TOPIC: FREEDOM OF EXPRESSION

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1. Introduction

If we take ourselves to be, as Aristotle thought, essentially social beings, our interest in the freedom to express ourselves quite obviously has a universal character. Since the need to communicate is fundamentally common and widespread, and is beyond the peculiarities and the taste of some people, a certain culture or a country, it is interesting to approach its legal protection from an international standpoint.

Before moving around the world to see how the right to freedom of expression is protected, it may be useful to have a look throughout history to remember that people have fought for freedom of speech. Attitudes towards freedom of speech for the people have varied, sometimes viewed as a privilege to be enjoyed and other times considered as a problem to be dealt with by governments or religions.

History students may recall the Greek philosopher Socrates (470 - 399 BC), whose views and teachings were seen as a corrupting influence on the morals of the youths of Athens. Socrates' views caused great consternation among political and religious leaders of the Greek hierarchy and led to his death. His plea before the jury, who eventually convicted him, remains one of the most eloquent defences of freedom of speech:

"If you offered to let me off this time on condition that I am not any longer to speak my mind in this search for wisdom, and that if I am caught doing this again I shall die, I should say to you, 'Men of Athens, I shall obey the God rather than you. While I have life and strength I shall never cease to follow philosophy and to exhort and persuade any one of you whom I happen to meet. For this, be assured the God commands . . .'and, Athenians, I should go on to say, 'Either acquit me or not; but understand that I shall never act differently, even if I have to die for it many times'"[1].

As time moved on, the early history of Rome saw the pendulum swing toward fewer restrictions, only to swing back to more restrictions as the empire expanded. This marked the beginning of the darkest period for freedom of speech. During the reign of Tiberius (14 -37 AD) no tolerance was shown toward those who spoke out against the government or its policies. It was not only Rome that opposed freedom of speech as it was at this time that Jewish leaders forced Pontius Pilate to put Jesus to death for his teaching and also ordered his apostles to stop preaching. They too were willing to die rather than to stop expressing their beliefs (Acts 5:28, 29).

During most periods of history, civil rights granted by governments were often altered or withdrawn at will which led to continued struggles for freedom of speech. Starting in the Middle Ages, some of the people demanded a written statement spelling out their rights with limitations placed on government control of those rights. As a result, significant bills of rights began to be formulated. Among these was the Magna Carta, a landmark in the field of human rights. Later came the English Bill of Rights (1689), the Virginia Declaration of Rights (1776), the French Declaration of the Rights of Man (1789), and the United States Bill of Rights (1791).

[1] Πλάτωνος, *Απολογία Σωκράτους* [Plato, *Socrates' Plea*].

The 17th, 18th, and 19th centuries heard the voices of leading figures of history speak out for freedom of expression. In 1644 the English poet John Milton, who may best be remembered for *Paradise Lost*, wrote the famous pamphlet *Areopagitica* as an argument against restrictions of freedom of the press. The 18th century witnessed the growth of freedom of speech in England, although restrictions remained. In America the colonies were pressing for the right to freedom of speech, both oral and printed. The Constitution of the Commonwealth of Pennsylvania, September 28, 1776, for example, stated in part: *"That the people have a right to freedom of speech, and of writing, and publishing their sentiments, therefore the freedom of the press ought not to be restrained.".* This statement was an inspiration for the First Amendment to the U.S. Constitution in 1791, which declared the thinking of the founders of the American Constitution on cherished rights of the people: *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.".*

Nineteenth-century English philosopher John Stuart Mill published his essay "On Liberty" in 1859. It is often quoted and has been referred to as one of the greatest of all statements in the cause of free speech. The battles for the right to speak freely in public, however, did not end with the arrival of the supposedly enlightened years of the 20th century. For example, because of efforts to restrict freedom of speech in America, proclamations defending that freedom have resounded from the halls of justice, both from lower courts and from the Supreme Court of the United States.

Justice Oliver Wendell Holmes, Jr. of the U.S. Supreme Court, stated his belief in free speech in a number of court decisions. Describing the test of free speech, he said: *"If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought - not free thought for those who agree with us but freedom for the thought that we hate."* (*United States v. Schwimmer, 1928*).

Many legal analysts and modern historians have written profusely about the numerous court battles fought to safeguard freedom of speech late in the 20th century. Freedom of speech is never guaranteed. Although governments may boast of the freedom they extend to their people, it can be lost in a change of government or of court justices.

Nowadays, provisions about the freedom of expression exist in all democratic Constitutions (eg Art. 77 of the Danish Constitution, Art.5 of the Greek Constitution, Art. 26 of the Slovak Constitution and so on). From an international point of view, "freedom of expression" is located after the "freedom of thought, conscience and religion" and before the "freedom of association" in all basic treaties for the protection of human rights, as observed with a quick look at various treaties: Article 19 of the Universal Declaration of Human Rights (1948)[2], Article 19 of the International Covenant on Civil and Political Rights (1966)[3], Article 10 of the European Convention on Human Rights (ECHR) (1950), and Article 11 of the Charter of the Fundamental rights of the European Union (2000)[4], which features identical is replicated in the draft of the European Constitution.

