself, as opposed to the accompanying administrative practice, must indicate the scope to the legitimate aim of the measure in question, to give individual adequate protection against arbitrary interference.

Therefore, the national courts must examine the quality of laws, other norms, practices or jurisprudence setting up a restriction on the exercise of freedom of expression. They must first look at the publicity and accessibility requirements, which would usually be fulfilled if the law in question is published. Unpublished internal regulations or other norms will definitely not fulfil these requirements if the individual concerned was not aware of their existence and/or content. Assessing the predictability and the foreseeable character of legal provisions or case-law seems to be more sophisticated. Courts must examine whether the respective provision is drafted in sufficiently clear and precise terms, through well-defined notions, which allow the correlation of the actions to the requirements of the law and define clearly the area of the prohibited conduct and the consequences of breaking the respective provision. The legal norms empowering public authorities to order and adopt secret measures against individuals, such as secret surveillance, must be very strictly scrutinised by courts as the most dangerous interference with the individual rights.

Where national courts face contradictory legislation, such as between laws or other regulations passed by local authorities and the federal laws and/or the Constitution, judges must apply the legal provisions which best ensure the unrestricted enjoyment of freedom of expression.

105. Leander v. Sweden, 1987.

Moreover, all pieces of national law must be interpreted and applied in accordance with the Court's jurisprudence and principles and, where clear contradictions exist, European law should prevail.

"The exercise of these freedoms ... may be subject to such ... restrictions ... [that] ...are necessary ... in the interest 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 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 list of the possible grounds for restricting the freedom of expression is exhaustive. Domestic authorities may not legitimately rely on any other ground falling outside the list provided for in paragraph 2. Therefore, where called to enforce a legal provision which in any way would interfere with the freedom of expression, the national courts must identify the value or interest protected by the respective provision and check if that interest or value is one of those enumerated in paragraph 2. Only if the answer is affirmative may the courts apply that provision to the individual concerned.

For instance, a criminal action or a civil suit filed against a journalist accused of damaging one's reputation or honour will have the legitimate aim of protecting "the reputation or rights of others". Or, the seizure of an obscene book could have the legitimate aim of protecting the "morals". Or, an injunction against a newspaper publishing classified information could be justified by the interest of "national security". However, the courts must ensure that the interest to be protected is real, and not a mere and uncertain possibility.

Problems may arise in cases of insult or defamation of high officials (including the president of the country, ministers, members of parliament, etc.) or civil servants (including police officers, prosecutors and law enforcement officers, and all public employees).

While the aim of convicting a person who has insulted or defamed a person belonging to any of the two categories might be justified by the need to protect "the reputation or rights of others", a higher penalty – provided by law – than the one provided for insulting or defaming an ordinary person will not be justified. Higher penalties for defaming high officials and civil servants go contrary to the principle of equality before the law. Moreover, such higher penalties would implicitly protect more than the rights of the individuals performing such functions. They would protect abstract notions, such as "state authority" or "state prestige" which are not found in the paragraph 2 list.

Moreover, values such as "image/honour of the country or government", "image/honour of the nation", "state or other official symbols", "image/authority of public authorities" (other than courts) are not provided by paragraph 2, and therefore they are not legitimate aims for restricting freedom of expression. This is why the national courts must not sanction any criticism – expressed

through words, gestures, images or in any other way – of such abstract notions, as they fall outside the scope of the area protected under paragraph 2. The explanation of this can be found in the functioning rules of a democratic society, where the criticism of those (individuals and institutions) exercising power is a fundamental right and duty of media, ordinary individuals and society at large. For instance, the destruction of or an "insulting" act against a state symbol would express one's disagreement and criticism with some political decisions, activity of public authorities, public policies in particular areas, or anything else in connection with the exercise of power. Such disagreement and criticism must be free as it is the only way to debate in public the wrongs and find the possible redress. In addition, such general and abstract notions, such as "state authority" would usually cover and hide some private and rather unlawful interests of those in power, or at least their interest to stay in power at all cost.

Where the domestic courts are satisfied that a legitimate aim underlies an interference with freedom of expression, they must then look into the third requirement of paragraph 2, as the Court does, and decide whether such interference is "necessary in a democratic society", following the Court's highly developed principles.

"The exercise of these freedoms … may be subject to such … restrictions … [that] …are necessary in a democratic society…"

In order to take a decision under this third requirement, the national courts must apply the principle of proportionality, answering the question: "Was the aim proportional with the means used to reach that aim?" In this equation, the "aim" is one or more of the values and interests provided by paragraph 2, for whose protection states may interfere with freedom of expression. The "means" is the interference itself. Therefore, the "aim" is that specific interest invoked by the state, such as "national security", "order", "morals", "rights of others", etc. The "means" is the particular measure adopted or enforced against an individual exercising his/her right of expression. For instance, a "means" could be: a criminal conviction for insult or defamation; an order to pay civil damages; an injunction against publication; the prohibition of the journalistic profession; the search of the a newspaper's premises; the seizure of the means by which an opinion was expressed; etc.

The decision on proportionality is based on the principles governing a democratic society. In order to prove that an interference was "necessary in a democratic society" the domestic courts, as well as the European Court, must be satisfied that a "pressing social need", requiring that particular limitation on the exercise of freedom of expression, did exist. In *Observer and Guardian v. the United Kingdom*[106] the Court stated that "the adjective 'necessary', within the meaning of Article 10, paragraph 2, implies the existence of a 'pressing social need'".

The first to assess the existence of a pressing social need are the national authorities which, when doing so, are required to follow the Court's jurisprudence. However, the domestic margin of appreciation goes hand in hand

with a European supervision, embracing both the law and the decisions applying the law, including the decisions issued by independent courts. In this respect, the Court held that "The Contracting States have a margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court."[107] The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with the freedom of expression as protected by Article 10. The message to the national courts is that they should follow the Court's jurisprudence from the very first hearing in a freedom of expression case. As the European standards such as the Court's jurisprudence offer freedom of expression a higher protection that the national law and case-law, all judges in good faith cannot do anything but apply the higher European standards.

The Court's reasoning in finding the answer to the question "was the restriction necessary in a democratic society?" or "was the aim proportional to the mean?" will be further examined taking into account each of the legitimate "aims" enumerated in paragraph 2. Obviously, the "mean" will in all cases be the same: the interference with freedom of expression.

Freedom of expression and national security/territorial integrity/public safety

One case where the ground of "national security" was raised to restrict freedom of expression is *Observer and Guardian*.[108] In 1996, the two newspapers announced the intention of publishing extracts from *Spycatcher*, a book by Peter Wright, a retired intelligence agent. At the time of the announcement, the book was not yet published. Mr Wright's book included an account of alleged unlawful activities by the British intelligence service and its agents. He asserted that MI5 bugged all diplomatic conferences in London throughout the 1950s and 1960s as well as the Zimbabwe independence negotiations in 1979; MI5 bugged diplomats from France, Germany, Greece and Indonesia, as well as Mr Khrushchev's hotel suit during his visit to Britain in the 1950s; that MI5 burgled and bugged Soviet consulates abroad; that MI5 plotted unsuccessfully to assassinate President Nasser of Egypt at the time of the Suez crisis; that MI5 plotted against Harold Wilson during his premiership from 1974 to 1976; and that MI5 diverted its resources to investigate left-wing political groups in Britain.

