

The European Convention on Human Rights: The Right to Freedom of Expression and Information restricted by Duties and Responsibilities in a Democratic Society

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Abstract

Article 10 of the European Convention for the protection of Human Rights and Fundamental Freedoms and the case law by the European Court of Human Rights in Strasbourg help to secure the right to freedom of expression and information in the European democracies. This paper explores some characteristics and recent developments of the European Court's case law regarding media, journalism and freedom of expression and information. It explains, also for a readership outside Europe, what the (actual) impact is of the European Convention and of the European Court of Human Rights on the practice of freedom of expression, media and journalism in Europe.

Although Article 10 in principle prohibits interferences by public authorities with the right to freedom of expression, it leaves open some possibilities and margin for State authorities to limit, restrict or sanction certain types of expressions or media-content, due to the "duties and responsibilities" related to communicating ideas and information. This paper, in its first part, clarifies under which circumstances and conditions state interferences with the right to freedom of expression and information can be justified under the European Human Rights system. The second part of the paper will focus on the added value created by the European Court's (recent) jurisprudence by safeguarding public debate and reporting on matters of public interest, by protecting investigative journalism, whistle-blowing and journalistic sources, and by guaranteeing access to information held by public authorities.

Introduction*

All parliamentary democracies in Europe guarantee the right to freedom of expression and media freedom in their constitutions, media laws or human rights acts. The practice and application of this freedom, however, still differs strongly from state to state, and can fluctuate over periods of time. Specifically in the areas

* This paper elaborates on and updates a working paper published by the European University Institute, Centre for Media Pluralism and Media Freedom (CMPF), in February 2014: D. Voorhoof, "The right to freedom of expression and information under the European Human Rights system: towards a more transparent democratic society", *EUI Working Paper* (Florence: EUI RSCAS 2014/12) 22 p., http://cadmus.eui.eu/bitstream/handle/1814/29871/RSCAS_2014_12.pdf?sequence=1. The material analysed in this article is also based on D. Voorhoof, "Freedom of Expression and Information, Media and Journalism under the European Human Rights System : Characteristics, Developments and Challenges", in P. Molnar, ed., *Turning Points in Free Speech and Censorship Around the Globe* (Budapest: CEU Press, 2014 (forthcoming)).

of state security, public order, the protection of confidential or secret information, the reputation of public persons, the right of privacy and in the domain of morals and religion, the right to freedom of expression has been differently interpreted and applied. Still the general tendency is that the scope and level of protection of freedom of expression and information has been extended and upgraded over the years in Europe. Public authorities have been less involved in prior restraint, censorship, oppression and criminal prosecution as forms of interferences with the right to freedom of expression and information.¹

Article 10 of the European Convention for the protection of Human Rights and Fundamental Freedoms (hereafter: the European Convention, or: the Convention, or: ECHR) and the case law by the European Court of Human Rights (ECtHR) have undoubtedly contributed to a higher level of respect for the right to freedom of expression and media freedom in the European democracies.² Indeed, until a few decades ago, the limits and

1. Internet regulation, filtering and surveillance related to the war on terror and state security show a tendency, however, to reduce some areas of freedom of expression and media freedom in Europe since 11 September 2001. For a global and updated overview, see Unesco, *World Trends in Freedom of Expression and Media Developments* (Paris: Unesco Publ., 2014), <http://unesdoc.unesco.org/images/0022/002270/227025e.pdf>. See also M. Price, S. Verhulst and L. Morgan, eds., *Routledge Handbook of Media Law* (New York: Routledge, 2013).

2. Other institutions and instruments of the European Convention on Human Rights and the Council of Europe play an important role in monitoring and enforcing freedom of expression as guaranteed under Article 10 ECHR, such as the Committee of Ministers' supervision of the execution of the Court's judgments (www.coe.int/t/dghl/monitoring/execution/default_en.asp) and the Commissioner of Human Rights, who plays a prominent role in promoting and monitoring respect for human rights in the Council of Europe's member states (www.coe.int/t/commissioner/default_en.asp). By promulgating resolutions, declarations and recommendations, the Parliamentary Assembly, the Committee of Ministers, and the ministers responsible for media and new communication services promote the awareness and develop guarantees for securing freedom of expression, e.g., in relation to court reporting, protection of journalistic sources and protection of whistle-blowers, access to official documents, the right to reply, public service media, independent regulatory authorities in the media sector, media pluralism, coverage of election campaigns, the media in the context of the fight against terrorism, blasphemy, religious insult, hate speech and the application of freedom of expression principles on the Internet and the new media environment. Aspects of freedom of expression are also reflected in and guaranteed by some Council of Europe Conventions, such as the Revised European Convention on Transfrontier Television (ECTTV, CETS nr. 32) and the European Convention on Access to Official Documents European (CETS nr. 205). The Council of Europe also promotes professional standards in the media and self-regulatory formats stimulating journalistic ethics or respecting ethical and basic democratic values on the internet and in the new media and in online media environments. For more information, see the website of the Council of Europe on Media and Information Society (www.coe.int/t/dghl/standardsetting/media/) and of the Steering Committee of Media and Information Society (CDMSI) (www.coe.int/t/dghl/standardsetting/media/CDMSI/default_en.asp). See also: www.obs.coe.int/oea_publ/legal/ebook_committeeministers-coe.pdf.en and www.obs.coe.int/oea_publ/legal/ebook_ParliamentaryAssembly.pdf.en.

restrictions of freedom of expression were determined by parliaments, governments or other national state authorities, ultimately scrutinized by their own domestic judicial authorities, without any further external control. This situation, this “paradigm” has significantly changed in Europe, due to the achievement of the European Convention on Human Rights and the enforcement machinery in which the European Court of Human Rights plays a crucial role.¹ In an impressive amount of judgments the ECtHR has found that the national level of protection of the right to freedom of expression did not meet the requirements of Article 10 ECHR. The Court’s case law has emphasised “that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment”, while restrictions and sanctions need a relevant, pertinent and sufficient motivation in terms that there is a pressing social need to impose and enforce them. Restrictions and limitations on the right to freedom of expression need to be interpreted narrowly. The ECtHR has also clarified that freedom of expression and information is not only to be respected by government and parliament, but also by the judicial authorities in the member states.² The recognition by the European Court of a horizontal effect³ of Article 10 and of the positive obligations for member states to protect the right to freedom of expression⁴

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1. See also D.J. Harris, M. O’Boyle, E. P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2009).
 2. Regardless of how precisely the European Convention is internally applied or guaranteed in the member states (monistic or dualistic approach). In some countries the European Convention is given precedence over national law and the provisions of the Convention have direct effect; in other countries the Convention has been ‘indirectly’ incorporated into domestic law (e.g. in the UK by the *Human Rights Act 1998* or in Germany by an approval in the Constitution, the *Zustimmungsgesetz* under Art. 59 of the German Constitution (*Grundgesetz*)). See also D.J. Harris, M. O’Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights* (Oxford: Oxford University Press 2009).
 3. The ECtHR at several occasions clarified how Article 10 ECHR is also to be applied in private legal relationships and it has repeatedly assessed interferences by private persons in the light of Article 10(2) ECHR: ECtHR 29 February 2000, Case No. 39293/98, *Fuentes Bobo v. Spain*; ECtHR 6 May 2003, Case No. 44306/98, *Appleby a.o. v. UK*; ECtHR Grand Chamber 30 June 2009, Case No. 32772/02, *Verein gegen Tierfabriken Schweiz (VGT) (n° 2) v. Switzerland*; ECtHR 16 December 2008, Case No. 23883/06, *Khursid Mustafa and Tarzibachi v. Sweden*; ECtHR 16 July 2009, Case No. 20436/02, *Wojtas-Kaletka v. Poland*; ECtHR 21 July 2011, Case No. 28274/08, *Heinisch v. Germany*; ECtHR Grand Chamber 12 September 2011, Case Nos. 28955/06, 28957/06, 28959/06, 28964/06, *Palomo Sánchez a.o. v. Spain*; ECtHR 6 October 2011, Case No. 32820/09, *Vellutini and Michel v. France*; ECtHR 10 May 2012, Case No. 25329/03, *Frasila and Ciocirlan v. Romania*; ECtHR 10 January 2013, Case No. 36769/08, *Ashby Donald a.o. v. France* and ECtHR 16 July 2013, Case no. 1562/10, *Remuszek v. Poland*.
 4. ECtHR 16 March 2000, Case No. 23144/99, *Özgür Gündem v. Turkey*; ECtHR Grand Chamber 7 June 2012, Case No. 38433/09, *Centro Europa 7 S.R.L. and Di Stefano v. Italy* and ECtHR 25 June 2013, Case No. 48135/06, *Youth Initiative for Human Rights v. Serbia*.

has further extended the scope of the right to freedom of expression in Europe.

The right to freedom of expression and information as guaranteed by Article 10 of the Convention is applicable in all 47 member states of the Council of Europe,¹ from Norway to Cyprus, from Portugal to Russia and from Iceland to Azerbaijan.² The way Article 10 of the Convention has been interpreted and applied by the European Court of Human Rights and has been promoted by the Council of Europe, has manifestly helped to upgrade and improve the level of freedom of expression and media freedom in countries that became member states of the European Convention after the fall of the Berlin Wall (9 November 1989), such as the Baltic states (Estonia, Lithuania and Latvia), the Czech Republic and Slovenia.³ But also in countries that already had a long-standing constitutional and democratic tradition, the right to freedom of expression and information has been broadened, strengthened, updated and upgraded under the influence of Article 10 of the European Convention, especially regarding discussions on matters of public interest, in protecting newsgathering activities and journalistic sources, whistle-blowing, access to public documents, media pluralism and internet freedom. In other Council of Europe member states that have less solid democratic institutions or that have experienced growing pains as they have moved toward democracy (such as in Turkey, Azerbaijan, Russia, Georgia, Armenia, Moldova, Serbia, Ukraine and Hungary), respect by the authorities for press freedom and freedom of (political) expression is still often problematic at the domestic level. Therefore, Article 10 of the

1. For more information about the Council of Europe, see www.coe.int. The only states in Europe which are not a member of the Council of Europe (and nor of the ECHR), are Belarus and the Holy See (Vatican).

2. The 47 member states that at present have ratified the Convention are Albania, Andorra, Austria, Armenia, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom. More than 800 million people are actually living under the protection of the European Convention on Human Rights and Fundamental Freedoms, as a “minimum rule” of human rights protection (Art. 53 ECHR). In the (near) future the European Union (EU) will accede to the ECHR as well, bringing the acts and action of the EU under the scrutiny of the ECtHR. This process of accession is now in a final stage: see European Union Treaty, Article 6(2) and Council of Europe Protocol No. 14, Article 17.

3. See the developments in these countries reflected in the press freedom indexes of *Reporters without Borders* and *Freedom House*.

Convention has become a crucial instrument to motivate, to stimulate or even to compel the national authorities of these countries to abstain from interfering in freedom of speech and press freedom, to respect freedom of public debate, political expression and critical journalism to a higher degree and to promote media pluralism and internet freedom.¹

This paper explores the impact, some characteristics and recent developments of the European Court's case law regarding media, journalism and freedom of expression and information.² Although Article 10 in principle prohibits interferences by public authorities with the right to freedom of expression, it leaves open some possibilities and margin for State authorities to limit, restrict or sanction certain types of expressions or media-content, due to the "duties and responsibilities" related to the exercise of the right to freedom of expression. This paper therefore will start by clarifying under which circumstances and conditions state interferences with the right to freedom of expression and information can be justified under the European Human Rights system. Some examples will illustrate how the duties and responsibilities related to publicly communicating information and ideas can indeed justify limitations or sanctions because of some specific content considered harmful for society or breaching the rights of others. Some speech or media-content can even be categorically excluded from Article 10 protection. The second part of the paper will focus on the added value created by the European Court's (recent) jurisprudence, by protecting public debate and reporting on matters of public interest, investigative journalism, whistle-blowing and journalistic sources, and by guaranteeing access to information held by public authorities.

1. For a global perspective, compare with Article 19 of the UN Covenant on Civil and Political Rights (ICCPR) and the General Comment No. 34, *Article 19: Freedoms of Opinion and Expression*, CCPR/C/GC/34, UNHRC 2011, <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>.

2. The case law analysed in this article includes the European Court's jurisprudence since December 1976 (ECtHR 7 December 1976, Case No. 5493/72, *Handyside v. UK*). In that judgment the Court firmly emphasized the importance of freedom of expression in a democratic society, but *in casu* found no breach of Article 10 of the Convention, as the protection of minors was considered to justify the interference by public authorities against the "Little Red Schoolbook" and its publisher, Mr. Handyside. The most recent jurisprudence of the ECtHR integrated in this analysis is the judgment in the case *Taranenko v. Russia* of 15 May 2014, in which the Court found a violation of Article 10. The case is about the detention and conviction of an activist who, during a protest action in a government building, had waved placards with "Putin, resign!" («Путин, уйди!») and distributed leaflets calling for the Russian President's resignation (ECtHR 15 May 2014, Case No. 19554/05, *Taranenko v. Russia*). All together nearly a thousand judgments related to Article 10 ECHR, freedom of expression, media and journalism.

1. “Duties and responsibilities” as justification for interferences with the right to freedom of expression and information

Article 10 of the European Convention reads as follows:

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

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of 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.