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[2] Everyone has the right to freedom **of opinion** and expression; this right includes freedom to hold opinions **without interference** and to **seek,** receive and impart information and ideas **through any media** and regardless of frontiers.

[3] Everyone shall have the right to hold opinions without interference.

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

[4] Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The remainder of this paper will focus on the ECHR while keeping an eye on the aforementioned international documents which fortify, delineate and regulate the freedom of expression. The centrality of the ECHR in our paper, nevertheless, has less to do with the way that Article 10 articulates and guarantees freedom of expression and more to do with its provision for the European Court of Human Rights[5] (ECtHR).

Reference to the case law of the ECtHR will allow us to see through a more official, legal lance what we commonly take as our liberty to freely say what we please, as well as the related liberty to hear what others have stated. Understanding the content, the meaning and the rationale of the freedom of speech and other forms of expressive communication, the structure and the central values of its protection will be the concern of the first part of this paper. What is commonly understood as a freedom to express one's views without any approval process or as a prohibition of censorship has to be closely examined. The first part also explores and gives attention to what exactly freedom of expression is, how it is related to everybody's everyday life and the opportunities of participation that it offers not only to writers or journalists, but to each of us. In the second part, the legitimate limitations in the practice of this right are to be explored.

2. Freedom of Expression

*"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." (*Article 10 ECHR)*.*

Opinions, information, ideas, convictions, comments, evaluations and judgements are usually coming out of our mouth when we are speaking. Commonly articulated as the freedom of speech, the interest at stake here expands beyond speech. For example, Chris knows that Susan's favourite colour is red (information); according to him, this is a very definite sign of a violent character (opinion); and he thinks that impeding Susan, like any other violent person, from reproducing would make this world a much better place to be (idea).

2.1. The real sense of free expression

2.1.1. Speech versus the right to hear and be heard or… Expression versus communication

Imagine that Chris is left alone in a room to proudly announce his conclusion to … himself! The fact that he is speaking freely, namely that he says exactly what he likes, without any interference, does not automatically mean that he is exercising his right to free speech. In fact, if we think twice, we realise that there is probably little reason for public interference anyway. Uttering words, if nobody is listening, reduces speaking to loud thinking. The same conclusion would apply of course, if Chris were allowed to speak in a language understood only by himself, in front of people with hearing disabilities, or people who have been officially committed to ignore him.

[5] The European Court of Human Rights (ECtHR), in Strasbourg, was set up under article 19 of the European Convention on Human Rights (ECHR) and was constituted in 1958. It comprises one judge from each member state of the Council of Europe. Judges serve in their personal capacity for nine-year renewable terms. Most Council of Europe member states accept the ECHR and the jurisdiction of the ECtHR.

Such examples illustrate the dimensions misleadingly silenced by the term freedom of "speech or expression". What counts as much as - if not, more than - producing words, is distributing and communicating them. The freedom of speech needs to be necessarily understood as a freedom to be heard, to - at least - initiate communication without public interference.

These multiple parameters of "speech" pointing to a two-way process of airing views, opinions and facts are secured by article 10 of the ECHR, which, like other international documents, stresses simultaneously the importance of "receiving **and** imparting information and ideas". It means that somebody is free to receive the information and ideas that Chris is imparting, but also that Chris is freely receiving the ideas somebody else is imparting. The freedom of speech of the "other" is granted to him/her - not simply on grounds of fairness, but in order to attain one's own interest in freedom of speech**.**

2.1.2. Regardless of the medium

Since one realises that communication, rather than production of sounds, is at the core of free speech, it is easily understood that the term "expression" and its legal protection is widely drawn. Speech is broadly construed to include not simply words - spoken or penned - but also photographs, paintings and performances. The whole range of expressive acts that are produced with the intention of communicating an idea can be understood as a way of speech. It also includes the freedom not to speak; and the right to seek information that is available, but not the right of access to information (e.g. restricted information). Similarly, the right to impart information does not imply a right of access to the means of imparting information, such as newspaper space or television air time. Article 10 of the ECHR, like all the international documents at issue, refers expressively to the freedom of *expression*.

The medium through which the expressive message will be communicated does not have much influence on the claim for its protection. Article 10 seems silent on what is popularly known as the freedom of the press, but the case-law of the ECtHR illustrates that the "press" undoubtedly falls within the ambit of protected "expression". Through its casework, the ECtHR has established the range and means of free expression protected under the ECHR - including political, artistic and commercial expression through the written and spoken word, television and radio, film and art. Freedom of press-specific dissemination of news and opinions covers newspaper and periodicals, books, posters, pamphlets, tapes, discs etc. New technologies, such as the Internet, satellite and digital broadcasting offer unprecedented opportunities to promote freedom of expression and communication.

Article 19 of the Universal Declaration of Human Rights (UDHR) explicitly states that freedom of expression through any media is to be protected. So does the Article 19 of the International Covenant on Civil and Political Rights (ICCPR) by entitling everybody to free expression *"orally, in writing or in print, in the form of art, or through any other media of his choice."*.