The General Attorney asked the courts to issue a permanent injunction against the newspapers preventing

106. Observer and Guardian v. the United Kingdom, 1995.
107. Lingens v. Austria, 1986; Janowski v. Poland, 1999; Tammer v. Estonia, 2001, etc.
108. Idem: Sunday Times v. the United Kingdom (No. 2), 1991.

them from publishing extracts from the book. In July 1986 the courts granted a temporary injunction to prohibit publication for the duration of the judicial proceedings regarding the permanent injunction.

In July 1987 the book was published in the United States, and copies of the books were circulating in the United Kingdom as well. Despite this, the temporary injunctions against the newspapers were maintained until October 1988, when the House of Lords refused to grant the permanent injunctions requested by the Attorney General.

The publishers of the O*bserver* and the G*uardian* complained to the Strasbourg organs against the temporary injunctions. The British Government argued that at the time the temporary injunctions were ordered, the information to which Peter Wright had had access was confidential. Had this information been published the British intelligence service, its agents and third parties would have suffered huge damages following the identification of agents; relationships with allied countries, organisations and people would have also been damaged; they all would have ceased to trust the British intelligence service. In addition, the government advanced the argument that there was a risk that other current or former agents would follow Mr Wright's example. For the post-publication period, the government relied on the need to assure allied states of the effective protection of information by the British intelligence service. In the government's opinion, the only way to give such assurance was to make clear that officers who threatened to breach their life-long duty of confidentiality could be effectively prevented from doing so by legal action, and that such action would be taken.

With regard to the prior restraints on publication, the Court stated that

> *… the dangers inherent in prior restrictions 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.*

The Court further found that the temporary injunctions were justified prior to the publication of the book but not after this moment. When the book was published in the United States, the information lost its confidential character, and therefore the interest in maintaining the confidentiality of the information in S*pycatcher* and keeping it away from the public eye no longer existed. Under the circumstances, there was not "sufficient" need to maintain the injunctions.

In a partly dissenting opinion Judge Pettiti has stated that the temporary injunctions were not justified even before the publication of the book outside the United Kingdom:

> *where the press is concerned a delay in relation to items of current affairs deprives a journalist's article of a large part of its interest.*

The judge said further that

> *one gets the impression that the extreme severity of the … injunction and of the course adopted by the Attorney General was less a question of the duty of the confidentiality than the*

fear of disclosure of certain irregularities carried out by the security service in the pursuit of political rather than intelligence aims.

In Mr Pettiti's opinion this constituted a violation of the freedom to receive information because

to deprive the public of information on the functioning of State organs is to violate a fundamental democratic right.

Judge De Meyer, also partly dissenting, expressed his agreement with Judge Pettiti and added:

the press must be left free to publish news, whatever the source, without censorship, injunctions or prior restraint: in a free and democratic society there can be no room for restrictions of that kind, and particularly not if there are resorted to, as they were in the present case, for "governmental suppression of embarrassing information" or ideas.

In *Vereniging Weekblad Bluf!*[109] the Court has also examined, based on different facts, the conflict between "national security" and freedom of expression. The applicant, an association based in Amsterdam, was publishing a weekly magazine called *Bluf!*, designed in principle for left-wing readers. In 1987, *Bluf!* obtained a periodic report of the Dutch internal secret service. The report, dated 1981, was marked "confidential" and contained information of interest for the Dutch secret service. The report referred to the Dutch Communist Party and anti-nuclear movements; it mentioned the Arabic League plan to set up an office in The Hague; and it gave information on the activities of the Polish, Romanian and Czechoslovakian secret services in the Netherlands.

The editor of the magazine announced the publication of the report, together with a comment, as a supplement to the issue of 29 April. The same day, the chief of the Dutch internal secret services sent a letter to the public prosecutor's office, stating that the dissemination of the report would break the criminal law. With regard to the secret character of the information in the report, he observed that

although … the various contributions taken separately do not (or do not any longer) contain any State secrets, they do – taken together and read in conjunction – amount to information whose confidentiality is necessary in the interests of the State or its allies. This is because the juxtaposition of the facts gives an overview, in the various sectors of interests, of the information available to the security service and of the BVD's activities and methods of operation.

As a result, prior to the printing and distribution of the magazine, *Bluf!*'s premises were searched following an order of the investigating judge. The entire print-run of *Bluf!*'s 29 April issue, including the supplement, was seized. During that night, unknown to the authorities, the staff of *Bluf!* reprinted the issue, and about 2500 copies were distributed the next day on the street, to the inhabitants of Amsterdam. The authorities did not stop the distribution.

109. Vereniging Weekblad Bluf! v. the Netherlands, 1995.

In May 1987 the investigating judge closed the investigation against the staff of *Bluf!* without any criminal charge being brought. In the meantime, the association asked for the return of the confiscated copies, but its application was denied. In March 1988, at the request of the public prosecutor, the Dutch courts decided that all copies of that *Bluf!* issue be withdraw from public circulation. The courts relied on the need to protect the national security and argued that the unsupervised possession of those materials was contrary to the law and to the public interest.

The association complained to the Strasbourg institutions, claiming that the Dutch authorities violated its right under Article 10 of the Convention. The government held that the interference with the applicant's freedom of expression was legitimately grounded by the need to protect "national security", giving the following arguments: individuals or groups posing a threat to national security could have discovered, by reading the report, whether and to what extent the Dutch secret service was aware of their subversive activities; the way in which the information had been presented could have also give them an insight into the secret service's methods and activities; these potential enemies could use the information to the detriment of national security.

Examining whether the interference – the seizure and withdrawal from circulation – was "necessary in a democratic society" for the protection of "national security", the Court held:

> *It is open to question whether the information in the report was sufficiently sensitive to justify preventing its distribution. The document in question was six years old. … the head of the security service [had] himself admitted that in* 1987 *the various items of information, taken separately, were no longer State secrets. Lastly, the report was marked simply "Confidential", which represents a low degree of secrecy.* […] *The withdrawal from circulation … must be considered in the lights of the events as a whole. After the newspaper had been seized, the publishers reprinted a large number of copies and sold them in the streets of Amsterdam, which were very crowded. Consequently, the information in question had already been widely distributed when the journal was withdrawn from circulation.* […] *In this latter connection, the Court points out that it has already held that it was unnecessary to prevent the disclosure of certain information seeing that it had already been made public or had ceased to be confidential.* […] *the information in question was made accessible to a large number of people, who were able in turn to communicate it to others. Furthermore, the events were commented on by the media. That being so, the protection of the information as a State secret was no longer justified and the withdrawal of issue No. 267 of* Bluf! *no longer appeared necessary to achieve the legitimate aim pursued.* […] *In short, as the measure was not necessary in a democratic society, there has been a breach of Article* 10.