Article 10(1) stipulates the principle of the right to freedom of expression, “without interference by public authority”, while Article 10(2), by referring to “duties and responsibilities” that go together with the exercise of this freedom, opens the possibility for public authorities to interfere with this freedom by way of formalities, conditions, restrictions and even penalties. Yet, the main characteristic of Article 10(2) is precisely that, by imposing the so-called “triple test”, it substantially reduces the possibility of interference with the right to express, receive and impart information and ideas. Interferences by public authorities are only allowed under the strict conditions that any restriction or sanction must be “prescribed by law”¹ must

1. In only a few cases the Court came to the conclusion that the condition “prescribed by law,” which includes foreseeability, precision and publicity or accessibility and which implies a minimum degree of protection against arbitrariness, was not fulfilled, such as in ECtHR 24 September 1992, Case No. 10533/83, *Herczegfalvy v. Austria*; ECtHR 23 September 1998, Case No. 24838/94, *Steel and Others v. UK*; ECtHR 25 November 1999, Case No. 25594/94, *Hashman and Harrup v. UK*; ECtHR 14 March 2002, Case No. 26229/95, *Gaweda v. Poland*; ECtHR 25 January 2005, Case Nos. 37096/97 and 37101/97, *Karademirci and Others v. Turkey*; ECtHR 17 January 2006, Case No. 35083/97, *Goussev and Marek v. Finland*; ECtHR 17 January 2006, Case No. 36404/97, *Soini and Others v. Finland*; ECtHR 18 July 2006, Case No. 75615/01, *Štefanec v. Czech Republic*; ECtHR 27 September 2007, Case No. 30160/04, *Dzhavadov v. Russia*; ECtHR 17 June 2008, Case No. 32283/04, *Meltex Ltd. and Mesrop Movsesyan v. Armenia*; ECtHR Grand Chamber 14 September 2010, Case No. 38224/03, *Sanoma Uitgevers BV v. The Netherlands*; ECtHR 29 March 2011, Case No. 50084/06, *RTBF v. Belgium*; ECtHR 5 May 2011, Case No. 33014/05, *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*; ECtHR 25 October 2011, Case No. 27520/07, *Akçam v. Turkey*; ECtHR 18 December 2012, Case No. 3111/10, *Ahmet Yilderim v. Turkey* and ECtHR 25 June 2013, Case No. 48135/06, *Youth Initiative for Human Rights v. Serbia*.

have a “legitimate aim” and finally and most decisively, must be “necessary in a democratic society”.¹

Although the Court’s case law gave recognition to the pre-eminent role of the media in a state governed by the rule of law and has frequently reiterated that the media play a vital role of “public watchdog” in a democracy, as “purveyor of information”, still “abusing” freedom of expression in all European States can be sanctioned in one or another way, in accordance with Article 10(2) of the Convention. In some exceptional cases the abuse of free speech cannot rely at all on the protection of Article 10 ECHR.²

Various laws and regulations in European countries restrict freedom of expression and media content, determining the responsibility of every person under the law. The aim of such restrictions is to protect the national states’ interests (protection of state security and public order), the protection of morals, the protection of reputation or privacy or more generally “the rights of others”, the protection of confidentiality of information, or the authority and impartiality of the judiciary. Other legal provisions are protecting personal data, or prohibiting and punishing “hate speech” that incites to violence, racism, xenophobia, hatred or discrimination. Also broadcasting law, audiovisual media services regulations and legal provisions on advertising or other forms of “commercial speech” contain restrictions on freedom of expression or on media content.³ When such legal provisions, limiting the right of freedom of

1. See also E. Barendt, *Freedom of Speech* (Oxford: Oxford University Press, 2007); E. Dommering, “Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR): Freedom of Expression,” in O. Castendyk, E. Dommering and A. Scheuer, eds., *European Media Law* (Austin, TX: Wolters Kluwer, 2008), 35-80; J. Casadevall, E. Myjer, M. O’Boyle and A. Austin, eds., *Freedom of Expression: Essays in Honour of Nicolos Bratza* (Oisterwijk: Wolf Legal Publishers, 2012) and D. Voorhoof and T. Mc Gonagle, ed., *Freedom of Expression, the Media and Journalists. Case law of the European Court of Human Rights* (Strasbourg: European Audiovisual Observatory, 2013), [http://www.obs.coe.int/documents/205595/2667238/IRIS+Themes+III+\(final+9+December+2013\).pdf/2e748bd5-7108-4ea7-baa6-59332f885418](http://www.obs.coe.int/documents/205595/2667238/IRIS+Themes+III+(final+9+December+2013).pdf/2e748bd5-7108-4ea7-baa6-59332f885418).

2. For an interesting analysis of the notion of “abuse” of human rights, see A. Sajó, ed., *Abuse: The Dark Side of Fundamental Rights* (Utrecht: Eleven International, 2006). See also H. Cannie and D. Voorhoof, “The Abuse Clause and Freedom of Expression under the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?”, *Netherlands Quarterly of Human Rights* 1 (2011): 54-83. See also ECtHR 17 December 2013, Case No. 27510/08, *Perinçek v. Switzerland* (this judgment is not final: the case has been referred to the Grand Chamber on 2 June 2014, on request of the Swiss Government).

3. For an overview and analysis, see Commissioner for Human Rights, *Human Rights in a Changing Media Landscape* (Strasbourg: Council of Europe Publishing, 2011); J. Casadevall, E. Myjer, M. O’Boyle and A. Austin, eds., *Freedom of Expression: Essays in Honour of Nicolos Bratza* (Oisterwijk: Wolf Legal Publishers, 2012) and M. Price, S. Verhulst and L. Morgan, eds., *Routledge Handbook of Media Law*.

expression and information, are applied in accordance with Article 10(2), there is no violation of the right to freedom of expression in terms of the European Convention. The interference by public authorities in such circumstances is considered as legal, legitimate and justified. From this perspective, freedom of expression and information as guaranteed under Article 10 of the European Convention is relative or qualified, compared to the more absolute approach found in the formulation of the First Amendment of the U.S. Constitution, guaranteeing “freedom of speech, and of the press”, prohibiting public authorities (‘Congress’) from abridging these freedoms. Due to the text of the U.S. First Amendment, combined with a set of other factors, some limitations and restrictions that are considered justified under the ECHR, would be considered violating the U.S. free speech protection, such as e.g. in the domain of defamation and ‘hate speech’.¹ Article 10 ECtHR reflects an approach of social responsibility and relativism of the right of freedom of expression, while the U.S. Constitutional guarantee of free speech has a more individual, liberal and categorical or absolute focus.²

An abundant case law of the European Court of Human Rights has made clear however that national law prohibiting, restricting or sanctioning expressions or information as forms of public communication may only be applied if the interference by the authorities is prescribed by law in a sufficiently precise way, is non-arbitrarily applied, is justified by a legitimate aim and most importantly is to be considered “necessary in a democratic society”. It is the European Court itself that has determined and elaborated the characteristics of the vague and open notion of what can be considered necessary in a democratic society in terms of limiting or restricting freedom of expression and information. At many occasions the Court has emphasized that freedom of expression “constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population”. It also stated that this freedom “is subject to the exceptions set out in Article 10 § 2, which must, however, be interpreted narrowly”. According to the Court’s case law, an open, pluralistic and democratic society by itself is the most effective, if not the only, guarantor of respect for civil, political, cultural and social rights and

1. See F. Schauer , “The Exceptional First Amendment”, *SSRN*: 2005, <http://ssrn.com/abstract=668543>.

2. Notice however that also the U.S. First Amendment has its limitations and boundaries: F. Schauer , “The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Saliency”, *SSRN*: 2003, <http://ssrn.com/abstract=405100>.

freedoms. This means that Article 10 has to be interpreted from a perspective of a high level of protection of freedom of expression and information, even if expressed opinions or information are considered harmful to the State or some groups, enterprises, organisations, institutions or public figures. The need for any restrictions must be established convincingly, precisely because freedom of expression is considered essential for the functioning of a democratic society. This also reflects the inherent paradox with regard the application of Article 10, as freedom of expression is considered a necessity in and for a democratic society, while at the same time the restrictions and limitations on that freedom are justified as well as being necessary in a democratic society. Both the principle and its exceptions find their justifications in the concept of a democratic society. This requires a very thorough, well elaborated, consistent, independent and transparent analysis of all factual elements, legal principles and interests involved in order to decide finally whether an interference with the right to freedom of expression and information is to be considered “necessary in a democratic society”.

In many cases - as well in numerous decisions on inadmissibility as in judgments on the merits - the European Court of Human Rights has accepted interferences with the rights guaranteed under Article 10(1) of the Convention, also in terms of injunctions and in terms of criminal sanctions, sometimes even imprisonment. In such cases the Court agreed with the defending State and declared the application complaining about an alleged violation of Article 10 manifestly ill-founded and hence inadmissible or, in a later stage, it came to the conclusion that an interference was in accordance with the “triple test” of Article 10 of the Convention. In each of these cases the European Court found no violation of the right to freedom of expression and information by accepting the argumentation that the interference at issue was to be considered necessary in a democratic society.

In what follows, a set of examples will illustrate the legitimate character of some justified interferences with the right to freedom of expression in Europe, not amounting to a violation of Article 10 of the Convention. For each category one or more cases are also referred to in which the Court did find a violation of Article 10. These references indicate and clarify the limit of the acceptable interferences with the right to freedom of expression and information under the European Convention.

1.1. Incitement to violence, hatred, discrimination or terrorism

A type of speech or content of expression for which the European Court does not guarantee a high level of protection - or rather any protection at all - is “hate speech,” including incitement to racism, xenophobia, discrimination,

hatred and violence or glorification of terrorism.¹

Since Article 17 ECHR provides that nothing in this Convention “may be interpreted as implying for any State, group or person any right to engage in any activity or to 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 provided for in the Convention”, the European Court has excluded, in some cases, the protection of Article 10 regarding speech or expressions that were deemed to have the intention to destroy other rights and freedoms enshrined in the Convention. The application of Article 17 of the Convention, the so-called abuse clause, leads to categorical exclusion from protection of the right to freedom of expression as guaranteed by Article 10. This approach contrasts with the Court’s general approach, which implies that an examination is required in the light of the case as a whole, taking into consideration all its factual and legally relevant elements. It shows however in a very clear way that expressions or media-content that goes contrary to the text and spirit of the Convention are categorically classified as abuse of the right of freedom of expression, and hence being excluded from protection by the Convention.²

In *Norwood v. The United Kingdom*, a member of the British National Party (BNP) had displayed a large poster with a photograph of the Twin Towers in flames, accompanied by the words ‘Islam out of Britain - Protect the British People’ and a symbol of a crescent and a star in a prohibition sign in the window of his first-floor flat. The Court found that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom, and therefore held that

“Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination”.

1. See A. Weber, *Manuel sur le discours de haine* (Leiden: Martinus Nijhoff Publishers, 2009) and A. Buyse, “Dangerous Expressions: the ECHR, Violence and Free Speech”, *International and Comparative Law Quarterly* 2 (2014): 491-503. For a critical analysis, see S. Sottiaux, “‘Bad Tendencies’ in the ECtHR’s ‘Hate Speech’ Jurisprudence,” *European Constitutional Law Review* 1 (2011): 40–63. See, e.g., ECtHR (Decision) 23 June 2003, Case No. 65831/01, *Garaudy v. France*; ECtHR (Decision) 16 November 2004, Case No. 23131/03, *Norwood v. UK*; ECtHR (Decision) 20 February 2007, Case No. 35222/04, *Pavel Ivanov v. Russia*; ECtHR 2 October 2008, Case No. 36109/03, *Leroy v. France*; ECtHR 16 July 2009, Case No. 15615/07, *Féret v. Belgium* and ECtHR 9 February 2012, Case No. 1813/07, *Vejdeland and Others v. Sweden*.

2. For a critical analysis, see H. Cannie and D. Voorhoof, “The Abuse Clause and Freedom of Expression under the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?”, *Netherlands Quarterly of Human Rights* 1 (2011): 54–83.

For that reason the Court came to the conclusion that “the applicant's display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14”.¹

Another example is the Court's decision in *Garaudy v. France*. This case concerns a book written by Roger Garaudy entitled “The Founding Myths of Israeli Politics”, which contains a chapter headed “The Myth of the Holocaust”. The Court pointed out that the content of the book, denying the Holocaust by the Nazi-regime during World War II, undermined the Convention's underlying values that support the fight against racism and anti-Semitism, and was capable of seriously troubling the public order. As a consequence, Holocaust denial and denying the crimes against humanity committed by the Nazis on the Jewish community entailed the direct application (so called ‘*guillotine effect*’) of Article 17. The Court stated as follows

“The Court considers that the main content and general tenor of the applicant's book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. It considers that the applicant attempts to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which are contrary to the text and spirit of the Convention. Such ends, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention. Accordingly, the Court considers that, in accordance with Article 17 of the Convention, the applicant cannot rely on the provisions of Article 10 of the Convention regarding his conviction for denying crimes against humanity”.²

In *Ivanov v. Russia*, the applicant accused the Jewish people of plotting a conspiracy against the Russian people and ascribed fascist ideology to the Jewish leadership. The Court held that

“such a general and vehement attack on one ethnic group is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination”.³

The Court however has started to show more reluctance to apply directly Article 17 in cases on the right to freedom of expression.⁴ Instead,

1. ECtHR (Decision) 16 November 2004, Case No. 23131/03, *Norwood v. UK*.

2. ECtHR (Decision) 23 June 2003, Case No. 65831/01, *Garaudy v. France*. Compare: ECtHR 5 March 2013, Case No. 61005/09, *Varela Geis v. Spain*

3. ECtHR (Decision) 20 February 2007, Case No. 35222/04, *Pavel Ivanov v. Russia*. See also ECtHR 14 March 2013, Case No. 26261/05 and 26377/06, *Kasymakhunov and Saybatalov v. Russia*.