Chris is in principle free to announce his conclusion to his friends or to the public, orally or in a printed form, in words or other gestures and symbols. He could write an article or a book on them (*Handyside v. United Kingdom*). His comments could be the subject of a TV program (*Informationsverein Lentia v. Austria*) or a radio interview (*Barthold v. Germany*). He could equally prefer to convey his message to the public through a song, a painting (*Muller v. Switzerland*), or a film (*Otto - Preminger Institute v. Austria*). The facts of these cases are not really important here, as they are just used to show indicatively the range of protection regarding the means of expression the ECtHR offers.

It is time to pause a while and think why is Chris - subject to some restrictions that will be discussed later - entitled to the appeal of Article 10; why should his free speech, as analysed so far, be protected? Exploring the rationale of this protection is important when deciding what should fall within its ambit and taking a stance in ambiguous cases, as well as when deciding on conflicts between freedom of speech and other legitimate interests.

2.2. Justifications of free expression

We want free expression for many reasons. Some involve individual interests, others the public interest or the common good. Some have to do with politics, or democratic politics in particular, others concern intellectual values like truth, and others have to do with promoting virtues of character like tolerance. Some involve the interests of speakers, others the interests of listeners or society at large.

2.2.1. Essentially individual interests

2.2.1.1. Advancing autonomy and self-determination

It is quite obvious that allowing Chris to claim in public that, like any violent person, Susan should be prevented from reproducing differs fundamentally from allowing him to put his idea into practice. Even if the former behaviour were not powerless and inconsequential, the latter would limit Susan's autonomy much more. Speech, due to its essentially symbolic nature, is a very useful tool in advancing individual autonomy, as distinct from outer freedom, namely freedom of action. Thinking for ourselves, arriving at conclusions and suggestions, expressing, as Chris does in our example, what would make this world a better place, is an essential aspect of our personhood. It does not matter whether opinions concern a private or a public issue, an important or worthless one. It is the subjectivity of the evaluation that is essential to the right of expression.

The symbolic nature of "expression" does not only moderate the side-effects of acting freely (when acting means just speaking) as illustrated above, but also allows acting broadly, in areas that non-symbolic, physical acting may be desirable, but unattainable. An anti-war protester hardly believes that her or his "speech" will end a war that is taking place at the other end of the world. (S)he does, nevertheless, benefit from a right to publicly declare her/him self in opposition to this war. Taking a stance towards facts and ideas, expressing ourselves, communicating our thoughts and points of views to others, create a space for self-determination, a space for creativity and autonomy. In this sense, the freedom of speech is a possibility given to everybody to leave a mark on the world making outer what is inner.

2.2.1.2. Discovering the truth and self-development

As already explained earlier much of the importance of free expression lies in its two-way direction. It is argued, then, that freedom of speech is beneficial, because beyond allowing one to make outer what is inner, it also permits the outer to become inner. Freedom of expression is crucial for self-realization or self-development. Mill (1859: *On Liberty*) argued that any serious approach to the truth needs to overcome the limits of the necessarily partial human mind - to understand the bases and limitations of one's views. In that sense, even fallacy has its place in the search for truth by stimulating others to defend or reformulate or refute their own ideas.

Chris will only be able to honestly realize the disadvantages of impeding Susan from reproducing, if he is allowed to lance his point of view in “the market place of ideas”. An open-ended procedure of communication and expression advances self-awareness and encourages tolerance.

2.2.2. The common good and democracy

Moving from the individual to the society, it could be argued that an enlightened society is one which, following public dialogue and debate, balances conflicting interests in a democratic process. If we replace the “truth”, as the ultimate goal of a person's quest, with the “best policies for the electorate”, as the ultimate goal of a democratic polity, we start realizing the importance of free speech in a democratic society. Chris' views on combating violence can, thus, be afforded a place in the democratic debate.

Moreover, since democracy means popular sovereignty, the citizens, as the ultimate decision makers, need complete access to information to make intelligent political choices. The political value of free speech is enhanced by the way it contributes to political civic participation, another precondition of democracy. The press, compared to the individual, has a particular public task in serving democracy. By permitting the flow of information, necessary for citizens to make informed decisions and for leaders to stay abreast of the electorates, the press fulfils an informative function. Furthermore, the press in particular serves as the people’s watchdog, ensuring independent criticism and evaluation of the established power of government and other institutions that may usurp democratic power.

Nevertheless, it should be taken into consideration that even if generally considered as an antidote to established power, the press is sometimes likely to reinforce the established power. Access to the mass media is distributed as unequally as are other forms of power. Nothing guarantees that all valuable expression will find its place in the public forum: media space and time is limited; therefore, which views are covered, and in what way, can depend mainly on the economic and political structure, the context of press institutions and the characteristics of the media as economically driven organizations trying to capture the largest possible audience. Article 11 of the Charter of Fundamental Rights of the European Union reflects this concern by stating that it is not only the freedom, but also the pluralism of the media that should be respected.

