

## **Art. 10 ECHR and its importance for the media in its role as a “public watchdog”**

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Some two hundred years ago, the infamous leader of France Napoleon Bonaparte said: “A journalist is a grumbler, a censorer, a giver of advice, a regent of sovereigns, a tutor of nations. Four hostile newspapers are more to be feared than a thousand bayonets.” Nowadays, the situation seems to be different. In the “Europe of human rights”<sup>2</sup> inconvenient journalists are facing a constant threat of persecution due to the content of their statements or because their powerful antagonists seek to know their sources. Their working places and even their homes are subject to searches by the police. Those who have the cash simply acquire press coverage, e.g. Italy’s former Prime Minister Berlusconi whose Mediaset company owns three major television channels and his holding company Fininvest has press interests in two newspapers.<sup>3</sup> Given these facts, freedom of the press seems to be in trouble. Indeed, bearing in mind that the atrocities of the Second World War were still fresh in mind during the formation phase of the European Convention on Human Rights (ECHR), it is peculiar that freedom of the press or journalistic freedom as such were not mentioned

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<sup>2</sup> Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, EG Court (2001) 1, p.6

<sup>3</sup> <http://news.bbc.co.uk/2/hi/europe/3257932.stm>

in Art. 10 of the Convention. In contrast, the drafters of the German *Grundgesetz* (GG), for instance, found it necessary to lay down not only freedom of expression but also freedom of the press in Art. 5(1) GG. Thus, it is not surprising that *ab initio* there were legal writers who argued that Art. 10 was weak and argued in favour of a special protocol securing the freedom of the press or were even calling “for the addition of a supplementary paragraph to spell out the responsibility of the media generally”.<sup>4</sup> These voices, however, remained unheard. Given the ancient role of the media as a public watchdog it is worth asking whether Art. 10 ECHR has any special importance for the journalists in the twenty first century.

Although Art. 10 does not explicitly refer to the freedom of the press, the European Court of Human Rights (ECtHR) has established a body of principles and rules granting the press as the “purveyor of information and public watchdog”<sup>5</sup> a special status in the enjoyment of the freedoms contained in Art. 10. It recognised that “freedom of the press [and] more generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention”.<sup>6</sup> However, the Court did not limit the scope of Art. 10 so as to encompass only political debate. In *Thorgeirson v Iceland*<sup>7</sup> it observed that “there is no warrant in its case-law for distinguishing ... between political discussion and discussion of other matters of public concern.”<sup>8</sup> Indeed, as early as 1979, the ECtHR established that besides ‘political speech,’ ‘civil speech’ was also protected by Art. 10. In *Sunday Times v UK*<sup>9</sup>, the judges were faced with the question of whether the newspaper could be restrained from publishing a full report about the thalidomide affair that caused outrage within the

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<sup>4</sup> Jacq C. & Teitgen F., *The Press in: Delmas-Marty M., The European Convention for the Protection of Human Rights* (Dordrecht, Kluwer Academic Publishers, 1992) 62-63

<sup>5</sup> *Barthold v Germany* [1985] 7 E.H.R.R. 383, para 58

<sup>6</sup> *Lingens v Austria* [1986] 8 E.H.R.R. 407, para 42

<sup>7</sup> [1993] E.C.H.R. 51

<sup>8</sup> *Ibid.* para 64

<sup>9</sup> [1979] 2 E.H.R.R. 245

British public and which criticised the law and the level of compensation offered by the responsible drug company. Giving special importance to victims who were unaware of the legal circumstances, the Court concluded that the public had “a vital interest in knowing all the underlying facts and the various possible solutions”<sup>10</sup>. This approach was affirmed in the more recent decision in *Fressoz and Roire v France*<sup>11</sup> where, on the occasion of an industrial unrest over pay levels, the applicants published an article revealing tax affairs of the chairman of a company.