4. ECtHR 17 December 2013, Case No. 27510/08, *Perinçek v. Switzerland* (this judgment is not final: the case has been referred to the Grand Chamber on 2 June 2014, on request of the Swiss Government). See also ECtHR 25 January 2009, Case No. 20985/05, *Orban and Others v. France* and ECtHR 22 April 2010, Case No. 40984/07, *Fattulayev v. Azerbaijan*.

the Court evaluates expressions that incite to violation, hatred or discrimination from the scope of Article 10, not categorically excluding “hate speech” from the protection of Article 10(1), and applying the triple test of Article 10(2). In some cases the Court finally came to the conclusion that the (criminal) convictions at issue could be considered as fulfilling the conditions of Article 10(2), including being considered as necessary in a democratic society, hence finding no violation of Article 10. Interferences and criminal convictions for incitement to hatred, violence or discrimination against a person¹, against certain minorities or groups of the population, foreigners or Muslims² and against homosexuals³ have been considered as being legitimate and necessary interferences with the right to freedom of expression, restricted by the duties and responsibilities related to the exercise of this right in a democratic society.

In *Vejdeland and Others v. Sweden* the Court held that “inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner”.⁴ The criminal conviction of the applicants for distributing leaflets that contained anti-gay offensive statements was considered from the scope of Article 10 as necessary in a democratic society in order to protect the rights of homosexuals. This means that the Court applies the principles relating to freedom of expression and ‘hate speech’ also in the context of incitement to discrimination based on sexual orientation. In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on “race, origin or colour”.⁵ The Court has also emphasised that it is particularly conscious of the vital importance of combating racial and gender discrimination in all its forms and manifestations.⁶

Furthermore also injunctions, criminal convictions and other interferences because of incitement to terrorism or glorification of terrorism

1. ECtHR Grand Chamber 22 October 2007, Case Nos. 21279/02 and 36448/02, *Lindon, Otchakovsky-Laurens and July v. France*.

2. ECtHR 16 July 2009, Case No. 15615/07, *Féret v. Belgium*

3. ECtHR 9 February 2012, Case No. 1813/07, *Vejdeland and Others v. Sweden*.

4. ECtHR 9 February 2012, Case No. 1813/07, *Vejdeland and Others v. Sweden*. See also ECtHR 16 July 2009, Case No. 15615/07, *Féret v. Belgium*.

5. ECtHR 9 February 2012, Case No. 1813/07, *Vejdeland and Others v. Sweden*

6. ECtHR 21 July 2011, Case Nos. 32181/04 and 35122/05, *Sigma Radio Television Ltd. v. Cyprus*.

have been considered by the Court as necessary in a democratic society.¹

On the other hand, in numerous cases against Turkey, the Court considered that convictions for separatist or terrorist propaganda were to be situated in the context of political debate. Firmly criticising the Turkish authorities or the military, or (political) statements about problems and developments in the Kurdish region or on religious matters, without however inciting to violence, can count on the protection of Article 10. The Court considered in many of these cases that “although certain particularly acerbic passages (...) paint an extremely negative picture of the Turkish State and thus give the narrative a hostile tone, they do not encourage violence, armed resistance or insurrection and do not constitute hate speech”.² Therefore the Court did not consider the publications, news reports, interviews or speeches at issue as ‘hate speech’, finding in a large number of judgments against Turkey violations of Article 10.

In the case *Perinçek v. Switzerland* the Court has tried to clarify that there are limits indeed in excluding ‘hate speech’ from the protection of the European Convention. The case concerns the conviction in Switzerland of a Turkish politician for publicly denying the existence of a genocide against the Armenian people. On several occasions, Perinçek - at the time chairman of the Turkish Workers’ Party - had described the Armenian genocide as “an international lie”. He had particularly insisted that whatever massacres had taken place did not meet the definition of genocide under international law. The Swiss courts found Perinçek guilty of racial discrimination. In its judgment of 17 December 2013, the Court considered the conviction of Perinçek as a violation of Article 10. The Court underlined that the free

1. ECtHR 10 October 2006, Case No. 4119/01, *Halis Doğan (n° 3) v. Turkey*; ECtHR (Decision) 22 March 2007, Case No. 6250/02, *Gülcan Kaya v. Turkey*; ECtHR (Decision) 29 May 2007, Case No. 26870/04, *Dieter Kern v. Germany*; ECtHR 21 February 2008, Case No. 64116/00, *Yalçiner v. Turkey*; ECtHR 2 October 2008, Case No. 36109/03, *Leroy v. France*; ECtHR (Decision), 20 April 2010, Case No. 18788/09, *Jean-Marie Le Pen v. France* and ECtHR 27 January 2011, Case No. 16637/07, *Aydin v. Germany*.

2. See amongst many others ECtHR 13 July 2004, Case Nos. 26971/95 and 37933/97, *Ayşenur Zarakolu and Belge Uluslararası Yayıncılık v. Turkey*; ECtHR 13 January 2005, Case No. 36215/97, *Dağtekin v. Turkey*; ECtHR 29 March 2005, Case No. 44104/98, *Biröl v. Turkey*; ECtHR 29 March 2005, Case No. 40287/98, *Alinak v. Turkey*; ECtHR 10 February 2009, Case No. 27690/03, *Güçlü v. Turkey*; ECtHR 6 July 2010, Case Nos. 43453/04 and 31098/05, *Gözel and Özer v. Turkey*; ECtHR 1 October 2013, Case Nos. 25764/09, 25773/09, 25786/09, 25793/09, 25804/09, 25811/09, 25815/09, 25928/09, 25936/09, 25944/09, 26233/09, 26242/09, 26245/09, 26249/09, 26252/09, 26254/09, 26719/09, 26726/09 and 27222/09, *Yalçinkaya and Others v. Turkey*; ECtHR 15 October 2013, Case No. 9858/04, *Mehmet Hatip Dicle v. Turkey*; ECtHR 22 October 2013, Case No. 52056/08, *Bülent Kaya v. Turkey*; ECtHR 17 December 2013, Case No. 12606/11, *Yavuz and Yaylalı v. Turkey*. See also ECtHR 4 December 2003, Case No. 35071/97, *Gündüz v. Turkey*.

exercise of the right to openly discuss questions of a sensitive and controversial nature is one of the fundamental aspects of freedom of expression and distinguished a tolerant and pluralistic democratic society from a totalitarian or dictatorial regime. According to the Court, rejecting the legal characterisation as ‘genocide’ of the 1915 events was not such as to incite hatred against the Armenian people. The Court was therefore of the opinion that Perinçek has not abused his right to freedom of expression in a way prohibited by Article 17 of the Convention. Nor was the conviction of Perinçek necessary in a democratic society. The Court held that historical research is by definition open to discussion and a matter of debate, without necessarily leading to final conclusions or absolute truths. In the remainder of its reasoning, the Court took the view that the Swiss authorities had failed to show how there was a social need in Switzerland to punish an individual for racial discrimination on the basis of declarations challenging only the legal characterisation as ‘genocide’ of acts perpetrated on the territory of the former Ottoman Empire in 1915 and the following years. According to the Court such a pressing social need did exist regarding the denial of the Holocaust, but not with regard to the Armenian ‘genocide’.¹ This judgment however is not final, as it was referred, in application of Article 43 of the Convention, to the Grand Chamber of the European Court on 2 June 2014. It is now up to the Grand Chamber of 17 judges to deliver a final ruling on the case and eventually to clarify its approach (not) applying Article 17 of the Convention in cases of freedom of expression and finally to decide whether the statements by Perinçek do or do not justify the interference at issue.

1.2. Religion and morals

In cases where interferences are based on the protection of the religious feelings of others or on morals,² or on the protection of minors,³ the Court

1. ECtHR 17 December 2013, Case No. 27510/08, *Perinçek v. Switzerland* (this judgment is not final: the case has been referred to the Grand Chamber on 2 June 2014, on request of the Swiss Government). See on the “instrumentalization” of the Holocaust, ECtHR 8 November 2012, Case No. 43481/09, *PETA Deutschland v. Germany*.

2. ECtHR 7 December 1976, Case No. 5493/72, *Handyside v. UK*; ECtHR 24 May 1988, Case No. 10737/84, *Müller and Others v. Switzerland*; ECtHR 20 September 1994, Case No. 13470/87, *Otto-Preminger-Institut v. Austria*; ECtHR 25 November 1996, Case No. 17419/90, *Wingrove v. UK* and ECtHR 13 September 2005, Case No. 42571/98, *I.A. v. Turkey*. See also ECtHR 10 July 2003, Case No. 44179/98, *Murphy v. Ireland*. Compare with ECtHR 31 January 2006, Case No. 64016/00, *Giniewski v. France* and ECtHR 2 May 2006, Case No. 50692/99, *Aydin Tatlav v. Turkey*.

3. ECtHR 7 December 1976, Case No. 5493/72, *Handyside v. UK* and ECtHR (Decision) 10 May 2011, Case No. 1685/10, *Karttunen v. Finland*. See also ECtHR (Decision) 8 December 2005, Case No. 40485/02, *Nordisk Film & TV A/S v. Denmark*.

has accepted a broad margin of appreciation by the member states, accepting the interferences at issue - against books, movies or paintings exposed in public - as being necessary in a democratic society.

The decision in *Karttunen v. Finland* illustrates such a finding by the Court. In this case Ms Anni Ullikki Karttunen complained under Article 10 of the Convention that her right as an artist to freedom of expression had been violated. She had incorporated pornographic pictures in her work in an attempt to encourage discussion and raise awareness of how wide-spread and easily accessible child pornography was. The work of Karttunen, exposed in an art gallery in Helsinki included hundreds of photographs of teenage girls or otherwise very young women in sexual poses and acts, while according to Finnish law the possession and distribution of these pictures were criminalised. The European Court considered that

“their criminalisation was mainly based on the need to protect children against sexual abuse as well as violation of their privacy but also on moral considerations”.

The Court recognised

“that conceptions of sexual morality have changed in recent years. Nevertheless, the Court does not find the view taken by the Finnish courts unreasonable, especially as the present case concerned minors or persons likely to be minors. The domestic courts, especially the District Court which balanced at length the relationship between freedom of expression, on the one hand, and morals and reputation and rights of others, on the other hand, found that the applicant’s freedom of expression did not justify the possession and public display of child pornography”.

Therefore the European Court found that the confiscation of the art work and the criminal prosecution of the artist did not violate Article 10.¹

Also offensive attacks on a religion can be restricted or sanctioned. In *I.A. v. Turkey* the Court reiterated that religious people have to tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. A distinction is however to be made between provocative opinions and abusive attacks on one's religion. According to the Court, one part of the book at issue contained an abusive attack on the Prophet of Islam. It accepted that believers could legitimately feel that these passages of the book constituted an unwarranted and offensive attack on them. Hence, the conviction of the publisher was a measure that

1. ECtHR 7 December 1976, Case No. 5493/72, *Handyside v. UK* and ECtHR (Decision) 10 May 2011, Case No. 1685/10, *Karttunen v. Finland*. See also ECtHR (Decision) 8 December 2005, Case No. 40485/02, *Nordisk Film & TV A/S v. Denmark*.

was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims. As the book was not seized and the publisher had only to pay an insignificant fine, the Court came, by four votes to three, to the conclusion that the Turkish authorities did not violate the right to freedom of expression in this case.¹

In *Aydin Tatlav v. Turkey* the Court did not exclude that Muslims could nonetheless feel offended by the caustic commentary on their religion, but this was not considered to be a sufficient reason in itself to justify the criminal conviction of the author of the book. With regard the punishment imposed on Tatlav, the Court is of the opinion that a criminal conviction involving, moreover, the risk of a custodial sentence, could have the effect of discouraging authors and editors from publishing opinions about religion that are non-conformist and could impede the protection of pluralism, which is indispensable for the healthy development of a democratic society. Taking into consideration all the elements of the case, the Strasbourg Court came to the conclusion that the interference by the Turkish authorities was disproportionate to the aims pursued. Consequently, the Court held unanimously that there has been a violation of Article 10 of the Convention.²

1.3. Secret and confidential information

At several occasions the European Court of Human Rights has accepted interferences by public authorities as being justified to protect the secret character or confidentiality of certain communications, information or data.³ A striking example is the judgment in *Pasko v. Russia*.⁴ The case concerns Grigoriy Pasko, a Russian national who at the time of the events was a naval officer and worked as a military journalist on the Russian Pacific Fleet's Newspaper *Boyevaya Vakhta*. Mr Pasko had been reporting on problems of environmental pollution, accidents with nuclear submarines, transport of military nuclear waste and other issues related to the activities of the Russian Pacific Fleet. He had also been in contact on a free-lance basis with a Japanese

1. ECtHR 13 September 2005, Case No. 42571/98, *I.A. v. Turkey*.

2. ECtHR 2 May 2006, Case No. 50692/99, *Aydin Tatlav v. Turkey*. See also ECtHR 31 January 2006, Case No. 64016/00, *Giniewski v. France* and ECtHR 16 February 2010, Case No. 41056/04, *Akdaş v. Turkey*.

3. ECtHR 16 December 1992, Case No. 12945/87, *Hadjianastassiou v. Greece*. See also ECtHR 24 November 2005, Case No. 53886/00, *Tourancheau and July v. France*; CtHR 9 November 2006, Case No. 64772/01, *Leempoel and S.A. Ciné Revue v. Belgium*; ECtHR 3 February 2009, Case No. 30699/02, *Marin v. Romania*. See also ECtHR (Decision) 8 February 2011, Case No. 30881/09, *Yleisradio Oy e.a. v. Finland*; ECtHR 24 January 2012, Case No. 32884/10, *Seckerson v. UK* and ECtHR 24 January 2012, Case No. 33510/10, *Times Newspapers Ltd. v. UK*.