The judgments in *Observer and Guardian* and *Bluf!* provide for at least two important principles.

The first principle states that once in the public arena, information on national security may not be prohibited, withdrawn, or the authors of dissemination punished.

The second principle institutes a prohibition on the states to unconditionally define as classified all information in the area of national security and, consequently, to establish a prior limitation on the access to such information. Certain information may indeed be classified where there are serious reasons to believe that its release into the public arena will pose a threat to national security. Moreover, the classified status of information must be limited in time, and the need for maintaining this status must be periodically verified. The interest of the public in knowing certain information should also be considered in the process of classifying or declassifying information related to the national security.

Therefore, legislation prohibiting in absolute and unconditional terms the dissemination of all information in the area of national security, eliminating the public control over the intelligence services' activities, would constitute a breach of Article 10 as not being "necessary in a democratic society". Where faced with legislation providing for general and unconditional prohibition of dissemination of all information in the area of national security, the national courts must reject such a claim, be it criminal or civil. Courts must allow the press, acting on the benefit of the public, to exercise its freedom to identify the malfunctions, illegalities or other wrongs within the intelligence system. The rules developed by the European Court in the instances where freedom of expression conflicted with the interest of defending the national security are the guidelines to be followed at national level. Even where a domestic legal system does not explicitly provide for the "necessity" test, the proportionality principle, and the public interest argument, the national courts must take account of them in their legal thinking and develop the balancing test which would answer the "necessity" question.

Another guideline can be found in Principle 12 of the Johannesburg Principles (1995), which reads that

> *a state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.*

In addition, Principle 15 prohibits the punishment of a person on grounds of

> *national security for disclosure of information if* (1) *the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or* (2) *the public interest in knowing the information outweighs the harm from disclosure.*

The 1981 Recommendation of the Committee of Ministers of the Council of Europe on the right to access to information held by the public authorities subjects the limitations on access to information to a three-part test: restrictions must be provided by law or practice, be necessary in a democratic society and be aimed at protecting a legitimate public interest. Any denial of information must

be explained and subjected to revision. Information in the area of national security is not an exception to this rule.

In *Sürek and Özdemir*[110] the applicants were convicted by the national courts to six months' imprisonment and a fine each, on the charge of disseminating separatist propaganda. In addition, the printed copies were seized. The applicants published two interviews with a senior figure in the PKK, who condemned the policies of the Turkish authorities in the south-east, which he described as being aimed at driving the Kurds out of their territory and destroying their resistance. He also claimed that the war on behalf of the Kurdish people will continue "until there is only one single individual left on our side." The applicants also published a joint statement issued by four organisations which, like the PKK, were illegal under Turkish law, which plead in favour of recognising the right of the Kurdish people to self-determination and the withdrawal of the Turkish army from Kurdistan.

The Court first referred to the criticism of the government – as practised by the publication – and held that

> *the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician.*

Further, the Court noted that the fact that the interviews were given by a leading member of a proscribed organisation and that they contained hard criticism of official state policy and communicated a one-sided view of the situation and responsibility for disturbances in the south-east Turkey cannot justify in itself an interference with the applicants' freedom of expression. In the Court's view,

> *the interviews had a newsworthy content which allowed the public both to have an insight into the psychology of those who are the driving force behind the opposition to official policy in south-east Turkey and to assess the stakes involved in the conflict.*

The Court further held that

> *domestic authorities failed to have sufficient regard 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 may be for them.*

Concluding, the Court found that the reasons given by the domestic courts to convict the applicants

> *although relevant, cannot be sufficient for justifying the interferences with their right to freedom of expression.*

Equally, in *Özgür Gündem*, the Court found that convictions for separatist propaganda, which were justified by the Turkish Government on the grounds of protecting national security and preventing crime and disorder, were contrary to Article 10:

> *the use of the term "Kurdistan" in a context which implies that it should be, or is, separate from the territory of Turkey, and the claims by persons to exercise authority on behalf of that entity may be highly provocative to the authorities.*

110. Sürek and Özdemir v. Turkey, 1999.

After referring to the right of the public to be informed on other views than those of the State and the majority of the population, the Court stated that

> *While several of the articles were highly critical of the authorities and attributed on lawful conduct to the security forced, sometimes in colourful and pejorative terms, the Court nonetheless finds that they cannot be reasonably regarded as advocating or inciting the use of violence.*[111]

By contrast, in Sürek (No. 3), the Court found that the grounds of protecting national security and territorial integrity were proportional with the restriction upon freedom of expression due to the capacity of the article to incite violence in south-east Turkey:

> *Indeed, the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor.*[112]

The difference from the other cases stays in the capacity of the impugned article to steer violence and in the possibility that such violence occur, both elements being determined by the Court on the basis of the concrete circumstances of each case.

"National security" along with "public safety" and "rights of others" were seen as overriding the interest of protecting freedom of expression in cases where the expression sanctioned by the domestic authorities was aimed at the destruction of the rights set forth in the Convention. In *Kühnen*[113] the applicant was leading an organisation whose aim was to bring the National Socialist Party (prohibited in Germany) back into the political scene. Mr Kühnen disseminated publications encouraging the fight for a socialist and independent Greater Germany. He wrote that his organisation was in favour of "German unity, social justice, racial pride, community of the people and camaraderie" and against "capitalism, communism, Zionism, estrangement by means of masses of foreign workers, destruction of the environment". He also wrote: "whoever serves this aim can act, whoever obstructs will be fought against and eventually eliminated".

Mr Kühnen was sentenced to prison by the German courts.[114] The European Commission of Human Rights noted that the applicant has advocated national socialism aimed at impairing the basic order of freedom and democracy, and that his speech ran counter to one of the basic values expressed in the Preamble to the Convention: the fundamental freedoms enshrined in the Convention "are best maintained … by an effective political democracy". In addition, the Commission found that the applicant's speech contained elements of racial and religious discrimination. Consequently, the Commission held that the

111. Özgür Gündem v. Turkey, 2000.
112. Sürek v. Turkey (No. 3), 1999.
113. Kühnen v. the Federal Republic of Germany; report 1998.
114. The German Penal Code prohibits the dissemination of propaganda by unconstitutional organisations where such propaganda is directed against the basic order of democracy, freedom and understanding of all people.

applicant was seeking to use the freedom of expression for promoting conduct contrary to the text and spirit of the Convention as well as contrary to Article 17 which prohibits the abuse of rights. Concluding, the Commission found that the interference with the exercise of the applicant's freedom of expression was "necessary in a democratic society".