3. Public interference: Restriction or violation of the freedom of expression?

National Constitutions guaranteeing freedom of expression always stress that the exercise of this right can lawfully be limited under some circumstances. So does the Article 10 of the ECHR. The ECtHR stresses (see, for example: *Handyside v. United Kingdom*, *1976*) that: *“freedom of expression … constitutes one of the essential foundations of the democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment.”*. Even if built on demands of a democratic society, such as “pluralism, tolerance and broadmindedness”, the freedom of speech is not absolute. Whoever exercises his freedom of expression undertakes “duties and responsibilities” (Article 10 (2) of the ECHR). The ECtHR cannot overlook such a person's duties and responsibilities, when it enquires whether restrictions were conducive to the protection of other important values in a democratic society.

The ECHR's provisions protect Chris' freedom to express his views about Susan, the red colour, violence and life in general, but whether the consequences of these views on Susan, on the society of red colour's supporters, on the society at large are also protected, should be examined more carefully.

Free expression often impacts on the rights and interests of others**.** For example, Chris' claim may damage Susan's reputation or incite racial hatred against red haired people... The 2nd paragraph of Article 10 of the ECHR provides that the exercise of free expression … may be subject to such formalities, conditions, restrictions or penalties as are 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 the reputation or the rights of others**, for **preventing the disclosure of information received in confidence**, or for **maintaining the authority and impartiality of the judiciary**. Therefore, the ECtHR, like national courts in previous stages, has sought to balance the right to freedom of expression with the state's legitimate need to restrict it in certain circumstances.

Interference by the public authority - such as injunction ordering to refrain from publication, seizure, forfeiture and destruction of the matrix and of copies of a book, prosecution, criminal conviction, order to pay fine for defamation - featuring as a *violation* of the freedom of expression in the first paragraph of the ECHR's Article 10, becomes a legitimate *limitation,* if it aims at the protection of **one of the *interests* mentioned above.** It is important to keep in mind that free expression, even when threatening one of those important interests, does not immediately and necessarily call for public interference, unless the latter **is *prescribed by law* and is *necessary in a democratic society*.**

Is Chris liable to any of the above penalties, after freely expressing his criticism to Susan, because, he has caused damage, let's say, to her reputation?

3.1. Assessing the limits of free expression (and their limits!)

3.1.1. Prescribed by law:

Interventions by the public authority resulting in an **acceptable limitation** of the freedom of expression feature as sanctions *in different national laws* prescribed to protect the above legitimate interests. They are to be found, for example, in “obscene publication acts”, designed to protect the morals of a society, in “criminal or civil defamation/ libel/ slander laws”, enacted to safeguard the reputation of a person, in various laws falling under the “contempt of court” rubric, restricting the flow of information in order to protect the administration of justice, in laws purporting to regulate the press (See for example: The Danish penal code; §152 on the infringement on professional secrecy, §263-275 on peace and defamation, The Danish Act on the treatment of personal information, The Danish Act on the media, The Danish Act on the databases of the media, The Danish Act of copyright or the Act on Slovak Press, Television and Radio).

In order to meet the requirement that the limitation is prescribed by law (see *The Sunday Times v. United Kingdom, 1979*) there must be sufficient *legal basis for the limiting measure.* The law should be expressed with sufficient clarity to enable the citizen to know with reasonable certainty the consequences a certain expressive act could entail. It has to be *accessible* (available, known, presented in a comprehensible form) and *foreseeable* (offering a general understanding of the cases it covers). The relevant law must provide a clear indication of the circumstances under which restraints on the freedom of expression are permissible, and, a

fortiori of the circumstances leading to the complete blocking of a publication (see *Gaweda v. Poland*, *2002*).

According to the ECtHR, the Polish courts erred when they inferred from Polish Law a power to refuse to register titles of periodicals (as a condition of their publication), because they failed to satisfy the test of truth: *"to …require of a title of a magazine that it embody truthful information, is … inappropriate from the standpoint of the 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 perspective readers.".* Accordingly, the ECtHR concluded that the law was insufficiently precise to enable the applicant to regulate his conduct, and, therefore the interference with the applicant's freedom of expression was not "prescribed by law".

3.1.2. Necessary in a democratic society

An actual "penalty", even if prescribed by law, as described above, can still qualify as a *violation* of the freedom of expression, *unless* it was necessary in a democratic society for the protection of one of the interests enumerated in Article 10(2) of the ECHR.

3.1.2.1. Necessary to *the* democratic society applying it - A margin of appreciation to the Contracting States

A legitimate limitation of the freedom of expression has to be necessary to achieve the interests specified earlier in ***the very* democratic society limiting it**. The machinery of protection established by the ECHR is subsidiary to the national systems safeguarding human rights and gets involved in the protection once all domestic remedies have been exhausted. Article 10 (2) leaves to the Contracting States a "*margin of appreciation"*, granted both to the domestic legislator (prescribing laws likely to limit freedom of expression) and to the bodies (judicial amongst others) that are called upon to interpret and apply the laws in force. Therefore, the way in which the ECtHR determines the presence or absence of a State's necessity to interfere with freedom of speech plays a major role in defining the extent of protection actually required.