4. ECtHR 22 October 2009, Case No. 69519/01, *Pasko v. Russia*.

TV station and a newspaper and had supplied them with information and a video footage. When Mr Pasko was searched at the Vladivostok airport before flying to Japan, some of his papers were confiscated with the explanation that they contained classified information. He was arrested upon his return from Japan and sentenced to four years' imprisonment, as he was found guilty of treason through espionage for having collected secret and classified information containing actual names of highly critical and secure military formations and units, with the intention of transferring this information to a foreign national. After having accepted that the Russian authorities acted on a proper legal basis, the Court observed that, as a serving military officer, Mr Pasko had been bound by an obligation of discretion in relation to anything concerned with the performance of his duties. The domestic courts had carefully scrutinised each of his arguments and had found that he had collected and kept, with the intention of transferring to a foreign national, information of a military nature that had been classified as a State secret and which had been capable of causing considerable damage to national security. Finally, Mr Pasko been convicted of treason through espionage as a serving military officer and not as a journalist. According to the European Court, there was nothing in the materials of the case to support the applicant's allegations that his conviction had been overly broad or politically motivated or that he had been sanctioned for any of his publications. The Court found that the domestic courts had struck the right balance of proportionality between the aim of protecting national security and the means used to achieve that purpose, namely the sentencing of the applicant to a "lenient sentence", much less severe than the statutory minimum, notably four years' imprisonment as compared to twelve to twenty years' imprisonment. Accordingly, the Court held that there had not been a violation of Article 10 of the Convention.

In *Stoll v. Switzerland* the Grand Chamber was of the opinion that the disclosure in a Sunday newspaper of (parts of) an ambassador's confidential report was capable of undermining the climate of discretion necessary to the successful conduct of diplomatic relations, and of having negative repercussions on the negotiations being conducted by Switzerland on the issue dealt with in the report. The report concerned a strategic document, drew up by the Swiss ambassador to the United States, classified as "confidential", concerning possible strategies with regard the compensations due to Holocaust victims and Jewish families for unclaimed assets deposited in Swiss banks. The judgment underlines that the fact that the journalist who published the article did not himself act illegally by obtaining the leaked document is not necessarily a determining factor in assessing whether or not he complied with his duties and responsibilities: as a journalist he could not claim in good faith to be unaware

that disclosure of the document in question was punishable under the Swiss Criminal Code. Finally the Court emphasised that the impugned articles were written and presented in a sensationalist style, that they suggested inappropriately that the ambassador's remarks were anti-Semitic, that they were of a trivial nature and were also inaccurate and likely to mislead the reader.¹

In other circumstances and different situations, the Court however decided that a conviction of a journalist, editor or broadcaster for making confidential or secret information public, could not be justified as being necessary in a democratic, referring to the task of the media to report on matters of public interest, in accordance with the principles of responsible journalism or professional ethics.² In some cases the Court has taken into account that the information at issue was no longer confidential or that it had already been spread in the public domain.³

1.4. Private life of heads of states, prime ministers, politicians and other public figures

In cases in which journalists or media revealed information or published pictures not concretely or effectively contributing to public debate or only focusing on the (intimate) private life of the persons concerned,⁴ the Court accepted (proportionate) interferences in their freedom of expression. On

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1. ECtHR Grand Chamber 10 December 2007, Case No. 69698/01, *Stoll v. Switzerland*.
 2. ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fressoz and Roire v. France*; ECtHR 18 May 2004, Case No. 58148/00, *Editions Plon v. France*; ECtHR 25 April 2006, Case No. 77551/01, *Dammann v. Switzerland*; ECtHR 19 December 2006, Case No. 62202/00, *Radio Twist v. Slovakia*; ECtHR 7 June 2007, Case No. 1914/02, *Dupuis and Others v. France*; ECtHR 14 December 2006, Case No. 76918/01, *Verlagsgruppe News GmbH v. Austria*; ECtHR 14 December 2006, Case No. 10520/02, *Verlagsgruppe News GmbH (n° 2) v. Austria*; ECtHR 24 April 2008, Case No. 17107/05, *Campos Dâmaso v. Portugal*; ECtHR 19 January 2010, Case No. 16983/06, *Laranjeira Marques Da Silva v. Portugal*; ECtHR 5 May 2011, Case No. 33014/05, *Editorial Board of Pravoye Delo and Shtetel v. Ukraine*; ECtHR 28 June 2011, Case No. 28439/08, *Pinto Coelho v. Portugal*; ECtHR 15 December 2011, Case No. 28198/09, *Mor v. France*. See also *infra* regarding whistle-blowing and protection of journalistic sources.
 3. ECtHR 26 November 1991, Case No. 13585/88, *Observer and Guardian v. U.K.*; ECtHR 26 November 1991, Case No. 13166/87, *Sunday Times (n° 2) v. U.K.*; ECtHR 9 February 1995, *Vereniging Weekblad "Bluf!" v. The Netherlands*; ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fressoz and Roire v. France* and ECtHR 17 January 2012, Case No. 20376/05, *Varapnickaitė-Mažylienė v. Lithuania*.
 4. ECtHR 9 November 2006, Case No. 64772/01, *Leempoel and S.A. Ciné Revue v. Belgium* and ECtHR 3 February 2009, Case No. 30699/02, *Marin v. Romania*. See also ECtHR 14 March 2002, Case No. 46833/99, *De Diego Nafria v. Spain* and ECtHR Grand Chamber 17 December 2004, Case No. 33348/96, *Cumpănă and Mazăre v. Romania*. See also ECtHR 4 June 2009, Case No. 21277/05, *Standard Verlags GmbH (n° 2) v. Austria* and ECtHR 14 January 2014, Case No. 73579/10, *Ruusunen v. Finland* and ECtHR 14 January 2014, Case No. 69939/10, *Ojala and Etukeno Oy v. Finland*. See also ECtHR 14 June 2007, Case No. 71111/01, *Hachette Filipacchi Associés v. France*.

several occasions the Court has observed that private individuals and to some extent also public persons have a legitimate expectation of protection of their private life.¹ Freedom of the press does not extend to idle gossip about intimate or extramarital relations merely serving to satisfy the curiosity of a certain readership and not contributing to any public debate in which the press has to fulfill its role of “public watchdog”.² The Court made clear that also public figures, including heads of state, prime ministers, ministers, politicians or other public officials should have their intimate life and privacy respected by the media.³ In a set of cases the Court also found violations of Article 8 (breach of privacy), as the media reporting had been disrespectful toward the right of privacy of the (public) persons concerned.⁴

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1. ECtHR 6 February 2001, Case No. 41205/98, *Tammer v. Estonia*; ECtHR 28 January 2003, Case No. 44647/98, *Peck v. UK*; ECtHR 30 March 2004, Case No. 53984/00, *Radio France and Others v. France*; ECtHR 26 April 2004, Case No. 59320/00, *Von Hannover v. Germany*; ECtHR 17 October 2006, Case No. 71678/01, *Gourguénidzé v. Georgia*; ECtHR 9 November 2006, Case No. 64772/01, *Leempoel and S.A. Ciné Revue v. Belgium*; ECtHR 9 April 2009, Case No. 28070/06, *A. v. Norway*; ECtHR 16 April 2009, Case No. 34438/04, *Egeland and Hanseid v. Norway*; ECtHR 4 June 2009, Case No. 21277/05, *Standard Verlags GmbH (n° 2) v. Austria*; ECtHR 18 January 2011, Case No. 39401/04, *MGN Limited v. UK* and ECtHR 14 January 2014, Case No. 73579/10, *Ruusunen v. Finland* and ECtHR 14 January 2014, Case No. 69939/10, *Ojala and Etukeno Oy v. Finland*. Compare with ECtHR 19 September 2006, Case No. 42435/02, *White v. Sweden*; ECtHR 10 February 2009, Case No. 3514/02, *Eerikäinen and Others v. Finland*; ECtHR 28 April 2009, Case No. 39311/05, *Karakó v. Hungary*; ECtHR 21 September 2010, Case No. 34147/06, *Polanco Torres and Movilla Polanco v. Spain* and ECtHR 16 January 2014, Case No. 13258/09, *Lillo-Stenberg and Sæther v. Norway*. See also ECtHR 25 November 2008, Case No. 36919/02, *Armoniené v. Lithuania* and ECtHR 25 November 2008, Case No. 23373/03, *Biriuk v. Lithuania*.
 2. ECtHR 4 June 2009, Case No. 21277/05, *Standard Verlags GmbH (n° 2) v. Austria*. See, however, the dissenting opinion in this case arguing that the state of marriage of a head of state can be regarded as a topic of public interest, that the rumours concerning the presidential couple's marriage that were circulated were of some relevance and that all in all the impugned text remained within the limits of acceptable comment in a democratic society.
 3. ECtHR 4 June 2009, Case No. 21277/05, *Standard Verlags GmbH (n° 2) v. Austria*; ECtHR 19 June 2012, Case No. 27306/07, *GmbH & Co KG and Krone Multimedia GmbH & Co KG v. Austria*; ECtHR 19 June 2012, Case No. 1593/06, *Kurier Zeitungsverlag und Druckerei GmbH (n° 2) v. Austria*; ECtHR 8 October 2013, Case No. 30210/06, *Ricci v. Italy*; ECtHR 14 January 2014, Case No. 73579/10, *Ruusunen v. Finland* and ECtHR 14 January 2014, Case No. 69939/10, *Ojala and Etukeno Oy v. Finland*. See also ECtHR 28 May 2004, Case No. 58148/00, *Editions Plon v. France*.
 4. ECtHR 6 February 2001, Case No. 41205/98, *Tammer v. Estonia*; ECtHR 26 April 2004, Case No. 59320/00, *Von Hannover v. Germany*; ECtHR 5 July 2011, Case No. 41588/05, *Avram and Others v. Moldova*; ECtHR 18 April 2013, Case No. 7075/10, *Ageyevy v. Russia*; ECtHR 31 October 2013, Case No. 12316/07, *Popovski v. the Former Yugoslav Republic of Macedonia*; ECtHR 19 November 2013, Case No. 45543/04, *Someşan and Butiuc v. Romania*; ECtHR 12 December 2013, Case No. 20383/04, *Khmel v. Russia*; ECtHR 14 January 2014, Case No. 22231/05, *Lavric v. Romania* and ECtHR 18 February 2014, Case No. 43912/10, *Jalbă v. Romania*.

There is no violation of Article 8 however, or a conviction of media or journalists because of publishing information about individuals tarnishing their reputation or containing information that might affect their private life, is considered a breach of Article 10 when the information is related to an issue of public interest.¹ In the case of *Von Hannover (no. 2) v. Germany* the Grand Chamber held unanimously that the publication of a picture of Princess Caroline of Monaco illustrating an article about the Principality of Monaco and the refusal by the German Courts to grant an injunction against it, did not amount to a violation of the right of privacy of the princess. The European Court was of the opinion that the princess, irrespective of the question to what extent she assumed official functions, is to be regarded as a public person. The article with the picture at issue did not solely serve entertainment purposes and there was nothing to indicate that the photo had been taken surreptitiously or by equivalent secret means such as to render its publication illegal.²

In balancing the interests and rights guaranteed by Article 8 and 10, in *Mosley v. The United Kingdom* the European Court also clarified that Article 8 does not require media to give prior notice of intended publications to those who feature in them.³ As a pre-notification requirement would inevitably also affect political reporting and serious journalism, having regard to the chilling effect to which a pre-notification requirement risked giving rise and to the doubts about its effectiveness, the European Court concluded that Article 8 did not require a legally binding pre-notification requirement.

1.5. Defamation without sufficient factual basis

In cases where journalists or media did not succeed giving reliable or relevant evidence for (serious) allegations, insinuations or accusations, the Court accepts convictions and (proportionate) sanctions imposed by the

1. ECtHR 19 September 2006, Case No. 42435/02, *White v. Sweden* and ECtHR 10 February 2009, Case No. 3514/02, *Eerikäinen and Others v. Finland*; ECtHR 10 January 2012, Case No. 34702/07, *Standard Verlags v. Austria*; ECtHR Grand Chamber 7 February 2012, Case No. 39954/08, *Axel Springer AG v. Germany* and ECtHR 7 February 2012, Case Nos. 40660/08 and 60641/08, *Von Hannover (n° 2) v. Germany*. See also ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fressoz and Roire v. France*; ECtHR Grand Chamber 20 May 1999, Case No. 21980/93, *Bladet Tromsø and Stensaas v. Norway*; ECtHR 3 October 2000, Case No. 34000/96, *Du Roy and Malaurie v. France*; ECtHR 29 March 2001, Case No. 38432/97, *Thoma v. Luxembourg*; ECtHR 25 June 2002, Case No. 51279/99, *Colombani and Others v. France* and ECtHR 21 February 2012, Case Nos. 32131/08 and 41617/08, *Tuşalp v. Turkey*.

2. ECtHR Grand Chamber 7 February 2012, Case Nos. 40660/08 and 60641/08, *Von Hannover (n° 2) v. Germany*. See also ECtHR 19 September 2013, Case No. 8772/10, *Von Hannover (n° 3) v. Germany*.

