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# Freedom of Political Expression

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# Summary

Freedom of expression is a fundamental feature of a democratic society. It may only be subject to clearly defined restrictions. The purpose of this thesis is to analyse what limitations on the right to express a political opinion that are acceptable in a democratic society.

I use a traditional legal method analysing the case-law of the European Court on Human Rights about freedom of expression. I also compare the European tradition in freedom of expression with the American tradition. Both of them have their roots in the Enlightenment, but they evolved in different directions. The American tradition emphasises the liberty of the individual, whereas the European tradition stresses the duties and responsibilities of those who exercise their right to freedom of expression. The most obvious difference between the two traditions is how they react to undemocratic opinions. Democratic states have a right to defend themselves against enemies to democracy.

I believe that democracy demands that also those who have undemocratic views must be allowed to propagate for their ideas. A democratic state may only interfere with the right to express a political opinion if it can prove that the speaker sought to incite his audience to harm, if serious harm could result from the expression, and if it is the only means available to prevent serious harm.

# Preface

*“If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner, if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation – those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.*

*It is necessary to consider separately these two hypotheses, each of which has a distinct branch of the argument corresponding to it. We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still.*

*First, the opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course, deny its truth; but they are not infallible. They have no authority to decide the question for all mankind and exclude every other person from the means of judging. To refuse a hearing to an opinion because they are sure that it is false is to assume that their certainty is the same thing as absolute certainty. All silencing of discussion is an assumption of infallibility. Its condemnation may be allowed to rest on this common argument, not the worse for being common.”<sup>1</sup>*

*John Stuart Mill 1859*

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<sup>1</sup> J. S. Mill, *On Liberty*, 76.

# Abbreviations

CERD	International Convention on the Elimination of All Forms of Racial Discrimination
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
FBI	Federal Bureau of Investigation
FPÖ	Freiheitliche Partei Österreichs
ICCPR	International Covenant on Civil and Political Rights
KGB	Komitet Gosudarstvennoi Bezopasnosti
NGO	Non Governmental Organisation
NJA	Nytt Juridiskt Arkiv
PKK	Partiya Karkerên Kurdistan
SS	Schutzstaffeln
UDHR	Universal Declaration of Human Rights
QC	Queen's Counsel

# 1 Introduction

## 1.1 Purpose and Delimitations

Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment<sup>2</sup>. It is, in fact, a prerequisite for democracy. Without freedom of expression there can be no democracy. Despite the fundamental feature of freedom of expression for a democratic society, the debate on necessary limitations on this freedom exists in every democratic society. It is impossible to find a universal agreement acceptable for everyone. The purpose of this thesis is to analyse what limitations on the right to express a political opinion that are acceptable in a democratic society. Special emphasis is put on the case-law of the European Court of Human Rights, hereinafter the Court, concerning Article 10 and other articles of the Convention for the Protection of Human Rights and Fundamental Freedoms, hereinafter the Convention, protecting freedom of expression. The text is up to date to 15 November 2006. I try to give a comprehensive explanation of the case-law concerning Article 10, with the exception of the many cases against Turkey. The case-law concerning other articles interrelated with Article 10 is dealt with more briefly. When I mention articles without giving the source, they refer to the Convention. I will compare different approaches to this fundamental freedom. My views on this issue are explained in the last chapter of this thesis. The purpose is further to propose changes I believe should be introduced; both in the wording of the article protecting freedom of expression in the Convention and in its interpretation.

It is impossible only to look at Article 10 of the Convention. Other rights are interrelated with freedom of expression under Article 10, such as freedom of thought, conscience and religion under Article 9, freedom of peaceful assembly and association under Article 11 and the right to vote under Article 3 of Protocol No. 1. There is a link between all of these provisions, namely the need to guarantee pluralism of opinion in a democratic society through the exercise of civic and political freedoms. The Convention and its protocols must further be seen as a whole.<sup>3</sup> Freedom of religion and freedom of assembly are *lex specialis* to freedom of expression under Article 10 and these special aspects of the right to freedom of expression should be considered under Article 9 or 11 and not under Article 10. This thesis is focused on the right to express a political opinion in a broad sense; both individually and collectively. Article 11 is often interpreted in the light of Article 10; therefore quite a few cases concerning Article 11 are discussed in this thesis.

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<sup>2</sup> ECtHR, *Grinberg v. Russia* para. 23.

<sup>3</sup> *Ždanoka v. Latvia* para. 115.

The Court has distinguished between three types of expression: political expression, artistic expression and commercial expression. This thesis is focused on political expression; therefore comments on artistic and commercial expressions are rare, but it can often be difficult to distinguish artistic expression from political expression. An artist can choose to express a political opinion through a work of art. The main difference is between political expression and artistic expression on the one hand; and commercial expression on the other hand. Commercial expression falls outside the scope of this thesis. I do not generally deal with the question of the right to seek and obtain information. Emphasis is put on the right to express political opinions and not on the right to receive information. Broadcasting generally falls outside the scope of this work.

## **1.2 Method and Material**

I have used a traditional legal method. Freedom of expression, as protected by the Convention, is analysed using the means of interpretation contained in the articles 31 to 33 of the Vienna Convention on the Law of Treaties from 1969. The starting point is the wording of the articles of the European Convention. This is, however, not enough. The text must be interpreted in the light of the object and the purpose of the Convention, which is found in its preamble. Namely, to maintain the fundamental freedoms which are the foundation of justice and peace by an effective political democracy and a common understanding, and observance of human rights. The Convention was drafted with the purpose of maintaining democracy. This must be taken into consideration when reading the cases from the Court. The case-law concerning freedom of expression is voluminous. The Court has established a substantial body of general principles applying to freedom of expression. They are identified in this thesis. Contracting States are bound to respect them.

In order to understand the intentions behind the wording of Article 10 supplementary means of interpretation is used. The preparatory work to the Convention has been published and is available to the general public. The Convention is, however, a living instrument and one must be cautious using the preparatory work, but it may explain the general intentions behind it. The Convention was concluded in the wake of World War II. This must also be taken into consideration when interpreting it. The drafters wanted to prevent a repetition of the horrors of the war and all cases must be seen in the light of this intention.

The Convention is written in French and English. Both languages are equally authoritative. Some cases are, however, only available in French. Unfortunately enough, I do not understand French and I have not been able to use any source written in this language. I have to rely on commentaries to the Convention when I deal with material only available in French.

I have used teachings by the most highly qualified publicists in this field, not only the writings by famous lawyers, but also the works of prominent philosophers. The legal literature I have used is mostly written by persons who have worked for the Court for many years or who are legal scholars with special knowledge of the case-law of the Court. The question of when it is justified to limit the right to freedom of expression is an issue with philosophical implications. It concerns the basic foundation of a democratic society. In this thesis, I take an all-embracing approach to freedom of expression and deal with the issue from a variety of perspectives without being too detailed. It is a fascinating subject, and I try to highlight the most debated issues concerning freedom of expression. One has to reflect over the question of acceptable limitations on the right to freedom of expression and I explain different aspects that need to be taken into consideration. I do not claim to have the eternal answer and it is possible that I will re-consider my views. I hope that this thesis will contribute, not only to the debate on acceptable limitations on the right to freedom of expression, but also to reflection on basic principles of democracy.

Freedom of expression is a typical first generation human right with emphasis on the right of the individual to act without interference from the state. This thesis is a classical liberal defence of this fundamental right, emphasising the right of the individual against unnecessary interferences by public authorities. In an era when “strenuous toleration of the extremist [is] no longer the lukewarm sea in which the common culture floats but rather a beleaguered, even minority opinion,”<sup>4</sup> this thesis may be controversial. Those who have other political views, more inclined to underline the interests of collective entities, may disagree with my views, and find them repulsive. I have no intention to hide my views, on the contrary; I will try to be as clear as possible. The quotes contained in this thesis usually reflect my position. This is *my* contribution to the ever-ongoing debate on the limits of freedom of expression.

This thesis is a combined descriptive, comparative and, analytical study of the concept of freedom of expression. It is descriptive as concerns the case-law of the Court about freedom of expression. It is, however, comparative as concerns the study of different national approaches to freedom of expression, and its protection by different international human rights instruments; and analytical as concerns the final analysis and the proposed new wording of the article protecting freedom of expression in the Convention. It would have been interesting to examine the American constitutional tradition in freedom of speech more thoroughly. A comprehensive comparative study of the American and European approaches to freedom of expression could be the subject of a future continuation of this work.

In this thesis, I consider every utterance, be it written, oral or expressed in any other form, with some kind of political agenda to be political speech. Not all speech deserves protection. The classic example of unprotected

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<sup>4</sup> J. D. Peters, *Courting the Abyss: Free Speech and the Liberal Tradition*, 21.

speech, elaborated by one of the most highly qualified constitutional jurists of all time, Justice Holmes, is if someone falsely shouts “Fire!” in a crowded theatre<sup>5</sup>. This expression does not deserve protection because it does not contain any kind of idea or information.

The First Amendment to the American Constitution speaks about freedom of speech; the European Convention mentions freedom of expression. These terms are not synonymous. Freedom of speech means the right to express one’s thoughts and opinions without governmental restriction. Freedom of expression has a broader scope. It includes freedom of speech, but also freedom of the press, freedom of assembly and freedom of religion and the prohibition of governmental interference with these freedoms.<sup>6</sup> Freedom of the press is an important concept of the freedom of expression, but it applies only to mass media. When the term freedom of speech is used in this thesis, it usually refers to the right under the American First Amendment. Freedom of expression generally refers to the rights protected by the European Convention.

This thesis is not focused on the Swedish approach to freedom of expression, but sometimes examples from Sweden are used as a basis for further discussion. This is because I know the Swedish society better than other societies. Mostly Swedish examples highlight general principles I believe should be applicable to all democratic societies.

For practical reasons, the pronoun he is used throughout the thesis. This does not necessarily always refer to a man. The word ‘he’ should be read as both he and she. It is prolix to write ‘he or she’ all the time.

### 1.3 Previously Conducted Research

There are many commentaries to the case-law of the Court written by famous scholars and lawyers with many years of working experience from the Court. *Jacobs & White European Convention on Human Rights* is written by Clare Ovey and Robin White. Clare Ovey is a Legal Officer with the Court and Robin White is Dean of Law at the University of Leicester. Hans Danelius is a former justice of the Supreme Court of Sweden. He was a member of the European Commission of Human Rights from 1983 to 1999. His book *Mänskliga rättigheter i europeisk praxis: En kommentar till Europakonventionen om de mänskliga rättigheterna* is the most comprehensive commentary to the case-law of the Court that I have used. Were it not written in Swedish, it would be the perfect guide for European lawyers to the case-law of the Court. *Theory and Practice of the European Convention on Human Rights* is written by two Dutch legal scholars: Pieter van Dijk and G.J.H van Hoof. Pieter van Dijk was a justice with the Court

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<sup>5</sup> See *Schenk v. U.S.*

<sup>6</sup> *Black’s Law Dictionary*, 295; the headwords **freedom of speech** and **freedom of expression**.

from 1996 to 1998. I have not found any work dealing exclusively with the question of the Court's case-law on freedom of expression. *Freedom of Speech* by Eric Barendt deals with freedom of expression from a more philosophical perspective. It is also a comparative study of different national approaches to freedom of expression.

## 1.4 Outline

After this introduction follows a chapter on the history of freedom of expression. In order to understand its importance for the democratic society it is necessary to know how freedom of expression evolved as a civil right belonging to the individual and why the principle of freedom of expression can be interpreted in so many different ways in different countries. The answer is found in the underlying philosophical roots to different approaches to freedom of expression; and in historical experiences of different states. It is impossible to give a comprehensive summary of centuries of debate between philosophers and historical experiences, which have shaped how countries approach freedom of expression. The time and scope of this thesis do not allow me to go into details. The third, fourth and fifth chapters deal with the European Court on Human rights and its case-law on the interpretation of the right to freedom of expression. I deal with groups of individuals who are in a position that gives them a special interest or special responsibilities in freedom of expression in the fourth chapter. Freedom of expression is predominantly a negative right where the state shall refrain from acting. The state must sometimes take positive measures to protect the right to freedom of expression. The positive obligations of the Contracting States are considered in the fifth chapter. I explain my views on freedom of expression in the sixth chapter. I have presented a model where to strike the balance between protected and unprotected speech and propose a revision of Article 10 of the Convention to fit this model. Finally, there is a chapter where all sources I have used: literature, legal instruments and cases are listed.

## 2 History

### 2.1 Historical Survey of the Concept of Freedom of Expression

The origins of the modern perception of freedom of expression can be found in the discussion on the rights of the members of the English parliament to debate freely, without the restraint of possible criminal proceedings due to their expressions in parliament. After the Glorious Revolution of 1688, when the monarch's power was curtailed, they were given this right in the Bill of Rights of 1689.<sup>7</sup> From that time, parliamentary debate in England is absolutely privileged against impeachment, or any other kind of court proceedings, outside the Parliament<sup>8</sup>. Their right to speak freely was not seen as a civil right, but as a privilege for parliamentarians. The personal right of the individual to say his opinion on government and religion developed later. It was the offshoot of freedom of the press and freedom of religion.<sup>9</sup>

The late 17th century saw the birth of the Enlightenment. Already in 1625, the famous Dutch jurist Hugo Grotius had published his *De jure belli et pacis*, in which he argued that natural law should govern international relations. This principle of natural law had long traditions, but Hugo Grotius was the first to argue its primacy and its independence of Christian theology. This was in an era when science had gotten a rise and Grotius' work had great importance in the study of science. The mathematical rules and natural law governing the state of nature were widely studied.<sup>10</sup> When the assumptions of natural law were applied to social problems, they were significantly modified. While the study of science was focused on describing the world as it was, relations between men were described as how they ought to be. Almost all philosophers of the time agreed that the society was not organised as it ought to be, but they disagreed on how it should be organised. John Locke supported a strong individualism. He argued that natural law gave men certain rights. The most important rights were life, liberty and property. He believed that the role of the state was to solve problems emerging from conflicting interests of individuals trying to define their own rights.<sup>11</sup>

Montesquieu distinguished the public domain from the private sphere. The latter should be protected from state interference. He supported the view that freedom of the press belonged to the private sphere.<sup>12</sup> Rousseau presented

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<sup>7</sup> L. Hannikainen, J. Kortteinen, K. Myntti, "Article 19" *The Universal Declaration of Human Rights: A Common Standard of Achievement*, 393.

<sup>8</sup> R. Clayton and H. Tomlinson, *The Law of Human Rights*, 1007.

<sup>9</sup> L. W. Levy, *Emergence of a Free Press*, 3.

<sup>10</sup> *Encyclopædia Britannica*, Headword **Enlightenment: Reason and Faith**.

<sup>11</sup> *Ibid.* **Enlightenment: Political Theory**.

<sup>12</sup> S. Boberg, *Gustav III och tryckfriheten 1774-1787*, 8.

the concept of the general will. It should be distinguished from the will of all, which is the product of every individual's particular will. The general will is the view that is morally correct for the common good, which is not necessarily in the interest of the particular individual.<sup>13</sup>

England was the first European country to abolish censorship in 1695<sup>14</sup>. This did not mean that a person was allowed to criticise the government or the church in any way he pleased. But, it was the end of pre-publication measures preventing publication. An author, printer or seller could still be punished for the contents of printed material. Only a good decade after the abolishment of censorship, the Parliament enacted legislation imposing financial burdens on the press. The state found other ways to suppress the free press than censorship. Newspapers were made so expensive that very few people could afford to buy and to read them.<sup>15</sup>

Censorship was strict in other parts of Europe, with the exception of the Dutch Republic<sup>16</sup>. Ever since the invention of the printing press, religious and profane leaders had been aware of its role as a propaganda tool and its potential damage if their opponents had access to it in a free debate on religious and political issues. The attitude of the church prevented Nicolaus Copernicus from presenting his shocking heliocentric theory of the solar system. When Galileo Galilei defended this theory, he was brought before the Inquisition. Matters of state or religion were not considered subjects fit for vulgar persons or common meeting<sup>17</sup>. It was a maxim that the king and the church could do no wrong. Public debate in printed material of political or religious matters was not considered to be of any benefit for the society. The church and state had full control over the printing press. Manuscripts intended for publication had to be submitted to the authorities for approval. Censorship was strict and the publication of printed material without prior approval was criminal and often severely punished. With the invention of the printing press came censorship of printed material. The growing popularity of theatre led to censorship of live drama; censorship of cinema is a direct consequence of its popularity among the masses.<sup>18</sup> Live theatre ceased to be subject to censorship a long time ago, but cinema censorship is still common in many Western democracies<sup>19</sup>.

The Enlightenment led to two major upheavals against oppressing governments: the American Declaration of Independence in 1776 and the French Revolution in 1789. Both America and France found the need to protect the right to freedom of expression. The state of Virginia enacted a Bill of Rights in 1776, a month prior to the American Declaration of Independence. Section 12 of this Bill stated that the free press is one of the great bulwarks of

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<sup>13</sup> J. Wolff, *An Introduction to Political Philosophy*, 86 f.

<sup>14</sup> T. von Vegesack, *När ordet blev fritt: Den långa vägen till tryckfrihet*, 25.

<sup>15</sup> *Ibid*, 109 ff.

<sup>16</sup> W. R. E. Velema, "Introduction to Elie Luzac's An Essay on Freedom of Expression (1749)" *Early French and German Defenses of Freedom of the Press*, 11.

<sup>17</sup> L. W. Levy, *Emergence of a Free Press*, 4.

<sup>18</sup> B. Skottsberg, "1920-talets rättighetsförklaringar" *Statsvetenskaplig tidskrift* 1942, 26.

<sup>19</sup> E. Barendt, *Freedom of Speech*, 125.

liberty, and can never be restrained but by despotic governments. The Declaration of Rights of Pennsylvania of the same year was the first law ever to mention the right to free speech as a civil right. Article XII of the declaration stated that the people have a right to freedom of speech, and of writing and publishing their sentiments; therefore the freedom of the press ought not to be restrained. France enacted the Declaration of the Rights of Man and the Citizen in 1789 and the First Amendment to the Constitution of the United States entered into force in 1791; both instruments protected freedom of expression, but in different ways. Two traditions in freedom of expression were thus born.

The French Declaration of Rights of Man and the Citizen of 1789 and the American Bill of Rights of 1791 were the first constitutional documents to contain an enumeration of political freedoms and rights of the people. The Belgian constitution of 1831 is considered a role model of a liberal constitution. It was strongly influenced by the French Declaration. The fundamental freedoms of the Belgian constitution spread throughout Europe and found its way to many European constitutions.<sup>20</sup> Freedom of the press was recognised by European states in the 19th century. The process was not without backlashes and the freedom to print criticism of the government was often curtailed when the rulers were displeased with the writing in the press.

Towards the end of the 19th century, restrictions on political speech was no longer the focus of the debate on the limits of freedom of expression. There was a growing concern in many European states for the protection of public morals, i.e. the dangers involved in the publication of pornography. The first international conference discussing issues relating to freedom of expression was convened in Paris in 1910. It was organised in order to discuss common actions against the publication of obscene material. The International Agreement for the Suppression of the Circulation of Obscene Publications was signed by 14 governments in 1910. Among the signatories were the United States, Austria-Hungary, France, Germany and the United Kingdom. Sweden did not sign the agreement.<sup>21</sup> According to Article 1 of the agreement, the states agreed to interchange information on various actions taken by them in order to suppress the circulation of obscene writings, designs, pictures or objects. The purpose of the agreement was to prevent importation of pornography to the Contracting States. It is interesting to note that the first international agreement in the field of freedom of expression does not protect it. On the contrary, the purpose was to restrict freedom of expression.

In a famous speech to the Congress in 1941, the American president, Franklin Delano Roosevelt, listed four essential human freedoms as the foreign policy goal of the United States. These freedoms were freedom of speech and expression, freedom of religion, freedom from economic want and freedom from fear of aggression.<sup>22</sup> The horrors of World War II led to a short-

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<sup>20</sup> B. Skottsberg, "1920-talets rättighetsförklaringar" *Statsvetenskaplig tidskrift* 1942, 18.

<sup>21</sup> T. von Vegesack, *När ordet blev fritt: Den långa vägen till tryckfrihet*, 128.

<sup>22</sup> P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 209.

lived revival of the concept of natural rights. It is not a coincidence that the Universal Declaration of Human Rights (UDHR), the Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions on International Humanitarian Law and the European Convention for the Protection of Human Rights and Fundamental Freedoms were all adopted within a few years after the end of the war. The wife of the president, Eleanor Roosevelt, led the work of the Commission drafting the UDHR. She thus participated in the universal recognition of her husband's principles.

Today, when the free speech-debate is no longer focused on the right to express views on political or religious matters, and when the protection of public morals is no longer as problematic as it used to be, the current debate on necessary limitations on the right to freedom of expression often concerns the question how a democratic society should react to verbal and written attacks on individuals or groups on the grounds of their race, colour, language, religion, nationality, ethnic origin or sexual orientation. It is a matter for discussion whether restrictions on this kind of speech can be justified in a democratic society. Even the most devoted proponents of freedom of expression seem to accept that incitement to race riots, where a breakdown of law is likely, may be prohibited. The discussion concerns the prohibition of speech, even though there is no suggestion that it will lead to violence or disorder. Many countries have enacted group libel laws against hate speech. Those who support these laws argue that to tolerate such speech is to lend respectability to racist attitudes, which may foster an eventual breakdown of public order; and that the laws affect long-term popular attitudes. The answer of those who oppose them may be that racist speech is best met by more speech advocating the moral and cultural superiority of a multi-cultural society and that group libel laws against racist speech are contra-productive. Prosecution of this offence may lead to bitterness and more racial hatred.<sup>23</sup>

## 2.1.1 The Importance of Freedom of Expression

It is very important to protect the right to freedom of expression, because it promotes democracy. There are many other advantages that can be derived from freedom of expression. Development in the political, artistic, scientific and commercial fields can all be attributed to freedom of expression.<sup>24</sup> A free society with a vivid public discussion on all issues promotes individual creativity. It has also been suggested that freedom of expression protects against starvation<sup>25</sup>. Lord Steyn wrote in a British case:

*[Freedom of expression] is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a*

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<sup>23</sup> E. Barendt, *Freedom of Speech*, 161 f.

<sup>24</sup> C. Ovey and R. White, *Jacobs & White European Convention on Human Rights*, 277.

<sup>25</sup> T. von Vegesack, *När ordet blev fritt: Den långa vägen till tryckfrihet*, 134.

*brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.*<sup>26</sup>

## 2.1.2 The Philosophic Perspective

Philosophers have debated over the question of acceptable limitations on the right to freedom of expression for centuries. John Stuart Mill was a 19th century liberal philosopher. His essay *On Liberty* is a strong protection for the unrestricted freedom of expression. A famous excerpt from this essay is quoted in the preface to this thesis. Mill accepted that under some circumstances it was necessary to interfere with the right to freedom of expression – when the utterance might harm others. He wrote:

*No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.*<sup>27</sup>

The modern philosopher John Rawls believed that freedom of expression might be restricted if some clearly defined conditions were fulfilled. He wrote:

*first, that the substantive evils which the legislature seeks to prevent must be of a highly special kind, namely, the loss of freedom of thought itself or of other basic liberties, including here the fair value of the political liberties; and second, that there must be no alternative way to prevent these evils than the restriction of free speech.*<sup>28</sup>

## 2.2 The American Tradition in Freedom of Expression compared to the European Tradition

Every state has its own history and traditions. This is reflected in the approach taken by the state to freedom of expression. Already in the 18:th century, two different approaches evolved: the European and the American. Both approaches were the products of the Enlightenment and they protected the liberty of the individual. They are not only reflected in the approach to freedom of expression, but in the approach to the society as a whole. The first one, with its origins in the French Declaration of the Rights of Man and

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<sup>26</sup> Lord Steyn in *R v. Secretary of State for the Home Department, ex p Simms* [1999] 3 WLR 328, 337 as quoted in R. Clayton and H. Tomlinson, *The Law of Human Rights*, 1007.

<sup>27</sup> J. S. Mill, *On Liberty*, 119.

<sup>28</sup> J. Rawls, *Political Liberalism*, 356.

Citizen from 1789, was influenced by continental European philosophers. The writings of Rousseau were especially important. The European approach combined liberty with equality and fraternity. Anyone who uses his rights and freedoms has duties and responsibilities and the rights and freedoms are not without limits. The state is the ultimate guarantor of the rights and freedoms; and the protector of people in need. The paternalistic European approach contrasts to the American approach, which puts more emphasis on the liberty and initiative of the individual before equality and social solidarity.<sup>29</sup> Over the years, these different traditions continued to develop and the difference between European societies and America grew.

Article XI of the French Declaration of the Rights of Man and Citizen provides:

The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law<sup>30</sup>.

The First Amendment to the American Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The United States has a more liberal approach to freedom of expression than most European states. The American constitution of 1787, is more influenced by the theories of Montesquieu on the division of powers<sup>31</sup>. His influence can also be found in the First Amendment to the Constitution. Montesquieu believed that freedom of speech and freedom of the press were rights which belonged to the private sphere with which the state should not interfere<sup>32</sup>. There is no reference to the responsibility of those using their right to freedom of expression in the First Amendment. A proposal, which took the rights of others into consideration, was rejected. It was written by Thomas Jefferson, the author of the American Declaration of Independence. He had helped Lafayette to write the Declaration of the Rights of Man and Citizen when he served as America's minister to France, and must have been influenced by its underlying values when he wrote:

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<sup>29</sup> M. A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, xvii.