A similar decision was taken in the case of D.I. *v. Germany,*[115] where the applicant (an historian) denied the existence of the gas chambers in Auschwitz, stating that they were fakes built up in the first post-war days, and that the German tax payers paid about 16 billion DM for fakes. The applicant was fined in the national courts. Before the Commission, the government justified this penalty by the interests of protecting the "national security and territorial integrity", "the reputation and rights of others" and for the "prevention of disorder and crime". Applying the proportionality principle, the Commission held:

> *the public interests in the prevention of crime and disorder in the German population due to insulting behaviour against Jews, and similar offences, and the requirements of protecting their reputation and rights, outweigh, in a democratic society, the applicant's freedom to impart publications denying the existence of the gassing of Jews under the Nazi regime.*

In H*onsik*[116] and O*chensberger,*[117] where the applicants also denied the existence of the Holocaust and incited racial hatred, the Commission reached similar conclusions.

"National security" versus freedom of expression was examined by the Court in relation to military secrets. In the H*adjianastassiou* case,[118] an officer was convicted to a five-month suspended prison sentence for having disclosed classified military information to a private company in exchange for payment. The information concerned a specific weapon and the corresponding technical knowledge, and in the government's view, the disclosure was capable of causing considerable damage to national security. After holding that military information is not excluded from Article 10's protection, the Court found the conviction to be "necessary in a democratic society" for protecting the "national security" and held:

> *the disclosure of the State's interest in a given weapon and that of the corresponding technical knowledge, which may give some indication of the state of progress in its manufacture, are capable of causing considerable damage to national security.* [...] *Nor does the evidence disclose the lack of a reasonable relationship of proportionality between the means employed and the legitimate aim pursued.*

115. D.I. v. Germany, 1996.
116. Honsik v. Austria, 1995.
117. Ochensberger v. Austria, 1994.
118. Hadjianastassiou v. Greece, 1992.

The H*adjianastassiou* judgment sends two important messages to the national courts. Firstly, that not all the military information is swept away from the public arena. Secondly, the Court held once again that it is for the national courts to establish in each particular case whether the respective information did pose a real and serious danger to the national security. Such an assessment based on the proportionality principle is the answer to the question whether or not an expression making public military information should or should not be prohibited or sanctioned.

Freedom of expression and prevention of disorder or crime

The national authorities have restricted freedom of expression under the "prevention of disorder" ground in the case of I*ncal*.[119]

Mr Incal, a Turkish national, member of the People's Labour Party (dissolved in 1993 by the Constitutional Court), had distributed leaflets containing virulent remarks about the Turkish Government's policy and called on the population of Kurdish origin to band together to raise certain political demands. The leaflets called people to fight against the "driving the Kurds out" campaign launched by the Turkish security police and local governments, and called this campaign "a part of the special war being conducted in the country at present against the Kurdish people". The leaflet also described the state's action as a "state terror against Turkish and Kurdish proletarians". However, the leaflets did not call for violence or hatred. The Turkish security police considered that the leaflets could be regarded as separatist propaganda. Mr Incal was convicted by the national courts to six months in prison on the charge of incitement to commit an offence. He was also prohibited from entering the civil service and taking part in a number of activities within political organisations, associations and trade unions.

Before the European Court, the Turkish Government argued that the applicant's conviction was necessary in order to prevent disorder, since the language of the leaflets was aggressive, provocative and likely to incite people of Kurdish origin to believe that they were victims of a "special war" and therefore justified in setting up self-defence committees. The government also argued that "it was apparent from the wording of the leaflets … that they were intended to foment an insurrection by one ethnic group against the State authorities" and that "the interest in combating and crushing terrorism takes precedence in a democratic society."

The Court did not share the government's views, and referred to the requirement that "actions or omissions of the government" be "subject to the close scrutiny not only

119. Incal v. Turkey, 1998.

of the legislative and judicial authorities but also of public opinion." In order to assess whether the conviction and sentencing of the applicant were "necessary in a democratic society" the Court stressed that

> *while precious to all, freedom of expression is particularly important for political parties and their active members.*

The Court held that it could not identify

> *anything which would warrant the conclusion that* Mr Incal *was in any way responsible for the problems of terrorism in Turkey* [...] *In conclusion,* Mr Incal's *conviction was disproportionate to the aim pursued, and therefore unnecessary in a democratic society.*

In addition to the breach of Article 10, the Court also found a breach of the right to a fair trial (Article 6) since one of the judges on the bench was a military judge.

Prevention of disorder or crime, as well as the interest of protecting national security, were argued by the Austrian Government in the case of *Saszmann*.[120] The applicant was given a three-month suspended prison sentence for having incited the members of the army, through the press, to disobedience and violation of the military laws. The Commission decided that the applicant's conviction was justified for the maintaining of order in the Austrian federal army and protection of national security:

> *... the incitement to disregard military laws constituted unconstitutional pressure aiming at the abolition of laws which had been passed in a constitutional manner. Such unconstitutional pressure could not be tolerated in a democratic society.*

The Court reached a different conclusion in the case of *Vereinigung Demokratischer Soldaten Österreichs und Gubi*,[121] where the Austrian courts prohibited the distribution of a periodical publication among the soldiers in military barracks, which proposed reforms and encouraged the soldiers to take legal actions against the authorities. The Austrian Government argued that the applicants' periodical threatened the country's system of defence, the effectiveness of the army and could lead to disorder and crime. The Court did not agree with the government's submissions and held that most of the items in the periodical

> *... set out complaints, put forward proposals for reforms or encourage*[d] *the readers to institute legal complaints of appeals proceedings. However, despite their often polemical tenor, it does not appear that they overstepped the bounds of what is permissible in the context of a mere discussion of ideas, which must be tolerated in the army of a democratic State just as it must be in the society that such an army serves.*

Therefore, the Court found an Article 10 violation.

"Prevention of disorder or crime" was balanced against political criticism of the government by its political adversaries. In *Castells*[122] the Court argued for a strong protection of the freedom of expression on behalf of the political opposition. Mr Castells was senator in the Span-

120. Saszmann v. Austria, 1997.
121. Vereinigung Demokratischer Soldaten Österreichs und Gubi v. Austria, 1994.
122. Castells v. Spain, 1992.

ish Parliament representing a political organisation favourable to the independence of the Basque Country. In 1979, he wrote an article entitled "Outrageous impunity", which was published in a national daily newspaper. Mr Castells accused the government of failure to investigate the murders in the Basque Country and stated: "the perpetrators of these crimes act, continue to work and remain in posts of responsibility, with total impunity. No warrant has been issued for their arrest." He also accused the government of complicity in those crimes:

> *the right wing, who are in power, have all the means at their disposal (police, courts and prisons) to seek out and punish the perpetrators of so many crimes. But don't worry, the right will not seek itself out. [...] Those responsible for public order and criminal prosecutions are the same today as they were before.*

Referring to the extremist groups guilty of these crimes, he wrote:

> *they have substantial files which are kept up to date. They have a considerable supply of weapons and of money. They have unlimited material and resources and operate with complete impunity ... it can be said they are guaranteed legal immunity in advance.*

Mr Castells further stated:

> *behind these acts there can only be the government, the party of government and their personnel. We know that they are increasingly going to use as a political instrument the ruthless hunting down of Basque dissidents and their physical elimination ... But for the sake of the next victim from our people, those responsible must be identified right away with maximum publicity.*

Mr Castells was charged with offending the government, convicted, and sentenced to one year in prison, which he never served.