3. ECtHR 10 May 2011, Case No. 48009/08, *Mosley v. UK*.

national authorities as not being in breach with Article 10 of the Convention.¹ The requirement that a journalist needs to prove that the allegations made in an article were “substantially true” on the balance of probabilities, constitutes a justified restriction on the right to freedom of expression under Article 10(2) of the Convention.² In some cases the obvious lack of evidence of published allegations made the Court even decide on the (manifest) inadmissibility of a complaint under Article 10 of the Convention.³

On the other hand, the Court has also considered that, as part of their role as a “public watchdog,” the media’s reporting on “‘stories’ or ‘rumours’ - emanating from persons other than an applicant - or ‘public opinion’” is to be

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1. See ECtHR 26 April 1995, Case No. 15974/90, *Prager and Oberschlick v. Austria*; ECtHR 27 June 2000, Case No. 28871/95, *Constantinescu v. Romania*; ECtHR 7 May 2002, Case No. 46311/99, *McVicar v. UK*; ECtHR Grand Chamber 6 May 2003, Case No. 48898/99, *Perna v. Italy*; ECtHR 30 March 2004, Case No. 53984/00, *Radio France v. France*; ECtHR 29 June 2004, Case No. 64915/01, *Chauvy v. France*; ECtHR Grand Chamber 17 December 2004, Case No. 33348/96, *Cumpănă and Mazăre v. Romania*; ECtHR Grand Chamber 17 December 2004, Case No. 49017/99, *Pedersen and Baadsgaard v. Denmark*; ECtHR 21 December 2004, Case No. 61513/00, *Busuioc v. Moldova*; ECtHR 31 January 2006, Case No. 53899/00, *Stăngu and Scutelnicu v. Romania*; ECtHR 14 February 2008, Case No. 36207/03, *Rumyana Ivanova v. Bulgaria*; ECtHR 22 May 2008, Case No. 17550/03, *Alithia Publishing Company Ltd. & Constantinides v. Cyprus*; ECtHR 8 July 2008, Case No. 24261/05, *Backes v. Luxembourg*; ECtHR 29 July 2008, Case No. 22824/04, *Flux (n° 6) v. Moldova*; ECtHR 16 September 2008, Case No. 36157/02, *Cuc Pascu v. Romania*; ECtHR 14 October 2008, Case No. 78060/01, *Petrina v. Romania*; ECtHR 18 December 2008, Case No. 35877/04, *Mahmudov and Agazade v. Azerbaijan*; ECtHR 5 February 2009, Case No. 42117/04, *Brunet-Lecomte and Others v. France*; ECtHR 21 June 2011, Case No. 35105/04, *Kania and Kittel v. Poland*; ECtHR 24 July 2012, Case No. 46712/06, *Ziemiński v. Poland*; ECtHR 2 February 2012, Case No. 20240/08, *Růžový panter, o.s. v. Czech Republic*; ECtHR 28 March 2013, Case No. 14087/08, *Novaya Gazeta and Borodyanskiy v. Russia*; ECtHR 14 January 2014, Case No. 22231/05, *Lavric v. Romania*; ECtHR 30 January 2014, Case No. 34400/10, *De Lesquen du Plessis-Casso (n° 2) v. France* and ECtHR 29 April 2014, Case No. 23605/09, *Salumäki v. Finland*. In some cases the Court found no violation of Article 10, while it accepted that the applicant had not been guaranteed a fair trial and that there had been a violation of Article 6(1) of the Convention: see, e.g., ECtHR 27 June 2000, Case No. 28871/95, *Constantinescu v. Romania* and ECtHR 4 November 2008, Case No. 42512/02, *Mihaiu v. Romania*.
 2. ECtHR 7 May 2002, Case No. 46311/99, *McVicar v. UK* and ECtHR Grand Chamber 17 December 2004, Case No. 49017/99, *Pedersen and Baadsgaard v. Denmark*.
 3. See, e.g., ECtHR (Decision) 4 April 2006, Case No. 33352/02, *László Keller v. Hungary*; ECtHR (Decision) 15 June 2006, Case No. 6928/04 and 6929/04, *Corneliu Vadim Tudor v. Romania*; ECtHR (Decision) 8 February 2007, Case No. 3540/04, *Falter Zeitschriften GmbH v. Austria*; ECtHR (Decision) 21 October 2008, Case No. 20953/06, *Tomasz Wolek, Rafal Kasprów and Jacek Łęski v. Poland* and ECtHR (Decision) 21 October 2008, Case No. 37115/06, *Vittorio Sgarbi v. Italy*. See also ECtHR (Decision) 16 October 2001, Case No. 45710/99, *Verdens Gang and Kari Aarsted Aase v. Norway*; ECtHR (Decision) 21 February 2002, Case No. 43525/98, *Gaudio v. Italy*; ECtHR (Decision) 20 November 2012, Case No. 9283/05, *Dunca and SC Nord Vest Press SRL v. Romania* and ECtHR 15 January 2013, Case No. 29672/05, *Ciuvică v. Romania*.

protected.¹ The Court at several occasions accepted that value judgments, allegations or statements only had “a slim factual basis” or that it was sufficient that there was “no proof the description of events given in the articles was totally untrue,” or that the “opinions were based on facts which have not been shown to be untrue”.² The Court accepted that value judgments and criticism can be based on “unconfirmed allegations or rumours”.³ Journalists or editors of news media must also be given the opportunity in defamation cases in court to rely on a defence of justification - that is to say proving the truth or the factual basis of the allegation - to escape criminal or civil liability.⁴ Therefore domestic courts should not refuse to consider the evidence proposed by the journalist or editor in libel or defamation cases.

The Court does not accept the reasoning of domestic courts that allegations of serious misconduct leveled against individuals or public persons should first have been proven in criminal proceedings.⁵ In the *Kasabova* case the Court clarified that “while a final conviction in principle amounts to incontrovertible proof that a person has committed a criminal offence, to circumscribe in such a way the manner of proving allegations of criminal conduct in the context of a libel case is plainly unreasonable, even if account must be taken, as required by Article 6(2), of that person’s presumed innocence”.⁶ Describing an act or behavior of a politician as “illegal” is to be considered as expressing a personal legal opinion amounting to a value judgment of which the accuracy cannot be

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1. See ECtHR 25 June 1992, Case No. 13778/88, *Thorgeir Thorgeirson v. Iceland* and ECtHR 9 June 2009, Case No. 17095/03, *Cihan Öztürk v. Turkey*.
 2. See ECtHR 25 November 1999, Case No. 23118/93, *Nilsen and Johnsen v. Norway*; ECtHR 28 September 1999, Case No. 28114/95, *Dalban v. Romania*; ECtHR 26 February 2002, Case No. 29271/95, *Dichand and Others v. Austria* and ECtHR 23 October 2007, Case No. 28700/03, *Flux and Samson v. Moldova*.
 3. ECtHR 27 November 2007, Case No. 42864/05, *Timpul Info-Magazin and Anghel v. Moldova*. See also ECtHR 9 June 2009, Case No. 17095/03, *Cihan Öztürk v. Turkey*. The Court in this case however also considered that “there was a sufficient factual basis for the applicant to make a critical analysis of the situation and to raise questions about the restoration project, since the authorities had already brought criminal proceedings against the applicant for breach of duty”.
 4. ECtHR 29 March 2001, Case No. 38432/97, *Thoma v. Luxembourg*; ECtHR 25 June 2002, Case No. 51279/99, *Colombani and Others v. France*; ECtHR 29 March 2005, Case No. 72713/01, *Ukrainian Media Group v. Ukraine* and ECtHR 14 December 2006, Case No. 29372/02, *Karman v. Russia*.
 5. See ECtHR 25 November 1999, Case No. 23118/93, *Nilsen and Johnsen v. Norway*; ECtHR 29 July 2008, Case No. 22824/04, *Flux (n° 6) v. Moldova*; ECtHR 14 October 2008, Case No. 34434/02, *Folea v. Romania*; ECtHR 14 October 2008, Case No. 37406/03, *Dyundin v. Russia*; ECtHR 23 October 2008, Case No. 14888/03, *Godlevskiy v. Russia* and ECtHR 2 April 2009, Case No. 24444/07, *Kydonis v. Greece*. Compare with ECtHR 27 June 2000, Case No. 28871/95, *Constantinescu v. Romania* and ECtHR 14 October 2008, Case No. 78060/01, *Petrina v. Romania*. See also ECtHR 17 April 2014, Case No. 5709/09, *Brosa v. Germany*.
 6. ECtHR 19 April 2011, Case No. 22385/03, *Kasabova v. Bulgaria*. See also ECtHR 14 December 2006, Case No. 29372/02, *Karman v. Russia*.

required to be proven.¹ Media applying the standards of journalistic ethics or journalists acting in consonance with the principles of “responsible journalism” are strongly protected by Article 10 of the Convention.²

In *Tuşalp v. Turkey* the Court reiterated that offensive language, in this case criticising the Prime Minister, may fall outside the protection of freedom of expression if it amounts to wanton denigration, for example where the sole intent of the offensive statement is to insult. But the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well serve merely stylistic purposes. Style constitutes part of communication as a form of expression and is as such protected together with the content of the expression. In addition, the Court observed that there was nothing in the case file to indicate that *Tuşalp*’s articles have affected the Prime Minister’s political career or his professional and private life. The Court came to the conclusion that the domestic courts failed to establish convincingly any pressing social need for putting the Prime Minister’s personality rights above the journalist’s rights and the general interest in promoting the freedom of the press where issues of public interest are concerned. The *Tuşalp* judgment continues a strong tradition in European Court jurisprudence where freedom of expression prevails in cases of insult or defamation of heads of state, presidents or high ranking politicians.³

1.6. Is the Court widening the “margin of appreciation”?

Especially in a number of Grand Chamber judgments the Court has accepted far reaching interferences with the right to freedom of expression. The outcome and rationale of some judgments in which the Court has found no violation of the right to freedom of expression have raised concerns

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1. ECtHR 27 May 2004, Case No. 57829/00, *Vides Aizsardzības Klubs v. Latvia*. See also ECtHR 16 November 2004, Case No. 56767/00, *Selistö v. Finland* and ECtHR 16 November 2004, Case No. 53678/00, *Karhuvaara and Iltalehti v. Finland*. See also ECtHR 17 April 2014, Case No. 5709/09, *Brosa v. Germany*.
 2. ECtHR 23 October 2007, Case No. 28700/03, *Flux and Samson v. Moldova*; ECtHR 27 November 2007, Case No. 42864/05, *Timpul Info-Magazin and Anghel v. Moldova* and ECtHR 10 January 2012, Case No. 34702/07, *Standard Verlags GmbH v. Austria*.
 3. ECtHR 8 July 1986, Case No. 9815/82, *Lingens v. Austria*; ECtHR 1 July 1997, Case No. 20834/92, *Oberschlick (n° 2) v. Austria*; ECtHR Grand Chamber 28 October 1999, Case No. 28396/95, *Wille v. Liechtenstein*; ECtHR 12 July 2001, Case No. 29032/95, *Feldek v. Slovakia*; ECtHR 25 June 2002, Case No. 51279/99, *Colombani and Others v. France*; ECtHR 29 March 2005, Case No. 72713/01, *Ukrainian Media Group v. Ukraine*; ECtHR 29 maart 2005, Case No. 75955/01, *Sokolowski v. Poland*; ECtHR 19 December 2006, Case No. 62202/00, *Radio Twist v. Slovakia*; ECtHR 15 March 2011, Case No. 2034/07, *Otegi Mondragon v. Spain*; ECtHR 28 April 2009, Case No. 39311/05, *Karakó v. Hungary*; ECtHR 1 June 2010, Case No. 16023/07, *Gutiérrez Suárez v. Spain* and ECtHR 21 February 2012, Case Nos. 32131/08 and 41617/08, *Tuşalp v. Turkey*. See also ECtHR 17 April 2014, Case No. 20981/10, *Mladina d.d. Ljubljana v. Slovenia*.

regarding the actual level of protection of press freedom in Europe.¹ The perception that the European Court has sometimes been too lenient in accepting interferences with the right to freedom of expression is clearly reflected in some dissenting opinions in annex to some recent judgments finding no violation of Article 10 of the Convention.²

In *Lindon, Otchakovsky-Laurens and July v. France*, the dissenting judges expressed the opinion that the Court's judging no violation of Article 10 of the Convention was "a significant departure from the Court's case-law in matters of criticism of politicians", while in *Stoll v. Switzerland* the dissenters considered the Court's judgment by finding no violation of Article 10 "a dangerous and unjustified departure from the Court's well established case-law concerning the nature and vital importance of freedom of expression in democratic societies."³

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1. See the proceedings and conclusions of the Seminar on the European Protection of Freedom of Expression: "Reflections on Some Recent Restrictive Trends," Strasbourg, 10 October 2008, www-ircm.u-strasbg.fr/seminaire_oct2008/index.htm. See also R. Ó Fathaigh and D. Voorhoof, "The European Court of Human Rights, Media Freedom and Democracy," in M. Price, S. Verhulst, and L. Morgan, eds., *Routledge Handbook of Media Law* (New York: Routledge, 2013), 107–124.
 2. It is to be noted that also, the other way around, the Court has been criticised for applying Article 10 in a too protective way for media and journalism, sometimes not sufficiently taking into consideration the rights of others or the margin of appreciation of the member states.
 3. ECtHR Grand Chamber 22 October 2007, Case Nos. 21279/02 and 36448/02, *Lindon, Otchakovsky-Laurens and July v. France* and ECtHR Grand Chamber 10 December 2007, Case No. 69698/01. In *Féret v. Belgium* the dissenting judges also firmly argued why they disagreed with the majority of the Court not finding a violation of Article 10 regarding the conviction for "hate speech" of the leader of a political party. The dissenting judges expressed the opinion that by confirming the criminal repression of political debate in this case, the Court neglected the essence of freedom of expression: "confirmer la répression pénale du discours politique en l'espèce va à l'encontre de la liberté d'expression" (ECtHR 16 July 2009, Case No. 15615/07, *Féret v. Belgium*). See also the dissenting opinions in ECtHR 29 July 2008, Case No. 22824/04, *Flux (n° 6) v. Moldova*; ECtHR 17 February 2009, Case No. 38991/02, *Saygılı and Falakaoğlu (n° 2) v. Turkey*; ECtHR 24 February 2009, Case No. 46967/07, *C.G.I.L. and Cofferati v. Italy*; ECtHR 4 June 2009, Case No. 21277/05, *Standard Verlags GmbH (n° 2) v. Austria*; ECtHR 16 July 2009, Case No. 10883/05, *Willem v. France*; ECtHR 31 May 2011, Case No. 3699/08, *Žugić v. Croatia*; ECtHR Grand Chamber 12 September 2011, Cases nos. 28955/06, 28957/06, 28959/06 and 28964/06, *Palomo Sánchez and Others v. Spain*; ECtHR 26 June 2012, Case No. 12484/05, *Ciesielczyk v. Poland*; ECtHR 25 September 2012, Case No. 11828/08, *Trade Union of the Police in the Slovak Republic and Others v. Slovakia*; ECtHR 9 October 2012, Case No. 29723/11, *Szima v. Hungary*; ECtHR 11 December 2012, Case No. 35745/05, *Nenkova-Lalova v. Bulgaria*; ECtHR 10 October 2013, Case No. 26547/07, *Print Zeitungsverlag GmbH v. Austria*; ECtHR 30 January 2014, Case No. 34400/10, *De Lesquen du Plessis-Casso (n° 2) v. France* (this judgment is not final yet (May 2014) because of a pending request for referral to the Grand Chamber) and ECtHR 4 February 2014, Case No. 11882/10, *Pentikäinen v. Finland* (this judgment is not final: the case has been referred to the Grand Chamber on 2 June 2014, on request of the applicant). See also some of the earlier dissenting opinions in ECtHR Grand Chamber 17 December 2004, Case No. 49017/99, *Pedersen and Baadsgaard v. Denmark*; ECtHR 13 September 2005, Case No. 42571/98, *I.A. v. Turkey*; ECtHR 24 November 2005, Case No. 53886/00, *Tourancheau and July v. France* and ECtHR 14 June 2007, Case No. 71111/01, *Hachette Filipacchi Associés v. France*.