<sup>30</sup> [http://www.elysee.fr/elysee/elysee.fr/anglais/the\\_institutions/founding\\_texts/the\\_declaration\\_of\\_the\\_human\\_rights/the\\_declaration\\_of\\_the\\_human\\_rights.20240.html](http://www.elysee.fr/elysee/elysee.fr/anglais/the_institutions/founding_texts/the_declaration_of_the_human_rights/the_declaration_of_the_human_rights.20240.html) Last visited 14 November 2006.

<sup>31</sup> J. Nergelius, *Komparativ statsrätt*, 8.

<sup>32</sup> S. Boberg, *Gustav III och tryckfriheten 1774-1787*, 8.

*The people shall not be deprived or abridged of their right to speak to write or otherwise to publish anything but false facts affecting injuriously the life, liberty, property of others or affecting the peace of the confederacy with foreign nations.*<sup>33</sup>

The American and French approaches are very similar, but there is a major difference. The terms of the First Amendment are absolute: *Congress shall make no law abridging freedom of speech*. The interpretation of the amendment is, however, not as absolute as the wording. The Supreme Court of the United States has upheld legislation against obscenity, libel and slander. The French declaration makes it clear that the right to freedom of expression might be abused and that the state has a right to enact laws against abuse of this right. This has made a deep impact in the European development of the concept of freedom of expression. In Europe, more emphasis is put on the duties and responsibilities of anyone using his right to freedom of expression towards the rights of others, than in the United States, where almost anything can be said in public.

The American approach to freedom of political speech can be summarised in three fixed points:

- (1) there is no such thing as seditious libel,
- (2) there are no prior restraints except for special cases and
- (3) the advocacy of revolutionary and subversive doctrines is fully protected.<sup>34</sup>

The right to freedom of speech is, however, not unrestricted in the United States. During World War I, when antiwar activists wanted to prevent the United States from participating in the war, the clear and present danger-test, according to which freedom of speech could be restricted, was established.<sup>35</sup> Justice Holmes wrote in the case of *Schenck v. United States*:

*The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.*<sup>36</sup>

The clear and present danger-doctrine was later re-formulated in the case of *Brandenburg v. Ohio*, in which it was explained that a state could not interfere with advocacy of illegal action “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>37</sup> American jurists disagree on the correct interpretation of this doctrine. Professor Gerhard Gunther has proposed that it should be interpreted in the following manner: in order for the govern-

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<sup>33</sup> L. W. Levy, *Emergence of a Free Press*, 251.

<sup>34</sup> J. Rawls, *Political Liberalism*, 342.

<sup>35</sup> J. A. Barron and C. T. Dienes, *First Amendment in a Nutshell*, 65.

<sup>36</sup> *Schenck v. United States* at 52.

<sup>37</sup> *Brandenburg v. Ohio*.

ment to justify restrictions in the freedom of speech, the government must prove, firstly, that the speaker sought to incite his audience and, secondly, that there existed an imminent danger that serious harm would result.<sup>38</sup>

The clearest example of the difference between the American and European traditions can be seen in the approach towards hate speech and incitement to racial discrimination. When the United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), it made a reservation to Article 4 stating that it did not accept any obligation to prohibit racist propaganda or declare racist organisations illegal<sup>39</sup>. The United States has no legislation prohibiting hate speech.<sup>40</sup> The case of *National Socialist Party v. Skokie* illustrates the American tradition in freedom of expression. It concerned an injunction issued by a local court in Illinois prohibiting Nazis from marching in Nazi-uniforms through a predominantly Jewish suburb. The Illinois Supreme Court denied the stay of this injunction. The U.S. Supreme Court reversed this decision. The injunction would deprive the petitioners from their right to freedom of speech. Restriction in the fundamental freedoms demands strict procedural safeguard and the state had failed to provide such safeguard.<sup>41</sup> If Nazis would complain to the ECtHR because of a denial of the possibility to march through a predominantly Jewish suburb, the Court would, with all reasonable certainty, declare the application manifestly ill-founded, with a reference to Article 17, stating that the Convention does not contain a right to engage in any activity aimed at the destruction of any of the rights and freedoms of the Convention<sup>42</sup>.

The freedom to discuss general political, religious and philosophical issues is very wide in America<sup>43</sup>. The right to criticise government also extends to criticism against civil servants, as long as the issue concerns a matter of public concern<sup>44</sup>. It is only excluded from protection of the First Amendment if the speaker knew that his criticism was untrue or if he was reckless as to its truth<sup>45</sup>. In the case of *New York Times v. Sullivan*, Judge Brennan wrote:

*we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.*<sup>46</sup>

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<sup>38</sup> J. A. Barron and C. T. Dienes, *First Amendment in a Nutshell*, 75 f.

<sup>39</sup> Reservation of the United States to CERD

<http://www.ohchr.org/english/countries/ratification/2.htm#reservations> Last visited 20 September 2006.

<sup>40</sup> L. Hannikainen, J. Kortteinen, K. Myntti, "Article 19" *The Universal Declaration of Human Rights: A Common Standard of Achievement*, 400.

<sup>41</sup> *National Socialist Party v. Skokie*.

<sup>42</sup> See further chapter 3.7.

<sup>43</sup> J. Rawls, *Political Liberalism*, 343.

<sup>44</sup> J. Attanasio, J. Goldstein and N. Redlich, *Understanding Constitutional Law*, 385.

<sup>45</sup> E. Barendt, *Freedom of Speech*, 145.

<sup>46</sup> *New York Times CO. v. Sullivan*.

American civil servants cannot suffer adverse employment consequences for their political affiliations. The government cannot restrict the political affiliations of civil servants. It can, however, prohibit them from engaging in political activities.<sup>47</sup>

The liberal American approach to freedom of speech does not apply to what is considered “obscenity”. The United States is less willing than many European states to tolerate obscene material. It is excluded from the protection of the First Amendment and the states may enact legislation against obscenity. The Supreme Court has had difficulties in defining the boundaries of obscenity. It is like squaring the circle.<sup>48</sup>

Another difference between the American and the European approaches to freedom of expression is the different attitudes to public radio and television. Most European states have big national broadcasting corporations, whereas it has been up to private media companies to act in this field in America.<sup>49</sup>

A recent American development related to freedom of speech is the adoption of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, in short: USA Patriot Act. It was introduced shortly after the attacks on America in September 2001. According to section 215 of the act, the FBI has a right to obtain f. ex. library records for an investigation to protect the country against international terrorism. This act has been subject to harsh criticism by civil rights activist.

## 2.3 Germany

The German Basic Law contains a long enumeration of political freedoms. It is a compassionate declaration defending democratic ideals. The experiences from the Nazi era have led to a very strong protection for civil and political rights in the Basic Law. Its opening article speaks about human dignity as inviolable and that the inviolable human rights are the basis of every community.<sup>50</sup> The Nazi party prospered under the democratic regime; once it came to power, it abolished the democratic system. The Basic Law includes safeguards against abuse of power and return to dictatorship. It contains rules on division of powers between the federal government and the *Länder*. Germany’s constitution is based on the principle of a democracy capable of defending itself<sup>51</sup>. According to article 21 (2) of the Basic Law, undemocratic parties can be declared anti-constitutional. Parties which, through their aims or the conduct of their members, seek to damage or

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<sup>47</sup> J. Attanasio, J. Goldstein and N. Redlich, *Understanding Constitutional Law*, 380.

<sup>48</sup> J. A. Barron and C. T. Dienes, *First Amendment in a Nutshell*, 102.

<sup>49</sup> L. Hannikainen, J. Kortteinen, K. Myntti, “Article 19” *The Universal Declaration of Human Rights: A Common Standard of Achievement*, 399.

<sup>50</sup> J. Nergelius, *Komparativ statsrätt*, 18 f.

<sup>51</sup> *Vogt v. Germany* para. 51.

overthrow the free democratic constitutional system or to endanger the existence of the Federal Republic of Germany shall be held to be anti-constitutional.<sup>52</sup> Artistic freedom of expression is expressively protected under the German constitution. Article 5 (3) states that art and science, research and teaching shall be free.

## 2.4 Turkey

One of the Contracting States to the Convention, Turkey, has a less liberal approach to freedom of expression. It is protected under the Turkish constitution, but the penal law contains many exceptions. It prohibits public denigration of Turkishness, the Republic, the Parliament, the Government, the President and the military or security structure. It is further not allowed to insult the Turkish flag or the national anthem. Writers and journalists are often prosecuted for these crimes. Convictions are rare, but the potential risk of a trial might deter journalists from doing their important job. The preamble to the Turkish constitution refers to Mustafa Kemal Atatürk, the founder of the modern Turkish state, as “the immortal leader and the unrivalled hero”. It is not allowed to question this dogma or to propagate for a division of the state.<sup>53</sup> The Turkish approach to freedom of expression is a major obstacle in the negotiations for EU membership. There have been many cases before the Court where the applicants have complained of Turkish interferences with their right to freedom of expression. These cases often concern interferences with the right of members of ethnic minorities to express their political opinions.

## 2.5 Sweden

Sweden has its own long tradition in freedom of expression. In Sweden, the period from 1719 to 1772 is known as the Age of Liberty. Sweden abolished the royal absolutism after the death of Charles XII and introduced a constitutional system with the power vested in the Council and the Parliament. The Parliament consisted of four estates: the Nobility, the Clergy, the Burghers, and the Peasantry. Two rival parties emerged, the Hats and the Caps, both struggling for power. These parties were not interested in abolishing censorship and introducing freedom of press and speech during the first decades of the Age of Liberty. The ruling party just took over the power of control over the printing press when there was a change of governments. Some reforms were, however, introduced. From 1735, the parties before a court were allowed to print court records.<sup>54</sup> Already in 1766 a Freedom of the Press Act was introduced by the Swedish

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<sup>52</sup> Translation of article 21 (2) of the Basic Law of the Federal Republic of Germany as contained in *Vogt v. Germany* para. 25

<sup>53</sup> *Turkey: Article 301 is a threat to freedom of expression and must be repealed now!* Amnesty International Public Statement of 1 December 2005.

<sup>54</sup> S. Boberg, *Gustav III och tryckfriheten 1774-1787*, 5 f.

parliament. It had the status of a fundamental law. The act did not only contain general principles of freedom of the press, but included a rule concerning public access to official documents.<sup>55</sup> It was introduced in order to prevent the ruling party from abusing its power. The opposition needed access to information on the government's operations and policies to perform its important role as watchdog against abuse of power.<sup>56</sup> The wide public access to official records is an important part of the Swedish tradition in freedom of expression. In fact, it makes Sweden unique.

When the four estates voted on the abolition of censorship, the Burghers and the Peasantry voted for a complete abolition of censorship, both for political and religious matters. The Nobility voted against the abolition, and the Clergy were in favour of abolishing censorship for political issues, but opposed it in matters concerning religion. Therefore, the act did not apply to religious issues.<sup>57</sup> Sweden was the first country to give freedom of expression constitutional protection. It was however short-lived. The king abolished this act after his *coup d'état*, which ended the Age of Freedom in 1772 and introduced a less liberal act on freedom of press.

Traditionally, the Swedish approach to freedom of expression has very much in common with the American approach, with few exceptions to the right to speak freely without state interference, f. ex. racist organisations are not illegal in Sweden. The Swedish tradition in freedom of expression dates back to 1766, i.e. a quarter of a century before the French Declaration of the Rights of Man and Citizen and the First Amendment. The Architect behind the Swedish Freedom of the Press Act, Anders Chydenius, was inspired by English thinkers; among others by John Locke, whose thoughts about the right to life, liberty and property are found in the American Declaration of Independence. The European tradition in Freedom of expression starts with the French Declaration of the Rights of Man and Citizen, which, to a large extent, was inspired by the thoughts of Rousseau. Over the years, Sweden has come closer to the European tradition, starting in the period after World War II with legislation against speech that might incite hatred against ethnic groups. Other groups of individuals have subsequently been included in this legislation.

The Committee on the Elimination of Racial Discrimination has criticised Sweden for its refusal to prohibit the existence of, and participation in, racist organisations<sup>58</sup>. The traditional Swedish approach is that only physical persons can commit crimes. To prohibit an organisation because of the acts of its members would be a breach of the Swedish tradition in criminal law. In order to live up to its obligation under the CERD, Sweden has recently broadened the scope of the group libel law prohibiting speech that might

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<sup>55</sup> E. Holmberg and N. Stjernquist, "Introduction" *Constitutional Documents on Freedom of Expression*, 3.

<sup>56</sup> T. von Vegesack, *När ordet blev fritt: Den långa vägen till tryckfrihet*, 32.

<sup>57</sup> H. Eek, "1766 års tryckfrihetsförordning, dess tillkomst och betydelse i rättsutvecklingen" *Statsvetenskaplig tidskrift* 1943, 208 f.

<sup>58</sup> CERD/C64/CO/8 para. 10.

incite hatred against minorities. It is likely that the Committee will continue to criticise Sweden since the obligations under Article 4 of the CERD are mandatory. The only solution would be to withdraw from the CERD and then ratify it again making a reservation against the obligation to declare racist organisations illegal.

## 2.6 Theories on Freedom of Expression

In the modern literature on freedom of expression, three different universal philosophical models can be identified, justifying why freedom of political expression should receive special protection. When courts in democratic states all over the world deal with cases concerning freedom of expression, elements from these theories can be found in their final judgments. Firstly, the model known as the **marketplace of ideas model**. It is the dominant theory in the United States. Its origins can be traced back to the writings of John Stuart Mill. The rationale behind it is that good ideas will prevail over bad ideas if they are to compete on the free market of ideas.<sup>59</sup> In the case of *Abrams v. United States*, Justice Holmes wrote, what is now a classical dissenting opinion:

*But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.<sup>60</sup>*

This theory can be criticised for a number of reasons. What proofs do we have that the marketplace model will produce truth? If the marketplace theory is to function the audience must already be well informed, otherwise it cannot come to the right conclusion. Those who receive the information must be rational decision-makers, but are they? One can also argue if there is such a thing as one single truth. Maybe the recipients will listen more to appeals to emotions and basic instincts than to rational arguments. There are also some opponents to the marketplace theory, predominantly socialist thinkers, who argue that citizens at large are excluded from participation in the marketplace. Mass media is owned and controlled by a few enterprises and entry to the marketplace is far from free. Other critics say that even if truth would always be the result of an open competition on the market of ideas, can we afford the delay? Apartheid, slavery and genocide are all now considered wrong. Maybe it is the result of the competition on the market of ideas, but there are so many victims who had to suffer during the struggle against wrong.<sup>61</sup>

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<sup>59</sup> J. A. Barron and C. T. Dienes, *First Amendment in a Nutshell*, 7.

<sup>60</sup> *Abrams v. United States*.

<sup>61</sup> J. A. Barron and C. T. Dienes, *First Amendment in a Nutshell*, 7 ff.

Another model is the so-called **self-government model**. The philosopher Alexander Meiklejohn developed this theory. He believed that freedom of expression ought to be protected against governmental interference because of the right all citizens have to understand political issues in order to be able to participate effectively in the democratic process.<sup>62</sup> The people must be free to participate in the political debate. Their freedom must extend to literary, scientific and educational speech. They all contribute to the shaping of political discourse.<sup>63</sup> Those who adhere to this model distinguish political speech from private speech. Everyone has an obligation to participate in the political discussion. The people have a self-governing function. They must be free to criticise the government without fear of reprisals and they must be free to receive information on the work of the government. Expressions that further the democratic process ought to receive protection against governmental interference. Private speech, i.e. speech that is not political, may be subject to restrictions. This theory has been criticised as unrealistic. Can an individual perform his important role of decision-maker? Does he have the time, interest and capacity? The theory has another deficit, how to distinguish between political speech and private speech. Shall literature and art only be protected if they contribute to political democracy and who is to decide if a piece of art fulfils this end?<sup>64</sup>

A third model is the **liberty model**. This model considers freedom of expression an end in itself. Every person has the right to liberty, and freedom of expression is included in this liberty. Freedom of expression fosters self-realisation and self-determination. This model focuses on the autonomy of the individual. The individual has a right to make choices free from coercion. Those who criticise this model say that the model does not put speech in the front line. No distinction is made between speech and other human activities.<sup>65</sup>

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<sup>62</sup> E. Barendt 1985, *Freedom of Speech*, 20.

<sup>63</sup> J. Attanasio, J. Goldstein and N. Redlich, *Understanding Constitutional Law*, 365.

<sup>64</sup> J. A. Barron and C. T. Dienes, *First Amendment in a Nutshell*, 9 ff.

<sup>65</sup> *Ibid.* 12 f.

## 3 ECHR

### 3.1 The Council of Europe

During the first years after World War II, many prominent European statesmen took private initiatives towards the unification of Europe. This led to the establishment of the Council of Europe in 1949. Ten states have participated since the beginning: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.<sup>66</sup> Today the Council of Europe has 46 Member States with two more states applying for membership; five countries have observer status<sup>67</sup>. The Council of Europe is based on the principle of voluntary co-operation. The member states retain their full sovereign powers and they cannot be bound by its decisions unless they agree. Adhesion to the Convention and the commitment to abolish the death penalty are prerequisites for admission to the Council of Europe.<sup>68</sup>

According to article 1 (a) of the Statute of the Council of Europe the aim of the organisation is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress. This aim should be pursued through the maintenance and further realisation of human rights and fundamental freedoms. (Article 1 (b))

The protection for human rights was one of the first issues to be discussed within The Parliamentary Assembly of the Council of Europe. A binding regional convention for the protection of human rights was desired. It was a long process to draft the Convention, but it was signed in Rome on 4 November 1950 and entered into force on 3 September 1953.<sup>69</sup> It is considered one of the principal achievements of the Council of Europe<sup>70</sup>.

### 3.2 The European Court of Human Rights

The European Commission of Human Rights and the European Court of Human Rights were created in order to deal with applications made by states and by individuals who alleged violations of the Convention. The role of the Commission was to consider if the application met the admissibility criteria. If the case was declared admissible, the Commission conducted an investigation of the merits of the complaint and considered whether there

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<sup>66</sup> P. Klein and P. Sands, *Bowett's Law of International Institutions*, 161.

<sup>67</sup> [http://www.coe.int/T/e/Com/about\\_coe/](http://www.coe.int/T/e/Com/about_coe/) Last visited 15 November 2006.

<sup>68</sup> P. Klein and P. Sands, *Bowett's Law of International Institutions*, 161.

<sup>69</sup> P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (1990), 2.

<sup>70</sup> P. Klein and P. Sands, *Bowett's Law of International Institutions*, 392.

had been a violation of the Convention. The Committee conducted a report expressing an opinion, which was not legally binding. The Commission and the states involved in the application could refer the case to the Court. An individual did not have this possibility, unless the defendant state was a party to a protocol allowing individuals this right. The referral by an individual had to pass a panel of three judges, who could declare it inadmissible because it did not raise a serious question affecting the interpretation of application of the Convention.<sup>71</sup>

From 1 November 1998, a new permanent Court has replaced the Commission and the old Court. The new Court handles both admissibility decisions and judgments on the merits. A panel of three judges, who unanimously can declare an application inadmissible, takes the decision on admissibility. The decision involves the consideration of nine questions:

1. Can the applicant claim to be a victim?
2. Is the defendant State a party to the Convention?
3. Have domestic remedies been exhausted?
4. Is the application filed within the six-month time-limit?
5. Is the application signed?
6. Has the application been brought before?
7. Is the application compatible with the Convention?
8. Is the application manifestly ill-founded?
9. Is there an abuse of the right of petition?

A chamber of seven judges delivers judgments on the merits if an application is declared admissible. A case may, in exceptional cases, be referred to a Grand Chamber of seventeen judges if the case raises serious questions affecting the interpretation of the Convention.<sup>72</sup> The Court deals with both individual complaints and inter-state cases, but there have only been a few inter-state cases before the Court. Contracting States are reluctant to refer an alleged breach of the Convention by another Contracting State to the Court.

The Court has a leading position in the development of international human rights protection. Courts in Australia, Canada and India have referred to judgments of the Court when they try cases concerning civil and political rights. There is a pan-European judicial system for the protection of fundamental civil and political rights. Over 800 million people in 46 countries can apply to the Court against breaches of their human rights protected by the Convention.<sup>73</sup> The success has its downside. It is obvious that the Court receives too many applications. The backlog is enormous and it continues to grow.

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<sup>71</sup> C. Ovey and R. White, *Jacobs & White European Convention on Human Rights*, 6 f.

<sup>72</sup> *Ibid.* 8 f.

<sup>73</sup> *Ibid.* 437 f.

### 3.3 Principles of Interpretation

In the case of *Golder v. the United Kingdom*, the Court stated that the generally accepted principles of international law, as contained in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, should guide the Court in the interpretation of the Convention<sup>74</sup>. These principles are generally regarded as principles of customary international law. The Convention is, however, different from an ordinary international treaty. It has a special character, requiring Contracting States to behave in a particular manner towards all persons within their jurisdiction. The Court does not distinguish between general and supplementary means of interpretation. It considers the interpretation as a single complex operation.<sup>75</sup>

The preparatory work to the Convention has been published. However, the Convention is a living instrument and the Court has adopted a dynamic interpretation to the substance of its provisions. The preparatory work has therefore a limited value in the interpretation of the Convention. The Convention is equally authenticated in English and French, discrepancies must be solved in favour of the meaning which best reflects the object and purpose of the treaty.<sup>76</sup>

There is a need to secure a uniform interpretation of the Convention in all Contracting States. When the Court uses terms, which do not have identical scope in all Contracting states, it has adopted its own interpretation of such terms. This is known as the autonomous meaning of terms.<sup>77</sup>

#### 3.3.1 Margin of Appreciation

The European Court on Human rights is not an ordinary court of appeal. It is not a fourth instance within the national judicial system. Its role is not to apply national law and, as a general rule, it does not deal with questions of evidence.<sup>78</sup> The role of the Court is to supervise how the states fulfil their obligations under the Convention. In the field of freedom of expression, it has the important role of giving a final ruling as whether an interference with the right to freedom of expression is necessary in a democratic society. The Contracting States have a certain margin of appreciation in assessing if a pressing social need exists in their country requiring them to interfere with the fundamental freedoms. State authorities are in principle in a better position than an international judge to assess if there is such a need<sup>79</sup>. This gives the state the favour of doubt.

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<sup>74</sup> *Golder v. the United Kingdom* para. 29.

<sup>75</sup> C. Ovey and R. White, *Jacobs & White European Convention on Human Rights*, 27 ff.

<sup>76</sup> *Ibid.* 29 ff.

<sup>77</sup> *Ibid.* 31.

<sup>78</sup> H. Danelius, *Mänskliga rättigheter i europeisk praxis: En kommentar till Europakonventionen om de mänskliga rättigheterna*, 57.

<sup>79</sup> *Handyside v. the United Kingdom* para. 48.

The states do not have an unlimited power of appreciation and the Court is empowered to give the final ruling on whether a restriction is compatible with Article 10.<sup>80</sup>

The scope of the margin of appreciation varies with the nature of the rights in issue and with the balancing of competing rights<sup>81</sup>. The scope of the domestic power of appreciation is not identical as regards each of the aims listed in Article 10 (2)<sup>82</sup>. It further varies with the type of expression concerned. The margin of appreciation of the state to regulate political speech, artistic speech and commercial speech is not identical.<sup>83</sup> The margin is very narrow when states limit political speech. It is established case-law that there is little scope under the Convention for restrictions on political speech or in debate of questions of public interest<sup>84</sup>.

Article 10 of the Convention protects freedom of expression. Interferences with the right to freedom of expression may only be introduced if they are 'necessary in a democratic society' for certain legitimate aims enumerated in the article. These legitimate aims can be for the protection of national security or public morals. In assessing whether an interference with the freedom of expression is necessary, national authorities have a certain margin of appreciation. This margin is wide when the aim is to protect national security. The Court has been reluctant to reject the assessments of national organs when they refer to the protection of national security. The state has an obligation to protect persons under its jurisdiction. This is the reason why the margin of appreciation is wide when states justify the limitation on the right to freedom of expression with the interest of national security; the well-being of large numbers of people is in issue. Information concerning national security is often highly sensitive and the state is usually justified in restricting the dissemination of such information.<sup>85</sup>

The Contracting States have a certain margin of appreciation when they regulate freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially religion.<sup>86</sup> At the same time, the margin of appreciation of the states to interfere with the freedom of the press is limited<sup>87</sup>.

The margin of appreciation is wide when there is no common European standard, such as with the question of public morals<sup>88</sup>. In the case of *Stjerna v. Finland*, the Court found that there was little common ground in the legislation for changing a person's name between European states. The margin

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<sup>80</sup> *Ibid.* para. 49.

<sup>81</sup> C. Ovey and R. White, *Jacobs & White European Convention on Human Rights*, 210.

<sup>82</sup> *The Sunday Times v. the United Kingdom* para. 59.

<sup>83</sup> *B 119-06*, 13.

<sup>84</sup> See *Murphy v. Ireland* para. 67.

<sup>85</sup> C. Ovey and R. White, *Jacobs & White European Convention on Human Rights*, 213.

<sup>86</sup> *Gündüz v. Turkey* para. 37.

<sup>87</sup> *Éditions Plons v. France* para. 44.

<sup>88</sup> H. Danelius, *Mänskliga rättigheter i europeisk praxis: En kommentar till Europakonventionen om de mänskliga rättigheterna*, 57.

of appreciation of the states to regulate this particular issue is therefore wide.<sup>89</sup> Other areas where the state has a wide margin of appreciation are town and country planning and child care<sup>90</sup>.