Two assumptions underlie the doctrine of the margin of appreciation: firstly, what is necessary to serve interests *may vary from country to country*, even in democratic societies; and second, a government's estimate of that necessity is entitled to some deference by the international court, presumably less familiar with the relevant circumstances. What is necessary for the protection of **morals**, for the **protection of the reputation or the rights of others** or for **maintaining the authority and impartiality of the judiciary** more or less varies between different Contracting States. The State authorities, in continuous contact with the vital forces of their countries, are in a better place to assess the reality of the pressing social need implied by the notion "necessary".

The need to allow some margin of appreciation to different Governments is obvious in regard to some of the interests mentioned above. States are allowed a certain measure of discretion in deciding to what extent seditious, blasphemous or obscene publications should be allowed (The Handyside case[6] - 1976, the case of Muller and Others - 1988). It has repeatedly been stated by

[6] Handyside v. United Kingdom, Judgement of 7 December 1976: Richard Handyside, the English publisher of The Little Red Schoolbook, was convicted on obscenity charges. The English courts found that the book was likely to "deprave and corrupt" a significant proportion of the children who were likely to read it. However, the book had been published in most member states, and was freely available in other parts of the UK. The ECtHR ruled that there had been no violation of Article 10 on grounds that the state had a legitimate aim, in light of local circumstances, to protect morals. It attached particular importance to the "intended readership of the Schoolbook… children and adolescents aged from 12 to 18." Although the book contained mainly correct, factual information, it also included

the ECtHR that standards in these areas vary widely among the Contracting States, and may change quite rapidly within a society. It is hardly possible, or perhaps even desirable to lay down general criteria of universal application in the field. Threatening Chris with prosecution and criminal conviction may be necessary to protect Susan's reputation, for example, in Germany, but not in Italy, where, let's say, different legal and cultural forces are in place.

Of course, the margin of appreciation for the Contracting States varies depending on the nature of the limitation and the interest protected. It has been proposed by the ECtHR that *"the scope of the domestic power of appreciation is not identical in regards to each of the aims listed in Article 10(2)…"* when, regarding an interest, the domestic law and practice of Contracting States reveals a fairly substantial measure of common ground, the margin of appreciation is limited allowing more extensive European supervision (The Sunday Times case). "Authority of the judiciary", for example, allows less margin of appreciation than "protection of the morals".

3.1.2.2. How much is "necessary"? - The interference should correspond to a pressing social need.

According to the doctrine of a margin of appreciation, State authorities are to some extent entitled to judge what restrictions on free speech are necessary for the protection of other important values in their democratic societies, but the word "necessary" itself poses some limit to the States' discretion. In the Handyside case (1976), it is underlined that "it is up to the national authorities to make the initial assessment of the reality of the *pressing social need* [calling for interference] implied by the notion of 'necessity' in this context". Nevertheless, the ECtHR notes (ibid) that "whilst the adjective 'necessary' within the meaning of Article 10(2), is not synonymous with 'indispensable'…'absolutely necessary'… 'to the extent strictly required by the exigencies of the situation', neither it has the flexibility of such expressions such as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'.

3.1.2.3. Necessary to any democratic society- ***proportionality***

Although the limitations on the freedom of expression are expressed in very general terms, in any case, the ECtHR, responsible for ensuring the observance of those States' engagements, is empowered to give the final ruling on whether a restriction or penalty is reconcilable with freedom of expression, as protected by Article 10. The domestic margin is coupled by a European supervision by the ECHR organs. Such supervision concerns both the aim of the measure challenged and its necessity, namely the decision to apply it in a certain case.

The ECtHR's supervisory functions oblige it to pay the utmost attention to the principles characterising a democratic society:

"Freedom of expression … subject to the Article 10(2) limitations, is applicable not only to information or ideas that are favourably received or regarded as inoffensive, or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society. This means, amongst other things, that every restriction or penalty imposed in this sphere must be proportionate to the legitimate aim pursued." (Handyside v. UK, 1976).

"sentences or paragraphs that young people at a critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offences".

This is not a requirement that the infringement should not be excessive in the light of what is necessary to protect the relevant interest. Rather it seems to involve an examination of the *severity of the interference* in comparison with the *public injury that might follow from not completely protecting one of the interests cited*. Moreover the ECtHR should examine whether the reasons adduced by the national court to justify any public interference to the freedom of speech were "relevant and sufficient".

In the Lingens (1986) and Barford (1989) case, both dealing with the regulation of speech criticising public officials, it is suggested that proportionality implies that the pursuit of the aims mentioned in Article 10(2) has to be weighed against the *value of open discussion of topics of public concern.* The ECtHR stresses the great importance of not discouraging members of the public, for fear of criminal or other sanctions, from voicing their opinions on issues of public concern. There is little scope for restrictions on political speech or debates on questions of public interest.

3.2. Restriction or violation of the freedom of expression? A look at ECtHR's answers

After having reviewed the ECtHR's method of adjudicating freedom of expression cases, we will have a closer look to its case law, so as to see how the protection of other interests - such as the reputation or the rights of others, the authority and impartiality of the judiciary and the morals of a society - has qualified the content of the protected freedom of expression.