Before the Court, the Spanish authorities argued that Mr Castells' conviction served to prevent "disorder and crime". Examining whether the interference was "necessary in a democratic society", the Court held:

> *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 Member of Parliament, like the applicant, calls for the closest scrutiny on the part of the Court.*

The Court then observed that

> *Mr Castells did not express his opinion from the senate floor, as he might have done without fear of sanctions, but chose to do so in a periodical. That does not mean, however, that he lost his right to criticise the government.*

Further, the Court referred to the criticism of the government:

> *The limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic society the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and*

public opinion. Furthermore, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly when other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.

The Court found a violation of Article 10. In addition, a concurring opinion held that

there are no grounds for affording better protection to the institutions than to individuals, or to the government than the opposition.

Similar, in accordance with the lessons derived from the previous judgments, the national courts must understand that even if in principle the incitement to legal disobedience is punishable, judges must not automatically apply a prohibition provided by law. Judges must weigh the conflicting interests and apply the proportionality principle while deciding whether punishing a particular exercise of the freedom of expression is "necessary in a democratic society". Moreover, as shown by the *Castells* judgment, national courts must refrain from punishing criticism of the state authorities. Such criticism, even harsh, is part of the political pluralism and plurality of opinions.

Freedom of expression and morals

The conflict between "morals" and freedom of expression brings new interpretations to the principle of proportionality. In principle, in such cases, the Court leaves the national authorities a wider margin of appreciation justified by the specificity of the "morals" in each member state or even in the different regions within the same country.

In *Müller and Others*[123] the national authorities' interference with freedom of expression was considered by the Court as reasonable and "necessary in a democratic society" for the protection of "morals". In 1981, during an exhibition of contemporary art, Mr Müller painted and exhibited three large paintings showing acts of sodomy, bestiality, masturbation and homosexuality. The exhibition was accessible to the general public, free of charge, without any age restriction. The Swiss courts fined Mr Müller and the organisers of the exhibition and seized the paintings, which were handed for preservation to an art museum. However, they were returned in 1988. In Strasbourg, Mr Müller and the organisers of the exhibition claimed that both the conviction and the seizure had violated their right to freedom of expression.

The Court referred to the lack of a uniform concept of morals within the territory of the Contracting Parties. The Court held that the national courts were in a better position than the international judge to decide on issues of

123. Müller and Others v. Switzerland, 1988.

"morals", having in view the former's direct contact with the reality in their countries. The Court further stated that

> *the paintings in question depict in a crude manner sexual relations, particularly between men and animals … the general public had free access to them, as the organisers had not imposed any admission charge or any age-limit. Indeed, the paintings were displayed in an exhibition which was unrestrictedly open to – and sought to attract – the public at large.*

The Court also held that the arguments of the national judges, who found that the images were "liable grossly to offend the sense of sexual propriety of ordinary sensitivity" by the "emphasis on sexuality in some of its crudest forms" were not unreasonable. The unlimited access of children played an essential role in the M*üller* judgment, as it played in the H*andyside* case,[124] where the applicant had published and distributed to pupils a book seen as obscene by the British authorities.

Another type of conflict between "morals" and freedom of expression was examined by the Court in the case of O*pen Door and Dublin Well Woman*.[125] Open Door Counselling Ltd and the Dublin Well Woman Centre were non-governmental and non-profit organisations in Ireland, where abortion was prohibited. The two organisations offered advice to pregnant women, and the Dublin Well Woman Centre provided a large series of services in the area of family planning, pregnancy, health, sterilisation, etc. It also offered to pregnant women information on the possibilities of abortion outside Ireland, such as the addresses of some clinics in the United Kingdom. Both organisations restricted themselves to providing advice; the decision on abortion was left to the women. In 1983 the Dublin Well Woman Centre published a brochure criticising two recent constitutional amendments. The first amendment gave to anyone the right to file applications with the courts requiring the prohibition on imparting information on abortions outside Ireland. The second constitutional amendment gave anyone the right to request court injunctions against pregnant women who intended to leave the country.

In 1986, following an application filed by the Irish Society for the Protection of Unborn Children, the Irish courts decided that the activity of imparting information on abortion was in violation of the Constitution and some provisions of the criminal law. The courts issued a permanent prohibition against the Dublin Well Woman Centre and Open Door on giving advice or help the pregnant women on abortion outside Ireland. The two organisations complained in Strasbourg claiming that their right to impart and receive information was violated. Four individual women joined them, two as direct victims of the prohibition and two as virtual victims.

Discussing the "morals" as a legitimate aim, the Court argued that the protection of the unborn children relies on profound moral values of the Irish people, and held that although the margin of appreciation of the national authori-

124. Handyside v. the United Kingdom, 1976.
125. Open Door and Dublin Well Woman v. Ireland, 1992.

ties is wider with respect to "morals", it is not unlimited: the national authorities do not have "an unfettered and an unreviewable" discretion. Further on, the Court examined whether the interference answered a "pressing social need" and whether it was proportionate to the legitimate aim pursued. The Court was struck by the absolute nature of the injunctions issued by the Irish courts, which imposed a perpetual and general prohibition "regardless of age or state of health or their reason of seeking counselling on the termination of pregnancy". The Court held that such a restriction was too large and disproportionate. Arguing the disproportionate nature of the interference, the Court noted the existence of other sources of obtaining information (magazines, telephone books, people living abroad), all proving that the need of a restriction imposed on the applicants was not a pressing one.

Here again, the national courts are taught that general and/or perpetual prohibitions on freedom of expression, even in areas as sensitive as morals, are unacceptable. National courts are given guidelines for applying the proportionality principle: the target group of the expression is important, being relevant if children and youth are also addressed; measures to limit the access to the respective form of expression is relevant, as proving the care for reducing the "immoral" impact; a real damage to "morals" should be identified, to avoid arbitrariness.

Freedom of expression and reputation and rights of others

Protection of "reputation and rights of others" is by far the "legitimate aim" most frequently used by the national authorities for restricting freedom of expression. Rather often, it has been invoked to protect politicians and civil servants against criticism. This is why, under this item, the Court has developed a large jurisprudence, demonstrating the high protection afforded to freedom of expression, in particular to the press. The media's privileged place derives from the Court's view of the central role of political expression in a democratic society both with respect to the electoral process and to daily matters of public interest. With regard to the language, the Court has accepted severe and harsh criticism as well as coloured expressions as the latter have the advantage of drawing attention to the issues under debate.