The doctrine of margin of appreciation performs two roles. It is both an interpretative obligation on the Court to respect domestic cultural traditions and values; and a standard of judicial review.<sup>91</sup> The historical background of a state is a factor that affects the width of the margin of appreciation<sup>92</sup>. One example of this is that applications against Germany and Austria against prohibition of National Socialist ideas are considered against the historical background of these countries.<sup>93</sup>

There is a tension between the notion that the state democratically should decide what is appropriate for itself and the idea of insisting on the same European protection of human rights and fundamental freedoms for everyone. It is a conflict between subsidiarity and universality.<sup>94</sup> If domestic and cultural traditions and values are to be respected, similar facts may lead the Court to different results depending on where the interference with an individual's right to a fundamental freedom occurs.

### 3.3.2 Proportionality

The Court applies the principle of proportionality. In the field of freedom of expression, it means that there must be a reasonable relationship between the interference and the legitimate aim under Article 10 (2) that a government wants to protect in order for the interference to be justified.<sup>95</sup> The interests of the society as a whole must be balanced against the interests of the individual. Only limitations that do not go beyond what is strictly necessary to achieve the legitimate aim pursued by the state can be permitted in a democratic society.<sup>96</sup> In the case of *Handyside v. the United Kingdom*, the Court held that every 'formality', 'condition', 'restriction' or 'penalty' restricting freedom of expression must be proportionate to the legitimate aim pursued<sup>97</sup>. The nature and severity of the penalties imposed are factors which will be taken into account when assessing the proportionality of an interference<sup>98</sup>. The Court has often stated that the necessity for restricting the freedom of expression must be convincingly established<sup>99</sup>. This means that a state cannot limit the freedom of expression as it wishes. The restrictions must be proportional to the legitimate aim pursued. It is always im-

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<sup>89</sup> *Stjerna v. Finland* para. 39.

<sup>90</sup> C. Ovey and R. White, *Jacobs & White European Convention on Human Rights*, 215.

<sup>91</sup> R. Clayton and H. Tomlinson, *The Law of Human Rights*, 274.

<sup>92</sup> *Rekvényi v. Hungary* para. 48.

<sup>93</sup> See *Schimanek against Austria* p. 6.

<sup>94</sup> R. Clayton and H. Tomlinson, *The Law of Human Rights*, 285.

<sup>95</sup> *Ibid.* 278.

<sup>96</sup> C. Ovey and R. White, *Jacobs & White European Convention on Human Rights*, 201.

<sup>97</sup> *Handyside v. the United Kingdom* para. 49.

<sup>98</sup> *Gündüz v. Turkey* para. 42.

<sup>99</sup> *Barthold v. Germany* para. 58.

portant to note on what ground the Court found a violation of the Convention. It can be either that the Contracting State overstepped its margin of appreciation, or that the impugned measure was disproportionate to the legitimate aim pursued.

### 3.4 Democracy as the Guiding Principle

The preamble to the Convention establishes a very clear connection between the Convention and democracy. It states that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights. European countries are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law.

The Court interprets the Convention in the light of its underlying values as defined in the preamble. It is not a collection of empty words.<sup>100</sup> The concept of a democratic society prevails throughout the Convention<sup>101</sup>. It is established case-law that political democracy is not only a fundamental feature of the European public order, but the Convention was designed to promote and maintain the ideals and values of a democratic society. Democracy is the only political model contemplated in the Convention and the only one compatible with it.<sup>102</sup> No one should be authorised to rely on the Convention in order to weaken or destroy the ideals and values of a democratic society<sup>103</sup>.

The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a democratic society<sup>104</sup>. Despite the importance of democracy for the interpretation of the Convention, the Court has not given a comprehensive definition of what constitutes a democratic society. It has stated that pluralism, tolerance and broadmindedness are recognised hallmarks of a democratic society<sup>105</sup>. Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic and pluralistic society<sup>106</sup>. Equality, liberty and encouragement of each individual's self-fulfilment are also important factors of any democracy<sup>107</sup>. Democracy does not simply mean that the views of the majority must always prevail. A balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.<sup>108</sup> An effective political democracy is also characterised by free

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<sup>100</sup> See *Soering v. the United Kingdom* para. 88.

<sup>101</sup> *Lingens v. Austria* para. 42.

<sup>102</sup> *Christian Democratic People's Party v. Moldova* para. 63.

<sup>103</sup> *Refah Partisi (the Welfare Party) v. Turkey* para. 99.

<sup>104</sup> *Handyside v. the United Kingdom* para. 48.

<sup>105</sup> *Christian Democratic People's Party v. Moldova* para. 64.

<sup>106</sup> *Gündüz v. Turkey* para. 40.

<sup>107</sup> C. Ovey and R. White, *Jacobs & White European Convention on Human Rights*, 210.

<sup>108</sup> *Christian Democratic People's Party v. Moldova* para. 63-64.

elections to a legislature<sup>109</sup>. Free elections and freedom of expression, particularly freedom of political debate, form the bedrock of any democratic system. These two rights reinforce each other.<sup>110</sup>

One of the decisive advantages of a democratic society is the possibilities it offers of resolving a country's problems through dialogue, without recourse to violence<sup>111</sup>. Violence may constitute a threat to democracy and the Court has often struck the balance between protected speech and unprotected speech where the speech incites to violence<sup>112</sup>. In the case of *Vogt v. Germany*, the Court recognised the principle of a democracy capable of defending itself. A democracy has a legitimate right to interfere with the freedom of those who want to do away with democracy. Recent European history has shown the potential dangers of a non-democratic society.<sup>113</sup> Democratic societies might be threatened by highly sophisticated forms of espionage and by terrorism. The Court has accepted that a state must be able to undertake the secret surveillance of subversive elements operating within its jurisdiction in order to defend democracy.<sup>114</sup>

It is standing case-law that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment<sup>115</sup>. Interferences with the right to freedom of expression may only be justified if they are necessary in a democratic society. There can be no democracy without pluralism of opinion. This is the reason why not only information or ideas that are favourably received or regarded as inoffensive are protected by Article 10, but also those that offend, shock or disturb. Freedom of political debate is at the very core of the concept of a democratic society<sup>116</sup>. The respect for pluralism of opinion is guaranteed through the exercise of civil and political freedom<sup>117</sup>. Pluralism and democracy are based on a compromise that requires various concessions by individuals, or groups of individuals. They must sometimes agree to limit some of their freedoms in the interest of greater stability of the country as a whole<sup>118</sup>. Interferences by public authorities with freedom of expression must be restricted strictly to what is necessary in a democratic society<sup>119</sup>.

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<sup>109</sup> *Mathieu-Mohin and Clerfayt v. Belgium* para. 47.

<sup>110</sup> *Bowman v. The United Kingdom* para. 42.

<sup>111</sup> *United Communist Party and Others v. Turkey* para. 57.

<sup>112</sup> C. Ovey and R. White, *Jacobs & White European Convention on Human Right*, 281.

<sup>113</sup> *Vogt v. Germany* para. 59.

<sup>114</sup> *Klass and Others v. Germany* para. 48.

<sup>115</sup> See f.ex. *United Communist Party and Others v. Turkey* para. 45.

<sup>116</sup> *Lingens v. Austria* para. 42.

<sup>117</sup> *Ždanoka v. Latvia* para. 115.

<sup>118</sup> *Refah Partisi (the Welfare Party) and Others v. Turkey* para. 99.

<sup>119</sup> *United Communist Party of Turkey and Others v. Turkey* para. 45.

## **3.5 Article 10 of the Convention**

Article 10 provides:

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.

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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The first subparagraph of Article 10 provides the general provision that everyone has the right to freedom of expression. The second subparagraph provides the exceptions to this fundamental freedom. This is the standard model to formulate the provisions of the Convention. All articles begin with the general rule in the first subparagraph, stating what is included in the right or freedom; the exceptions to the right or freedom are found in the second subparagraph.

### **3.5.1 What is Included in the Right to Freedom of Expression?**

Article 10 (1) provides:

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.

All forms of expression are included in the right to freedom of expression. The most obvious are orally or printed communications, but various forms of behaviour and activity can also be protected under Article 10 (1): silent processions, picketing, the wearing of different signs or political uniforms and flag burning. The Court has given the word expression a broad meaning. The disrupting of a hunt by whistling a horn has been considered by the

Court as political speech<sup>120</sup>. In the case of *X v. the United Kingdom* the applicant had been convicted for buggery. The Commission argued that there might be an issue under Article 10 regarding his claim that the imprisonment denied him his right to express feelings of love for other men.<sup>121</sup> The only expressions that are exempted from protection under Article 10 (1) on the basis of their content are the justification of a pro-Nazi policy<sup>122</sup> and hate speech<sup>123</sup>. The right to freedom of expression also includes a right not to express oneself. There are, however, exceptions to this principle. For example, a witness before a court may be obliged to speak and to tell the truth.<sup>124</sup> He must, however, not be obliged to incriminate himself<sup>125</sup>. Politicians, especially leading figures of a party, may have to distance themselves from the views of the party if they disagree with them and want to evade responsibility for the acts of the party<sup>126</sup>. In some states, there is a duty to vote; this is not a violation of Article 10, as long as the elections take place by secret ballot.<sup>127</sup>

Freedom of expression is not limited to private persons. Legal persons also have a right to freedom of expression. Various NGO:s often use their right to express political opinions. Private companies mostly use their right to freedom of expression to advertise, but it is not difficult to find examples of a company using its right to express a political opinion; a betting and gaming company might want to express the political opinion that the national laws regulating this activity ought to be changed.

The Convention does not contain a right of recruitment to civil service. It was deliberately omitted during the preparation of the Convention. It is consequently not a violation of the Convention if a person is not appointed to a post as a civil servant. Nevertheless, the dismissal of a civil servant because of his political views may violate his rights under the Convention.<sup>128</sup>

### 3.5.2 Exceptions to the General Rule

Article 10 (2) provides:

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

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<sup>120</sup> *Hashman and Harrup v. the United Kingdom* para. 28.

<sup>121</sup> *X v. the United Kingdom* p. 45.

<sup>122</sup> *Lehideux and Isorni v. France* para. 53.

<sup>123</sup> *Gündüz v. Turkey* para. 41.

<sup>124</sup> H. Danelius, *Mänskliga rättigheter i europeisk praxis: En kommentar till Europakonventionen om de mänskliga rättigheterna*, 306.

<sup>125</sup> *K v. Austria* para. 11.

<sup>126</sup> *Ždanoka v. Latvia* para. 123.

<sup>127</sup> P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), 570.

<sup>128</sup> *Wille v Liechtenstein* para. 41.

safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The freedom of expression is not absolute. It can be subject to restrictions, but according to the article these restrictions must (a) be prescribed by law, (b) be necessary in a democratic society and (c) have the aim of protecting one of the following interests:

(1) national security, (2) territorial integrity, (3) public safety (4) to prevent disorder or crime, (5) to protect health or morals (6) to protect the reputations or rights of others, (7) to prevent the disclosure of information received in confidence or (8) to maintain the authority and impartiality of the judiciary.

The restrictions contained in article 10 (2) can be divided into three groups: the protection of society, measures against obscenity and blasphemy; and prevention of slander and libel.

When the Court deals with a complaint concerning Article 10 of the Convention it applies a four-steps test.

1. It starts with assessing if the impugned measure amounts to an interference with the right to freedom of expression.
2. Then it deals with the question of whether the interference was prescribed by law.
3. If the Court finds that the impugned measure was prescribed by law, it deals with the question whether the interference pursued legitimate aims. Only those aims as are enumerated in Article 10 (2) may justify an interference with the right to the freedom of expression.
4. Lastly, it deals with the question whether the interference was necessary in a democratic society.

An interference contravenes the Convention if any of the last three questions is answered in the negative. The Court does not continue examining all four steps if it has found a breach of the Convention. The order of this four-steps test is usually followed, but the Court is not bound to follow it. The Court may skip some of the steps and only try if the impugned measure was necessary in a democratic society.<sup>129</sup> The following four sections deal with the Court's consideration under the different stages of the four steps test.

### **3.5.3 Interference**

It is usually undisputed between the parties before the Court whether there has been an interference with the applicant's right to freedom of expression.

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<sup>129</sup> See *Wille v. Liechtenstein* para. 56.

The disagreement concerns the question whether the interference was necessary in a democratic society.

It is clear from the wording of Article 10 (2) of the Convention that ‘formalities’, ‘conditions’, ‘restrictions’ and ‘penalties’ constitute interferences with the individual’s right to freedom of expression. In order to be in compliance with the Convention, they need to be justified under one of the legitimate aims of Article 10 (2). Only measures taken by public authorities may constitute interferences with the right to freedom of expression.

There are two types of interferences: measures taken by the authorities before the information has been placed in the public domain and post-publication sanctions. Prior restraints, such as executive orders preventing publication, are not as such incompatible with the Convention, but the dangers inherited in them are of a nature that they call for careful scrutiny. This is especially so as regards news. News is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.<sup>130</sup> Post-publication measures include criminal proceedings against the speaker, the payment of damages as a result of civil actions, confiscation and forfeiture of published material.

The Court has given the word ‘interference’ a wide interpretation. It has dealt with a number of cases concerning Article 10 and found a wide variety of measures amounting to an interference with the applicant’s right to freedom of expression: the expulsion and ban on re-entering a territory<sup>131</sup>, the dismissal of a civil servant<sup>132</sup>, the denial of registration of a magazine without which publication was impossible<sup>133</sup>, storage of information about the political views of political dissidents in secret registers<sup>134</sup>, a court-order to behave in a certain manner in the future<sup>135</sup> and a limitation to five British pounds, which unauthorised persons may spend during general elections promoting or procuring the election of a candidate<sup>136</sup>.

When assessing if there has been an interference with a person’s right to freedom of expression, the size of a fine is of minor importance. The interference exists whether a fine was nominal or substantive. What matters is if a person was convicted.<sup>137</sup>

One example of the width of the expression ‘interference’ is found in the case of *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*. The Austrian authorities distributed military periodicals by sending them to conscripts free of charge. The authorities refused to deliver the

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<sup>130</sup> *Observer and Guardian v. The United Kingdom* para. 60.

<sup>131</sup> *Piermont v. France* para. 53.

<sup>132</sup> *Vogt v. Germany* para. 43.

<sup>133</sup> *Gaweda v. Poland* para. 37.

<sup>134</sup> *Segerstedt-Wiberg and Others v. Sweden* para. 107.

<sup>135</sup> *Hashman and Harrup v. the United Kingdom* para. 28.

<sup>136</sup> *Bowman v. The United Kingdom* para. 33.

<sup>137</sup> *Jersild v. Denmark* para. 35.

paper *der Igel* to the soldiers. It was the only military periodical that the authorities refused to distribute. The paper contained articles on military life, often of a critical and satirical nature. The Court argued that the practice of distributing newspapers was bound to have an influence on the level of information imparted to the members of the armed forces. The refusal of the minister of defence to allow the distribution of this newspaper amounted to an interference with the right of the applicant to impart information and ideas.<sup>138</sup>

In sum, all measures by public authorities that prevent or hinder the free flow of opinions and information, or which may have a chilling effect on future speech, including court proceedings against speakers, are generally regarded as interferences with an individual's right to freedom of expression.

### 3.5.4 Prescribed by Law

In order to decide if an impugned measure has been prescribed by law, the Court applies a threefold test. Firstly, it assesses if the measure had some basis in domestic law. This rarely constitutes any problems. Then the Court investigates the quality of the law. The law must be adequately accessible to a person concerned. This means that the law must have been published. Secret laws are not compatible with a democratic society and the rule of law. The third step concerns the test of foreseeability. A person must be able to foresee the consequences of the law for him. The law must be formulated with sufficient precision as to enable a person to regulate his conduct. He must be able to foresee the consequences which a given action may entail. A law must be able to keep pace with changing circumstances and it cannot provide for every eventuality. It may therefore be formulated in less rigid terms. Sometimes a person concerned must ask for appropriate legal advice in order to understand the consequences of a given action.<sup>139</sup> The term 'law' must be understood in its substantive meaning and not its formal one. Both enactments of lower rank than statutes and unwritten law have been accepted by the Court as 'law'.<sup>140</sup>

The Court does not deal with questions of domestic law. It leaves to the national courts to decide upon the correct application and interpretation of domestic law. Questions of national law are for the Court questions of fact.<sup>141</sup>

In the case of *Hashman and Harrup v. the United Kingdom*, protestors against fox-hunting disrupted a hunt by blowing a hunting horn and engaging in hallooing. Proceedings were brought against the protestors and an injunction was imposed on them not to breach the peace or behave *contra*

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<sup>138</sup> *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria* para. 27.

<sup>139</sup> *Rekvényi v. Hungary* para. 34.

<sup>140</sup> *Kruslin v. France* para. 29.

<sup>141</sup> *Ovey and White, Jacobs & White European Convention on Human Right*, 202.

*bonus mores* in the future. According to British law, these terms should be understood as “*wrong rather than right in the judgment of the majority of contemporary fellow citizens*”. The Court found that it was impossible to foresee what behaviour would constitute a breach of the protestor’s obligations. The court order lacked precision. Therefore, there was a breach of Article 10.<sup>142</sup>

The case of *Gaweda v. Poland* concerned an ordinance on the registration of periodicals, requiring that registration of a magazine should be refused if it would be “*inconsistent with the real state of affairs*”. A Polish court held that the name of a periodical must be relevant to its contents and refused to register a certain periodical. The Court held that the ordinance was not formulated with sufficient precision. The ordinance did not help an individual to regulate his conduct. Therefore, the state had violated Article 10.<sup>143</sup>

The case of *Goussev and Marenk v. Finland* concerned the seizure of pamphlets from the homes of the applicants. In the pamphlets, a department store was strongly criticised for selling fur coats. The search had been carried out after a demonstration which had disturbed and caused the suspension of a session of the Finnish Parliament. The Court held that it was not clear if the police could seize material, which was potentially defamatory during a search which was being carried out for the purposes of finding evidence of another suspected crime. The law did not provide the foreseeability required by Article 10.<sup>144</sup>

### 3.5.5 Legitimate Aims

Interferences with the right to freedom of expression must only be introduced for certain legitimate aims. According to Article 18, restrictions permitted under the Convention to the said rights and freedoms shall not be applied for any other purpose other than those for which they have been prescribed. In earlier applications, the Commission adopted an idea of inherent limitations arising from the applicant’s situation. The Court never followed this notion.<sup>145</sup> Any interference with the right to freedom of expression must be justified with one of the provisions enumerated in Article 10 (2) of the Convention. They are national security, territorial integrity, public safety, prevention of disorder or crime, protection of health and morals, prevention of disorder or crime, protection of the reputation or rights of others, prevention of the disclosure of information received in confidence and maintenance of the authority and impartiality of the judiciary. This list of justifications is exhaustive. Article 10 has the longest list of legitimate aims for interferences with any of the rights protected by the Convention. The scope of these aims is wide. They are general and

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<sup>142</sup> *Hashman and Harrup v. the United Kingdom* para. 35-40.

<sup>143</sup> *Gaweda v. Poland* para. 48.

<sup>144</sup> *Goussev and Marenk v. Finland* para. 54.

<sup>145</sup> C. Ovey and R. White, *Jacobs & White European Convention on Human Right*, 198.

extensive. It is sometimes difficult to distinguish the different legitimate aims from each other. The governments often refer to several of the aims when they try to justify an interference with the right to freedom of expression. The Court usually accepts the states' explanation that the impugned measure protects one of these aims. The central issue is whether the measure is necessary in a democratic society and whether the measure is proportionate to the legal aim pursued<sup>146</sup>.

### 3.5.6 Necessary in a Democratic Society

The central issue in cases regarding Article 10 has mostly been if an interference was necessary in a democratic society. In its case-law, the Court has established the fundamental principles relating to this question:

(i) 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. [...] [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. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which [...] must [...] be construed strictly, and the need for any restrictions must be established convincingly. [...]

(ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. [...] In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts.<sup>147</sup>

The principle of proportionality plays an important role for the Court when assessing if an interference was necessary in a democratic society. The adjective necessary implies the existence of a 'pressing social need' for the interference. The burden of proof to show that there existed a pressing social need is placed on the government and the grounds for the interference must not only be 'relevant and sufficient', but also 'convincingly established'.

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<sup>146</sup> *Ibid.* 204.

<sup>147</sup> *Hertel v. Switzerland* para. 46.

The Court takes a number of factors into consideration when determining if an interference was necessary in a democratic society: the type of expression, the value of the expression, the medium in which the expression was communicated, the audience, the target for the expression, the accessibility for the audience, the objective of the interference, the duties and responsibilities of the speaker, and the impact the interference had on the applicant.<sup>148</sup>

The Court has not given a comprehensive definition of what constitutes a democratic society. It has reluctantly given some basic conditions that need to be fulfilled in a democratic society.<sup>149</sup>

The list of legitimate aims for which the right to freedom of expression can be restricted is long. One can believe that the states have extensive opportunities to restrict this fundamental right, but they must be able to explain why the measures they adopt are necessary in a democratic society, and this is the test, the states often fail to prove.

### **3.5.6.1 Protection of the Society**

Article 10 (2) of the Convention contains some legitimate aims for restriction of the freedom of expression with the purpose of protecting the society. These aims are the protection of national security, territorial integrity, public security, prevention of disorder or crime, prevention of the disclosure of information received in confidence and the maintenance of the authority and impartiality of the judiciary. They resemble each other and the states often justify interferences with a reference to several of these aims in conjunction.

#### **3.5.6.1.1 National Security**

When the national security is at stake, a state has a wide margin of appreciation in restricting the right to freedom of expression. The Court has been reluctant to reject the assessments of national organs when they defend national security.<sup>150</sup> It is reasonable to believe that the Court will be reluctant to interfere with measures aimed at the prevention of incitement to a violent overthrow of government.

In the case of *Hadjianastassiou v. Greece* a captain in the air force had been convicted for having disclosed military secrets. He had commuted to a private company a technical study on guided missiles based on his own documentation. He complained to the Court that the conviction infringed his right to freedom of expression. The Court said that the disclosure of the

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<sup>148</sup> Clayton and Tomlinson, *The Law on Human Rights*, 1077 f.

<sup>149</sup> See further section 3.4 of this thesis.

<sup>150</sup> H. Danelius, *Mänskliga rättigheter i europeisk praxis: En kommentar till Europakonventionen om de mänskliga rättigheterna*, 57.

State's interest in a given weapon and that of the corresponding technical knowledge are capable of causing considerable damage to national security. Members of the armed forces have specific duties and responsibilities. As an officer, the applicant was bound by an obligation of discretion in relation to anything concerning the performance of his duties. The Court found no violation of Article 10.<sup>151</sup>

In the fight against terrorism, national authorities have a right to take measures in order to maintain national security and public safety. These measures have to be in compliance with the principles of a democratic society. An individual has a fundamental right to freedom of expression and a democratic society must be able to protect itself against terrorists and terrorist organisations. The two interests must be balanced against each other.<sup>152</sup> It is justified for a state to hinder support for a terrorist organisation, in the Courts interpretation an organisation that resorts to violence to achieve its ends, and restricting freedom of expression for that aim.<sup>153</sup>

The case of *Özgür Gündem v. Turkey* concerned a newspaper which had to close down due to serious attacks and harassments. Seven persons connected with the newspaper were killed. It was never established who was responsible for these crimes. It was clear that the government considered the newspaper a propaganda tool for the PKK. The Court found a breach of the Convention. The government had failed to comply with its positive obligations to take adequate positive and investigative measures on the newspaper.<sup>154</sup> In other cases concerning the Kurdish minority, the Court has emphasised that there is little scope under Article 10 (2) for restrictions on political speech or on debate on questions of public interest. The government occupies a dominant position. It must therefore display restraint in resorting to criminal proceedings, especially if other means are available. The state is the guarantor of public order and may take measures intended to react appropriately and without excess to unjustified remarks and criticism. The margin of appreciation of the state is wider when such remarks incite to violence.<sup>155</sup>

Only where the Court considered that a publication "genuinely amounted to an incitement to separatist violence" the Court found a breach of Article 10.<sup>156</sup> In the case of *Zana v. Turkey*, a former mayor of the city of Diyarbakir had been convicted for the statements he made in an interview in which he supported the PKK, in his words a "*national liberation movement*". He also said that he was against massacres, but anyone can make mistakes, and the PKK kill women and children by mistake. The Court found his words contradictory and ambiguous. Taken as a whole, the Court found no violation of Article 10, due to the explosive situation in

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<sup>151</sup> *Hadjianastassiou v. Greece* para. 45-47.

<sup>152</sup> *Zana v. Turkey* para. 55.

<sup>153</sup> *Ibid.* para. 58-60

<sup>154</sup> *Özgür Gündem v. Turkey* para. 71.

<sup>155</sup> *Sürek v. Turkey (No. 2)* para. 34.