3.2.1. Freedom of expression and protection of the reputation of the others

In *Lingens v. Austria (1986)*[7] the ECtHR made clear that politicians must expect and tolerate greater public scrutiny and criticism than average citizens:

"The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual, as the former inevitably and knowingly lays himself open to close scrutiny … by both journalists and the public at large… A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interest of the open discussion of political issues.".

The ECtHR stressed the media's crucial role in reporting matters of public interest. Freedom of the *press* provides the public with *"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 ECHR.".*

The ECtHR offered a clear example in 2001 when it published its decision on a decade-old case in which Ľubomír Feldek, a Slovak poet, in 1994 was found guilty of libel and "injuring Slovak state interests" by the Slovak Supreme Court. The plaintiff in the case was Dušan Slobodník, a former Culture Minister and later a member of parliament for the HZDS party of Vladimír Mečiar. Feldek had in the early 1990s publicly claimed that Slobodník had a facist past

[7] Lingens v. Austria, Judgement of 8 July 1986, Peter Lingens: a magazine publisher in Vienna, published two articles critical of the Austrian Chancellor, Bruno Kreisky, and accusing him of protecting and assisting former members of the Nazi SS. The Chancellor brought private prosecutions for criminal defamation. Lingens was convicted and fined, and his magazine was confiscated. The ECtHR found that this interference with freedom of expression was not necessary for the protection of the reputation of others in a democratic society.

- his membership in the World War II Nazi youth league, Slovakia's Hlinka Mladosť. He also wrote a poem in 1992 titled Dobrú Noc, Moja Milá ('Good Night, My Dear'), in which appeared the line *esesák sa objal s eštebákom* (an SS man hugged an ŠtB [communist secret service] man), an apparent reference to Slobodník. The ECtHR decided Feldek's fundamental right to free expression had been violated, and ordered Slovakia to pay the poet 565,000 Slovak crowns ($11,280) in damages and court costs.

Generally, in its practice regarding defamation cases the ECtHR has distinguished between statements of fact and value judgements. While the existence of facts can be demonstrated, the truth of value judgements is not susceptible of proof. In both Lingens and a later case, *Oberschlick v. Austria (1991)*[8], the ECtHR made it clear that freedom of expression was not limited to verifiable, factual data. In other words, it was not "necessary in a democratic society" for journalists to prove the truth of their opinions and value judgements about political figures, as these were impossible to prove anyway.

Nevertheless, it should be kept in mind (see *McVicar v. The United Kingdom*[9]*, 2002*) that journalists' right of reporting on issues of general interest is safeguarded, as long as they are acting in good faith in order to provide accurate and reliable information, in accordance with the ethics of journalism.

"... Special grounds are required before a newspaper can be dispensed from its ordinary obligation to verify actual statements that are defamatory to private individuals. The question whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the newspaper could reasonably regard its sources as reliable with respect to the allegations.".

According to the ECtHR, when a journalist does not verify his sources before publication a libel conviction against him does not constitute a violation of his freedom of expression.

3.2.2. Freedom of expression and protection of the rights of the others

The delicate balance between freedom of the press and its impact on the rights of others was weighed by the ECtHR in *Jersild v. Denmark*[10] *(1994)*. The ECtHR acknowledged that the racist remarks, for which the Greenjackets were convicted, "were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10" and that the Danish Government had acted to protect its minorities against racial discrimination. It also noted the potential impact of the medium, since "it is commonly acknowledged that the audio-visual media

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[8] Oberschlick v. Austria, Judgement of 23 May 1991: This case concerned the publication in a periodical of a criminal summons laid against the Secretary-General of the Austrian Liberal Party in respect of remarks he had made during a general election campaign. The publication led to the conviction of the applicant for defamation. The ECtHR upheld his complaint of a violation of Article 10.

[9] McVicar v. The United Kingdom, Judgement of 7 May 2002: McVicar had published an article implying that a well-known British athlete used performance- enhancing drugs. The athlete filed a defamation action against the journalist and the jury found that he had committed libel and was ordered to pay the athlete's costs and was also enjoined from further publishing similar allegations in the future. The ECtHR highlighted the limits of the protection afforded to journalists and ruled that the libel conviction did not constitute a violation of the journalist's freedom of expression.

[10] Jersild v. Denmark, Judgement of 23 September 1994: Jersild was a Danish journalist working for a respected television news programme. He reported on a group of extremist youths -the Greenjackets - who made racist comments about black people and immigrants in Denmark. The youths, the journalist and the news chief were prosecuted and convicted. However, the ECtHR ruled that the penalties imposed on the media had violated Article 10, as the news item was not intended to engender racist views, but to expand on an issue that was already of considerable public interest.

have often a much more immediate and powerful effect than the print media". However, the ECtHR found that the penalties imposed on the media in this case were not necessary in a democratic society for the protection of the rights of others:

"The punishment 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.".

In the Jersild case, the ECtHR took into account the intended audience of the message in determining whether state interference is justified. Unlike the Handyside case, in which the messages of "The Little Red Schoolbook" were aimed primarily at children, the Greenjackets item was part of a serious news programme directed at a well-informed audience, who clearly required less protection.