A dissenting opinion in another case is very illustrative in this context. The dissenting judges of the European Court, being confronted with a controversial finding of a non-violation of Article 10 by the majority in the case *Barata Monteiro da Costa Nogueira and Patrício Pereira v. Portugal*, pointed at a worrying trend, the Court's supervisory role scrutinizing fundamental rights and freedoms in Europe actually being under attack. The essential message of the dissenters is that the finding of the majority in this case contributes to the weakening of the philosophy of freedom of expression itself. It emphasises that at a time when the winds are changing, it is the Court's task, more than ever, to reinforce freedom of expression and information as a key element in democracy.¹

Again on 13 July 2012 a robust dissenting opinion was added to a Grand Chamber judgment in the case *Mouvement raëlien suisse v. Switzerland*. The dissenters obviously disagree with the Court's majority, finding no violation of Article 10, this time in a case concerning a ban imposed by local authorities on a poster campaign of an association, allegedly promoting unlawful activities on their website. The dissenting opinion seems to deplore the lack of protection guaranteed to freedom of expression, leaving too wide a discretion for interpretations of limitations and restrictions, combined with a too broad margin of appreciation left to the domestic authorities interfering with freedom of expression and information within their jurisdiction. The dissenting judges emphasise that "the right to freedom of expression under Article 10 is an essential provision because it underpins the democracy that lies at the heart of the Convention. Any restriction of that freedom must be strictly justified by a pressing social need and narrowly circumscribed by relevant and sufficient reasons".²

Also the case *Animal Defenders International v. UK*³ shows a striking difference of opinion among the Strasbourg judges, the Grand Chamber holding, by nine votes to eight, that the UK's ban on political advertising on television did not violate Article 10 of the Convention. Essentially, the

1. Dissenting opinion of Tulkens, Popović, and Sajó in ECtHR 11 January 2011, Case No. 4035/08, *Barata Monteiro da Costa Nogueira and Patrício Pereira v. Portugal*. See also D. Voorhoof, "Tulkens on the Barricades of Freedom of Expression and Information," *Strasbourg Observers* blogpost, 24 August 2012, <http://strasbourgobservers.com/2012/08/24/tulkens-on-the-barricades-of-freedom-of-expression-and-information/>.

2. Dissenting opinion of Tulkens, Sajó, Lazarova Trajkovska, Bianku, Power-Forde, Vučinić, and Yudkivska in ECtHR Grand Chamber 13 July 2012, Case No. 16354/06, *Mouvement raëlien Suisse v. Switzerland*.

3. ECtHR Grand Chamber 22 April 2013, Case No. 48876/08, *Animal Defenders International v. UK*.

majority of the judges accepts that a total ban on political advertising on television, characterized by a broad definition of the term “political,” with no temporal limitations and no room for exceptions, not even for a TV advertisement by an NGO raising awareness on animals rights and contributing to a public debate on animal protection, is in accordance with the right to freedom of political expression. The dissenting judges argued for a radically different approach, even pointing at the “double standard within the context of a Convention whose minimum standards should be equally applicable throughout all the States parties to it,” but their arguments could not convince the majority of the Grand Chamber.¹

Most recently, in *Pentikäinen v. Finland* the dissenting judges expressed the opinion that the majority’s finding of no violation of Article 10 was likely to create a “chilling effect” on press freedom. In this case the European Court found that a Finnish press photographer’s conviction for disobeying the police while covering a demonstration did not breach his freedom of expression. The European Court recognised that Pentikäinen, as a newspaper photographer and journalist, had been confronted with an interference in his right to freedom of expression. However, as the interference was prescribed by law, pursued several legitimate aims (the protection of public safety and the prevention of disorder and crime) and was to be considered necessary in a democratic society, there was no violation of his right under Article 10 of the Convention. His arrest was a consequence of his decision to ignore the police orders to leave the area, while there was also a separate secure area which had been reserved for the press. The Court also considered that the fact that the applicant was a journalist did not give him a greater right to stay at the scene than the other people and that the conduct sanctioned by the criminal conviction was not his journalistic activity as such, but his refusal to comply with a police order at the very end of the demonstration, when the latter was judged by the police to have become a riot. The dissenting judges expressed the opinion it has not been substantiated why it was necessary in a democratic society to equate a professional journalist, operating within recognised professional limits in covering the demonstration, with any of the people taking part in the demonstration and to impose drastic criminal restraints on him. The dissenting judges criticised sharply the imposition of restrictions on the journalist’s

1. After emphasizing being “perplexed” by the approach of the majority, one of the dissenting opinions concludes: “Nothing has been shown in this case to suggest that the state of democracy in the United Kingdom requires, by way of a ‘pressing need’, the wide ban on paid ‘political’ advertisements that is in issue here; or that the said democracy is less robust than in other States parties to the Convention and cannot afford risk-taking with ‘issue-advertising’. On the contrary, tradition and history force one to assert the very opposite”.

freedom of expression through his arrest, detention, prosecution and conviction for a criminal offence simply because he had the courage to do his duty in furtherance of the public interest.¹ As this case has been referred to the Grand Chamber by decision of the Court's Panel on 2 June 2014, it is up to the Grand Chamber of 17 judges to reconsider the arguments of the Finnish authorities and of the applicant journalist in this case. It also illustrates that an actual debate and reflection is taking place in Europe, also within the European Court of Human Rights, how to secure a high level of freedom for media and journalism in a democracy, without neglecting other rights and interests of individuals and society.

2. The scope of freedom of expression: recent developments in the ECtHR's case law

2.1. Media as public watchdog and the role of NGOs

At numerous occasions the European Court has emphasized the importance of an open public debate and the role of investigative journalism. Particular attention is paid to the public interest involved in the disclosure of information, contributing to debate on matters of public interest. The Court has reiterated that

“In a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence”.²

In such a context a journalist, a civil servant, an activist or a staff member of an NGO should not be prosecuted or sanctioned because of breach of confidentiality or the use of illegally obtained documents.³ The Court has accepted that the interest in protecting the publication of information originating from a source which obtained and retransmitted the

1. ECtHR 4 February 2014, Case No. 11882/10, *Pentikäinen v. Finland* (this judgment is not final: the case has been referred to the Grand Chamber on 2 June 2014, on request of the applicant).

2. ECtHR Grand Chamber 12 February 2008, Case No. 14277/04, *Guja v. Moldova* and ECtHR 8 January 2013, Case No. 40238/02, *Bucur and Toma v. Romania*.

3. ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fressoz and Roire v. France*; ECtHR 25 April 2006, Case No. 77551/01, *Dammann v. Switzerland*; ECtHR 7 June 2007, Case No. 1914/02, *Dupuis and Others v. France*; ECtHR 26 July 2007, Case No. 64209/01, *Peev v. Bulgaria* and ECtHR Grand Chamber 12 February 2008, Case No. 14277/04, *Guja v. Moldova*. See also ECtHR 19 December 2006, Case No. 62202/00, *Radio Twist v. Slovakia* and ECtHR 28 June 2011, Case No. 28439/08, *Pinto Coelho v. Portugal*.

information unlawfully may in certain circumstances outweigh those of an individual or an entity, private or public, in maintaining the confidentiality of the information. A newspaper that has published illegally gathered emails between two public figures, directly related to a public discussion on a matter of serious public concern, can be shielded by Article 10 of the Convention against claims based on the right of privacy as protected under Article 8 of the Convention.¹

The Court at several occasions has confirmed that press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature. The conviction of a journalist for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest. As a result the press may no longer be able to play its vital role as “public watchdog” and the ability of the press to provide accurate and reliable information may be adversely affected.² In cases in which journalists reported about confidential information in a sensationalist way³ or in which the revealed documents did not concretely or effectively contribute to public debate or only concerned information about the private life of the persons concerned,⁴ the Court accepted (proportionate) interferences in their freedom of expression (*supra*).

The European Court has also made clear that in a democratic society, in addition to the press, non-governmental organizations (NGOs), campaign groups or organizations, with a message outside the mainstream must be able to carry on their activities effectively and be able to rely on a high level of freedom of expression, as there is “a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public

1. ECtHR (Decision) 16 June 2009, Case No. 38079/06, *Jonina Benediktsdóttir v. Iceland*. See also ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fressoz and Roire v. France* and ECtHR 19 December 2006, Case No. 62202/00, *Radio Twist v. Slovakia*.

2. ECtHR Grand Chamber 10 December 2007, Case No. 69698/01, *Stoll v. Switzerland*. See also ECtHR Grand Chamber 27 March 1996, Case No. 17488/90, *Goodwin v. UK* and ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fressoz and Roire v. France*.

3. ECtHR Grand Chamber 10 December 2007, Case No. 69698/01, *Stoll v. Switzerland*.

4. ECtHR 9 November 2006, Case No. 64772/01, *Leempoel and S.A. Ciné Revue v. Belgium* and ECtHR 3 February 2009, Case No. 30699/02, *Marin v. Romania*. See also ECtHR 14 March 2002, Case No. 46833/99, *De Diego Nafria v. Spain* and ECtHR Grand Chamber 17 December 2004, Case No. 33348/96, *Cumpănă and Mazăre v. Romania*. See also ECtHR 14 January 2014, Case No. 73579/10, *Ruusunen v. Finland* and ECtHR 14 January 2014, Case No. 69939/10, *Ojala and Etukeno Oy v. Finland*.

interest such as health and the environment”.¹ In a democratic society public authorities are to be exposed to permanent scrutiny by citizens and everyone has to be able to draw the public’s attention to situations that they consider unlawful.² The Court has also argued that freedom of expression is of major importance for persons belonging to minority groups.³

2.2. Protection of whistle-blowers

In the Grand Chamber judgment in *Guja v. Moldova*, the Court recognized the need of protection of whistleblowers by Article 10 of the Convention. The Court noted

“that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgence or publication corresponds to a strong public interest. The Court thus considers that the signaling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large”.

Although disclosure should be made in the first place to the person’s superior or other competent authority or body, the Court accepted that when such a practice is clearly impractical, the information could, as a last resort, be disclosed to the public. The Court held that the dismissal of a civil servant for leaking two confidential letters from the public prosecutor’s office to the press was in breach of Article 10 of the Convention, also referring to the

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1. ECtHR 23 September 1998, Case No. 24838/94, *Steel and Others v. UK*. See also ECtHR 25 August 1998, Case No. 25181/94, *Hertel v. Switzerland*; ECtHR 28 June 2001, Case No. 24699/94, *VGT Verein gegen Tierfabriken v. Switzerland*; ECtHR 4 October 2007, Case No. 32772/02, *VGT Verein gegen Tierfabriken (n° 2) v. Switzerland*; ECtHR 27 May 2004, Case No. 57829/00, *Vides Aizsardzības Klubs v. Latvia* and ECtHR 7 November 2006, Case No. 12697/03, *Mamère v. France*. See also ECtHR 29 October 1992, Case No. 14234/88 and 14235/88, *Open Door and Dublin Well Women v. Ireland*; ECtHR Grand Chamber 25 November 1999, Case No. 25594/94, *Hashman and Harrup v. UK*; ECtHR 20 September 2007, Case No. 57103/00, *Çetin and Şakar v. Turkey*; ECtHR 3 February 2009, Case No. 31276/05, *Women on Waves v. Portugal*; ECtHR 14 September 2010, Case Nos. 6991/08 and 15084/08, *Hyde Park and Others (n° 5-6) v. Moldova*; ECtHR 1 December 2011, Case Nos. 8080/08 and 8577/08, *Schwabe and M.G. v. Germany*; ECtHR 12 June 2012, Case Nos. 26005/08 and 26160/08, *Tatár and Fáber v. Hungary*; ECtHR 26 November 2013, Case No. 3753/05, *Kudrevičius and others v. Lithuania* (referred to Grand Chamber) and ECtHR 15 May 2014, Case No. 19554/05, *Taranenko v. Russia*.
 2. ECtHR 27 May 2004, Case No. 57829/00, *Vides Aizsardzības Klubs v. Latvia*. See also ECtHR 12 June 2012, Case Nos. 26005/08 and 26160/08, *Tatár and Fáber v. Hungary*.
 3. ECtHR 17 February 2004, Case No. 44158/98, *Gorzelik v. Poland*.