<sup>156</sup> C. Ovey and R. White, *Jacobs & White European Convention on Human Rights*, 281.

southeastern Turkey and that the interview further coincided with attacks by the PKK. The Court found the measures taken by the Turkish authorities proportionate.<sup>157</sup>

There has been a number of Turkish freedom-of-expression cases in which the Court has found no breach of the Convention when the applicant had been convicted for acts that could be regarded as support or instigation to the use of violence. This yardstick was criticised by Judge Bonello in a concurring opinion in the case of *Sürek v. Turkey (No. 2)*. He wrote:

*I believe that punishment by the national authorities of those encouraging violence would be justifiable in a democratic society only if the incitement were such as to create 'a clear and present danger', When the invitation to the use of force is intellectualised, abstract, and removed in time and space from the foci of actual or impending violence, hence the fundamental right to freedom of expression should generally prevail.*<sup>158</sup>

The case of *Association Ekin v. France* concerned a book entitled *Euskadi at war*. It contained information on the Basque cause. The French authorities believed that the book promoted separatism, vindicated recourse to violence and was likely to constitute a threat to public order. It was banned from circulation, distribution and sale in France. According to the French law, different rules applied to books of foreign origin than to books of domestic origin; even books written and printed in France could be considered of foreign origin. The Court found that such legislation was in conflict with the wording of Article 10 'regardless of frontiers'. The content of the book did not justify the measures taken by the authorities and the Court found a breach of Article 10 of the Convention.<sup>159</sup>

Propaganda for war of aggression is prohibited under customary international law. This was confirmed by the Nuremberg tribunal. Propaganda for war of aggression constitutes an incitement to crimes against humanity.<sup>160</sup> The judgments from the Nuremberg trial form part of customary international law. It is clear from the case of *Golder v. the United Kingdom* that the accepted principles of customary international law should guide the Court in the interpretation of the Convention.

The Court has said that the authorities of a democratic state must tolerate criticism, even if it may be regarded as provocative or insulting<sup>161</sup>. One example of this is the case of *Thorgeir Thorgeirson v. Iceland*. It concerned the conviction of the applicant for defamation of the police force. He had written two newspaper articles criticising the Icelandic police for brutality. The Court found that the applicant was essentially reporting rumours. He was convicted partly because of failure to establish the truth of his allega-

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<sup>157</sup> *Zana v. Turkey* para. 57-62.

<sup>158</sup> Concurring opinion of Judge Bonello in the case of *Sürek v. Turkey*.

<sup>159</sup> *Association Ekin v. France* para. 62-64.

<sup>160</sup> L. Hannikainen, J. Kortteinen, K. Mynnti, "Article 19," *The Universal Declaration of Human Rights: A Common Standard of Achievement*, 404.

<sup>161</sup> *Özgür Gündem v. Turkey* para. 60.

tions. This was an unreasonable, if not impossible task. Moreover, the Court did not accept the government's argument that the aim of the articles was to damage the reputation of the police force as a whole. The articles concerned a matter of serious public concern. They were framed in particularly strong terms, but the Court did not find the language used as excessive. The conviction was capable of discouraging an open discussion of matters of public concern. The interference was disproportionate and amounted to a violation of Article 10. The Court stated in this case that there is no difference between political discussion and discussion of other matters of public concern.<sup>162</sup>

The police in a state may have a surveillance system against its own citizens in order to protect national security and to combat terrorism. If the citizens would have full access to information contained in these registers, such a system would be pointless. The state has a wide margin of appreciation in deciding to what extent individuals should be allowed to know exactly what information the police have stored on them. The interest of national security in the fight against terrorism often prevails over the interests of the individual in this question.<sup>163</sup> Secret Police registers with information about the political opinions of the citizens may have adverse effects on their right to freedom of expression<sup>164</sup>. It is, however, clear that secret surveillance of citizens by intelligence services can only be tolerated in a democratic society if it is strictly necessary for safeguarding the democratic institutions<sup>165</sup>.

To uphold diplomatic relations with other states is one of the central functions of the state. In the case of *Colombani and Others v. France*, the applicants had been convicted for defamation of the Moroccan king. They had published an article in which it was stated that the king was responsible for not doing enough to prevent drug trafficking from Morocco. France tried to justify this interference with the protection of the reputation and rights of the king. France argued that the purpose of the article was to damage the character and reputation of the Moroccan authorities at the highest level, including the king. The Court found that the conviction amounted to a violation of the Convention. According to the French law, foreign heads of state received a greater degree of protection than other individuals. In the view of the Court, such legislation could not be reconciled with modern practice and political conceptions. The interest of the state to maintain friendly relations between heads of state could not justify a legal system, which confers a special status to foreign heads of state, shielding them from criticism solely on account of their function or status.<sup>166</sup>

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<sup>162</sup> *Thorgeir Thorgeirson v. Iceland* para. 64-69

<sup>163</sup> *Segerstedt-Wiberg and Others v. Sweden* para. 104.

<sup>164</sup> *Ibid.* para. 107.

<sup>165</sup> *Klass and Others v. Germany* para. 42.

<sup>166</sup> *Colombani v. France* para. 47 and 68.

### 3.5.6.1.2 Territorial Integrity

Territorial integrity is one of the legitimate aims for which the right to freedom of expression can be restricted. It was included upon a proposal from the Turkish representative to the Committee of Experts, drafting the Convention. He argued that the states needed a provision that would enable them to defend themselves against all activities aimed at the disintegration of the nation. The Committee accepted this inclusion on the premises that “it did not permit a restriction on the rights of national minorities to press their views by democratic means.” The Turkish representative assured that his proposal had no connection with the question of the rights of national minorities.<sup>167</sup> The Turkish government must have forgotten this promise, because there are a number of cases, concerning the situation of the Kurdish minority and their right to freedom of expression, where Turkey has been found guilty of breaches against Article 10.

### 3.5.6.1.3 Prevention of the Disclosure of Information Received in Confidence

A state may interfere with the right to freedom of expression in order to prevent the disclosure of information received in confidence. The case of *The Sunday Times v. the United Kingdom (No. 2)* concerned the book *Spycatcher*. It was the memoirs of a former senior member of the British security service and contained information the government wanted to keep secret in the interest of national security. Extracts from the book were published in *the Sunday Times* on the same day as the book was published in the United States. A British Court issued an interlocutory injunction prohibiting further publication of the *Spycatcher*. The Court argued that since the book had been published in America it had lost its status as confidential. The damage had already been done. A continuation of the restrictions prevented newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern. Consequently, the Court found a breach of Article 10.<sup>168</sup> The Court came to a similar conclusion in the case of *Vereniging Weekblad Bluf! v. the Netherlands*. It concerned a report written by the Dutch security service which, despite an injunction against the publication of the report, was widely spread in a newspaper and thus ceased to be confidential.<sup>169</sup>

### 3.5.6.1.4 Prevention of Disorder or Crime

One of the legitimate aims that may justify an interference with the right to freedom of expression is for the prevention of disorder or crime. In the case

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<sup>167</sup> *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights* vol. IV, 24 ff.

<sup>168</sup> *The Sunday Times v. The United Kingdom (No. 2)* para. 55.

<sup>169</sup> *Vereniging Weekblad Bluf! v. the Netherlands* para. 45.

of *Chorherr v. Austria* the applicant had disturbed a military parade, by handing out leaflets against the purchase of fighter aircrafts by the Austrian air force. He was imparting the view for the spectators. Two police officers informed him that he disturbed public order and he was instructed to cease his demonstration. He refused to comply and asserted his right to freedom of expression. The crowd started protesting against the applicant and he was arrested and placed in police custody. He was released a few hours later and subsequently fined for his behaviour. The Court found no violation of Article 10. The states must ensure that lawful manifestations may take place peacefully and they have a wide margin of appreciation as to the means to be used to achieve this aim. Austria had not overstepped its margin of appreciation.<sup>170</sup> Two judges believed that the interference was disproportionate. They argued that the impairment of the spectators' view could have been remedied by several other measures. The arrest and detention were disproportionate to the aim pursued. They emphasised the fact that the applicant was only released one and a half hour after the end of the ceremony.<sup>171</sup>

### 3.5.6.1.5 The judiciary

Another legitimate aim for which the right to freedom of expression can be limited is for maintaining the authority and impartiality of the judiciary. The state must, however, not interfere with a reasonable public discussion on the functioning of the judicial system.<sup>172</sup> As is clear from the following cases, the practice of the Court concerning this legitimate aim is ambiguous.

In the case of *the Sunday Times v. the United Kingdom*, an injunction had been granted restraining the applicant from publishing an article on the merits of a pending litigation. It was considered that such publication would prejudice the legal process. The Court considered that the article concerned a matter of undisputable public interest, namely the thalidomide tragedy. It concerned the question whether a powerful company bore the legal or moral responsibility to indemnify the victims of this disaster. The Court concluded that there was no pressing social need for the injunction and found a breach of Article 10.<sup>173</sup>

In the case of *Barfod v. Denmark*, the applicant had been convicted for defamation of two lay judges. He had written a newspaper article in which he questioned their power to do decide impartially in a case brought by their employer. The Court found no breach of Article 10. The applicant could have criticised the reasoning in the judgment without a defamatory accusation against the lay judges personally.<sup>174</sup>

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<sup>170</sup> *Chorherr v. Austria* para. 32-33.

<sup>171</sup> Joint partly dissenting opinion of judge Foighel and Loizou in the case of *Chorherr v. Austria*.

<sup>172</sup> C. Ovey and R. White, *Jacobs & White European Convention on Human Rights*, 288.

<sup>173</sup> *The Sunday Times v. the United Kingdom* para. 66-67.

<sup>174</sup> *Barfod v. Denmark* para. 35.

In the case of *Worm v. Austria* the applicant had been convicted for having exercised prohibited influence on criminal proceedings. He had written an article on the trial against a former minister for tax evasion. The article was formulated in such absolute terms, which lead the audience to believe that a criminal court could not come to another conclusion but to convict the politician. The Austrian court that convicted the applicant took into consideration that the lay judges of the court might read the article. The Court found no violation of Article 10. It concluded that the reasons adduced by the Austrian court were sufficient to justify an interference with the applicant's right to freedom of expression.<sup>175</sup>

The case of *De Haes and Gijssels v. Belgium* concerned the conviction of the applicants for defamation of judges. They had written articles about a divorce suit, which involved allegations against the father of sexual abuse of his children. The Belgian court had awarded custody of the children to the father. The applicants criticised the judges at length and in virulent terms, they argued that the judges were biased. They belonged to the same extreme right wing circles as the father and it was alleged that this influenced their decision. The Court found that the articles were severely critical, but at the same time proportionate to the seriousness of the issue discussed in them; in conclusion the Court found a breach of Article 10, the necessity of the interference had not been shown.<sup>176</sup>

The case of *Prager and Oberschlick v. Austria* concerned two journalists who had been convicted for defamation of a judge, Judge J. A newspaper article contained criticism of the functioning of the Austrian judicial system. Some judges were subject for particularly harsh criticism. It was alleged that they treat each accused at the outset as if he had already been convicted. Judge J was alleged to be 'arrogant' and 'bullying'. The Court stressed that the allegations were extremely serious. The Court did not believe that the article was based on sufficient research to substantiate such serious allegations and it also underlined the fact that Judge J had not been given the opportunity to comment on the accusations. The Court found no breach of the Convention. The interference was not disproportionate to the legitimate aim pursued.<sup>177</sup>

In the case of *Kobenter and Standard Verlags GmbH v. Austria* the applicants had been convicted for defamation of a judge who had acquitted a journalist with a Catholic newspaper from defamation of a group of homosexuals. The judgment contained an excursus in which the judge had quoted a book and written "*in truth, homosexuality includes also the lesbian world and of course, that of animals*". This quotation was followed by a long passage describing in detail examples of same-sex practices among different animals. The style of the judgment was heavily criticised in the Austrian society and the applicants published an article in which it was written that

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<sup>175</sup> *Worm v. Austria* para. 51-59.

<sup>176</sup> *De Haes and Gijssels v. Belgium* para. 45-49.

<sup>177</sup> *Prager and Oberschlick v. Austria* para. 36-38.

we might expect at the end of the twentieth century that a judge of even minimal enlightenment would, at the very least, deliver a judgment that differs more than somewhat from the traditions of medieval witch trials. [...] Lending support to a homophobe's venomous hate campaign with outrageous examples from the animal kingdom casts doubt on the intellectual and moral integrity of the judge concerned.

The judge later decided to delete the excursus from the judgment but he filed a private prosecution for defamation against one of the applicants. The Court found that the criticism put forward in the article concerned the judgment and not deficiencies by the judge in conducting the proceedings. The issue concerned a matter of public interest and the criticism did not amount to an unjustified destructive attack against the judge or the judiciary. The Court found that the conviction of the applicants amounted to a breach of Article 10.<sup>178</sup>

### 3.5.6.2 Health and Morals

The right to freedom of expression may be restricted for the protection of health and morals. There is no uniform European conception of morals. What is morally acceptable varies from place to place and time to time.<sup>179</sup> Regulating freedom of expression in relation to matters liable to offend intimate personal convictions, states have a rather wide margin of appreciation. The margin is wider within the sphere of religion than within other spheres of morals.<sup>180</sup> The margin of appreciation of the states is almost as wide as in the sphere of protection of national security when it comes to protection of morals.<sup>181</sup> In the case of *Handyside v. the United Kingdom*, the Court upheld a decision to seize and forfeit a book intended for children and adolescents. The British authorities considered it obscene. The book might have pernicious effects on many of the young readers.<sup>182</sup> The case of *Müller and Others v. Switzerland* concerned an exhibition of art, describing sexual relations, even between men and animals. The Swiss authorities confiscated these paintings and convicted the painters arguing that the works of art were obscene. The Court inspected the original paintings and argued in the same manner as in the *Handyside* case and found no violation of Article 10<sup>183</sup>.

Another sphere where people might get offended by certain expression is the religious one. The Court has dealt with two cases where sacred figures had been portrayed in a non-favourable fashion. The case of *Wingrove v. the United Kingdom* concerned a pornographic movie with a woman dressed as a nun having sexual fantasies about Jesus. The British Board of Film Classification refused to give the film a certificate for distribution. Without

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<sup>178</sup> *Kobenter and Standard Verlags GmbH v. Austria* para. 9-13 and 30-33.

<sup>179</sup> *Handyside v. the United Kingdom* para. 48.

<sup>180</sup> *Gündüz v. Turkey* para. 37.

<sup>181</sup> H. Danelius, *Mänskliga rättigheter i europeisk praxis: En kommentar till Europakonventionen om de mänskliga rättigheterna*, 58.

<sup>182</sup> *Handyside v. the United Kingdom* para. 67.

<sup>183</sup> *Müller and Others v. Switzerland* para. 43.

such a certificate, it was illegal to distribute the film. The Court found no violation of Article 10. The British authorities had not overstepped their margin of appreciation.<sup>184</sup> The case of *Otto-Preminger-Institut v. Austria* concerned a film based on a theatre play written in the 19th century. God, Jesus Christ and Virgin Mary were provocatively portrayed as idiots, guilty of spreading syphilis among the human race. The film was seized and forfeited. The Court underlined that an overwhelming majority of the population of the region, where the film was due to be shown, was of Roman Catholic faith. The Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. Austria did not overstep the margin of appreciation in order to ensure religious peace when seizing it. The film might have offended many people if it had been shown. The measures taken by the Austrian authorities did not constitute a breach of the Convention.<sup>185</sup> The Court emphasized that persons who exercise their right to freedom of expression have duties and responsibilities. They include, in the context of religious opinions and beliefs, a duty to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.<sup>186</sup> In a joint dissenting opinion, three judges explained how to strike a balance between freedom of religion under Article 9 and freedom of expression under Article 10.

It should not be open to the authorities of the State to decide whether a particular statement is capable of 'contributing to any form of public debate capable of furthering progress in human affairs'; such a decision cannot but be tainted by the authorities' idea of "progress". [...] There is a danger that if applied to protect the perceived interests of a powerful group in society, such prior restraint could be detrimental to that tolerance on which pluralist democracy depends. [...] The Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to express views critical of the religious opinions of others. Nevertheless, it must be accepted that it may be legitimate for the purpose of Article 10 (art. 10) to protect the religious feelings of certain members of society against criticism and abuse to some extent; tolerance works both ways and the democratic character of a society will be affected if violent and abusive attacks on the reputation of a religious group are allowed. [...] The duty and the responsibility of a person seeking to avail himself of his freedom of expression should be to limit, as far as he can reasonably be expected to, the offence that his statement may cause to others. Only if he fails to take necessary action, or if such action is shown to be insufficient, may the State step in. The need for repressive action amounting to complete prevention of the exercise of freedom of expression can only be accepted if the behaviour concerned reaches so high a level of abuse, and comes so close to a denial of the freedom of religion of others, as to forfeit for itself the right to be tolerated by society.<sup>187</sup>

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<sup>184</sup> *Wingrove v. the United Kingdom* para. 65.

<sup>185</sup> *Otto-Preminger-Institut v. Austria* para. 56.

<sup>186</sup> *Gündüz v. Turkey* para. 37.

<sup>187</sup> Joint dissenting opinion of Judges Palm, Pekkanen and Makarczyk in the case of *Otto-Preminger-Institut v. Austria*.

This judgment has been heavily criticised by legal scholars. David Pannick QC wrote:

First, it is no business of the judiciary to assess whether a film makes a ‘contribution to any form of public debate capable of furthering progress in human affairs’. The central purpose of freedom of expression is to allow readers, viewers and listeners to make up their own minds about the value of a work. The Court here demonstrated a fundamental failure to understand the basic principle of freedom of expression asserted by Stewart J. in an opinion in the United States Supreme Court in 1966:

A book worthless to me may convey something of value to my neighbour. In the free society [...], it is for each to choose for himself.

Secondly, the court fails to understand that social development, in art as well as in politics, has often proceeded from the assertion of ideas that cause offence, sometimes outrage, to established thought. Freedom of expression is of limited value if it covers only that which does not upset received opinion.

Thirdly, for judges to assess artistic merit, and to penalise dissent, is especially dangerous in the context of religion. Established religion commands uncritical devotion from many of its followers, and so enjoys considerable power in religious societies, such as Austria. In such a climate, dissenting voices will inevitably struggle to make themselves heard. It is the task of the court to ensure that they are not silenced. No doubt, Galileo, Copernicus and Spinoza offended religious feelings in their day, and were regarded as making no useful contribution to human knowledge.

Fourthly, the court appears to have been especially concerned by the mocking contents of the film. But ridicule has always been one of the most powerful weapons open to the critic of the established order. Judges, whether in national courts or in Strasbourg, should resist the temptation to act as arbiters of good taste.<sup>188</sup>

In the case of *Murphy v. Ireland* the Court dealt with a ban of broadcasting religious advertisements. The Court stressed the wide margin of appreciation of the state in regulating religious broadcasting and found no violation of Article 10.<sup>189</sup> In the case of *Open Door and Dublin Well Woman v. Ireland*, two organisations had been restrained from imparting information to pregnant women on how to obtain abortions abroad. The Court found a violation of the Convention. The organisations had only explained available options to pregnant women and not advocated abortion. The measures taken by the Irish authorities were disproportionate.<sup>190</sup>

Measures against obscenity and blasphemy usually concern artistic expressions. The Court has stated that those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. The state must not encroach unduly on their freedom of expression. Artists are however not immune from limitations in their right to express opinions.<sup>191</sup>

There is a trend among European states not to interfere with expressions that might offend the moral perceptions of parts of the population. The right to

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<sup>188</sup> D. Pannick, “Religious Feelings and the European Convention on Human Rights” *Public Law*, 8.

<sup>189</sup> *Murphy v. Ireland* para. 82.

<sup>190</sup> *Open Door and Dublin Well Woman v. Ireland* para. 80.

<sup>191</sup> *Müller and Others v. Switzerland* para. 33-34.

express an opinion on matters of public concern often prevails over the right of others not to be offended. Many countries have abolished their legislation against blasphemy and measures against pornography are now exceptional in comparison to the situation fifty years ago.<sup>192</sup> The Court has further recognised that conceptions of sexual morality have changed in recent years<sup>193</sup>. The practise of the Court has also changed and much of the earlier case-law about measures against obscenity is obsolete. The Court, usually, no longer accepts the arguments put forward by the governments explaining why measures against obscenity and blasphemy are necessary in a democratic society.

### 3.5.6.3 Protection of the Rights of Others

The right to freedom of expression cannot be used as a defence for defamation. It does not contain a right to slander people, i.e. to make false and malicious remarks about them. Words can hurt, especially if they are targeted against the reputation of a person. According to Article 10 (2) of the Convention, the right to freedom of expression may be restricted in order to protect the reputation of others. What constitutes unacceptable defamation varies from time to time and place to place. In the early 19th century, officers frequently challenged each other to duels in order to redress a perceived insult to their honour. Since that time, much have changed, but people can still get very upset with untruthful remarks about them. Surprisingly enough, since politicians often make public statements susceptible to criticism; they are very sensitive to personal criticism. Politicians are often targets of vigorous criticism. This criticism may sometimes constitute defamation. The Court has frequently dealt with convictions of journalists for defamation of politicians. The Court has stated that politicians must display a greater degree of tolerance, especially when they themselves make public statements that are susceptible to criticism.<sup>194</sup> The limits of acceptable criticism of politicians are discussed in chapter 4.1.2.

Slander and libel can be targeted against groups of individuals. Interferences with the right to freedom of expression of those who verbally or in writing attack members of certain groups on the grounds of their origin or other characteristics are usually justified with the protection of the rights or reputation of others.

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<sup>192</sup> H. Danelius, *Mänskliga rättigheter i europeisk praxis: En kommentar till Europakonventionen om de mänskliga rättigheterna*, 328 f.

<sup>193</sup> *Müller and Others v. Switzerland* para. 36.

<sup>194</sup> *Jerusalem v. Austria* para. 38.

## 3.6 Prohibition of Abuse of Rights

Article 17 provides:

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

Article 17 was included in the Convention in order to protect it against abuse of rights. The general purpose of the article is to prevent totalitarian groups from exploiting in their own interest the fundamental freedoms enumerated in the Convention with the aim of destroying these rights. The purpose is further to make it impossible for groups or individuals to derive from it a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention.<sup>195</sup> The same applies to those who want to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society<sup>196</sup>.

This article may be invoked by a State as a justification for an interference with the right to freedom of expression. The few cases where Article 17 has been invoked mostly concern interferences with the right of political parties to express their opinions. Article 17 must be narrowly interpreted. Limitations on the fundamental rights must not go further than to what is necessary to prevent the total subversion of any of these rights<sup>197</sup>. The standard of tolerance applied by the Court does not prevent a democratic society from protecting itself against activities aimed at the destruction of the rights and freedoms in the Convention<sup>198</sup>.

In the case of *The Communist Party v. Germany*, the party complained against the decision of the German Constitutional Court to declare it anti-constitutional. The Commission applied Article 17 and rejected the application. It was considered that the aim of the party was to establish the dictatorship of the proletariat through a proletarian revolution. Even if the party would have assumed power by democratic means through a general election, dictatorship would still involve the suppression of some of the fundamental rights of the Convention. This policy is incompatible with the Convention and does not deserve the protection of it.<sup>199</sup>

A racist political party, with the aim of removing all non-white people from the territory of a state cannot rely on the Convention to pursue these aims.

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<sup>195</sup> *Lawless v. Ireland* para. 6-7 under The Law.

<sup>196</sup> *Refah Partisi (The Welfare Party) and Others v. Turkey* para. 99.

<sup>197</sup> C. Ovey and R. White, *Jacobs & White European Convention on Human Rights*, 362.

<sup>198</sup> *Hirst v. the United Kingdom (No. 2)* para. 71.

<sup>199</sup> *The Communist Party v. Germany* as referred in C. Ovey and R. White, *Jacobs & White European Convention on Human Rights*, 362.

Such a policy clearly contains elements of racial discrimination, which is prohibited under the Convention.<sup>200</sup>

Many European states have introduced legislation prohibiting the denial of the Holocaust. The Court has stated that the Holocaust belongs to a category of clearly established historical facts, whose negation or revision is removed from protection of Article 10 by Article 17<sup>201</sup>. The denial, in a biased and polemical manner far from any scientific objectivity, of the systematic killing of Jews in National Socialist concentration camps by use of toxic gas, run counter to one of the basic principles of the Convention, namely justice and peace. It further reflects racial and religious discrimination.<sup>202</sup> National Socialism is a totalitarian doctrine incompatible with democracy and human rights. The justification of a pro-Nazi policy does not enjoy the protection of Article 10.<sup>203</sup> Any complaint by adherents to this ideology under Article 10 will be declared manifestly ill-founded if the complaint concerns an alleged interference with their possibility to spread Nazi-propaganda.<sup>204</sup> The Court stated in the case of *Garaudy v. France* the following:

There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.<sup>205</sup>

A political party may promote a change of law on two conditions. Firstly, they must only use legal and democratic means and secondly, the change they want to introduce must be compatible with fundamental democratic principles. A political party which does not respect democracy, or incites to violence, cannot rely on the protection of the Convention against penalties imposed on them if they pursue a policy aimed at the destruction of democracy.<sup>206</sup>

Article 17 may be invoked by the state as a defence for interferences with freedom of expression if the aim of the impugned actions is to spread violence or hatred. It may further be applied against a political party that resorts to illegal or undemocratic methods, encourages the use of violence

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<sup>200</sup> *Glimmerveen and Hagenbeek v. the Netherlands* p. 195 f.

<sup>201</sup> *Chauvy and Others v. France* para. 69.

<sup>202</sup> *Honsik v. Austria* under The Law.

<sup>203</sup> *Lehideux and Isorni v. France* para. 53.

<sup>204</sup> *B.H., M.W., H.P. and G.K. against. Austria* p. 4.

<sup>205</sup> *Garaudy v. France* under The Law p. 14.