3.2.3. Freedom of expression and maintaining the authority and impartiality of the judiciary

In several cases, the ECtHR has weighed the right to freedom of expression against the administration of justice, and ruled in favour of the former. For example, in *Sunday Times v. UK*[11] *(1979)*, the ECtHR stressed the media's role in reporting matters which the public has a right to know, saying:

"The Thalidomide disaster was a matter of undisputed public concern… Article 10 guarantees not only the freedom of the press to inform the public, but also the right of the public to be properly informed… The question of where responsibility for a tragedy of this kind actually lies is also a matter of public interest… The facts of the case…did not cease to be a matter of public interest merely because they formed the background to pending litigation. By bringing to light certain facts, the [Sunday Times] article might have served as a brake on speculative and unenlightened discussion.".

In Goodwin v. UK[12] (1996) - another 'contempt of court case' - the ECtHR endorsed the freedom not to speak, i.e. the fundamental right of journalists not to disclose the identity of confidential sources of information, stating:

"Protection of journalistic sources is one of the basic conditions for press freedom… Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of protection of journalistic sources for

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[11] In this case, the ECtHR found that an injunction preventing the Sunday Times newspaper from publishing an article about 'Thalidomide children" (children who were born deformed as a result of their mothers having taken Thalidomide as a tranquilliser during pregnancy) was a violation of Article 10. The injunction had been made on the grounds that the article might prejudice court proceedings then pending against Distillers, the company which had manufactured the drug. However, the ECtHR case had been in a "legal cocoon" for several years, and it was unclear that the parents' action was ever going to come to trial.

[12] Goodwin v. United Kingdom, Judgement of 27 March 1996: the ECtHR decided that Goodwin, a journalist, had the right not to disclose the identity of a source that had given him confidential information about a company that, if published, might have caused the company financial harm and job losses. The High Court had ordered Goodwin and his publishers to disclose the source and held them in contempt when they refused. In considering the case, the ECtHR considered whether the disclosure order was proportional to the aim of protecting the company's interests. It determined that the balance between free speech and the rights of others should weigh in favour of the public interest, not commercial interests.

press freedom in a democratic society and the potentially chilling effect an order of disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the ECHR unless it is justified by an overriding requirement in the public interest.".

3.2.4. Freedom of expression and the protection of the morals

As we have seen earlier (i.e. the Handyside case), the protection of morals can be used as a paradigm case for areas in which the ECtHR exercises its supervision in a more lenient form when taking into consideration the need of a margin of appreciation allowed to Contracting States. It is here that the interference is more easily accepted as legitimate restriction.

In *Müller v. Switzerland*[13] *(1988)* - the first case in which the ECtHR extended the right to freedom of expression to artistic expression - it was determined that it might be necessary for a State to restrict free expression in order to protect vulnerable citizens, especially children. This restrictive outcome took effect also in *Otto - Preminger Institute v. Austria*[14] *(1994)*, even if, unlike the Müller case, the Institute had restricted the showing of a 'blasphemous' film to paying adults above 17 years of age. There was little risk that children would have the chance to see the film as it was to be screened late at night. Therefore, the Institute had taken precautions, which seemingly precluded the need for the state to interfere 'for the protection of morals'. Despite stating that people with religious beliefs have to tolerate criticism and denial by others, which looks obvious in every democratic society, the ECtHR in practice gave the state a very wide margin of appreciation, accepting that its action was necessary in order to keep the peace. In contrast, the European Commission had said that very stringent reasons were needed to justify the seizure of a film - *"which excludes any chance to discuss its message"* - and that these reasons were lacking. Similarly, the ECtHR deferred to the state's margin of appreciation in *Wingrove v. UK*[15] *(1997)*, finding that the state's refusal to provide an official classification for an allegedly blasphemous film was not a violation of Article 10.

4. Conclusion: Free (?) expression in Europe

It has been shown that drawing the line between legitimate limitations and illegitimate violations of the freedom of expression is a matter of weighing relative injuries as well as striking a balance between protecting freedom of expression and protecting other people's rights and State's interests. It is argued that the ECtHR in the years ahead will face new challenges, as it will increasingly have to grapple with cases of a vastly different kind from many newly emerging states of Eastern Europe. In this sense, it is useful, by way of conclusion, to have a quick look at the Council of Europe Parliamentary Assembly's Recommendation 1589 (2003), as a document

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[13] Müller v. Switzerland, Judgement of 24 May 1988: Muller, an artist, was convicted in Switzerland for exhibiting 'obscene' paintings, which were temporarily forfeited. There had been no attempt to protect children's morals through entry fees or age restrictions on the exhibition.

[14] Otto-Preminger Institute v. Austria, Judgement of 20 Sept. 1994: The Austrian authorities seized and forfeited an allegedly blasphemous film from a private institute on the grounds that it would have been offensive to Christians. The Commission on Human Rights found a violation of Article 10, but the ECtHR ruled by six votes to three that there had not. At issue was whether the action was proportionate to the legitimate aim pursued, and therefore 'necessary in a democratic society'. The basis of the ECtHR's decision was that most people living in the area were Roman Catholic and the state had acted to protect their rights and prevent disorder, and therefore was within the state's margin of appreciation.