In *Lingens*[126] – a landmark case – the Court balanced freedom of the press against the right to reputation of a high public official. In October 1975, following general elections in Austria, Mr Lingens published two articles criticising the Federal Chancellor, Mr Bruno Kreiski, who had won the elections. The criticism focused on the political move of the Chancellor, who had announced a coalition with a party lead by a person with a Nazi background, and on the Chancellor's systematic efforts to sustain politically

126. Lingens v. Austria, 1986.

the former Nazi. The Chancellor's behaviour was characterised as "immoral", "undignified", demonstrating "the basest opportunism". Following a private prosecution brought by the Chancellor, the Austrian courts found these statements insulting and sentenced the journalist to a fine. The national courts also found that the journalist could not prove the truth of his allegation of "basest opportunism".

Before the European Court, the Austrian Government claimed that the applicant's conviction was aimed at protecting the reputation of the Chancellor.

Looking into the requirement of the necessity of the interference "in a democratic society", the Court developed some very important principles. Politicians must display wider tolerance to media criticism:

> *Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. 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 both journalists and the public at large, and he must consequently display a greater degree of tolerance.*

The Court did not exclude the protection of politicians' reputation but held that

> *in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.*

The political context of the contested articles was of relevance:

> *The impugned expressions are therefore to be seen against the background of a post-election political controversy; … in this struggle each used the weapons at his disposal; and these were in no way unusual in the hard-fought tussles of politics.*

The impact of the applicant's conviction upon the freedom of the press in general was another element which the Court found relevant:

> *As the government pointed out, the disputed articles had at the time already been widely disseminated, so that although the penalty imposed on the author did not strictly speaking prevent him from expressing himself, it nonetheless amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future; … In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.*

The Austrian courts' approach with regard to the truth proof defence was found by the Court to be wrong. The Court emphasised the distinction between "facts" and "value judgments", holding that the truth of the "value judgments" is an impossible task. The applicant's opinions about the Chancellor's political conduct were a mere

expression of the right to hold and impart opinions rather than the right to impart information. While the existence of facts can be demonstrated, the truth of the value-judgments is not susceptible of proof. The requirement of proving the truth of value judgments infringes the heart of the freedom of opinion. The Court also observed that the facts on which Mr Lingens had founded his value-judgments were undisputed, and he was in good faith.

The principles developed by the Court in the area of political criticism and the distinction between facts and opinions were reaffirmed in many further judgments.[127] Thus, in *Dalban*, the Court held that

> *it would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth*.

In addition, in *Schwabe*, the Court referred to the language:

> *in a short contribution to a discussion on the behaviour of politicians and their political morals, not every word can be weighed to exclude any possibility of misunderstanding*

In *Oberschlick* (No. 2), the use of the word "idiot" to describe the behaviour of a politician was found admissible.[128] And, in *Lopes Gomes da Silva*, where a candidate to the local elections was called "grotesque", "buffoonish" and "coarse", the Court found that although incisive, the wording was not exaggerated and it came in response to a provocative speech by the candidate. The Court also stated 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.*[129]

In *Oberschlick*, *Dalban*, *Dichand* and many other judgments the Court held that:

> *journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation*.[130]

However, even press freedom is not absolute. In *Tammer* the Court found in favour of private life. The impugned remarks were related to aspects of Ms Laanaru's private life which she described in her memoirs written in her private capacity. Ms Laanaru had been assistant to the Minister of the Interior (her husband, who had previously been prime minister). The impugned remarks regarded her role as a mother and in breaking up her husband's previous family. Finding against a violation of Article 10, the Court argued that

> *despite her continued involvement in the political party the Court does not find it established that the use of the impugned terms in relation to Ms Laanaru's private life was justified by considerations of public concern or that they bore on a matter of general importance*.[131]

127. Oberschlick v. Austria, 1991; Schwabe v. Austria, 1992; Dalban v. Romania, 1999, etc.
128. Oberschlick v. Austria (No. 2), 1997.
129. Lopes Gomes da Silva v. Portugal, 2000.
130. For more on the "language" see above, page 17.

Following the Court's principles, any internal law protecting by special or higher penalties politicians and in general all high officials (such as the president, the prime minister, ministers, members of the Parliament, etc.) against insult or defamation, in particular by the press, would be incompatible with Article 10. Where such provisions exist and are invoked by the politicians, the national courts must abstain from enforcing them. In exchange, the general legal provisions on insult and defamation could be relied on.

Moreover, where the honour and reputation of politicians conflict with the freedom of the press, the national courts must carefully apply the proportionality principle and decide whether the conviction of a journalist is a necessary measure in a democratic society, looking at the guidelines provided by the Court in cases such as *Lingens*. Similarly, where the national law provides for the truth proof defence in cases of insulting expressions, the domestic courts must abstain from requesting such evidence, following the Court's distinction between facts and opinions. Moreover, the good faith defence must be accepted in cases of defamation, which essentially concerns facts. If at the time of publication the journalist had sufficient reasons to believe that a particular piece of information was true, he/she should not be sanctioned. The 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.*[132]

This is why a journalist should only be required to make a reasonable check and to assume in good faith the accuracy of the news. Another argument in this respect concerns the absence of intent, on the part of the journalist, to defame the alleged victim. As long as the journalist believed the information be true, such intent is lacking and therefore the journalist's conduct may not be sanctioned under provisions prohibiting intentional defamation; intentional defamation is what all criminal laws provide for.

The national courts must also refrain from applying criminal sentences, in particular imprisonment. Such sentences endanger the very core of the freedom of expression and function as censorship for the entire media, hampering the press in its role of public watchdog.

All the above guidelines provided by the European Court to the national courts apply equally to the criticism of civil servants or to any other criticism intended to bring into the public debate matters of interest for the large public or communities.

In Thorgeirson[133] the Court upheld the freedom of the press in the context of criticism aimed at civil servants. The applicant (a writer) published in a daily newspaper two articles on police brutality. The first article took the form of

131. Tammer v. Estonia, 2001.
132. Sunday Times (No. 2) v. the United Kingdom, 1991.
133. Thorgeir Thorgeirson v. Iceland, 1992.

a letter addressed to the Minister of Justice who was called on to institute a commission

> *to investigate the rumours, gradually becoming public opinion, that there is more and more brutality within the Reykjavík police force and being hushed up in an unnatural manner.*

Except for a journalist who had been victim of police brutality, the applicant did not indicate names of other victims. Describing the police officers and their behaviour, Mr Thorgeirson used, among others, the following expressions: "wild beasts in uniform that creep around, silently or not, in the jungle of our town's night-life"; "individuals reduced to a mental age of a new-born child as a result of strangle-holds that policemen and bouncers learn and use with brutal spontaneity instead of handling people with prudence and care"; and "allowing brutes and sadists to act out their perversions". Following a television programme where the police denied the allegations of brutality, the applicant published a second article, stating that "[police] behaviour was so typical of what is gradually becoming the public image of our police force defending itself: bullying, forgery, unlawful actions, superstitions, rashness and ineptitude". The applicant was sentenced to a fine for defamation of unspecified members of the police.