<sup>206</sup> *Refah Partisi (the Welfare Party) and Others v. Turkey* para. 98.

aimed at undermining the democratic and pluralist system of a country, or pursues objectives that are racist or are likely to destroy the rights and freedoms of others.<sup>207</sup>

Article 17 covers essentially Articles 9, 10 and 11 of the Convention since these articles concern rights of individuals to engage in activities. Article 17 cannot be interpreted as allowing a state to deprive an individual of the right to liberty and security or the right to a fair trial.<sup>208</sup> This article cannot be invoked by the state as a justification for deprivation of an individual's political freedom simply on the ground that he has supported a totalitarian government in the past.<sup>209</sup> It is important to note that even persons who engage in terrorist activities with the aim of destroying the fundamental freedoms cannot be deprived of their protection under the Convention of articles which they have not abused in order to achieve these aims<sup>210</sup>.

Remarks that are more than insulting to immigrants do not enjoy the protection of the Convention<sup>211</sup>. There can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention<sup>212</sup>.

### 3.7 Hate Speech

It is easy for the state to justify interferences with the right to freedom of expression if the expression might incite disorder or undermine the security of minority groups within the society or if it concerns racist opinions. Complaints on restrictions placed on hate speech have frequently been declared inadmissible<sup>213</sup> and in a recent case, the Court said that hate speech is not protected under the Convention<sup>214</sup>. The term hate speech is to be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance on the grounds of race, colour, language, religion, nationality or national or ethnic origin<sup>215</sup>.

In the case of *Jersild v. Denmark*, a journalist had interviewed youths who made very offensive racist remarks about immigrant workers. The interview was broadcast on television, and as a result of this the journalist was convicted for having aided and abetted in the dissemination of racist remarks. The Court held that the aim of the interview was to address problems of

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<sup>207</sup> *United Communist Party or Turkey and Others v. Turkey* para. 23

<sup>208</sup> *Lawless v. Ireland* under The Law para. 7.

<sup>209</sup> *De Becker v. Belgium* para. 11

<sup>210</sup> P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), 565.

<sup>211</sup> *Jersild v. Denmark* para. 35.

<sup>212</sup> *Gündüz v. Turkey* para. 41.

<sup>213</sup> Ovey and White, *Jacobs & White European Convention on Human Rights*, 280.

<sup>214</sup> *Gündüz v. Turkey* para. 41.

<sup>215</sup> *Ibid.* para. 22.

racism in Denmark. It sought to explain why Danish youths had these attitudes towards immigrant. The interview was part of a serious news programme and was intended for a well-informed audience. The journalist had dissociated himself from the persons interviewed and rebutted some of the statements made by the youths. To punish a journalist for assisting in the dissemination of statements made by other persons in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. The Court held that the reasons adduced in support of the interference with his right to freedom of expression were not sufficient to establish convincingly that the conviction was necessary in a democratic society. The conviction was disproportionate to the aim of protecting the reputation or rights of others.<sup>216</sup>

In the case of *Gündüz v. Turkey*, the leader of a sect had declared in television the secular Turkish institutions as "impious". He vehemently criticised secularism and democracy. He said that he wanted to destroy democracy and set up a regime based on *sharia*, and that children, born to parents who were married by a Turkish official, were bastards. The leader of the sect was convicted for these statements. The Court held that his comments on secularism and democracy demonstrated an intransigent attitude towards contemporary institutions in Turkey and profound dissatisfaction with them. The expressions did not call for violence and could not be regarded as hate speech based on religious intolerance. The Court held that many people might legitimately feel offended by the remarks on children born of parents who were married in civil marriages as bastards. It noted that the remarks were made orally during a live television broadcast. The applicant had no possibility of reformulating himself before they were made public. The Turkish courts had not attached enough weight to the fact that the applicant was actively participating in a lively public discussion. As to his intention to do away with democracy and institute a society based on *sharia*, the Court held that the mere fact of defending *sharia*, without calling for violence to establish it, cannot be regarded as hate speech. The expressions were made in a TV-programme whose aim was to present the sect of which the applicant was the leader. His views were already widely known and he expressed his views in the course of a pluralistic debate in which he was actively taking part. The Court considered that the need for restricting the expressions in issue had not been convincingly established and it found a violation of Article 10.<sup>217</sup>

### 3.8 Derogations

According to Article 15 (1) of the Convention, in time of war or other public emergency threatening the life of the nation, High Contracting Parties may take measures derogating from its obligations under the Convention.

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<sup>216</sup> *Jersild v. Denmark* para. 33-37.

<sup>217</sup> *Gündüz v. Turkey* para. 43-53.

According to Article 15 (2), some rights are non-derogable. Freedom of expression is, however, not a non-derogable right. The exceptions allowed, must never be disproportionate to what is strictly required by the exigencies of the situation. There can be no restriction in the freedom to hold opinions. Under no circumstances, it can be strictly required to restrict the freedom to hold opinions<sup>218</sup>. The right to hold opinions is protected under Article 19 (1) of the ICCPR. The exceptions allowed in article 19 (3) apply only to article 19(2) protecting freedom of expression. States, which are parties to both the Convention and the ICCPR, cannot derogate from the right of the individual to hold opinions. Article 60 of the Convention does not allow such derogation.

According to Article 16, states have a right to restrict the political activities of aliens. This provision is obsolete. It cannot be compatible with a modern democratic society to restrict political speech merely on the ground that the speaker is an alien. The Parliamentary Assembly of the Council of Europe has recommended that it should be removed from the Convention.<sup>219</sup>

### 3.9 Other Convention Rights as *Lex Specialis* to Freedom of Expression

There is a link between Article 10, Article 11 and Article 3 of Protocol No. 1. It consists in the need to guarantee respect for pluralism of opinion in a democratic society through the exercise of civic and political freedoms.<sup>220</sup> Articles 9, 10 and 11 all protect the personal opinion of an individual. A consideration under one of these articles must often be considered in the light of another article regulating a person's opinion.<sup>221</sup> Freedom of expression is often invoked in conjunction with complaints about breaches of other rights of the Convention. The rights are inter-related. Article 9 only protects the thoughts of the person who hold them, whereas Article 10 includes the protection of any expression or opinion.<sup>222</sup> Freedom of religion and the right to peaceful assembly are *lex specialis* to freedom of expression. These special aspects of freedom of expression should be considered under Article 9 or Article 11 and not under Article 10.<sup>223</sup> The right to vote under Article 3 of Protocol No. 1 is also *lex specialis* to Article 10<sup>224</sup>. When several persons express a given opinion together with other people, Article 10 and Article 11 overlap each other. A demonstration is a joint expression of a political opinion. That is also the case, even when the demonstration has the character of a silent procession. In practise, there will hardly be a problem

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<sup>218</sup> P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), 585.

<sup>219</sup> C. Ovey and R. White, *Jacobs & White European Convention on Human Rights*, 216.

<sup>220</sup> *Ždanoka v Latvia* para. 115.

<sup>221</sup> See *Young, James and Webster v. the United Kingdom* para. 57.

<sup>222</sup> R. Clayton and H. Tomlinson, *The Law of Human Rights*, 1061.

<sup>223</sup> H. Danelius, *Mänskliga rättigheter i europeisk praxis: En kommentar till Europakonventionen om de mänskliga rättigheterna*, 306.

<sup>224</sup> *Hirst v. the United Kingdom (No. 2)* para. 89.

with this overlap. The legitimate aims for which the right to freedom of expression can be restricted in Article 10 (2) and Article 11 (2) partly coincide. Article 10 (2) does not distinguish between expressions made by one person or several persons jointly.<sup>225</sup> It is sometimes difficult to assess beforehand with certainty under which article the Court will consider a case. The approach of the Court in this question is rather ambiguous. It appears to be a matter of choice or convenience. In the case of *Ezelin v. France*, concerning a lawyer who took part in a demonstration in support for three members of the Guadeloupe independence movement, the Court said that Article 10 was *lex generalis* in relation to Article 11<sup>226</sup>. In the case of *Sigurdur A. Sigurjónsson v. Iceland*, concerning compulsory membership of an association for taxi drivers, the Court found a violation of Article 11. It was unnecessary to deal separately with the question if there also was a breach of Article 10.<sup>227</sup> In the case of *Vogt v. Germany*, both Article 10 and Article 11 had been breached<sup>228</sup>.

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<sup>225</sup> P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), 569.

<sup>226</sup> *Ezelin v. France* para. 35.

<sup>227</sup> *Sigurdur A. Sigurjónsson v. Iceland* para. 43.

<sup>228</sup> *Vogt v. Germany* para. 68.

# 4 Politicians, Journalists and Civil Servants

## 4.1 Groups with a Special Interest in Freedom of Expression

Freedom of expression is especially important for two groups: politicians and journalists. It is the role of the politician to disseminate ideas and foster debate of general interest. Journalists have an important role as a public watchdog. Civil servants are in another position. The state may have a reasonable demand on them to be loyal to the state and to refrain from expressing certain views. Therefore, these groups deserve special attention. Politicians represent a political party. Parties play an important role in the democratic society.

This thesis is focused on the right to express political opinions. I have chosen to deal with the role of the politician extensively, since the role of politicians is to express political opinions. Section 4.1.1 concerns cases about the limits for what politicians are allowed say and section 4.1.2 concerns journalistic monitoring of politicians. It is a comprehensive examination of the case-law of the Court concerning politicians. The quotes from different concurring or dissenting opinions represent the American tradition in freedom of expression. They also reflect my view on acceptable limitations on the right to freedom of expression.

### 4.1.1 Politicians

A representative democracy cannot function without politicians. They are to produce ideas and agitate for their ideas and fight for their implementations. Their role is to debate with political opponents. Democracy demands that politicians have a wide freedom when it comes to propagating for their ideas.

The Court has stated that Article 10 is applicable to activities of a political nature. Freedom of political debate constitutes a particular aspect of freedom of expression.<sup>229</sup>

In the case of *Castells v. Spain* a politician, and member of parliament, was convicted for insulting the government when he accused it for being responsible for the deaths of several Basques. The Court found that the conviction amounted to a violation of the Convention. It said:

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<sup>229</sup> *Rekvényi v. Hungary* para. 26.

While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament [...] call for the closest scrutiny on the part of the Court.<sup>230</sup>

In this case, the Court stated what is now standing case-law:

The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media. Nevertheless it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith.<sup>231</sup>

Judge Pekkanen wrote in a concurring opinion:

*Mr Castells was punished for holding the opinion that the Government was responsible for the incidents in question and publishing it. [...] For a finding of a violation of Article 10 (art. 10) of the Convention it is sufficient that Mr Castells was punished for criticising the Government when he had done so in a way which should be allowed in a democratic society.*<sup>232</sup>

Judge de Meyer wrote in his concurring opinion:

*Mr Castells was prosecuted and convicted for having written and published his views on a question of general interest; in a 'democratic society' it is not acceptable that a citizen be punished for doing this.*<sup>233</sup>

In the case of *Jerusalem v. Austria*, a politician who was a member of a regional parliament said that two associations were totalitarian psycho-sects with fascist tendencies. A court issued an injunction ordering the politician not to repeat her statements on the associations. The Court held that associations lay themselves open to scrutiny when they enter the arena of public debate. The associations were active in public discussion on drug policy and cooperated with a political party. The Court believed that they ought to have shown a higher degree of tolerance to criticism. It noted that the statements were made in a forum which was comparable to Parliament. In a democracy, Parliament or such comparable bodies are the essential forum for public debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein. The statements were value judgments and reflected a fair comment on matters of public interest. In a heavy critique of the procedure in the Austrian courts, the Court said that it was struck by their inconsistent approach. On the one

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<sup>230</sup> *Ibid.* para. 42.

<sup>231</sup> *Castells v. Spain* para. 46.

<sup>232</sup> Concurring opinion of Judge Pekkanen in the case of *Castells v. Spain*.

<sup>233</sup> Concurring opinion of Judge de Meyer in the case of *Castells v. Spain*.

hand, they required proof of a statement and on the other hand refused to consider all available evidence. The Court found a breach of Article 10.<sup>234</sup>

The applicants in the case of *Lehideux and Isorni v. France* were a former minister in the government of Marshal Pétain and a lawyer who had defended the Marshal during the trial against him for treason in 1945. They participated in the publication of an advertisement in a daily newspaper in which it was argued that the judgment against Marshal Pétain should be overturned and his memory rehabilitated. It was alleged that he had played a double game and wanted victory for the Allies. The National Association of Former Members of the Resistance filed a criminal complaint against the defendants and they were convicted for public defence of war crimes or the crimes of collaboration and ordered to pay damages of one franc. The French court did not consider that the applicants had distanced themselves from the policies of Marshal Pétain towards the Jewish part of the population. The Court held that the applicants were supporting one of the conflicting theories in the debate about the role of the head of the Vichy government. It was not the task of the Court to decide on the factual basis for the statements of the applicants. The advertisement was part of an ongoing debate among historians about the events in question. The advertisement was signed by two legally constituted organisations, which sought to rehabilitate the memory of Marshal Pétain. It was scarcely surprising that they supported the one of two conflicting theories, which was most favourable to the man whose memory they sought to defend. The Court noted that the events referred to had occurred more than forty years before. Even though the remarks in issue were likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. Every country must make an effort to debate its own history openly and dispassionately. The Court considered the convictions disproportionate and unnecessary in a democratic society and consequently it found a breach of Article 10.<sup>235</sup>

In a concurring opinion Judge de Meyer wrote:

*Freedom of expression implies just as much the right to present a public figure in a favourable light as the right to present him in an unfavourable light. Similarly, it implies just as much the right to disapprove of a judicial decision concerning him as the right to approve of it. In particular, those who wish to serve the memory of such a figure and promote his rehabilitation cannot be denied to express themselves freely and in public to that effect. It is natural that those who wish to impart ideas of this kind should direct attention to the merits of the person concerned or what they consider to be his merits. They cannot be required to mention in addition his errors and faults, whether real or supposed, or some of them.*<sup>236</sup>

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<sup>234</sup> *Jerusalem v. Austria* para. 39-47.

<sup>235</sup> *Lehideux and Isorni v. France* para. 46-58.

<sup>236</sup> Concurring opinion of Judge de Meyer in the case of *Lehideux and Isorni v. France*.

In a concurring opinion Judge Jambrek wrote:

*The best protection for democracies against the resurgence of the racist, anti-Semitic and subversive doctrines which originated in the totalitarian regimes of national-socialist or communist persuasion remains the possibility of engaging in a free critique which reveals the real dangers and the ways to forestall them. Democracies, unlike dictatorships, can cope with the sharpest controversies and promote what should be the democratic ideal resulting from the European Convention on Human Rights.*<sup>237</sup>

A politician has a certain responsibility to act if he disagrees with the policy of his party. He has to dissociate himself from the acts of a party if he does not want to take the consequences of these acts. This is especially applicable to leaders of a party. It must be held in mind that politicians may express opinions not only by speeches or actions, but also by omissions or lack of respons.<sup>238</sup>

In the case of *Piermont v. France*, a German member of the European Parliament participated in a demonstration in French Polynesia. She made a speech against nuclear tests and supported independence for the territory in the future. She was expelled from French Polynesia, banned from re-entering and prohibited from entering New Caledonia. The government argued that the interference pursued two legitimate aims: the prevention of disorder and the protection of territorial integrity. The Court argued that the political situation in the territory should be of some weight for the outcome of the case, but her statements were made during a peaceful, authorised demonstration and she never called for violence or disorder. Her speech was a contribution to the political debate in French Polynesia. The Court found a breach of the Convention. The French authorities had not struck a fair balance between the aims pursued and the applicant's right to freedom of expression.<sup>239</sup>

The case of *VgT Verein gegen Tierfabriken v. Switzerland* concerned an association for the protection of animals. A private television company refused to broadcast commercials for this association, propagating for a vegetarian lifestyle and opposing animal experimentation. There was a law in Switzerland, for which the state was responsible, prohibiting political advertising. Its object was to prevent financially powerful groups from obtaining a competitive political advantage. The Court did not exclude that such a prohibition would be compatible with Article 10 in certain situations. The Swiss Federal Court had argued in general terms against political advertising and the Court found that the Swiss authorities had not explained how the general reasons against political advertising were applicable to the particular circumstances of the case. It is of importance to note that the law was only applicable to certain media. The law was not applicable to the

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<sup>237</sup> Concurring opinion of Judge Jambrek in the case of *Lehideux and Isorni v. France*.

<sup>238</sup> *Ždanoka v. Latvia* para. 123.

<sup>239</sup> *Piermont v. France* para. 77-78 and 85.

press. The Court found a violation of Article 10. The interference with freedom of expression was not necessary in a democratic society.<sup>240</sup>

## 4.1.2 Journalists

Freedom of the press is an important part of the concept of freedom of expression. The press fulfils an essential function in a democratic society. The democratic system requires that persons holding public power are subject to close control not only by their political opponents in the institutions of the State, but also by the public opinion. This opinion is to a large extent formed and expressed in the media.<sup>241</sup> It is incumbent upon the press to impart information and ideas on political issues and other areas of public interest. The press does not only have the task of imparting such information and ideas; the public also has a right to receive them. The Court has often called the press a “public watchdog”.<sup>242</sup> In order for the press to fulfil its important role as a public watchdog, journalists may recourse to a degree of exaggeration, or even provocation<sup>243</sup>. Political invectives often spill over into the personal sphere; such are the hazards of politics and the free debate of ideas<sup>244</sup>. Freedom of the press sometimes collides with the right to respect for someone’s private life. A politician has a legitimate claim for the protection of his reputation. In a conflict between the right of the press to impart ideas on matters of public concern and general importance and the reputation of others, national courts must strike a proper balance between these interests. There are a number of cases from the Court concerning defamation actions against journalists for their reporting on politicians. The press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. The limits of acceptable criticism are wider as regards a politician who is acting in his public capacity than as regards a private individual. A politician lays himself open to close scrutiny of his every word and deed by both journalists and the public at large. He must display a greater degree of tolerance against criticism than other individuals must, but the press must not overstep the bounds set for the protection of the reputation of others.<sup>245</sup> When dealing with cases concerning vigorous criticism of politicians, the Court distinguishes between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof.<sup>246</sup> It is sometimes difficult to assess if a particular statement constitutes a value-judgment or a statement of facts. A value-judgment must be based on sufficient facts in order to constitute a fair comment, which is included in the right to freedom of expression under Article 10. The difference lies in

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<sup>240</sup> *VgT Verein gegen Tierfabriken v. Switzerland* para. 73-79.

<sup>241</sup> Report of the Commission of 11 October 1984, as referred in van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (1990), 415.

<sup>242</sup> See *Barthold v. Germany* para. 58.

<sup>243</sup> *Prager and Oberschlick v. Austria* para. 38.

<sup>244</sup> *Lopes Gomes da Silva v. Portugal* para. 34.

<sup>245</sup> *Lingens v. Austria* para. 41-42.

<sup>246</sup> See *Lingens v. Austria* para. 46.

the degree of factual proof that has to be established.<sup>247</sup> The Court does not accept all value-judgments. A state may have a right to interfere with value-judgments that are excessive. A value-judgment may be excessive, in particular, in the absence of any factual basis for it.<sup>248</sup>

One of the leading cases on this problem is the case of *Lingens v. Austria*. Mr. Lingens was an Austrian journalist. He wrote articles in which he criticised the Austrian Chancellor, Mr. Kreisky, for his attitudes towards the leader of the FPÖ, who had been a member of the SS during World War II. The journalist wrote that the behaviour of the Chancellor was “immoral” and “undignified” and an example of “basest opportunism”. Mr. Kreisky brought private prosecutions against Mr. Lingens and the journalist was convicted. The Court noted that the impugned expressions constituted value-judgments. The Austrian legislation demanded that the journalist should prove the truth of his statements in order to escape conviction. This requirement was impossible to fulfil and it infringed his right to freedom of opinion, which is a fundamental part of the right secured by Article 10 of the Convention.<sup>249</sup>

In the case of *Unabhängiger Initiative Informationsvielfalt v. Austria*, a newspaper had published a leaflet in which the policies of the FPÖ were criticised. A court had granted an injunction against the publisher prohibiting it from repeating the statement on Mr. Haider, the leader of the party, that he incited people to “racist agitation”. The Court found that the statement should be seen in the political context in which it was made. It was a reaction to an opinion poll initiated by Mr. Haider on proposals by the party to restrict immigration. The Court held that the statements may be considered polemical, but it was made in a particular situation in which it contributed to a discussion on subject matters of general interest such as immigration, its control and the legal status of aliens in Austria. The statement was part of the political discussion initially provoked by Mr. Haider by initiating the above-mentioned opinion poll on these issues. The statement was a fair comment on a matter of public interest, i.e. a value-judgment. In the light of the circumstances of the case, this opinion was not excessive and there was consequently a breach of the Convention.<sup>250</sup>

In the case of *Scharsach and News Verlagsgesellschaft mbH v. Austria*, a journalist had been convicted for defamation of a politician. He had written an article in which he expressed his negative attitudes towards a future coalition government with the participation of the FPÖ. He wrote that certain members of this party had not dissociated themselves from National Socialist ideas and called them “closet Nazis”. Mrs Rosenkranz, one of the persons referred to, filed a private prosecution for defamation and the journalist was convicted by an Austrian court. The Court held that the impugned statement was a value-judgment. Mrs Rosenkranz was married to a well-

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<sup>247</sup> *Scharsach and News Verlagsgesellschaft mbH v. Austria* para. 40.

<sup>248</sup> *De Haes and Gijssels v. Belgium* para. 47.

<sup>249</sup> *Lingens v Austria* para. 46.

<sup>250</sup> *Unabhängiger Initiative Informationsvielfalt v. Austria* para. 43-46.

known right-wing politician, the editor of a magazine considered to be extreme right-wing. She was also a politician who had never dissociated herself from the political views of her husband. She had publicly criticised the Austrian law prohibiting Nazi activities. Taken as a whole, there was some factual basis for the impugned statement. The Court considered that the statement was a fair comment on an important matter of public interest, namely a personal political analysis of the Austrian political scene. The term “*closet Nazi*” was not excessive and the Court found that the interference with the right to freedom of expression amounted to a violation of Article 10.<sup>251</sup>

In the case of *Oberschlick v. Austria* a journalist had been convicted for defamation. A politician had proposed that foreigners should receive less favourable treatment than Austrians. The family allowances for Austrian women should be increased by 50% and immigrant mothers should get a 50% reduction of the same allowances. The journalist had written that this proposal corresponded to the philosophy and the aims of National Socialism, a statement for which he was convicted. The Court held that Mr. Oberschlick’s criticism sought to draw the public’s attention in a provocative manner to a proposal which was likely to shock many people. A politician who expresses himself in such terms exposes himself to a strong reaction on the part of journalists and the public. The applicant had published a true statement of facts followed by a value-judgment. He had merely expressed his opinion to the proposal. The conviction amounted to a violation of Article 10.<sup>252</sup>

In the case of *Oberschlick v. Austria (no. 2)* a journalist had made the following remarks on a politician: “I will say of Jörg Haider, firstly that he is not a Nazi and, secondly, that he is, however, an idiot”<sup>253</sup> The journalist was convicted for these remarks. The Court found that these remarks did not constitute a gratuitous personal attack. The journalist wrote the article as a response to a speech the politician had made. The author provided an objectively understandable explanation for his remarks. Such remarks may be excessive. The remarks had, however, some factual basis. Therefore, there was a breach of Article 10.<sup>254</sup>

In the case of *Lopes Gomes da Silva v. Portugal*, a journalist had been convicted for defamation of a politician who had been proposed to head the list of a party in the elections to the City Council of Lisbon. In an editorial comment the journalist had written:

Not in the oldest or most delapidated ruins of Salazarism could an ideologically more grotesque and more buffoonish [*boçal*] candidate have been dug out: such an incredible mixture of crude reactionaryism [*reaccionarismo alarve*], fascist bigotry and coarse anti-Semitism. Any leading figure of the Salazar regime [*Estado Novo*]

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<sup>251</sup> *Scharsach and News Verlagsgesellschaft mbH v. Austria* para. 41-46.

<sup>252</sup> *Oberschlick v. Austria* para. 61-63.

<sup>253</sup> *Oberschlick v. Austria (No. 2)* para. 9.

<sup>254</sup> *Ibid.* para. 33-35.

or any mayor of Lisbon from the former regime would come across as singularly progressive compared to this brilliant find ...<sup>255</sup>

The Court held that the expressions could be considered polemical. The comments were made in a political debate on matters of general interest and the journalist had supported them with an objective explanation. He had reproduced excerpts from articles written by the politician alongside his editorial. He thus allowed readers to form their own opinion. The Court attached great importance to that fact and found a violation of Article 10.<sup>256</sup>

In the case of *Dichand and Others v. Austria*, a politician who was at the same time a practicing lawyer was the subject of harsh criticism in an article written by the applicant. It was argued that lawyers in democracies all over the world give up their law firms when they become members of government and that the politician did not intend to comply with this moral concept. It was further stated that the lawyer had taken part in the adoption of laws which brought about advantages for his clients. An injunction was issued prohibiting the applicant from repeating these statements. The Court found that there was some factual basis for the value-judgment. The article represented a fair comment on an issue of general public interest. It concerned a politician of importance, and the fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion. The restriction imposed on the applicant's right to freedom of expression was a breach of Article 10.<sup>257</sup>

In the case of *Feldek v. Slovakia* a journalist had been sentenced for defamation of the minister for culture and education. The journalist had written an article in which he criticised the minister for his fascist past and since this, in his views, was incompatible with membership of the government, he urged the minister to resign. The Court found that the statement was made in the context of a free debate on an issue of general interest. The remarks concerned a minister and the limits of acceptable criticism for a minister are wider than for a private individual, there was further some factual basis for the expression. The issue concerned the political development of the country in the light of its historical background. The Court therefore found a violation of Article 10.<sup>258</sup>

In the case of *Krone Verlag GmbH & Co. KG v. Austria*, the applicant had published articles on a politician who was employed as a teacher and at the same time was a member of the Austrian parliament and the European Parliament. It was alleged that he received three salaries. According to Austrian law, he was not entitled to the teacher's salary when he was a member of the European Parliament. The articles were accompanied by photographs of the politician. The politician applied for an injunction against the applicant, claiming that it should be ordered to refrain from publishing his picture in

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<sup>255</sup> *Lopes Gomes da Silva v. Portugal* para. 10.