serious chilling effect of the applicant's dismissal for other civil servants or employees, discouraging them from reporting any misconduct.¹ In *Bucur and Toma v. Romania* the Court considered that the general interest in the disclosure of information revealing illegal activities within the Romanian Intelligence Services (RIS) was so important in a democratic society that it prevailed over the interest in maintaining public confidence in that institution. The Court observed that the information about the illegal telecommunication surveillance of journalists, politicians and business men that had been disclosed to the press affected the democratic foundations of the State. Hence it concerned very important issues for the political debate in a democratic society, in which public opinion had a legitimate interest. The fact that the data and information at issue were classified as 'ultra-secret' was not a sufficient reason to interfere with the whistle-blower's right in this case. The conviction of Bucur for the disclosure of information to the media about the illegal activities of RIS was considered as a violation of Article 10 ECHR. In its judgment the Court also relied on Resolution 1729(2010) of the Parliamentary Assembly of the Council of Europe on protecting whistle-blowers.²

Especially in cases where information is published on alleged corruption, fraud or illegal activities in which politicians, civil servants or public institutions are involved, journalists, publishers, media and NGOs can count on the highest standards of protection of freedom of expression. The Court has emphasized that "in a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public has the right to be informed".³ The Court expressed the opinion that "the press is one of the means by which politicians and

1. ECtHR Grand Chamber 12 February 2008, Case No. 14277/04, *Guja v. Moldova*. See also ECtHR 5 October 2006, Case No. 14881/03, *Zakharov v. Russia*; ECtHR 26 July 2007, Case No. 64209/01, *Peev v. Bulgaria*; ECtHR 13 November 2008, Case Nos. 64119/00; 76292/01, *Kayasu v. Turkey*; ECtHR 13 January 2009, Case No. 39656/03, *Ayhan Erdoğan v. Turkey*; ECtHR 19 February 2009, Case No. 4063/04, *Marchenko v. Ukraine*; ECtHR 26 February 2009, Case No. 29492/05, *Kudeshkina v. Russia*; ECtHR 16 July 2009, Case No. 20436/02, *Wojtas-Kaleta v. Poland*; ECtHR 31 March 2011, Case No. 6428/07, *Stryk v. Ukraine*; ECtHR 21 July 2011, Case No. 28274/08, *Heinisch v. Germany*; ECtHR 18 October 2011, Case No. 10247/09, *Sosinowska v. Poland* and ECtHR 8 January 2013, Case No. 40238/02, *Bucur and Toma v. Romania*.

2. ECtHR 8 January 2013, Case No. 40238/02, *Bucur and Toma v. Romania*. Notice that in some other cases the Court showed more respect for secret, classified military information: ECtHR 22 October 2009, Case No. 69519/01, *Pasko v. Russia*. In this case the ECtHR failed to apply the Guja-criteria, while the information at issue concerned serious environmental issues, related to nuclear pollution (see *supra*).

3. ECtHR 22 November 2007, Case No. 64752/01, *Voskuil v. The Netherlands*.

public opinion can verify that public money is spent according to the principles of accounting and not used to enrich certain individuals”.¹

Defamation laws and proceedings cannot be justified if their purpose or effect is to prevent legitimate criticism of public officials or the exposure of official wrongdoing or corruption. A right to sue in defamation for the reputation of officials could easily be abused and might prevent free and open debate on matters of public interest or scrutiny of the spending of public money.²

That is also the message of the Committee of Ministers’ Recommendation CM/Rec(2014)7 on the protection of whistle-blowers. Recommendation CM/Rec(2014)7 (30 April 2014) recognises “that individuals who report or disclose information on threats or harm to the public interest (“whistle-blowers”) can contribute to strengthening transparency and democratic accountability” and it refers explicitly to the right of freedom of expression and information guaranteed by Article 10 ECHR.

Therefore it is recommended that member States should have in place:

“a normative, institutional and judicial framework to protect individuals who, in the context of their work-based relationship, report or disclose information on threats or harm to the public interest”.

In order to fulfil this mission, the national framework in the member states should foster an environment that encourages reporting or disclosure in an open manner and individuals should feel safe to freely raise public interest concerns.

It is recommended that “clear channels should be put in place for public interest reporting and disclosures and recourse to them should be facilitated through appropriate measures”. The channels for reporting and disclosures comprise:

- “- reports within an organisation or enterprise (including to persons designated to receive reports in confidence);
- reports to relevant public regulatory bodies, law enforcement agencies and supervisory bodies;
- disclosures to the public, for example to a journalist or a member of parliament”.

It is obvious that the European Court’s case law has contributed to raising awareness about the lack of protection of whistle-blowers in many

1. ECtHR 14 November 2008, Case No. 9605/03, *Krone Verlag GmbH & Co (n° 5) v. Austria*.

2. ECtHR 9 June 2009, Case No. 17095/03, *Cihan Öztürk v. Turkey*.

states in Europe. Recommendation CM/Rec(2014)7 of 30 April 2014 to the member states requesting to take action for stimulating, facilitating and protecting whistle-blowing is aiming to implement at the national level a higher threshold of protection of public interest whistle-blowing, in line with the European Court's case law.¹

2.3. Protection of journalistic sources

An interference by public authorities by means of prosecution or other judicial measures with regard to the journalist's research and investigative activities calls for the most scrupulous examination from the perspective of Article 10 of the Convention.² It is based on this perspective that journalistic sources enjoy a very high level of protection in terms of Article 10 of the Convention. According to the Court

“protection of journalistic sources is one of the basic conditions for press freedom, as is recognised and reflected in various international instruments including the Committee of Ministers Recommendation (...). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest”.³

Searches in news rooms and confiscations of journalistic material in order to reveal the identity of an informant can hardly be justified from this

1. Committee of Ministers, Recommendation CM/Rec(2014)7 on the protection of whistle-blowers, 30 April 2014, <https://wcd.coe.int/ViewDoc.jsp?id=2188855&Site=CM>

2. See ECtHR 24 February 1997, Case No. 19983/92, *De Haes and Gijssels v. Belgium*; ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fressoz and Roire v. France*; ECtHR Grand Chamber 20 May 1999, Case No. 21980/93, *Bladet Tromsø and Stensaas v. Norway*; ECtHR 3 October 2000, Case No. 34000/96, *Du Roy and Malaurie v. France*; ECtHR 29 March 2001, Case No. 38432/97, *Thoma v. Luxembourg*; ECtHR 25 June 2002, Case No. 51279/99, *Colombani and Others v. France*; ECtHR 27 May 2004, Case No. 57829/00, *Vides Aizsardzības Klubs v. Latvia*; ECtHR 19 December 2006, Case No. 62202/00, *Radio Twist v. Slovakia*; ECtHR 29 March 2005, Case No. 72713/01, *Ukrainian Media Group v. Ukraine* and ECtHR 7 June 2007, Case No. 1914/02, *Dupuis and Others v. France*. See also ECtHR 16 July 2013, Case No. 73469/10, *Nagla v. Latvia*.

3. ECtHR Grand Chamber 27 March 1996, Case No. 17488/90, *Goodwin v. UK*. See also ECtHR (Decision) 8 December 2005, Case No. 40485/02, *Nordisk Film & TV A/S v. Denmark* and ECtHR 31 May 2007, Case No. 40116/02, *Šečić v. Croatia*.

perspective. On several occasions, the European Court was of the opinion that searches of media offices, the home and place of work of journalists or reporters amounted to a violation of Article 10 of the Convention, disrespecting the subsidiarity of the proportionality principle.¹

An important additional element in this regard is that any interference with the right to protection of journalistic sources must be attended with legal procedural safeguards, reducing or even eliminating the possibility that the police or public prosecutors can have access to the journalists' sources, unless after a decision by a court, a judge or another independent and impartial body. In *Sanoma Uitgevers BV v. the Netherlands* the Grand Chamber noted that First and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body (...). The requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not.

The Court noted that it was well aware "that it may be impracticable for the prosecuting authorities to state elaborate reasons for urgent orders or requests. In such situations an independent review carried out at the very least prior to the access and use of obtained materials should be sufficient to determine whether any issue of confidentiality arises, and if so, whether in the particular circumstances of

1. ECtHR 23 February 2003, Case No. 51772/99, *Roemen and Schmit v. Luxembourg*; ECtHR 15 July 2003, Case No. 33400/96, *Ernst and Others v. Belgium*; ECtHR 22 November 2007, Case No. 64752/01, *Voskuil v. The Netherlands*; ECtHR 27 November 2007, Case No. 20477/05, *Tillack v. Belgium*; ECtHR 15 December 2009, Case No. 821/03, *Financial Times Ltd. and Others v. UK*; ECtHR Grand Chamber 14 September 2010, Case No. 38224/03, *Sanoma Uitgevers BV v. The Netherlands*; ECtHR 12 April 2012, Case No. 30002/08, *Martin and Others v. France*; ECtHR 28 June 2012, Case Nos. 15054/07 and 15066/07, *Ressiot and Others v. France*; ECtHR 22 November 2012, Case No. 39315/06, *Telegraaf Media Nederland Landelijke Media N.V. and Others v. The Netherlands*; ECtHR 18 April 2013, Case No. 26419/10, *Saint-Paul Luxembourg S.A. v. Luxembourg* and ECtHR 16 July 2013, Case No. 73469/10, *Nagla v. Latvia*. See also Committee of Ministers of the Council of Europe, Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information, 8 March 2000, [www.coe.int/t/dgh/standardsetting/media/Parliamentary Assembly of the Council of Europe, Recommendation 1950 \(2011\) on the Protection of Journalists' Sources](http://www.coe.int/t/dgh/standardsetting/media/Parliamentary%20Assembly%20of%20the%20Council%20of%20Europe/Recommendation%201950%20(2011)%20on%20the%20Protection%20of%20Journalists%27%20Sources.pdf), 25 January 2011, <http://assembly.coe.int/mainf.asp?Link=/documents/adoptedtext/ta11/erec1950.htm>; D. Banisar, *Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources* (2007), www.privacyinternational.org and D. Voorhoof, "The Protection of Journalistic Sources under Fire?," in D. Voorhoof, ed., *European Media Law: Collection of Materials, 2012-2013* (Gent: Knops Publishing, 2012), 287-306, <http://europe.ifj.org/assets/docs/147/154/9355293-0d86c9a.pdf>.

the case the public interest invoked by the investigating or prosecuting authorities outweighs the general public interest of source protection”.¹

The Court furthermore clarified that the exercise of any independent review that only takes place subsequently to the handing over of material capable of revealing journalists’ sources would undermine the very essence of the right to confidentiality. Therefore the judge or other independent and impartial body must be in a position to carry out the weighing of the potential risks and respective interests “prior” to any disclosure.

The ECtHR also requires that any decision interfering with the protection of journalists’ sources “should be governed by clear criteria, including whether a less intrusive measure can suffice to serve the overriding public interests established. It should be open to the judge or other authority to refuse to make a disclosure order or to make a limited or qualified order so as to protect sources from being revealed, whether or not they are specifically named in the withheld material, on the grounds that the communication of such material creates a serious risk of compromising the identity of journalists’ sources (...). In situations of urgency, a procedure should exist to identify and isolate, prior to the exploitation of the material by the authorities, information that could lead to the identification of sources from information that carries no such risk”.²

Only with respect of these procedural guarantees interferences with the right to protection of journalists’ sources can be justified in order to meet an “overriding requirement in the public interest”, like for instance preventing or investigating major crime or acts of (racist) violence, protecting the right to life or preventing that minors would be sexually abused and hence subjected to inhuman or degrading treatment.³

2.4. Toward a Right of Access to Official Documents

An important new development is the Court’s recent shift toward approaching access to public documents from the perspective of Article 10 of the Convention. For a long time, the Court refused to apply Article 10 in cases of refusals of access to public documents.⁴ The However, in a 2007

1. ECtHR Grand Chamber 14 September 2010, Case No. 38224/03, *Sanoma Uitgevers BV v. The Netherlands*.

2. ECtHR Grand Chamber 14 September 2010, Case No. 38224/03, *Sanoma Uitgevers BV v. The Netherlands* and ECtHR 16 July 2013, Case No. 73469/10, *Nagla v. Latvia*.

3. ECtHR (Decision) 8 December 2005, Case No. 40485/02, *Nordisk Film & TV A/S v. Denmark* and ECtHR 31 May 2007, Case No. 40116/02, *Šečić v. Croatia*.