Before the European Court, the government argued that the conviction was aimed at protecting the "reputation … of others", namely of the police officers, and, in addition, that the limits of acceptable criticism are wider only with regard to political speech. The Court, however, observed

> *that there is no warrant in its case-law for distinguishing, in the manner suggested by the government, between political discussion and discussion of other matters of public concern.*

With regard to the language, the Court stated that

> *both articles were framed in particularly strong terms. However, having regard to their purpose and the impact which they were designed to have, the Court is of the opinion that the language used cannot be regarded as excessive.*

The Court concluded that

> *the conviction and sentence were capable of discouraging open discussion of matters of public concern*

and that the reasons advanced by the government did not proved the proportionality of the interference to the legitimate aim pursued. The applicant's conviction was therefore not "necessary in a democratic society".

In *Thoma*, a journalist was ordered to pay civil damages for having stated that all the Water and Forestry Commission officials but one were corruptible. The Court found a violation of Article 10, taking into account the wide debate on this topic and the general interest raised by it. Referring to the criticism of civil servants, the Court held:

> *Civil servants acting in official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word*

and deed to the extent politicians do and should therefore be treated on equal footing with the latter when it comes to criticism of their conduct.[134]

"Rights of others", namely religious freedom versus freedom of expression, were examined by the Court in *Otto-Preminger Institut*.[135] The applicant, an association based in Innsbruck, announced a series of six showings accessible to the general public of the movie *Council in Heaven*, directed by Werner Schroeter. The announcement carried a statement to the effect that, in accordance with the law, persons under the age of seventeen were prohibited from seeing the film. The film portrayed the God of the Jewish religion, Christian religion and Islamic religion as an apparently senile old man prostrating himself before the Devil with whom he exchanged a deep kiss, calling Devil his friend. Other scenes showed the Virgin Mary listening to an obscene story and a degree of erotic tension between the Virgin Mary and the Devil. The adult Jesus Christ was portrayed as a low-grade mental defective. The Virgin Mary and Jesus Christ were shown in the film applauding the Devil.

Prior to the first showing, at the request of the Innsbruck diocese of the Roman Catholic Church, the public prosecutor instituted criminal proceedings against the director of the Otto-Preminger Institut under the charge of "disparaging religious doctrines". After seeing the film, a domestic court granted its seizure. Consequently, the public showings did not take place. The criminal proceedings were discontinued, and the case was pursued only to the effect of the seizure. The Otto-Preminger Institut complained to the European Commission, arguing that its right under Article 10 was violated by the seizure of the film. The Commission shared this view.

Before the Court, the government argued that the seizure of the film was aimed at "protection of rights of others", in particular of right to respect for religious feelings, and at the "prevention of disorder". The right to respect for religious feelings is part of the right to thought, conscience and religion provided for in Article 9 of the Convention. Looking at the legitimacy of this aim, the Court held:

> *Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising*

134. Thoma v. Luxembourg, 2001.
135. Otto-Preminger Institut v. Austria, 1994.

their freedom to hold and express them [...] *The respect for the religious feelings of believers as guaranteed in* Article 9 *can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society. The Convention is to be read as a whole and therefore the interpretation and application of* Article 10 *in the present case must be in harmony with the logic of the Convention.*

Further, the Court referred to the duty of avoiding

expressions that are gratuitously offensive to others ... such do not contribute to any form of public debate capable of furthering the progress in human affairs.

Defending its position, the government stressed the role of religion in the everyday life of the people of Tyrol, where the proportion of the Roman Catholic believers was 87%.

Balancing the two conflicting values, the Court held that it could not:

disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. 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. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time. In all the circumstances of the present case, the Court does not consider that the Austrian authorities can be regarded as having overstepped their margin of appreciation in this respect.

Consequently, the seizure of the film did not violate Article 10.

It is interesting to note that three dissenting judges argued in favour of a violation of Article 10:

it should not be open to the authorities of the State to decide whether a particular statement is capable of "contributing to any form of public debate capable of furthering progress in human affairs"; such a decision cannot but be tainted by the authorities' idea of "progress". [...] *The need for repressive action amounting to complete prevention of the exercise of freedom of expression can only be accepted if the behaviour concerned reaches so high a level of abuse, and comes so close to a denial of the freedom of religion of others, as to forfeit for itself the right to be tolerated by society.* [...] *the film was to have been shown to a paying audience in an "art cinema" which catered for a relatively small public with a taste for experimental films. It is therefore unlikely that the audience would have included persons not specifically interested in the film. This audience, moreover, had sufficient opportunity of being warned beforehand about the nature of the film.* [...] *It does appear that there was little likelihood in the instant case of anyone being confronted with objectionable material unwittingly. We therefore conclude that the applicant association acted responsibly in such a way as to limit, as far as it could reasonably have been expected to, the possible harmful effects of showing the film.*

The need to protect "rights of others" versus freedom of imparting and receiving information was also examined by the Court in the context of some racist statements broadcast on television with the mere purpose of informing the public about the carriers of the racist speech.

In the case of *Jersild*[136] the applicant was a television journalist who was convicted by the national courts for aiding and abetting the dissemination of racist statements. He took the initiative of preparing a programme where three members of a youth group sharing racist views were invited and interviewed. The journalist knew in advance that racist statements were likely to be made during the interviews and had encouraged such remarks. Editing the interviews, the journalist included the offensive assertions. The interviews were presented during a serious television programme intended for a well-informed audience, dealing with a wide range of social and political issues, including xenophobia and immigration. The audience could hear statements such as: "It's good being a racist. We believe Denmark is for the Danes"; "People should be allowed to keep slaves"; "Just take a picture of a gorilla … and then look at a nigger, it's the same structure body and everything … flat forehead"; "A nigger is not a human being, it's an animal, that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they are called", etc. The young men were also asked questions about their place of live and work and their criminal record.

The main reason why the national courts found the journalist guilty was the lack of a final statement by which, in the courts' opinion, he should have explicitly criticised the racist views expressed during the interviews.

Before the European Court, the government justified the conviction by the need to protect the rights of those insulted by the racist statements. The Court emphasised the vital importance of combating racial discrimination, stressing that the matter broadcast by the applicant was of high public concern. Looking at how the programme was prepared and presented, the Court found that

> *it could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought – by means of an interview – to expose, analyse and explain this particular group of youth, limited and frustrated by their social situation, with criminal record and violent attitudes.*

Criticising the national courts' approach on how the journalist should have counterbalanced the racist statements, the Court held that

> *the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this 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.*

Discussing news reporting based on interviews, whether edited or not, the Court held that the punishment

136. Jersild v. Denmark, 1994.

of a journalist for assisting in the dissemination of statements made by another person in an interview

would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.