[15] Wingrove v. United Kingdom. In this case, the British Board of Film Classification refused to issue a classification certificate to Nigel Wingrove for his video *Visions of Ecstasy* on grounds that it was blasphemous. This effectively banned the film as it is an offence in the UK to supply or offer a video for which no classification certificate has been issued.

offering not only some normative insight on what 'serious violations of freedom of expression' could mean, but also some pragmatic understanding on the standards of freedom of speech around Europe.

According to this paper, violence continues to be a way of intimidating investigative journalists or of settling scores between rival political and economic groupings, for whom certain media act as mercenaries. The number of journalists attacked, or even murdered, in the Russian Federation is alarming. Violence has also recently been recorded in Armenia, "the Former Yugoslav Republic of Macedonia", Georgia, Ukraine and Belarus. In particular, the Assembly strongly condemns the murder of Tigran Naghdalian, Chairman of the Public Television and Radio Council of Armenia. When journalists are attacked, or even murdered, it is not only their right to life and personal integrity that is unlawfully prejudiced. It is also their freedom of expression and the whole society's freedom of information at stake. It is obvious that crude violence to silence journalists could never qualify as a legitimate restriction (prescribed by law and necessary in a democratic society!).

It is also proposed that it is unacceptable in a democracy that journalists should be criminally prosecuted, and even sent to prison for their work, as it has been the case for Mikola Markevich, Paval Mazheika and Viktar Ivashkevich in Belarus, and of Grigory Pasko in Russia. Criminal prosecution against journalists continues in Turkey.

In Ukraine, according to numerous journalists and to the conclusions of the parliamentary hearings on freedom of speech and censorship, the presidential administration provides instructions to the media on the coverage of the main political events. Such practice, like in the case of countries where the national television continues to be state-run or under tight government control, renders public interference the illegitimate rule in the field of communications. It is regrettable, for instance, that broadcasting law provides for many forms of direct political interference. In certain countries it is still far too easy to replace heads of public media according to the whims of the authorities.

Other forms of legal harassment, such as defamation suits or disproportionately high fines that bring media outlets to the brink of extinction, continue to proliferate in several countries and functioning as an informal censorship. Such cases were recorded in Azerbaijan, Belarus, Croatia, Russia and Ukraine. A dozen lawsuits have been brought against Presspublica, the publisher of the major Polish daily, *Rzeczpospolita.* Intimidation of the media and serious violation of their freedom takes also the form of police raids, tax inspections and other kinds of economic pressure.

Even the most advanced new democracies still face difficulties in ensuring genuinely independent public service broadcasting and a proper balance between government and opposition. In certain west European countries, courts continue to violate the right of journalists to protect their sources of information. In Italy, the potential conflict of interest between the holding of political office by Mr. Berlusconi and his private economic and media interests is a threat to media pluralism unless clear safeguards are in place.

Media concentration is a serious problem for freedom of expression and information across the continent. In certain countries of Central and Eastern Europe a very small number of companies now predominantly own the printed press. Access to digital television also tends to be highly concentrated.

The Assembly, therefore, stresses the need for the Council of Europe, through its appropriate bodies, to continue to monitor closely the state of freedom of expression and media pluralism across the continent and to put all its weight behind the active defence of its basic standards

and principles, including the duty of journalists to observe ethical and responsible professional standards.

Even if, like other transnational governmental or non-governmental organisations, the Council of Europe's contribution to safeguarding freedom of expression is indeed very valuable, it should be kept in mind that cultivating free speech can be promoted to some extent by each of us on an everyday basis. Realizing that our freedom of speech is enhanced, and not suppressed, by the expression of disagreeing voices is at the core of such a challenge. After all, a violent response to Chris on behalf of Susan would confirm his conclusion, while the mere opening of a discussion with him would rather refute his views...

5. Glossary

Margin of appreciation

A doctrine used in the international human rights law to mediate the tension between effective international supervision in establishing human rights norms on the one hand, and primary domestic responsibilities and socio-cultural choices and contexts on the other. The poles in contest may be seen as involving the vertical or horizontal distribution of power. The term is used to express that there is a space left to the contracting states (or generally other sub-groups) to put in practice the general norms in a way that is relevant to their understanding of them and convenient to their history and civilisation. It underlines the (social, cultural, political etc) relativity of the meaning of the rules. The sense of freedom of expression and its limitations (amongst other things) varies and is expected to shift along time and space, in different moments of history or different points of the world. (Supra-national) Judges are bound to some extent by this sense of relativity when defining in practice general rules or declarations.

Proportionality

In law and politics, proportionality is a maxim in some theories of governance and a principle underpinning many constitutional provisions. In simple terms, the principle means that if you want to crack a nut, do not use a sledgehammer. The principle requires the institutions not to take any measure that is excessive than what is absolutely required.The principle of proportionality is an interpretive device designed to restrain the power of state authorities and to provide greater protection of individual autonomy.

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