<sup>256</sup> *Ibid.* para. 32-35.

<sup>257</sup> *Dichand and Others v. Austria* para. 50-51.

<sup>258</sup> *Feldek v. Slovakia* para. 85.

connection with statements describing him as somebody who received his salaries unlawfully. An Austrian court granted the injunction. The Court held that the articles concerned a matter of public concern which did not fall wholly within the politician's private sphere. The politician had entered the public arena and had to bear the consequences thereof. It found no valid argument why the applicant should be prevented from publishing his picture and, consequently, Austria had violated Article 10.<sup>259</sup>

The case of *Schwabe v. Austria* concerned an article in which the head of the regional government was accused of applying different moral standards to a member of another political party than to a member of his own party. It was stated that he had demanded that a mayor should resign after being involved in a car accident when he at the same time had known for years that his deputy had been involved in a car accident resulting in the death of a man. The deputy brought a private prosecution case against the author and he was convicted for defamation. The Court noted that the article was a reaction to the demands put forward by the head of the regional government that a mayor should resign. It was further stated that the applicant's main concern was to show that he applied different moral standards to a member of another party than to his party friend and deputy. The comparison amounted to a value-judgment not susceptible of proof. Mr. Schwabe could not be considered to have exceeded the limits of freedom of expression. The value-judgment was based on substantially correct facts and the Court found that the conviction was a violation of the applicant's right to freedom of expression.<sup>260</sup>

In the case of *Grinberg v. Russia* a journalist had been convicted for defamation of a politician. He accused the politician, who had been elected governor of a Russian region, of wanting to limit the freedom of the press. The journalist wrote that he "*had no shame and no scruples*". The Court found that this comment was a value judgment, not susceptible of truth. It was the subjective appraisal of the journalist of the moral behavior of the politician. The statement was made in an article which concerned the freedom of the press, a question of public interest; consequently, the Court found a violation of Article 10.<sup>261</sup>

There are limits to the freedom of the press. A politician does not have to accept very hard criticism targeted at the reputation of the person as such. He has a right of respect for his private life. In the case of *Tammer v. Estonia*, a journalist had been convicted for having made very offensive and insulting remarks on a female politician. In an article, the journalist had given her nicknames with the meaning that she was a person responsible for breaking up another person's marriage, and a careless mother, deserting her child. In the Estonian language, these words were regarded as very offensive. The journalist was convicted for defamation. The Court found no violation of Article 10. The journalist had not been denied the possibility to

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<sup>259</sup> *Krone Verlag GmbH & Co. KG v. Austria* para. 36-39.

<sup>260</sup> *Schwabe v. Austria* para. 31-35.

<sup>261</sup> *Grinberg v. Russia* para. 30-32.

criticise the politician. He could have chosen to use other words, of not so insulting nature.<sup>262</sup>

The Parliamentary Assembly of the Council of Europe has adopted a resolution on the right to privacy. (Resolution 1165 from 1998) Article 9 of this resolution states that certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts. This resolution is not binding on the Contracting States, but the Court may take it into account when balancing freedom of expression with the right to privacy<sup>263</sup>. The Court has elaborated on the question of a politician's right to privacy and right to protection of his reputation in the case of *Éditions Plon v. France*. It considered a book written by the private physician to President François Mitterrand. The French president was diagnosed with cancer shortly after his election in 1981. The book, published only a few days after the death of the president, was banned from distribution by a French court. It contained a very private and detailed enumeration of all the stages in the president's declining health and the description of the efforts of his physician to hide his illness from the general public. The Court considered that the book concerned a matter of public interest: the question if the public had a right to be informed about any serious illness suffered by the head of State; and if a person who knew that he was seriously ill was fit to hold the highest national office. The Court considered that the pressing social need to uphold the prohibition weakened with the laps of time. The public interest in discussion of the history of President Mitterrand's two terms in office prevailed over the right of protection of the rights of François Mitterrand and his heirs and considerations of medical confidentiality. It considered that the interim injunction that preceded the main proceedings was proportionate to the aim of protecting the reputation of the president. The measures later ceased to meet a pressing social need and were therefore disproportionate to the legitimate aim. The Court stressed that it did not consider that requirements of historical debate may release medical practitioners from the duty of medical confidentiality. Once this confidentiality has been breached, the passage of time must be weighed against the interest of public debate. This does not mean that the person originally responsible for the breach of medical confidentiality must not be punished.<sup>264</sup>

When the Court balances the right to freedom of expression under Article 10 with the right to respect for private and family life under Article 8, it makes a fundamental distinction between reporting of facts, even controversial ones, capable of contributing to a debate in a democratic society and reporting of details of the private life of an individual. If the reporting concerns politicians in their official functions, the press fulfils its important role as public watchdog. The Court has not defined the limits for acceptable reporting of the private life of a politician. If the reporting comes within the

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<sup>262</sup> *Tammer v. Estonia* para. 67-71.

<sup>263</sup> See *Von Hannover v. Germany* para. 67.

<sup>264</sup> *Éditions Plon v. France* para. 44-53.

sphere of a political or public debate, it is probable that this will outweigh the interest of a politician to respect for private and family life. If the sole purpose of the reporting is to satisfy the curiosity of a particular readership regarding details of a politician's private life, his right to privacy will generally prevail, since this reporting does not contribute to any debate of general interest to society despite the fact that the politician is known to the public.<sup>265</sup>

### 4.1.3 Civil Servants

There are special problems concerning civil servants and their possibilities to participate in the political debate. Everyone within the jurisdiction of a Contracting State enjoys the right of freedom of expression and freedom of expression also extends to civil servants.<sup>266</sup> They are employed by the government; and political discourse concerns criticism of the government, their employer. The government has a legitimate claim to have loyal civil servants. They can also be subject to criticism. As civil servants, they are representatives of the government and may be subject to political criticism.

For civil servants the 'duties and responsibilities' assume a special significance. The margin of appreciation of the state, when interfering with the freedom of expression of civil servants is rather wide<sup>267</sup>. It is reasonable that a civil servant in a sensitive post should be subject to; at least, some restrictions on his right to freedom of expression concerning information gained in his official capacity<sup>268</sup>. Civil servants have a special duty of discretion. Their freedom to criticise government policies may be curtailed.<sup>269</sup> The Court has stated that a democratic state is entitled to require civil servants to be loyal to the constitutional principles on which it is founded<sup>270</sup>.

There are some cases concerning high ranking civil servants who have publicly criticised their employers, i.e. the government. In the case of *Haseldine against the United Kingdom*, a British diplomat was dismissed from his post for disciplinary offences. He had written an open letter published in a British newspaper criticising the policy of the British government vis-à-vis South Africa. The Commission held that an employer has the right to prevent the disclosure of information received in confidence during the course of employment. The information published was not easily or publicly available. Two considerations had to be made: a person's situation, in this case a civil servant employed by the Foreign and Commonwealth Office; and the nature of the means he used in making his statements. The Commission said that "*by entering the diplomatic service the applicant*

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<sup>265</sup> *Von Hannover v. Germany* para. 65.

<sup>266</sup> *Vogt v. Germany* para. 43.

<sup>267</sup> *Ahmed and Others v. the United Kingdom* para. 61.

<sup>268</sup> *Haseldine against the United Kingdom*, under the Law.

<sup>269</sup> C. Ovey and R. White, *Jacobs & White European Convention on Human Rights*, 283.

<sup>270</sup> *Vogt v. Germany* para. 59.

accepted certain restrictions on the exercise of his freedom of expression as being inherent in his duties". The dismissal did not amount to a violation of Article 10.<sup>271</sup> In the case of *E. S. against Germany*, an admiral, who made critical remarks in public about the Federal Chancellor and the Federal Minister of Defence, was suspended from duty. In the Commission's view, the Government had an interest in the proper functioning of the Armed Forces. The interference with the right to freedom of expression of the admiral was thus justified.<sup>272</sup>

In the case of *Ahmed and Others v. United Kingdom*, senior local government officers were not allowed to engage in some political activities. The Court held that there was a pressing social need to limit the political activities of this group of government officers. The United Kingdom had a long tradition of political neutrality of senior officers, which the government wanted to maintain. Therefore, the interference with the applicants' right to freedom of expression was justified.<sup>273</sup>

In the case of *Wille v. Liechtenstein*, the applicant, who was President of the Liechtenstein Administrative Court, gave a public lecture in which he expressed the opinion that the Constitutional Court of the country had the power to decide on the interpretation of the Liechtenstein Constitution when the Prince and the parliament disagreed on its correct interpretation. His Serene Highness Prince Hans-Adam II was very upset with this lecture and sent a letter to the applicant in which he said that he would not appoint him again to a public office, if his name were to be proposed. This is what happened on a later occasion. The Court held that the announcement by the Prince of his intention not to reappoint the applicant to a public post constituted a reprimand for the previous exercise by the applicant of his right to freedom of expression, as it was likely to discourage him from making statements of that kind in the future.<sup>274</sup> The Court found a violation of Article 10. The Prince's action appeared disproportionate to the aim pursued.<sup>275</sup>

The Court has dealt with some cases concerning the right to freedom of expression for military servicemen. Everybody has a right to freedom of expression, but there are other interests that have to be balanced against this right. The Court has said that the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline<sup>276</sup>. The case of *Grigoriades v. Greece* concerned a former conscript. In the course of his military service he claimed to have discovered abuses against conscripts. The applicant came into conflict with his superiors and as a result he had to serve additional time in the army. He refused to serve additional time and wrote a letter to his commanding officer in which he criticized the army. He was later convicted for insulting the

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<sup>271</sup> *Haseldine against the United Kingdom* under the Law.

<sup>272</sup> *E. S. against Germany* p. 8.

<sup>273</sup> *Ahmed and Others v. the United Kingdom* para. 63.

<sup>274</sup> *Wille v. Liechtenstein* para. 50.

<sup>275</sup> *Ibid.* para. 70.

<sup>276</sup> *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria* para. 36.

army. The Court admitted that the letter included certain strong and intemperate remarks concerning the armed forces. The letter was not published by the applicant. It was sent to his commanding officer and it did not contain any insults directed against any person. Its impact on military discipline was insignificant. The Court found a breach of Article 10. The conviction was not necessary in a democratic society.<sup>277</sup>

There is no right under the Convention of recruitment to the civil service. It was deliberately omitted during the drafting process. The refusal to appoint a person as a civil servant cannot provide the basis for a complaint under the Convention. However, a person who has already been appointed as a civil servant can complain of being dismissed if that dismissal violates one of his rights under the Convention.<sup>278</sup> In the case of *Vogt v. Germany*, a German schoolteacher was the subject of disciplinary proceedings on the ground that she had failed to comply with the duty of political loyalty to the Constitution. She was a senior member of the German Communist Party and as a civil servant, she had to be loyal to the Basic Law. Active membership of the Communist party was incompatible with this duty, since the party was considered to have anti-constitutional aims. Her salary was reduced to 60 per cent of her normal salary and subsequently she was suspended from her duties. She used to teach German and French and the Court found that there was no security risk involved in language teaching. It was almost impossible for her to find a new job outside the public sector and her party had not been declared anti-constitutional. The Court therefore found the measures taken against her to be disproportionate. Consequently, there was a violation of Article 10.<sup>279</sup> This can be regarded as a change of policies of the Court. It had already dealt with two cases with similar circumstances: *Kosiek v. Germany* and *Glaserapp v. Germany*. Mr. Kosiek was an active member of the National Democratic Party of Germany and Mrs Glaserapp was affiliated with the Communist Party of Germany. Teachers, in their positions as civil servants had to be loyal to the German constitution. In both cases, the Court found that the applicants sought access to a post in the civil service, but the Convention does not contain a right of access to public service. The Court found no interference with the applicants' right to freedom of expression in either of the cases. The authorities had taken account of the applicants' opinions in order to check if they possessed one of the necessary personal qualifications for the job.<sup>280</sup>

The Court dealt with the question of criticism against civil servants in the case of *Thoma v. Luxemburg*. In a radio program, problems connected with reforestation after a storm were debated. The applicant, who was the host of the program, quoted from a newspaper an article in which another journalist had stated that "*all but one of the Water and Forestry Commission officials were corruptible*". The applicant was convicted for defamation, because he had not formally distanced himself from the allegation. The Court noted that

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<sup>277</sup> *Grigoriades v. Greece* para. 47-48.

<sup>278</sup> *Wille v. Liechtenstein* para. 41.

<sup>279</sup> *Vogt v. Germany* para. 61.

<sup>280</sup> *Kosiek v. Germany* para 39 and *Glaserapp v. Germany* para. 53.

the topic raised in the program was being widely debated in the country and it concerned a problem of general interest. It found that the applicant had mentioned that the statement was a quotation and that the truth of the allegation was later discussed in the radio program. The Court found that the interference with the right of the applicant to freedom of expression was disproportionate. It was not necessary in a democratic society.<sup>281</sup>

## 4.2 Freedom of the Press

The media played an important role in the democratic change from totalitarian regimes to democratic governments in Central and Eastern Europe and it is still a vital safeguard against undemocratic movements<sup>282</sup>. The press fulfils a pre-eminent role in a state governed by the rule of law<sup>283</sup>. Freedom of the press is an important part of the concept of freedom of expression and the margin of appreciation of the state to interfere with the freedom of the press is narrow.<sup>284</sup> The Court has given some general principles applying to the freedom of the press:

It is incumbent on the press to impart information and ideas on matters of public interest<sup>285</sup>. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate, which is at the very core of the concept of a democratic society<sup>286</sup>.

Article 10 does not prohibit prior restraints on publication or bans on distribution. The dangers that such interferences with the right to freedom of expression pose for a democratic society are such that they call for the most careful scrutiny.<sup>287</sup> This is especially important for the press; news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.<sup>288</sup>

The press must not overstep the bounds set for protection of the State against the threat against violence. It is incumbent on the press to impart information and ideas on political issues, this also includes divisive ideas. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press gives the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.<sup>289</sup>

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<sup>281</sup> *Thoma v. Luxemburg* para. 50-65.

<sup>282</sup> *Ovey and White, Jacobs & White European Convention on Human Rights*, 289.

<sup>283</sup> *Castells v. Spain* para. 43.

<sup>284</sup> *Éditions Plons v. France* para. 44.

<sup>285</sup> *Observer and Guardian v. the United Kingdom* para. 59 (b).

<sup>286</sup> *Lingens v. Austria* para. 42.

<sup>287</sup> *Éditions Plons v. France* para. 42.

<sup>288</sup> *Observer and Guardian v. the United Kingdom* para. 60.

<sup>289</sup> *Sürek v. Turkey (No. 2)* para. 35.

The Court has emphasized that the protection of a journalistic source is one of the basic conditions for freedom of the press. If there were no such protection, it would affect the press in its role as public watchdog. Sources would be deterred from assisting the press. An order to disclose a source has a chilling effect on the exercise of freedom of expression. Limitations on the confidentiality of journalistic sources can only be justified by an overriding requirement in the public interest.<sup>290</sup>

Journalists also have ‘duties and responsibilities’ in their exercise of freedom of expression. In a situation of conflict and tension within a state, these responsibilities assume special significance, because the media might become a vehicle for dissemination of hate speech and the promotion of violence. The state cannot interfere with the right of the press to impart information that cannot be categorised as hate speech or promotion of violence referring to the interests of the state.<sup>291</sup>

### 4.3 Transitional Period from Totalitarianism to Democracy

After the fall of the Communist regimes in Eastern and Central Europe many of these countries have introduced democratic systems. A newly established democracy needs time for reflection in a period of political turmoil in order to enable it to consider what measures that are required to sustain its achievements<sup>292</sup>. Many of these states have introduced restrictions on the activities of the agents of the former regimes. The case of *Ždanoka v. Latvia* concerns a politician who was an active member of the Latvian branch of the Communist Party of the Soviet Union. She actively supported the coup against Mr. Gorbachev in August 1991 and she opposed Latvian independence. She was later disqualified from standing as a candidate to the Latvian parliament due to her activities during the old regime. Both a seven-judge chamber and a Grand Chamber dealt with the case. The Chamber observed that a permanent disqualification from eligibility could only be imposed on perpetrators of grievous criminal offences, such as war crimes or treason. During the early years following the re-establishment of Latvia’s independence, it could be considered a legitimate and balanced measure to ban leading figures of the former regime from eligibility. However, more than ten years after the fall of the former regime, the conduct of the person concerned, during the old regime, must be carefully examined in order to justify the continuation of such measure. The Chamber found that the applicant’s disqualification from standing as a parliamentary candidate was disproportionate and consequently amounted to a breach of the Convention.<sup>293</sup> The Grand Chamber found no violation of the Convention. It took the historical

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<sup>290</sup> *Goodwin v. the United Kingdom* para. 39-40.

<sup>291</sup> *Erdogdu and Ince v. Turkey* para. 54.

<sup>292</sup> *Ždanoka v. Latvia* para. 131.

<sup>293</sup> *Ibid.* para. 74-75.

situation of Latvia in consideration when coming to this conclusion. This measure would probably not have been accepted in a country with an established framework of democratic institutions. The Grand Chamber considered that national authorities were better placed to decide what measures needed to be taken in order to safeguard the democratic order of Latvia. It could not be considered that Latvia had overstepped its wide margin of appreciation.<sup>294</sup> This case was by no means clear-cut. Seven of the judges in the Grand Chamber dissented. Judge Rozakis wrote:

*The election of parliamentarians to express their electorate's expectations lies at the core of a representative democracy, whatever their opinions are, and however displeasing these latter are to other strata of society. In a system of sound democratic governance the criterion of eligibility cannot be determined by whether a politician expresses ideas which seem to be acceptable to the mainstream of the political spectrum, or loyal to the established ideologies of the State and society, but by the real representativeness of his or her ideas vis-à-vis even a very small segment of society. Accordingly, if a politician is prevented from representing part of society's ideas, it is not only he or she who suffers; it is also the electorate which suffers, it is democracy which suffers. [...] it is difficult to contend that the election of the applicant to the Latvian Parliament would have had adverse effects on the democratic stability of the country.*<sup>295</sup>

Many post-communist countries in East and Central Europe have imposed restrictions in the field of labour against those who collaborated with the former Communist regimes. Such legislation can be regarded as discrimination in employment or the exercise of a profession on the basis of political opinion<sup>296</sup>. The Court has dealt with this problem in some cases. In the case of *Sidabras and Džiautas v. Lithuania* the applicants were former employees of the Soviet Security Service, the KGB. Lithuania had enacted a law restricting the opportunities of former employees with the KGB to find jobs, due to their lack of loyalty to the state. Because of this law, the first applicant had been dismissed from his post as a tax inspector and the other applicant had lost his job as a prosecutor. They were also banned from engaging in professional activities in parts of the private sector. The Court argued that such restrictions on a person's opportunity to find employment in the private sector cannot be justified in the same manner as restrictions on access to their employment in the public sector. The Court observed that the law was enacted almost a decade after Lithuania's independence. It found that the law lacked necessary safeguards for avoiding discrimination. The Court concluded that the measures taken by the Lithuanian authorities were disproportionate and found a violation of Article 14 taken in conjunction with Article 8.<sup>297</sup> It distinguished this case from *Vogt v. Germany*. This case concerned the dismissal of a teacher. The very nature of teaching posts involves the imparting of ideas and information on a daily basis. This was not the issue in this case. Neither the dismissal, nor the alleged inability to find employment amounted to a restriction on the applicants' ability to express their

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<sup>294</sup> *Ibid.* para. 134-135.

<sup>295</sup> Dissenting opinion of Judge Rozakis in the case of *Ždanoka v. Latvia*.

<sup>296</sup> *Sidabras and Džiautas v. Lithuania* para. 30.

<sup>297</sup> *Ibid.* para. 58-62.

views or opinions in the same extent as in *Vogt v. Germany*. Article 10 was not applicable in this case. The Lithuanian law did not encroach upon the applicants' right to freedom of expression<sup>298</sup> The circumstances in the case of *Rainys and Gasparavičius v. Lithuania* were similar. Mr. Rainys was dismissed from his job as a lawyer at a private telecommunications company and Mr. Gasparavičius was disbarred from his position as barrister. The measures taken against them were due to the same law as in the above mentioned case The Court found these measures disproportionate and found a violation of Article 8 about the respect for private life.<sup>299</sup> The case was not considered under Article 10. It has been proposed that such legislation can be characterised as discrimination in employment on the basis of political opinion<sup>300</sup>.

The case of *Rekvényi v. Hungary* concerned restrictions on the political activity of members of the armed forces, the police and security service They were not allowed to join any political party or to engage in any political activity. Amendments to the Hungarian Constitution with this effect had been adopted some months prior to the second democratic parliamentary elections in 1994. The Court said that it is a legitimate aim to have a politically neutral police force. The Communist party ruled the country from 1949 to 1989. Membership of this party was almost compulsory for persons working in certain spheres of the society, this was especially so for members of the police force. Party membership of these civil servants guaranteed that the political will of the Communist party was directly implemented. Against this historical background, the relevant measures taken in Hungary in order to protect the police from the direct influence of party politics can be seen as answering 'a pressing social need' in a democratic society. States have a legitimate interest in consolidating and maintaining democracy. They may introduce constitutional safeguards in order to protect democracy. Such a safeguard can be the restriction of political activities of police officers. Despite the wording of the law, there was not an absolute ban on political activities of police officers. They remained entitled to undertake some activities enabling them to articulate their political opinions and preferences. The restrictions were therefore not excessive. There was no violation of the Convention.<sup>301</sup> Judge Fischbach wrote in a dissenting opinion:

*I can see no convincing argument which, in a pluralist, democratic society, could justify a ban on joining a political party. On the contrary, I consider that the unhappy experiences suffered under the communist regime ought to encourage political leaders to advocate a fresh approach so that the democratic process can be consolidated and the future prepared for in a spirit of open-mindedness and tolerance. As the police are now no longer at the service of the communist party, but of democracy, it is essential that change be accompanied by an approach fostering awareness of democratic pluralism through divergent political views that fuel debate over ideas.*<sup>302</sup>

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<sup>298</sup> *Ibid.* para. 70-71.

<sup>299</sup> *Rainys and Gasparavičius v. Lithuania* para. 36.

<sup>300</sup> *Ibid.* para. 28.

<sup>301</sup> *Rekvényi v. Hungary* para. 46-48.

<sup>302</sup> Partly dissenting opinion of Judge Fischbach in the case of *Rekvényi v. Hungary*.

An employee has an obligation to be loyal to his employer. This duty must be balanced against his right to freedom of expression. His right to participate in a general political debate will usually prevail over his obligation of loyalty to his employer, but the limits have not been established. Some posts at various NGO:s: political parties, trade unions and religious organisations, require that the employees share the values of the organisation.<sup>303</sup> It is unclear whether an employee can be bound by a contract to restrain his right to freedom of expression<sup>304</sup>.

## 4.4 Dissolution of a Political Party

Political debate is at the very core of the concept of a democratic society and political parties make an irreplaceable contribution to this debate. They represent the different shades of opinion, which is found within a country's population and play a vital role in a democratic society. They ensure pluralism and the proper functioning of democracy; there can be no democracy without pluralism of opinion. The activities of a political party form part of a collective exercise of freedom of expression.<sup>305</sup>

Some parties pursue aims that are incompatible with the concept of a democratic society. The authorities of a state might want to prevent them from achieving their aims. Article 17 may be invoked by the state as a defence for dissolving a political party that uses illegal or undemocratic methods or encourage the use of violence with the aim of undermining the democratic and pluralist political system of a state. The same applies to parties that adhere to a racist ideology or if their political objectives are likely to destroy the rights and freedoms of others.<sup>306</sup> Totalitarian movements can be a threat against the democratic society. They can make benefits from the democratic society which they want to destroy. If such a party comes to power, it is not unlikely that it will abolish democracy. There are examples of this in the European history of the 20th century.<sup>307</sup> It must always be remembered that political parties play an important role in a democratic society and interferences by state authorities with the internal affairs of an opposition party call for close scrutiny<sup>308</sup>. Drastic measures, such as the dissolution of an entire political party and a disability barring its leaders from carrying on any similar activity for a specified period, may be taken only in the most serious cases.<sup>309</sup> A decision to dissolve a political party is a very drastic measure and the Court has only dealt with the issue in a handful of cases. In the 1950s, the Commission rejected an application by the German Communist party against the decision by the German Constitutional court to declare it

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<sup>303</sup> H. Danelius, *Mänskliga rättigheter i europeisk praxis: En kommentar till Europakonventionen om de mänskliga rättigheterna*, 310.

<sup>304</sup> R. Clayton and H. Tomlinson, *The Law of Human Rights*, 1061.

<sup>305</sup> *United Communist Party of Turkey and Others v. Turkey* para. 43-44.