The Court found a violation of Article 10.

Freedom of expression and the authority and impartiality of the judiciary

The Court's jurisprudence under this heading shows that although the judiciary enjoys a special protection, it does not function in a vacuum, and questions about the administration of justice may be part of the public debate.

In the *Sunday Times* case[137] the government justified injunctions against publication of a newspaper article by the interest of protecting the impartiality of the judiciary and preserving the trust of the public in the judicial authorities. Following the use of the sedative "thalidomide" between 1959 and 1962 many children were born with severe malformations. The drug was produced and sold by Distillers Company Ltd, which withdraw it from the market in 1961. Parents sued the company, asking for civil damages; negotiations between the parties continued for many years. The parties' transactions had to be approved by the courts. All newspapers, including *The Sunday Times*, covered the issue extensively. In 1971 the parties started negotiations to set up a charity fund for the children with malformations. In September 1972 *The Sunday Times* published an article entitled "Our thalidomide children: a cause for national shame", criticising the company for the reduced amount of money paid to the victims and for the small amount which the company intended to put into the charity fund. *The Sunday Times* announced that it would describe, in a future article, the circumstances of the tragedy.

At the request of the company, the Attorney General asked the court to issue an injunction against the newspaper, arguing that the publication of the announced article would obstruct justice. The injunction was granted and *The Sunday Times* refrained from publication.

Before the European Court, *The Sunday Times* claimed a violation of Article 10. The government justified the injunction by the need to maintain the "authority and impartiality of the judiciary", since thalidomide cases were still pending before the courts. The Court stated that

There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in

137. Sunday Times v. the United Kingdom, 1979.

the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not *only do the media have the task of imparting such information and ideas: the public also has a right to receive them*.

In the particular circumstances of the case, the Court observed that the "thalidomide disaster" was a matter of undisputed public concern. In addition, the families involved in the tragedy as well as the public at large had the right to be informed on all the facts of this matter. The Court concluded that the injunction ordered against the newspaper "did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention."

In the case of D*e* H*aes and* G*ijsels*[138] the applicants, two journalists, reported in a newspaper on a case pending before the courts. In five articles they criticised in virulent terms the judges of a Court of Appeal who had decided, in a divorce case, that the two children of the divorced family would live with their father. The father, a well-known notary, had previously been accused by his former wife and her parents of sexual abuse of the two children. At the time of the divorce, the investigation against the notary was closed without indictment.

Three judges and a prosecutor sued the two journalists and the newspaper, asking civil damages for defamatory statements. The civil courts found that the two journalists had cast strong doubts on the impartiality of the judges by writing that they had intentionally ruled wrongly due to their close political relationship with the notary. The journalists were obliged to pay civil damages (a symbolic amount) and to publish the judgment in six newspapers at their own expense.

The Court recognised that members of the judiciary must enjoy public trust and therefore they must be protected against destructive attacks lacking any factual basis. Moreover, since they have a duty of discretion, judges cannot respond in public to various attacks, as, for instance, politicians are able to do. The Court then considered the articles and noted that many details were given, including experts opinions, proving that the journalists had carried out serious research before informing the public on this case. The articles were part of a large public debate on incest and on how the judiciary dealt with it. Giving due importance to the right of the public to be informed on an issue of public interest, the Court decided that the national courts' decision was not "necessary in a democratic society", and that therefore Article 10 had been violated.

In principle, the defamation of a judge by the press takes place as part of a debate on the malfunction of the judicial system or in the context of doubting the independence or impartiality of judges. Such issues are always important for the public and must not be left outside the public debate, in particular in a country experiencing the

138. De Haes and Gijsels v. Belgium, 1997.

transition to an independent and effective judiciary. This is why the national courts must weigh the values and interests involved in case where judges or other judicial actors are criticised. Courts must balance the honour of the judge in question against the freedom of the press to report on matters of public interest, and decide the priority in a democratic society.

Certainly, where the criticism is primarily aimed at insulting or defaming the members of the judiciary without contributing to the public debate on the administration of justice, the protection afforded to freedom of expression may be narrower. Another relevant issue under this head is the possibility of publicly contesting a final judicial decision.

Protection of journalistic sources and legitimate aims

A particular component of freedom of expression is the protection of journalistic sources, which may conflict with any of the legitimate aims referred to in paragraph 2. The *Goodwin* judgment[139] is significant for the balance between the interests of justice and rights of others on the one hand, and the desire to protect sources on the other hand.

Mr Goodwin, a journalist with *The Engineer*, received from a "source", by telephone, information on the Tetra Ltd company. The source stated that the company was on the way to obtaining a large credit when it had major financial problems. The information was not asked for and no payment was made. In the course of preparing an article on this subject, the journalist telephoned the company and asked for comments. Following this conversation, the company asked the court for an injunction on the publication of Mr Goodwin's article, arguing that its economic and financial interests would be seriously hampered if the information were to become public. The injunction was granted, and the company sent a copy to all major newspapers.

Further, the company asked the court to request the journalist to reveal the name of his source. It was argued that this would help the company to identify the dishonest employer and initiate proceedings against him. The journalist repeatedly denied the court's request and did not reveal the source. He was fined on the charge of "obstruction of justice".

Before the European Court, the applicant claimed that the court order requesting him to reveal the source, as well as the fine for not doing so had both infringed his right to freedom of expression. Recalling that "freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance", the Court further held that the

139. Goodwin v. the United Kingdom, 1996.

> *protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms* [...] *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 in view the importance of journalistic sources for press freedom in a democratic society and the potentially chilling effect of a disclosure order, the Court found

> *that both the order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so gave rise to a violation of his right to freedom of expression.*

Following the *Goodwin* judgment, on 8 March 2000 the Committee of Ministers of the Council of Europe adopted Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information.

In countries where the legal protection of journalists' sources is not enacted, the courts must afford it as part of the European law, such as the Court's ruling in *Goodwin*, and as part of the internationally recognised principles of law. The national courts must be the guardians of freedom of expression, which covers the need of protecting journalistic sources in all instances, including those where journalists are called to answer as defendants or as witnesses. In doing so, the national courts must be guided only by the proportionality principle and by the role of the press in a democracy.

Table of cases

The cases cited in the text are listed below with their bibliographic references. The case-law of the Court and Commission is published in the following series:

- Collection of decisions of the European Commission of Human Rights, Vols. 1-46, 1960-74
- Decisions and reports of the European Commission of Human Rights, Vols. 1-94B , 1975-98
- Series A: Judgments and decisions of the European Court of Human Rights, Vols. 1-338, 1961-95
- Reports of judgments and decisions, 1996-

All the Convention case-law, including judgments and reports not published in paper form, can be consulted in the HUDOC database: http://hudoc.echr.coe.int/

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