4. The Court got on a new track in ECtHR (Decision) 10 July 2006, Case No. 19101/03, *Sdružení Jihočeské Matky v. Czech Republic*. See also W. Hins and D. Voorhoof, “Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights,” *European Constitutional Law Review* 3 (2007): 114–26.

judgment the Court expressed its opinion that “particularly strong reasons must be provided for any measure affecting this role of the press and limiting access to information which the public has the right to receive,”¹ implicitly recognizing at least a right of access to information. In the spring of 2009 the Court delivered two important judgments in which it recognized the right of access to official documents. The Court made clear that when public bodies hold information that is needed for public debate, the refusal to provide documents in this matter to those who are requesting access is a violation of the right to freedom of expression and information as guaranteed under Article 10 of the Convention. In *TASZ v. Hungary* the Court’s judgment mentioned the “censorial power of an information monopoly” when public bodies refuse to release information needed by the media or civil society organizations to perform their “watchdog” function. It also considered that the State had an obligation not to impede the flow of information sought by a journalist or an interested citizen. The Court referred to its consistent case law in which it has recognized that the public has a right to receive information of general interest and that the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society’s “watchdogs,” in the public debate on matters of legitimate public concern, even when those measures merely make access to information more cumbersome. The Court emphasized once more that the function of the press, including the creation of forums for public debate, is not limited to the media or professional journalists. Indeed, in the present case, the preparation of the forum of public debate was conducted by a nongovernmental organization. The Court recognized civil society’s important contribution to the discussion of public affairs and qualified the applicant association, which is involved in human rights litigation, as a social “watchdog”. In these circumstances the applicant’s activities warranted Convention protection similar to that afforded to the press. Furthermore, given the applicant’s intention to impart the requested information to the public, thereby contributing to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired.²

In *Kenedi v. Hungary* the European Court held unanimously that there had been a violation of the Convention, on account of the excessively long proceedings—over ten years—with which Mr. Kenedi sought to gain and

1. ECtHR 27 November 2007, Case No. 42864/05, *Timpul Info-Magazin and Anghel v. Moldova*.

2. ECtHR 14 April 2009, Case No. 37374/05, *Társaság A Szabadságjogokért v. Hungary* and ECtHR 26 May 2009, Case No. 31475/05, *Kenedi v. Hungary*.

enforce his access to documents concerning the Hungarian secret services. The Court also reiterated that “access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant’s right to freedom of expression”. The Court noted that Mr. Kenedi had obtained a court judgment granting him access to the documents in question, following which the domestic courts had repeatedly found in his favor in the ensuing enforcement proceedings. The administrative authorities had persistently resisted their obligation to comply with the domestic judgment, thus hindering Mr. Kenedi’s access to documents he needed to write his study. The Court concluded that the authorities had acted arbitrarily and in defiance of domestic law and it held, therefore, that the authorities had misused their powers by delaying Mr. Kenedi’s exercise of his right to freedom of expression, in violation of Article 10.¹

More recently, in *Youth Initiative for Human Rights v. Serbia*, the European Court has reiterated that “the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom” and that “obstacles created in order to hinder access to information which is of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as “public watchdogs”, and their ability to provide accurate and reliable information may be adversely affected”.² Referring to *TASZ v. Hungary*, the European Court stated explicitly “that the notion of ‘freedom to receive information’ embraces a right of access to information”. The Court is of the opinion that as the applicant NGO, Youth Initiative for Human Rights, was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate, there has been an interference with its right to freedom of expression. The Court found that the restrictions imposed by the Serbian intelligence agency, resulting in a refusal to give access to public documents, did not meet the criterion as being prescribed by law, and therefore violated Article 10 of the Convention.

1. ECtHR 26 May 2009, Case No. 31475/05, *Kenedi v. Hungary*. The Court came to the conclusion that in this case Article 13 (effective remedy) had also been violated since the Hungarian system did not provide for an effective way of remedying the violation of the freedom of expression in this situation. The Court found that the procedure available in Hungary at the time and designed to remedy the violation of Kenedi’s Article 10 rights had been proven ineffective. There had, therefore, been a violation of Article 13 read in conjunction with Article 10 of the Convention.

2. ECtHR 25 June 2013, Case No. 48135/06, *Youth Initiative for Human Rights v. Serbia*.

In another recent judgment on the right of access to public documents the Strasbourg Court has further clarified and expanded the scope of application of Article 10 of the Convention. The applicant in this case was an NGO, the Austrian association for the preservation, strengthening and creation of an economically sound agricultural and forestry land ownership (OVESSG). The Court considers that the refusal to give OVESSG access to the requested documents amounted to an interference with its rights under Article 10, as the association was involved in the legitimate gathering of information of public interest with the aim of contributing to public debate. The unconditional refusal by the Austrian regional authorities to give access to a series of documents thus made it impossible for OVESSG to carry out its research and to participate in a meaningful manner in the legislative process concerning amendments of real property transaction law in the region. The refusal to give access to the requested documents amounted to a violation of Article 10 of the Convention.¹ The Court's recognition of the applicability of the right to freedom of expression and information in matters of access to official documents is undoubtedly an important new development which further expands the scope of application of Article 10 of the Convention.²

Final observations and perspectives

Surveying the European Court's jurisprudence related to Article 10 of the Convention shows that the Court is securing high standards of freedom of expression and protection of media and journalists. The Grand Chamber judgments of 7 February 2012 in *Axel Springer AG v. Germany* and in *Von Hannover (n° 2) v. Germany*,³ the recent findings of violations of Article 10 in several cases of protection of journalistic sources⁴ and in a series of

1. ECtHR 28 November 2013, Case. No. 39534/07, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*.

2. See also P. Tiilikka, "Access to Information as a Human Right in the Case Law of the European Court of Human Rights" *Journal of Media Law* 5 (2013): 79-103 and the European Convention on Access to Official Documents, 18 June 2009, CETS nr. 205, www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=205&CM=8&DF=24/09/2012&CL=ENG.

3. ECtHR Grand Chamber 7 February 2012, Case No. 39954/08, *Axel Springer AG v. Germany* and ECtHR 7 February 2012, Case Nos. 40660/08 and 60641/08, *Von Hannover (n° 2) v. Germany*.

4. ECtHR 15 December 2009, Case No. 821/03, *Financial Times Ltd. and Others v. UK*; ECtHR Grand Chamber 14 September 2010, Case No. 38224/03, *Sanoma Uitgevers BV v. The Netherlands*; ECtHR 12 April 2012, Case No. 30002/08, *Martin and Others v. France*; ECtHR 28 June 2012, Case Nos. 15054/07 and 15066/07, *Ressiot and Others v. France*; ECtHR 22 November 2012, Case No. 39315/06, *Telegraaf Media Nederland Landelijke Media N.V. and Others v. The Netherlands*; ECtHR 18 April 2013, Case No. 26419/10, *Saint-Paul Luxembourg S.A. v. Luxembourg* and ECtHR 16 July 2013, Case No. 73469/10, *Nagla v. Latvia*.

judgments in relation to critical reporting by media and investigative journalism¹ clearly illustrate the awareness of the European Court regarding the importance of freedom of expression and information in a democratic society.

Especially the multiple references in the Court's recent case law to the danger of a "chilling effect",² and its impact on the finding of unjustified interferences with media and journalists, help to guarantee a higher standard of freedom of expression and information through the interpretation and the application of Article 10 of the Convention. In *Kaperzyński v. Poland* the European Court emphasized that it

"must exercise caution when the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in a discussion of matters of legitimate public concern (...). The chilling effect that the fear of criminal sanctions has on the exercise of journalistic freedom of

1. See ECtHR 12 April 2011, Case No. 4049/08, *Conceição Leiria v. Portugal*; ECtHR 19 April 2011, Case No. 22385/03, *Kasabova v. Bulgaria*; ECtHR 19 April 2011, Case No. 3316/04, *Bozhkov v. Bulgaria*; ECtHR 31 May 2011, Case No. 5995/06, *Šabanović v. Montenegro and Serbia*; ECtHR 28 June 2011, Case No. 28439/08, *Pinto Coelho v. Portugal*; ECtHR 19 July 2011, Case No. 23954/10, *Uj v. Hungary*; ECtHR 26 July 2011, Case No. 41262/05, *Ringier Axel Springer Slovakia, a.s. v. Slovakia*; ECtHR 22 November 2011, Case No. 1723/10, *Mizzi v. Malta*; ECtHR 10 January 2012, Case No. 34702/07, *Standard Verlags GmbH (n° 3) v. Austria*; ECtHR 17 January 2012, Case No. 29576/09, *Lahtonen v. Finland*; ECtHR 21 February 2012, Case Nos. 32131/08 and 41617/08, *Tuşalp v. Turkey*; ECtHR 19 June 2012, Case No. 3490/03, *Tănăsioaica v. Romania*; ECtHR 10 July 2012, Case No. 46443/09, *Eiðsdóttir v. Iceland*; ECtHR 10 July 2012, Case No. 43380/10, *Hlynsdóttir v. Iceland*; ECtHR 18 September 2012, Case No. 39660/07, *Lewandowska-Malec v. Poland*; ECtHR 2 October 2012, Case No. 5126/05, *Yordanova and Toshev v. Bulgaria*; ECtHR 16 October 2012, Case No. 17446/07, *Smolorz v. Poland*; ECtHR 23 October 2012, Case No. 19127/06, *Jucha and Żak v. Poland*; ECtHR 20 November 2012, Case Nos. 36827/06, 36828/06, and 36829/06, *Belek v. Turkey*; ECtHR 27 November 2012, Case Nos. 13471/05 and 38787/07, *Mengi v. Turkey*; ECtHR 22 January 2013, Case Nos. 33501/04, 38608/04, 35258/05, and 35618/05, *OOO Iypress and Others v. Russia*; ECtHR 12 February 2013, Case No. 13824/06, *Bugan v. Romania*; ECtHR 23 July 2013, Case No. 33287/10, *Sampaio e Paiva de Melo v. Portugal*; ECtHR 3 September 2013, Case No. 22398/05, *Ümit Bilgiç v. Turkey*; ECtHR 17 September 2013, Case No. 16812/11, *Welsh and Silva Canha v. Portugal*; ECtHR 22 October 2013, Case No. 11867/09, *Soltész v. Slovakia*; ECtHR 29 October 2013, Case No. 66456/09, *Ristamäki and Korvola v. Finland*; ECtHR 3 December 2013, Case No. 64520/10, *Ungváry and Irodalom Kft. v. Hungary*; ECtHR 7 January 2014, Cases Nos. 21666/09 and 37986/09, *Ringier Axel Springer Slovakia, a.s. (No. 2-3) v. Slovakia* and ECtHR 17 April 2014, Case No. 20981/10, *Mladina d.d. Ljubljana v. Slovenia*.

2. E.g., when criminal law is applied to prosecute and sanction journalists while reporting on matters of public interest, or in cases of prior restraint or when severe sanctions are imposed on media of journalists, or when journalists are prohibited no longer to exercise their profession.

expression is evident. . . . This effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed on media professionals”.¹

In *Cumpănă and Mazăre v. Romania* (Grand Chamber 17 December 2004) the Court made clear that, although sentencing is in principle a matter for the national courts, the imposition of a prison sentence for a press offence is incompatible with the right to freedom of expression as guaranteed by Article 10 of the Convention. Only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence, a conviction to imprisonment can eventually be justified. The Court observed that

“investigative journalists are liable to be inhibited from reporting on matters of general public interest – such as suspected irregularities in the award of public contracts to commercial entities – if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment or to a prohibition on the exercise of their profession. The chilling effect that the fear of such sanctions has on the exercise of journalistic freedom of expression is evident”.²

Since *Cumpănă and Mazăre v. Romania* the European Court, at several occasions³ held that prison sentences for defamation cannot be justified under Article 10, where the defamatory statements concern a matter of public interest. This rule against prison sentences includes pardoned, suspended, or conditional sentences, effectively removing from European legislatures and courts the ability to impose such sentences in defamation cases to be situated in public debate or political expression.⁴

The references to the “chilling effect”, the broadening of the scope of application of Article 10 including acts of investigative journalism, protection of sources, whistle-blowing and access to public documents and the strict

1. ECtHR 3 April 2012, Case No. 43206/07, *Kaperzyński v. Poland*.

2. ECtHR Grand Chamber 17 December 2004, Case No. 33348/96, *Cumpănă and Mazăre v. Romania*.

3. See recently ECtHR 24 September 2013, Case No. 43612/02, *Belpietro v. Italy*.

4. ECtHR 18 December 2008, Case No. 35877/04, *Mahmudov and Agazade v. Azerbaijan*; ECtHR 22 April 2010, Case No. 40984/07, *Fattulayev v. Azerbaijan*; ECtHR 6 July 2010, Case No. 37751/07, *Mariapori v. Finland*; ECtHR 31 May 2011, Case No. 9559/06, *Šabanović v. Montenegro and Serbia* and ECtHR 24 September 2013, Case No. 43612/02, *Belpietro v. Italy*. See also ECtHR 8 October 2013, Case No. 30210/06, *Ricci v. Italy* and Parliamentary Assembly of the Council of Europe, *Resolution 1577 (2007): Towards decriminalization of defamation*, <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1577.htm>.

scrutiny of the pertinent and sufficient reasons for proportionate interferences with the right to freedom of expression and information, have undoubtedly helped to upgrade the level of protection of free speech, journalism and media reporting in Europe.

The analysis of the Court's case law has also demonstrated how the European Court has developed finding a balance with the "duties and responsibilities" justifying interferences, restrictions and sanctions, as freedom of expression is also to respect the fundamental interests of society and the rights of others. Too often however, member states have interfered in the rights of citizens, journalists, media and NGO's in a disproportionate way, e.g. by means of injunctions, confiscations, criminal prosecutions and sentences to imprisonment of citizens, activists or journalists, without sufficient or pertinent reasons. The decisive condition formulated in Article 10(2) ECHR that any interference with the right to freedom of expression and information must be justified as being "necessary in a democratic society" has proved to be a very important, if not crucial condition to be fulfilled in order to guarantee freedom of expression and information against unjustified or overbroad interferences by public authorities. The Court's case law has also clarified however that there is still a margin, even a need for justified and proportionate limitations, restrictions and sanctions, such as those related to hate speech, privacy, protection of confidential information and libel or defamation.

The challenge for the future is to bring more European Convention member states in line with the European Court's case law and to inspire, influence or persuade other states and regions in the world to upgrade the freedom of expression of its citizens, to protect the freedom of newsgathering and independent and critical reporting by journalists and NGOs and to create more access to information and transparency on matters of interest for society. Protecting and effectively guaranteeing these rights, but also confronting the users with their "duties and responsibilities", is a crucial step toward developing the quality of democracy, stimulating diversity and tolerance, guaranteeing the respect for human rights and ultimately helping to realize a more sustainable and a better world to live in.