<sup>306</sup> *Ibid.* para. 23.

<sup>307</sup> *Refah Partisi (The Welfare Party) and Others v. Turkey* para 99.

<sup>308</sup> See *Castells v. Spain* para. 42.

<sup>309</sup> *Refah Partisi (the Welfare Party) v. Turkey* para. 100.

anti-constitutional. The Commission applied Article 17 and rejected the application. It was found that the aim of the party was to establish the dictatorship of the proletariat through a proletarian revolution. The Commission argued that this policy was not compatible with the Convention and it did not deserve its protection.<sup>310</sup>

In the case of *United Communist Party of Turkey and Others v. Turkey*, a political party had been dissolved by the Turkish Constitutional Court. The reason behind this decision was that it contained the word “communist” in its name and it allegedly promoted separatism. The Court rejected the arguments put forward by the government justifying the decision. There was no evidence that the party represented a real threat to the Turkish society on the sole basis of its communist name and it was not established that the party promoted separatist violence. To hinder a political group solely because it seeks to debate in public the situation of part of the State’s population cannot be justified in a democratic society. The party was trying to find a solution on the Kurdish question and the measures against it were disproportionate to the aimed pursued and unnecessary in a democratic society.<sup>311</sup>

The Court came to the opposite conclusion in the case of *Refah Partisi (the Welfare Party) and Others v. Turkey* concerning the decision by the Turkish Constitutional Court to dissolve one of two parties in the ruling coalition government. The party programme and the accumulation of acts and speeches by its members made it plausible that the party pursued aims that were against the Convention. It intended to introduce a regime based on the Islamic *sharia* law. The party did not exclude the possibility to use force in order to implement its policy. Therefore, the Court found no breach of the Convention.<sup>312</sup> The Court stated in this case:

A State cannot be required to wait, before intervening, until a party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of democracy, even though the danger of that policy for democracy is sufficiently established and imminent<sup>313</sup>.

In the case of *Christian Democratic People’s Party v. Moldova*, a political opposition party with approximately ten percent of the seats in parliament was temporarily banned. The government had proposed the introduction of Russian as a compulsory subject for schoolchildren, a proposal the Christian democrats opposed. They organised protest rallies against it on a square outside the parliament. On the eve of the local elections, the Ministry of Justice banned the party temporarily. The Court rejected the arguments put forward by the government, justifying this decision, that the gatherings were organised without prior authorisation, children were present and some statements made at the gatherings amounted to incitement of violence. The Court argued that only very serious breaches endangering political pluralism

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<sup>310</sup> *The Communist Party v. Germany* as referred in C. Ovey and R. White, *Jacobs & White European Convention on Human Rights*, 362.

<sup>311</sup> *United Communist Party of Turkey and Others v. Turkey* para. 54-61.

<sup>312</sup> *Refah Partisi (the Welfare Party) and Others v. Turkey* para. 135.

<sup>313</sup> *Ibid.* para. 102.

or fundamental democratic principles could justify a ban on the activities of a political party. The meetings were entirely peaceful, the incitement to violence consisted in singing of a fairly mild student song. The Court also took into consideration the chilling effect a ban of a political party has on future expressions of political opinions and found a violation of the Convention.<sup>314</sup>

## 4.5 Negative Right to Freedom of Assembly and Association

Private employers are not bound by the Convention, but the Contracting states have a duty to enact labour legislation, which is in compliance with the Convention. In the case of *Young, James and Webster v. the United Kingdom*, the three applicants had been dismissed from their jobs at the British Rail. A closed shop agreement had been concluded between the employer and three trade unions. The agreement required employees to join one of these unions. The applicants refused to join any trade union and were consequently dismissed. They argued that the dismissal amounted to a violation of Article 11. The Court did not answer the question if the Convention included a right not to be compelled to join an association. It noted that the negative right to freedom of association had been excluded from the Convention when it was drafted. The Court stated that the threat of dismissal involving loss of livelihood is a most serious form of compulsion. Union membership was not a requirement when the applicants were first hired. In this circumstances, such a form of compulsion strikes at the very substance of freedom of association. Two of the applicants opposed the policies of the trade unions. One of them opposed to the political affiliations of the trade union. The applicants had to support an organisation, whose aims they did not support. The Court found that the measures taken by the British authorities were disproportionate and that the United Kingdom had overstepped its margin of appreciation. Consequently, it found a violation of Article 11.<sup>315</sup>

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<sup>314</sup> *Christian Democratic People's Party v. Moldova* para. 71-78.

<sup>315</sup> *Young, James and Webster v. the United Kingdom* para. 55 and 65.

# 5 Positive Obligations

## 5.1 Positive Obligations

The object of Article 10 is to protect the private individual against arbitrary interference by public authorities with his right to express views and to hold opinions. Nevertheless, the effective protection of freedom of expression creates positive obligations on the state. A genuine and effective exercise of the freedom of expression does not depend merely on the states duty not to interfere. Sometimes the state has an obligation to take positive measures of protection, even in the sphere of relations between individuals. In determining whether a positive obligation exists, a fair balance has to be struck between the general interest of the community and the individual. A positive obligation on the state must not be impossible to fulfil; or impose a disproportionate burden on the authorities.<sup>316</sup> The state has an obligation to enact domestic legislation protecting freedom of expression<sup>317</sup>. Such legislation must protect the right of private individuals to express opinions on matters of public interest from attack by political opponents. The state must further not hinder the distribution of newspapers and it must ensure that the free flow of information and ideas of public interest is not hindered by political opponents.<sup>318</sup> States must protect those who use their right to freedom of expression against unlawful acts of violence. States must also effectively investigate attacks on those who have used their right to freedom of expression.<sup>319</sup> It must be safe to express a political opinion. There is an obligation on the state to protect politicians against physical attacks.

In the case of *Özgür Gündem v. Turkey*, the Court found a violation of Article 10. The Turkish authorities had failed to protect a newspaper and its journalists against attacks involving violence. The Court stressed that the government's strongly held conviction that the newspaper was a propaganda tool for the PKK would not provide a justification for failing to protect the newspaper against violence even if the accusation were true<sup>320</sup>.

As has already been explained there is a close connection between the freedom of peaceful assembly and freedom of expression. This is especially important for demonstrations. The right to peaceful assembly includes the right to demonstrate. The main difference between freedom of expression and freedom of peaceful assembly two freedoms is that a demonstration is a collective expression of a political opinion. The case of *Plattform "Ärzte für das Leben" v. Austria* concerned an association of doctors who were campaigning against abortion. The association held two demonstrations which

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<sup>316</sup> *Özgür Gündem v. Turkey* para. 42-43.

<sup>317</sup> *VgT Verein gegen Tierfabriken v. Switzerland* para. 45.

<sup>318</sup> H. Danelius, *Mänskliga rättigheter i europeisk praxis: En kommentar till Europakonventionen om de mänskliga rättigheterna*, 307.

<sup>319</sup> *Özgür Gündem v. Turkey* para. 45.

<sup>320</sup> *Ibid.* para. 46.

were disrupted by counter-demonstrators despite the presence of large contingent of police. The Court held that a demonstration may annoy or give offence to opponents to the ideas or claims by its participants. They must, however, be able to hold the demonstration without fear that they will be subjected to physical violence by their opponents; it would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. The right to counter-demonstrate cannot extend to inhibiting the exercise of the right of others to demonstrate. Genuine effective freedom of peaceful association cannot be reduced to a mere duty on the State not to interfere. The Contracting States have a duty to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, but they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used. The Court found no violation of the Convention since the state had taken measures to protect the demonstration.<sup>321</sup> The same arguments apply to freedom of expression under Article 10. Those who express political opinions on highly controversial issues must be able to do so without having to fear that they will be subject to physical violence. The states have a positive obligation to protect individuals who express political opinions, but they cannot give an absolute guarantee that no physical attack will not occur. The measures taken must be reasonable and appropriate. The state has an obligation to take measures, but not as to the results. It is obvious that there are limits as to what a state can do to protect individuals against sudden attacks. The resources are limited and the state must make certain choices, but it is especially important to protect politicians during an election campaign. The wide freedom of political expression is even wider during an election campaign<sup>322</sup>. The positive obligations must also be broader before general elections in order to ensure the free expression of the people in the choice of legislature.

Only states can breach the Convention, but Contracting States have a duty to enact legislation protecting the right to freedom of expression in other spheres than the one for which the state has a direct responsibility. The state must enact labor legislation which will secure freedom of expression for an employee against unreasonable demands from his employer. A private employer has the right to demand that his employees are loyal to the company. Freedom of expression can often be restricted in voluntary employment contracts. The state has a positive obligation to ensure that restrictions on the freedom of expression of employees do not transgress a certain limit.<sup>323</sup>

Some commentators believe that a state has an obligation to enact laws that will force mass media to publish replies or rectifications on the ground of a civil claim or in combination with a criminal conviction for insult<sup>324</sup>. It has

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<sup>321</sup> *Plattform "Ärzte für das Leben" v. Austria* para. 32-39.

<sup>322</sup> *See Bowman v. the United Kingdom* para. 42.

<sup>323</sup> *Rommelfanger against the Federal Republic of Germany* p. 9-10.

<sup>324</sup> P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), 560.

also been argued that a person who is a target for serious allegations in the press must be allowed to comment on the accusations<sup>325</sup>.

The positive obligation of the state to protect the right of one's private life under Article 8 is wider than its positive obligation under Article 10. The state has a positive obligation to enact laws protecting private life and the right to control the use of one's image. This obligation is not absolute. The interest of freedom of expression has to be balanced against the interest of an individual for protection of his private life. When photos contribute to a debate of general interest, this interest usually prevails. The duty of the state to protect the right of an individual to his private life is less wide concerning politicians and other persons who exercise official functions. Politicians and other celebrities must have a reasonable right to be protected against intrusions in private life such as the publication of images containing very personal or even intimate "information" of an individual.<sup>326</sup> The Swedish Chancellor of Justice has suggested that the states' positive obligations extend to enactment of legislation prohibiting the publication of untruthful aspects on sensitive private matters<sup>327</sup>.

A state is under the obligation not to hinder the creation of a party or the election campaign of candidates from that party.<sup>328</sup> It may also be obliged to impose a duty on political parties to respect democratic principles<sup>329</sup>.

Lastly, the Contracting States have an obligation under Article 3 of Protocol No. 1 to hold free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

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<sup>325</sup> *Prager and Oberschlick v. Austria* para. 37.

<sup>326</sup> *Von Hannover v. Germany* para. 59-60 and 72.

<sup>327</sup> G. Lambertz, "Tryckfriheten ska skydda privatlivet" *Aftonbladet* 10 September 2006.

<sup>328</sup> P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), 656.

<sup>329</sup> *Refah Partisi (the Welfare Party) and Others v. Turkey* para. 103.

# 6 Analysis

## 6.1 Introduction

It is a delicate task to balance the right of the individual to speak freely without the restraint of possible criminal proceedings due to his expressions, with the interest of the state, or the public as a whole, to have a stable and peaceful society. The task is even more delicate when balancing competing interests of different individuals. A total agreement cannot be found on where to strike the proper balance; there will always be those who consider that the state must have a wide discretion in limiting freedom of expression for the protection of some kind of higher value. Others believe that the right to freedom of expression must be unrestricted.

Article 5 of the Vienna Declaration and Programme of Action states that all human rights are universal, indivisible, interdependent and interrelated. There is further no hierarchy between the different rights I agree with this position. The problem arises as to what constitutes rights and duties. In my view, they must be justiciable, otherwise we cannot speak about rights, but merely about goals to strive for. I make a fundamental difference between negative and positive rights; and between civil and political rights and economic and social rights. It does not cost anything for the state to abstain from censorship, but it must be the decision of the voters to decide the amount of money to be spent on support for the cultural sphere of society.

I will try to explain how I believe the balance should be struck between protected speech and unprotected speech. A starting point must be the fundamental feature of freedom of expression for a democratic society. Pluralism of opinion, tolerance and broadmindedness are recognised hallmarks of a democratic society. The free exchange of different ideas is of paramount importance for the development of a real democracy. This gives the speaker the favour of doubt. I do not desire an unrestricted right to freedom of expression, since this could lead to complete anarchy or an abolition of democracy, but the advantages of a vivid public debate on all political, philosophical and historical matters usually outweigh all disadvantages. History has shown that the potential harm of some expressions is of a nature that cannot be disregarded from. There are interests that prevail over the right of the individual to freedom of expression. The potential loss of political freedoms is such an interest that justifies governmental interference with the liberty of an individual. The reasons for any restriction must, however, be convincingly established and the measures imposed must be proportional to the aim pursued.

I believe that liberty is something that is inherent in the human nature. Liberty is a part of the rational natural law, applicable to all human beings. All physical persons are entitled to liberty, and the right to freedom of expression is included in this liberty. Freedom of expression is an end in

itself. I support the liberty model justifying why freedom of political expression should receive special protection.

The test I propose on how to balance competing interests consists of three elements: a subjective and an objective element; and because of the fundamental feature of this right for the democratic society, a general rule stating that restrictions on this freedom may only be imposed as a last resort. It is a slightly modified model of the Brandenburg test on the interpretation of restrictions allowed under the First Amendment to the American Constitution as proposed by professor Gerhard Gunther (see chapter 2.2) and of John Rawls' proposal on the same issue (see chapter 2.1).

Limitations on the right to express a political opinion can only be acceptable in a democratic society if the government can prove:

- (1) that the speaker had the intent to incite his audience to harm, and
- (2) that there existed an imminent danger that serious harm would result from the expression and
- (3) that there is no alternative way to prevent this harm.

This test contains both a subjective and an objective element. The subjective element is that the speaker must desire serious harm; the objective element is that serious harm might be the result of the same expression.

There are worse evils than governmental interferences with the right to freedom of expression. A democratic state must have the possibility to prevent those who want to do away with democracy from achieving their aims. If democracy were lost, it would involve serious breaches of human rights, maybe for generations to come. The experiences from the fall of the Weimar Republic are frightening. Nevertheless, measures against undemocratic groups must be proportionate.

Even John Stuart Mill agreed that the right to freedom of expression might be restricted under some circumstances. He wrote: "*even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act*"<sup>330</sup>. The potential harm of an expression should guide the legislators and courts when they balance protected speech from unprotected speech. The loss of fundamental freedoms is a serious harm, but the serious harm does not need to be of such magnitude. The state may interfere with expressions that provoke violence, if there is an imminent threat that violence may be the result from the expression. The adjective imminent implies that the existence of serious harm does not have to be established with absolute certainty; a state may be justified in pre-emptive measures to prevent serious harm. The question now arises, what is serious harm? It cannot be defined in positive terms. A number of factors need to be taken into consideration: the type of expression, the medium in which the expression was communicated,

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<sup>330</sup>J. S. Mill, *On Liberty*, 119.

the position of the speaker, the audience; and the target for the expression. The principle of proportionality must also be applied, in which the objective of the government for the interference and the impact of the interference on the speaker must be considered.

The potential harm one person can inflict on the society through the expression of his opinions is very insignificant. The state should, in principle, only interfere with the right of one individual to express his opinions when these opinions are targeted against discernable individuals; and if there is an objective ground for believing that the individual would experience serious harm as a result of these expressions.

## 6.2 Democracy as the Guiding Principle

The Court has not given a comprehensive definition of what constitutes a democratic society. There might be good reasons for this; maybe it is impossible to define democracy in positive terms. Interferences with the right to freedom of expression must be justified with what is necessary in a democratic society. It should be the role of the Court to define the proper meaning of these terms.

According to Article 1 of the Convention, Contracting States shall ensure to everyone within their jurisdiction the rights and freedom defined in it. A state would breach the Convention if it did not act against those who want to abolish the democratic society. The Court recognised that democracies must be capable of defending themselves in the case of *Vogt v. Germany*<sup>331</sup>. The decisive question is when the states may interfere with the right to freedom of expression of those who want to do away with democracy. To nip in the bud or to wait until a real threat occurs? As to political parties, the Court has explained that a state cannot be required to wait, before intervening, until a party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of democracy<sup>332</sup>. According to Article 17, enemies to democracy cannot derive a right from the Convention to engage in activities aimed at the destruction of its rights and freedoms. I believe, like Judge Jambrek in his concurring opinion in the case of *Lehideux and Isorni v. France* that “[d]emocracies, unlike dictatorships, can cope with the sharpest controversies and promote what should be the democratic ideal”. A democratic society must be strong enough to endure criticism, even the propagation for the abolition of democracy. The best protection of a democratic society is democracy. Speech that oppose democracy is best met by more speech advocating the moral and cultural superiority of a democratic society. I would also like to add what Lord Steyn wrote: “people are more ready to accept decisions that go against them if

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<sup>331</sup> *Vogt v. Germany* para. 59.

<sup>332</sup> *Refah Partisi (the Welfare Party) v. Turkey* para. 102.

*they can in principle seek to influence them*”<sup>333</sup>. If the enemies to democracy are allowed to say their meaning, the risk that they will use violence to achieve their aims diminishes. Measures against them will create martyrs and lead to bitterness and hatred. In my view, there must be an imminent threat to the democratic society before a state may act against the enemies to democracy. I know that it is a difficult question and it is the big dilemma of the democratic society, but it is the most feasible way of dealing with enemies to democracy. It is the lesser of two evils, and there are reasonable arguments for the opposite position.

I believe that safeguards to democracy are inherent in the democratic system. Voters tend to gather in the political middle. A politician has to get the nomination of his party before he can be elected. The voters then have to vote for the party, and in a country with proportional electoral system, no political party will, usually, be able to form a majority government. Parties therefore have to find coalition partners. Democratic parties often refuse to co-operate with parties that do not respect democratic principles. The Hitler argument is always presented as a defence for restrictions on the right to freedom of expression, because he came to power through democratic elections. It is my contention that this happened in a situation in which many historical, social and political factors coincided. The democratic parties of Germany had failed to co-operate to solve Germany’s problems. Let us hope that democratic parties all over the world have learnt their lesson.

### **6.3 The ECtHR and the American Tradition in Freedom of Expression**

There have been proponents in the Court for the American approach to freedom of political speech. Judge Bonello declared that he supported the American clear-and-present-danger doctrine in a concurring opinion in the case of *Sürek v. Turkey (No. 2)*. Judge de Meyer has written at least two concurring opinions in which he supports an almost unfettered right to freedom of political expression. His concurring opinions in the cases of *Castells v. Spain* and *Lehideux and Isorni v. France* are examples of this position. The concurring opinion of Judge Pekkanen in the case of *Castells v. Spain* is also an example of the American tradition in free speech. It is my hope that they will influence the Court in adopting a more speaker’s friendly position.

One of the basic principles of the American approach to freedom of expression is that there is no such thing as seditious libel, not against the government and not against governmental institutions. In principle, the same

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<sup>333</sup> Lord Steyn in *R v. Secretary of State for the Home Department, ex p Simms* [1999] 3 WLR 328, 337 as quoted in R. Clayton and H. Tomlinson, *The Law of Human Rights*, 1007.

applies to criticism against civil servants, since they are the representatives of the government. It is impossible to defame the government, the parliament or the military. I believe that this should be a minimum standard for a democratic society. There can be no such crime as defamation of the government in a free society<sup>334</sup>. This is not the position of the Court, but Judge Pekkanen seems to support this idea. In a concurring opinion he wrote:

*Mr Castells was punished for holding the opinion that the Government was responsible for the incidents in question and publishing it. [...] For a finding of a violation of Article 10 (art. 10) of the Convention it is sufficient that Mr Castells was punished for criticising the Government when he had done so in a way which should be allowed in a democratic society.*<sup>335</sup>

The Court has stated that the authorities of a democratic state must tolerate criticism, even if it may be regarded as provocative or insulting,<sup>336</sup> but it has not excluded the possibility that a conviction for defamation of the government may be compatible with the Convention.

## 6.4 Hate speech

I will illustrate my position to how the state should react to hate speech by adducing some rather silly examples:

*All members of group X are thieves, paedophiles, rapists and guilty of spreading sexually transmitted diseases.*

This is an ignorant, irresponsible and highly questionable statement. Members of group X might justifiably be offended by these remarks, but at the same time, it is the opinion of the speaker. Freedom of opinion and freedom of expression are hallmarks of a democratic society. The state must not interfere with the moral autonomy of the individual unless there are compelling reasons. If the speaker has no intent to incite his audience to harm, the state must refrain from interfering with his right to freedom of expression, because there is no discernable victim. There is no conflict between different individuals that call for state-interference. However, if the speaker continues with the following statement:

*Mr. Y is a member of group X,*

the state may be justified in interfering with the right to freedom of expression of the speaker. Taken alone this statement is inoffensive, but together with the forgoing statement it will constitute a gratuitous attack on the reputation of Mr. Y. It is nothing but an insult used to denigrate and disparage him. The statement is targeted at Mr. Y and the previous statement

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<sup>334</sup> See J. Rawls, *Political Liberalism*, 342.

<sup>335</sup> Concurring opinion of Judge Pekkanen in the case of *Castells v. Spain*.

<sup>336</sup> *Özgür Gündem v. Turkey* para. 60.

about group X has been attributed to one discernable individual. It is an easy task to balance the competing interests of the two individuals: the interest of the speaker to say his opinion and the interest of Mr. Y not to be offended. The conviction of the speaker would not be a violation of his right to freedom of expression. The individualisation of the subject for offensive remarks does not have to be as blunt as my example. It is enough if the government can prove that a specific individual is targeted.

*Mr. Y is a thief, paedophile, rapist and guilty of spreading sexually transmitted diseases.*

This statement would normally also constitute a gratuitous attack on the reputation of Mr. Y. Nevertheless, if the statement is true and Mr. Y has been convicted for these crimes, the speaker should not be convicted, because the truth is a defence to actions for defamation.

It follows from the above mentioned that I do not support group libel laws against hate speech. I believe that such speech is best met by more speech advocating the moral and cultural superiority of the tolerant democratic society. Thomas Jefferson said in his First Inaugural Address in 1801:

*If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it<sup>337</sup>.*

Reason and open discussions are the best protections against ignorance and intolerance. I believe that group libel laws are contra productive. Even if prosecutions are rare, they will lead to bitterness and more hatred. I believe that the conviction of a person for expressing his views will not change his opinions, on the contrary; he will develop more hatred and seek revenge.

I support the view that it is “*better to allow those who preach racial hatred to expend their venom in rhetoric rather than to be panicked into embarking on the dangerous course of permitting the government to decide what its citizens may say and hear*”<sup>338</sup>. Sometimes individuals will transgress a limit to what is morally acceptable and offend people with their expressions, but it is better to accept that individuals make mistakes than to allow the state to control the opinions of the people. It is of more importance to have laws protecting the liberty of the individual than laws restricting the same liberty. Article 10 does not contain a right not to be exposed to political views that a person disagrees with. Those who hold political opinions must tolerate and accept the denial of their political views and even the propagation by others of doctrines hostile to their own.<sup>339</sup>

I support the struggle against intolerance and racism, but I do not share the common European opinion on how these views are best fought. One must

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<sup>337</sup> L. W. Levy, *Emergence of a Free Press*, 313.

<sup>338</sup> *Collin v. Smith* as quoted in Attanasio, Goldstein and Redlich 2000, 434.

<sup>339</sup> Compare *Murphy v. Ireland* para. 50

distinguish between speech and actions. It is not the verbal or written expression that should be punished, but any physical attack resulting from these ideas. Hate crimes can never be tolerated in a democratic society. They must be dealt with decisively. But there is another way to deal with hate crimes than to interfere with the fundamental right to freedom of expression: penalty enhancement for crimes committed. If a victim is targeted because of his race, nationality, religious beliefs, political views, sexual orientation, social class or other similar criteria, it should be an aggravating factor rendering extra punishment. It must also be noted that, according to the reasoning in the case of *Günduz v. Turkey*, speech that incite, promote or justify hatred against people on the ground of their sexual orientation is not included in the Court's definition of hate speech<sup>340</sup>.

## 6.5 Undemocratic Ideologies

The Court has stated that National Socialism is a totalitarian regime incompatible with democracy and human rights<sup>341</sup>. I agree. The same applies to Communism and religious fundamentalism. National Socialism and Communism are ideological brothers. The European history of the twentieth century has been shaped by their ideology of violence. Of course the views of neo-Nazis, communists and religious extremists 'offend shock and disturb'. It is standing case-law that freedom of expression 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 other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society<sup>342</sup>. It is unfortunate that the Court has not upheld this simple principle. Freedom only to speak inoffensively is no freedom.

The Holocaust, the industrialised extermination of the Jews as a race during World War II, is unprecedented in all its horror in the history of mankind. The denial or the revision of the existence of gas chambers is criminalized in many European states. It is not protected under Article 10 of the Convention. The Court has said that the Holocaust belongs to a category of clearly established historical facts, the denial of which is removed from the protection of the Convention.<sup>343</sup> I do not believe that it should be the role of the state to decide the correct interpretation of history. It is a fundamental feature of a totalitarian society.

The words of John Stuart Mill most not be forgotten:

*But the peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation – those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are*

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<sup>340</sup> See *Günduz v. Turkey* para. 22.

<sup>341</sup> *Lehideux and Isorni v. France* para. 53.

<sup>342</sup> See *Handyside v. the United Kingdom* para. 49.

<sup>343</sup> See *Chauvy and Others v. France* para. 69.

*deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.*<sup>344</sup>

## 6.6 Dissolution of a Political Party

When expressions made by an individual form part of a collective right to freedom of expression, the potential harm these expressions might inflict on the society grows. I can understand and maybe also agree with the conclusion of the Court to uphold the decision to ban the Turkish Welfare Party. This party pursued a policy that was incompatible with democracy and human rights. It appears that there was an imminent danger that it could achieve its aim. The party was one of two parties in the ruling coalition government. I do not agree with the decision of the Commission in the case of *the Communist Party v. Germany*, because there was no imminent threat that the party would achieve its undemocratic aims. This case must, however, be seen in the light of the ongoing Cold war of 1957 and the special situation with two Germanies.

## 6.7 The Importance of a Constitutional Court

The government occupies a dominant position in the society and the individual is subordinated to the will of the government. In order to balance the interest of the government and the interest of the individual to have his liberty, it is important that the constitution of every state includes a Bill of Rights ensuring the individual certain fundamental rights and freedoms with which the state must not interfere. These rights and freedoms may only be subject to clearly defined exceptions necessary in a democratic society. Any law affecting these rights and freedom must be subject to judicial review. It should be the role of a constitutional court to examine if a law restricting one of the fundamental rights or freedoms is necessary in a democratic society. All democratic states ought to have a constitutional court.

History has shown that governments may find good causes to restrict these fundamental freedoms in order to protect some kind of higher value. In the fight against terrorism, many states have enacted legislation against terrorism that would have been unthinkable a few years earlier. It is important that these laws are subject to judicial review. The danger with restrictions on the fundamental rights and freedoms is that we might end up on a slippery slope.

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<sup>344</sup> J. S. Mill, *On Liberty*, 76.

## 6.8 Transitional Period from Totalitarianism to Democracy

In a period of transition from a totalitarian regime to a pluralistic democracy, states may take measures for consolidation and maintenance of the democratic society. The Court has upheld the measures taken by the states with this aim in some cases, for example, *Ždanoka v. Latvia* and *Rekvényi v. Hungary*, but the practice of the Court has not been coherent<sup>345</sup>. A newly democratic society is fragile; and there will always be persons who were the beneficiaries of the undemocratic regime, who longs for a return to the “bad old days”. In a transitional period, measures must be taken to safeguard democracy. In Russia, the Communist party of the Soviet Union was declared illegal and its assets forfeited, but it was re-established only two years after the fall of the ‘evil empire’. I strongly disagree with the judgments of the Court in the *Rekvényi* and *Ždanoka* cases. I consider that a newly democratic state must be allowed to take measures for the protection of the fragile democracy, but these measures must be proportionate to the legitimate aim pursued. Once the democracy has been firmly established and the courts are able to uphold the rule of law, there is no need for special measures protecting democracy in newly democratic societies compared to “old democracies”. I agree with Judge Fischbach who wrote: “*I can see no convincing argument which, in a pluralist, democratic society, could justify a ban on joining a political party.*”<sup>346</sup> I also agree with Judge Rozakis who wrote: “*it is difficult to contend that the election of the applicant to the Latvian Parliament would have had adverse effects on the democratic stability of the country.*”<sup>347</sup> I was profoundly amazed at the judgment in the case of *Rekvényi v. Hungary*. It shows the downside of the principle of margin of appreciation. Why do the peoples of Eastern and Central Europe not deserve the same liberty as western Europeans? I would also like to stress my belief that it is predominantly positive for the maintenance of democracy if people engage in political activities and join political parties. It is the best protection democracy can get. It shows that they are not indifferent to democracy and the future well-being of their country.

## 6.9 Civil Servants

Freedom of political expression shall also apply to criticism against civil servants. They represent the state and as representatives of the state, they must endure harsh criticism. The state may only interfere with the right of an individual to criticise civil servants if the speaker knows that his statements are untrue or is reckless as to its truth

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<sup>345</sup> See section 4. 2. of this thesis.

<sup>346</sup> Partly dissenting opinion of Judge Fischbach in the case of *Rekvényi v. Hungary*.

<sup>347</sup> Dissenting opinion of Judge Rozakis in the case of *Ždanoka v. Latvia*.

Civil servants must, in principle, be free to express political opinions and to join political parties, but this question is more complicated than many other issues concerning freedom of expression. All employees have to be loyal to their employer and for civil servant this employer is the government. Whistle-blowers who reveal wrongdoings within the government play an important role in a democratic society; if there were no whistle-blowers, the public would be deprived of some of its possibilities to monitor the government. I agree with the decision of the Commission in the *Haseldine* case. A diplomat cannot express political opinions that deviate from the policy of his government; and at the same time be employed by the government, but I disagree with the decision in the case of *E. S against Germany* about the dismissal of an admiral for criticising the defence policy of the government. His criticism solely concerned domestic policies.

The Convention does not give a right of recruitment to civil service. Some positions may require that civil servants share democratic values and are loyal to their state. An active communist could not have worked for the intelligence or the foreign ministry of a Western European state during the Cold war; and I doubt whether it would be wise to let racists work for the Migration Board deciding on issues concerning immigrants.

## 6.10 Freedom of the Press

The Court has often stated that it is incumbent on the press to impart information and ideas on all matters of public interest<sup>348</sup>. What will happen if the press refuses? In my opinion, it is the right of the press to impart information and ideas on all matters of public interest and not its duty. There can be no duty on the press to impart information. Freedom of the press includes full editorial freedom of the editor to determine the contents of the newspaper. The state must not impose a duty on the press to impart information; it is not compatible with my perception of the freedom of the press. This “duty” is not justiciable. It may, however, be regarded as a moral duty.

## 6.11 Censorship

Censorship is not compatible with my perception of a democratic society<sup>349</sup>. It is a typical feature of a dictatorial society. Live drama has ceased to be subject for censorship a long time ago. The same should apply to cinema, but many Western democracies still have systems for cinema censorship. Directors must have full freedom to decide the contents of a film. Artistic freedom must include the right of the author not to have his work massacred by the state. I do not understand why movies should be subject to different

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<sup>348</sup> See *Observer and Guardian v. the United Kingdom* para. 59 (b).

<sup>349</sup> Compare *Cyprus v. Turkey* para. 254.

treatment than printed material. However, I do not oppose a voluntary classification system operated by the entertainment industry itself.

Prior restraints preventing publication are not completely incompatible with a democratic society. The dangers inherited in them are of a nature that call for careful scrutiny<sup>350</sup>, but they might be imposed against the publication of material received in confidence and for the protection of national security. A publication of material concerning the defence of a state might inflict serious harm to the society, justifying the state to impose this kind of measures.

## 6.12 Decriminalisation of Defamation

I have considered if defamation and slander ought to be decriminalised. There are reasonable arguments for such a decriminalisation. It is disproportionate to sentence someone to jail for defamation. The victims are best served through public apologies and civil claims. Defamation is not criminal in the United States and in many other common law countries. Victims of defamation have to file civil claims against journalists or others who have spread defamatory expressions. The cost of a civil law suit might, however, deter victims from claiming their right to just compensation. This is why I do not recommend a complete decriminalisation of defamation.

## 6.13 Public Service Broadcasting

Questions on broadcasting generally fall outside the scope of this thesis, but I take the opportunity to explain that I do not oppose state run television networks, as long as there are private alternatives. Public television and radio channels may in some cases be to prefer before commercial channels. If we start from the self-government model justifying why freedom of political speech should receive higher protection than private speech, there might in fact be a positive obligation on the state to run TV and radio stations. In order for the voter to participate effectively in the democratic process, it is important that he is well-informed. He must get information on what the government and opposition are doing in order to make his mind up as to what party, or candidate, to support in the elections. The government should ensure that the voter has a possibility to receive expressions that further the democratic process. It is problematic to decide what kind of speech that fosters the democratic process and what kind of speech that is private. We must remember the words of David Pannick QC in his criticism of the judgment in the case of *Otto-Preminger-Institut v. Austria*:

[I]t is no business of the judiciary to assess whether a film makes a ‘contribution to any form of public debate capable of furthering progress in human affairs’. The

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<sup>350</sup> See *Observer and Guardian v. The United Kingdom* para. 60.

central purpose of freedom of expression is to allow readers, viewers and listeners to make up their own minds about the value of a work.<sup>351</sup>

It is clear that parliamentary debate fosters the democratic process; the same applies to news reporting about matters of public interest, whatever this means. There is no standard explanation of the term 'public service'. Let us assume that it means the public broadcasting of programmes with the aim of improving the society by informing the people. Parliamentary debate, news and documentaries and maybe information for and on minority groups and possibly cultural events could be included in the concept of public service. There is a danger that the values of the broadcaster are imposed on the viewer, but as long as there are private alternatives and the public service channels try to apply a principle of neutrality; the government can run public service channels. It must, however, be borne in mind that abuse of a dominant position is not compatible with the standards of a democratic society. Because of the connection between democracy and public service, it ought to be funded directly from the national budget. I believe that entertainment should be left to private owned enterprises or channels that are funded from the market.

## 6.14 Financial Support for Political Opinions

Many Western democracies have introduced restrictions on the amount of money that a person may spend in support for a particular candidate before general elections. The Court found a breach of Article 10 in the case of *Bowman v. the United Kingdom* where the applicant had spent more than five British pounds informing the public about the views on abortion taken by the candidates in a constituency. The reasons behind such legislation is that the state want to prevent corruption and ensure a proper balance between different candidates. I see nothing wrong in supporting a candidate financially if I share his values and want to see them implemented in the society. No one shall be compelled to express a political opinion or make public what party he supports. In the interest of democracy it must be allowed to support any candidate with any sum of money. If one assumes that good ideas will prevail over bad ideas on the free market of ideas, such contributions is of minor importance for the election results. Two interests have to be balanced: the secrecy of the polls and the fight against corruption. In order to combat corruption I reluctantly accept legislation demanding that candidates have to make public the names of persons who make contributions exceeding a certain limit. In the case of *VgT Verein gegen Tierfabriken v. Switzerland* the Court did not exclude that a prohibition of political advertising was compatible with Article 10.<sup>352</sup>

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<sup>351</sup> D. Pannick, "Religious Feelings and the European Convention on Human Rights" *Public Law*, 8.

<sup>352</sup> *VgT Verein gegen Tierfabriken v. Switzerland* para. 75.

## 6.15 Commercial Expressions

Commercial expressions receive a lesser degree of protection than political and artistic expressions. I agree with this position. Nevertheless, I do not think that the possibilities to advertise and to promote legal products or services should be restricted, unless there are compelling reasons. The state should, in principle, not interfere with commercial speech as long as the advertisements are fair and accurate.

## 6.16 Proposed New Wording of Article 10

I do not think that the Court has struck the balance between the fundamental right to freedom of expression of the individual and the interest of the state correctly. The margin of appreciation of the state is too wide, and the legitimate aims in Article 10 (2) are too widely drawn and not clearly defined. Therefore the legitimate aims for which freedom of expression might be justified by the state ought to be reduced.

Freedom of expression includes freedom of speech, freedom of assembly and freedom of religion. All these freedoms guarantee pluralism of opinion in the society. These freedoms should be joined under one article. It will secure a uniform interpretation of the freedom rights in the Convention. It would be of little importance whether an expression is made under the protection of freedom of speech or freedom of religion. It would be almost impossible to come to different conclusions about almost identical expressions. The Supreme Court of Sweden has recently dealt with two cases concerning offensive remarks about homosexuals. In the first case, a Pentecostal preacher was acquitted, because he had made his remarks in church before his congregation and was thus protected under the right to freedom of religion, which is *lex specialis* to freedom of expression<sup>353</sup>, whereas in the second case, members of an extremist and xenophobic political party who had made similar remarks at a school were convicted<sup>354</sup>. If freedom of expression and freedom of religion were joined under one article, it would make such discrepancies more unlikely to occur. I have already explained my position to 'hate speech' and I do not believe that any of the defendants should have been convicted. They had only expressed their 'offending, shocking and disturbing' opinions on matters of general interest.

Present wording:

### Article 9

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief,

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<sup>353</sup> *NJA 2005 s. 805.*

<sup>354</sup> *NJA 2006 s. 467.*

and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

#### **Article 10**

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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

#### **Article 11**

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Proposed wording:

Everyone has the right to freedom of expression. This right includes freedom to hold opinions and to seek, receive and impart information

and ideas without interference by public authority and regardless of frontiers.

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join political parties and trade unions. No one may be compelled to belong to an association or to take part in an assembly.

Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

The exercise of these freedoms may be subject to such interferences as are prescribed by law and are necessary in a democratic society, in the interests of national security, for the prevention of crime or public disorder, for the protection of the reputation or the rights of others or for preventing the disclosure of information received in confidence.

### **6.16.1 To Seek Information**

Article 19 of the UDHR and Article 19 of the ICCPR both protect the right to seek information. In order to get a uniform interpretation of the three international instruments: the UDHR, the ICCPR and the ECHR, the words 'to seek' should be included in the Convention. It might protect journalists in the newsgathering process, but it will not dramatically change the interpretation of Article 10. The right to seek information is already included in the interpretation of the right to respect for private life under Article 8. The seeking of information is a part of the freedom to hold and to impart an expression because it precedes the formation of an opinion.<sup>355</sup> It would therefore be reasonable to include the right to seek information in the Article of the Convention protecting the right to freedom of expression.

### **6.16.2 Duties and Responsibilities**

The most radical proposal is the delete of the reference to duties and responsibilities in the present Article 10 (2). The reason for this proposal is that I would like to make the European approach to freedom of political expression more similar to the American approach. It is a complete break with the European tradition in freedom of expression and the paternalistic influence from Rousseau. The right to freedom of expression is a part of the liberty of the individual. It is a birthright. There can be no question of duties

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<sup>355</sup>P. van Dijk and G. J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (1990), 558.

and responsibilities in exercising a birthright. Nevertheless, the exercise of this right may cause harm to other people; or to the society as a whole. The potential harm must be the decisive point on where to draw the line between protected and unprotected speech. The state shall not intrude with the right to freedom of expression, unless there is an imminent danger that serious harm will result from the exercise of this right. The imminent danger of potential harm to the society prevails over the right of the individual to express his opinion if the expression will incite violence or the loss of political liberties or if the speaker intrudes in the liberty of another individual. It must be the role of the state to find solutions to problems emerging from conflicting interests of individuals, who are trying to define their rights.

The context of the situation in which the expression is made is the central issue on where to strike the correct balance between protected speech and unprotected speech, but it is not a question of duties and responsibilities of the speaker.

### **6.16.3 Licensing of Broadcasting**

Most European states have big national broadcasting corporations. This is a difference between the American and European approaches to freedom of expression. There used to be a state monopoly in broadcasting in many European states. This was especially true when the Convention was drafted. The Court does not consider that state monopolies are compatible with Article 10 of the Convention. State monopoly on broadcasting, which was the only means of television and radio available in many European countries for decades, is no longer compatible with the Convention. It involves the total impossibility of broadcasting otherwise than through a national station. This constitutes an interference with the freedom of expression which is not necessary in a democratic society.<sup>356</sup> The development in the field of distribution of radio and television makes the provision in Article 10 (2) that states are allowed to require the licensing of broadcasting, television and cinema enterprises out of date. The state is the ultimate guarantor of pluralism, which is a fundamental feature of a democratic society. It should be the role of the state to promote as many alternatives as possible. Only technical limitations may justify a governmental interference with the possibilities of a private company to start a radio or TV channel. The state must justify this interference with the need to prevent public disorder.

It is further only absurd to uphold a legal order, which enables the state to require the licensing of cinema enterprises. In a democratic state, individuals must be able to start cinema enterprises without governmental interference. Such are the demands of a pluralistic society. When the Convention was drafted in the 1950s, cinema still played an important role in informing the audience on matters of general interest. Few people had access to television;

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<sup>356</sup> *Informationsverein Lentia and Others v. Austria* para. 39.

and newsreels provided information to the general public. The situation has now changed dramatically. The problem now is not that the state might want to prevent cinema enterprises from starting, but their financial difficulties that might be a threat to the pluralist society.

#### 6.16.4 Interferences

Restrictions on the right to the freedoms under the proposed article shall be called interferences. The present Article 10 (2) mentions the words formalities, conditions, restrictions and penalties; Article 9 (2) speaks about limitations and Article 8 (2) mentions the word interference. This is also the word used by the Court in its four-steps test when determining if a measure is necessary in a democratic society.

#### 6.16.5 Health and Morals

The word health ought to be removed from the list of aims justifying interferences with the right to freedom of expression. ‘Health’ appears in the preparatory work to the Convention for the first time in a proposal by the Committee of Experts that prepared the Convention. There is no explanation as to why health should be included as a legitimate aim for restricting freedom of expression.<sup>357</sup> The UDHR does not allow a restriction with this right with a reference to protection of health. It was, however, proposed by the Soviet representative in the drafting committee, which prepared the UDHR, as a legitimate aim for restricting the freedom rights, because freedom of thought and religion were “dangerous to the moral education of youth and to health and respect for others.”<sup>358</sup> In the case of *Barthold v. Germany*, the respondent state unsuccessfully tried to justify a rule prohibiting veterinary surgeons from advertising with the protection of human health<sup>359</sup>. There has not been any case before the Court where a state has been able to justify an interference with the right to freedom of expression on the ground that an impugned expression threatens health; and it is unlikely ever to occur. This aim appears superfluous and ought to be deleted from the Convention.

It can hardly be argued that pornography fosters the democratic process, and it has very little to do with the search for truth, but the inclusion of pornography as protected speech may well be justified from libertarian grounds. What rights do other people have to interfere with the individual’s right to take his own moral decisions? It violates the individual’s right to choose his sexual life-style. The aim under Article 10 (2) of protection of public morals as a justification for interferences with the individual’s right to freedom of expression is the most repulsive imaginable. States must not interfere with

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<sup>357</sup> *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights* vol. III, 286.

<sup>358</sup> Å. Samnøy, “Origins of the Universal Declaration” *The Universal Declaration of human Rights A Common Standard of Achievement*, 16.

<sup>359</sup> *Barthold v. Germany* para. 50.

expressions on grounds of public morality. The individual must have the liberty to act as he wants, as long as he does not inflict serious harm on society or on other individuals. The decision by the British authorities not to give the film in *Wingrove v. the United Kingdom* a certificate for distribution, has been criticised in the following terms: "To prohibit a film from being seen in private because the ideas which it contains may offend the religious beliefs of others is impossible to reconcile with a developed concept of free speech"<sup>360</sup>. It is difficult not to agree. In a democratic society, there can be no pressing social need justifying interferences with pornography, showing consenting adults to a willing audience<sup>361</sup>. If I do not like the contents of a magazine or a film, I will not consume it. It is as simple as that! It is not the task of the authorities in a democratic society to act as arbiters of good taste.

Many European states still have laws prohibiting blasphemy. It is true that the application of these laws is increasingly rare,<sup>362</sup> but laws against blasphemy are incompatible with the democratic society. They are remnants from the *Ancien Régime* when the church could do no wrong and matters of religion were not considered subjects fit for vulgar persons or common meetings. No religious dogma is so sacred that it cannot be subject to complete denial. The Court has stated that those who hold religious beliefs must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their own<sup>363</sup>. Any law against blasphemy ought to be consigned to the legal dustbin immediately!

### 6.16.6 Territorial Integrity

Territorial integrity as one of the legitimate aims for interferences with the right to freedom of expression should be deleted from the Convention. There is nothing wrong in propagating for the independence, cessation or autonomy of a region of a country, as long as it is done through peaceful and democratic means. It is interesting to note that this aim was included in the Convention on a Turkish proposal. The Turkish representative to the Committee of Experts stressed that there was no connection between his proposal and the question of the rights of national minorities. The Committee agreed to this proposal on the clear understanding that it did not permit a restriction on the rights of national minorities to press their views by democratic means.<sup>364</sup> The Turkish government has later often argued before the Court that an impugned expression concerning the Kurdish

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<sup>360</sup> D. Pannick, "Religious Feelings and the European Convention on Human Rights" *Public Law*, 10.

<sup>361</sup> Compare *Dudgeon v. the United Kingdom* para. 69.

<sup>362</sup> See *Wingrove v. The United Kingdom* para. 57.

<sup>363</sup> *Murphy v. Ireland* para. 50.

<sup>364</sup> *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights* vol. IV, 24 ff.

question threatens the integrity of the state<sup>365</sup>. The state must, however, be able to restrict the right to freedom of expression when undemocratic means are used in order to propagate for the independence of one of its regions through the use of violence. A state must justify such restrictions with a reference to the interests of national security or public safety. It must not be forgotten that the state has an obligation to protect all persons within its jurisdiction against violence. If undemocratic means are used in the fight for independence of a particular territory, there is an imminent danger that serious harm will result from these means. The state is therefore justified in restricting the right of freedom of expression if separatists use undemocratic means in order to achieve their aims.

### 6.16.7 The Judiciary

One of the legitimate aims for restricting freedom of expression in Article 10 (2) is for maintaining the authority and impartiality of the judiciary. This aim ought to be removed from the Convention. Courts play an important role in a democratic society governed by the rule of law. They are the guarantors of justice. Judges have the power to put an individual to jail and thus deprive him of his liberty, in many countries for the rest of his life. There is a great public interest in ensuring that this power is not abused. The freedom of the press to monitor and supervise the judiciary should not be restricted.

There is a connection between Article 10 and the right to a fair trial under Article 6. Anyone charged with a criminal offence shall be presumed innocent until proved guilty. Trial by the media is abominable, but unavoidable. The press sometimes transgress the principle of presumption of innocence in publishing incriminating information. If the information is wrong, the person concerned will be entitled to damages. The threat of damages will deter newspapers from publishing this kind of information. The press has a big impact in modern society and if photos of a suspect is published, the statement of a witness might be inadmissible.

It is a fundamental legal principle that judges must be impartial and be guided solely by the law and evidence adduced to the Court<sup>366</sup>. Professional judges must be able to disregard from what has been published by the press when they handle a case. If laymen jurors are prejudiced by newspaper articles about the accused, the system with jury trials ought to be changed, instead of interferences with the fundamental right to freedom of expression.

Judges must be protected from destructive and unfounded personal attacks. This is especially important since judges are subject to a duty of discretion that precludes them from replying to criticism.<sup>367</sup> With the proposed wording of the article, the state can justify restrictions in such speech with a

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<sup>365</sup> See *Zana v. Turkey* para. 48.

<sup>366</sup> See *Barfod v. Denmark* para. 19.

<sup>367</sup> See *De Haes and Gijssels v. Belgium* para. 37.

reference to the protection of the reputation or the rights of others. As I have pointed out earlier, the state may only interfere with criticism against civil servants if the speaker knew that the statement was untrue or if he was reckless as to its truth. This principle must also apply to criticism against judges. The general interest in allowing a free public debate on the functioning of the judiciary will usually prevail over the interest of judges to be protected against criticism.

### **6.16.8 Negative Right to Freedom of Assembly and Association**

The negative right to freedom of association and peaceful assembly must be included in the Convention. No one may be compelled to belong to an organisation or to take part in a demonstration. In the case of *Young, James and Webster v. the United Kingdom* concerning closed shops agreement, the Court found a breach of Article 11. The political affiliations of the trade unions played an important role in the Court's assessment.

In Sweden, all university students are obliged to join a student's union. If they fail to satisfy this condition, the results from their exams will not be officially registered and they will not be able to get their degree. The pressure to join such a union is severe, since failing to comply with the obligation might mean the loss of future livelihood. These unions are to represent the students before the board of directors, but they also have a political agenda, for example. they oppose any political proposal to introduce tuition fees. A student who prefers education with high quality before insipid education free of charge, has the obligation to join an association that has a political view he does not support. I believe that the obligation to join a student's union is a breach of Article 11 of the Convention especially in the light of Article 10.

In the Soviet Union and its satellites, people were obliged to take part in political demonstrations. If they failed to turn up, their salary was reduced. A democratic state cannot demand from the people that they take part in demonstrations. This may appear obvious, but there is a need to include the right not to take part in demonstrations in the Convention. In a case before the Swedish Parliamentary Ombudsman, a civil servant at the state job centre had threatened unemployed with loss of unemployment benefits if they failed to participate in meeting on a bus heading for a demonstration organised by trade unions associated with the ruling political party<sup>368</sup>. With the inclusion of the negative right to freedom of assembly, such excesses against the individual would be less likely to occur.

The present wording of Article 11 allows the states to impose restrictions on the exercise of the freedom of association and the freedom of assembly by

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<sup>368</sup> *Riksdagens Ombudsmän – JO*, case number 1288-2005.

members of the armed forces, of the police or of the administration of the State. The liberty of every individual to join an association or to take part in an assembly outweighs the interest of the state to have politically neutral police officers and members of the armed forces and civil servants.

# Concluding Remarks

I have praised much in the American constitutional tradition, especially the American tradition in freedom of political speech. I also like the approach by the U. S. Supreme Court to interpret the constitution as a living instrument; and the separation, at least in theory, of church and state. I disagree with many things in the American constitutional tradition. It falls outside the scope of this thesis to deal with other aspects of constitutional law, but I would like to explain that I do not understand why the death penalty is not considered '*cruel and unusual*'. It is not even a problem for me to justify an interference with the right of an individual to carry arms with the interest of the society as a whole to reduce the number of guns in the society. There are limits even for a civil libertarian! The European tradition in freedom of expression has its advantages. It is wise to define in law what aims that might justify a restriction on this fundamental right in a democratic society. The European trend not to interfere with expressions that might offend the moral perceptions of parts of the population is also to be preferred before the American moralistic approach. I do not see the dangers with 'obscene material'. Every state may have something of value to contribute to the development of freedom of expression. I believe that Sweden's tradition of wide public access to official records should be exported to other countries.

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