However, a restriction on journalistic freedom could arise out of the last sentence of Art. 10(1) which draws a clear distinction between the written word and broadcasts, cinema and television enterprises that require a licence from the particular state. Assuming that Art. 10 would be of particular importance for journalists, this distinction appears to be absurd since the media is capable of reaching more people through spoken words and motion pictures, thereby meeting its function as a public watchdog. As a matter of fact, the distinction in question was inserted “due to technical or practical considerations [and] also reflected a political concern on the part of several states, namely that broadcasting should be the preserve of the State.”<sup>12</sup> Considering the technological progress made over the last decades and the fact that most European states do not hold a monopoly on broadcasting or television any longer, the initial reasoning has become less important. Indeed, in case the domestic authorities refuse to give a license, the Court assesses the interference “in the light of the other requirements”<sup>13</sup> of Art. 10(2). Thus, the ECtHR provided the media as a whole with a wide scope for action to enable the journalists to comply with their duty to impart information and ideas on political issues and other areas of public interest where the public has a right to receive such

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<sup>10</sup> Ibid. para 66

<sup>11</sup> [2001] 31 E.H.R.R. 28

<sup>12</sup> *Groppera Radio AG v Switzerland* [1990] 12 E.H.R.R. 321, para 60

<sup>13</sup> *Tele 1 Privatfernsehgesellschaft MBH v Austria* [2000] E.C.H.R. 424, para 25

information and ideas.<sup>14</sup> However, this would be rendered meaningless if the Court would not considerably limit possible justifications for restrictions upon journalistic freedom invoked by the States under Art.10(2).

The crucial question here is to which extent the Member States enjoy a 'margin of appreciation' to decide whether or not an interference with freedom of the press is justified. "Underlying the doctrine of the margin of appreciation are two assumptions: First, what is necessary to achieve [journalistic freedom] may vary from state to state even in 'democratic societies'; and second, a government's estimate of that necessity is entitled to some deference by an international court, presumably less familiar with relevant local circumstances".<sup>15</sup> In *Olsson v Sweden*<sup>16</sup> the ECtHR concretised the notion of necessity by stating that it "implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued".<sup>17</sup> Despite this restriction of the margin of appreciation, the doctrine still posed a danger to the 'public watchdog' and the Court was criticised "to use the margin of appreciation as a substitute for coherent legal analysis of the issues at stake [and its] case law on Article 10 [was deemed to be] weak and unpredictable"<sup>18</sup>. Indeed, comparing the decisions in *Otto-Preminger Institute v Austria*<sup>19</sup> and *Jersild v Denmark*,<sup>20</sup> one is tempted to agree. Apart from the fact that the judgements coincided with each other, both were dealing with film footage which attracted a great deal of attention. However, the results regarding margin of appreciation were different and for some writers it was "difficult to understand why the Court did not attribute [to the Danish

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<sup>14</sup> Cf. *Lingens v Austria* [1986] 8 E.H.R.R. 407, para 41

<sup>15</sup> Janis M. & Kay R. & Bradley A., *European Human Rights Law, Text and Materials*, 2<sup>nd</sup> ed (New York, Oxford University Press, 2000), 146

<sup>16</sup> [1988] 11 E.H.R.R. 259

<sup>17</sup> *Ibid.* para 67

<sup>18</sup> Lord Lester of Herne Hill, *The European Convention on Human Rights in the New Architecture of Europe*, in: Proceedings of the 8th International Colloquy on the European Convention on Human Rights (Strasbourg, Council of Europe, 1996) 236-237

<sup>19</sup> [1994] 19 E.H.R.R. 34

<sup>20</sup> [1994] 19 E.H.R.R. 1

judges] the same powers of appreciation that it did to the Austrian judges. The Court surely does not consider that respect for religious sensibilities lampooned by a satirical film is different in character from respect of fundamental dignity owed to a 'nigger' despicably ridiculed in a television"<sup>21</sup> But this was exactly what the ECtHR did. While in *Otto-Preminger Institute* the movie had artistic and commercial background and "therefore [did] not contribute to any form of public debate capable of further progress in human rights"<sup>22</sup>, Mr Jersild's good-faith reporting of xenophobic affairs was intended to shake up the public opinion. Because the journalist acted in his capacity as a public watchdog the Court did not even mention the doctrine of margin of appreciation giving an unambiguous signal that in matters of sufficient public interest there is no room for states' discretion. In the recent decision in *Steel and Morris v UK*,<sup>23</sup> the judges even went a step further to unhinge the doctrine by giving two 'amateur journalists' who published a leaflet criticising McDonald's, the protection of Art. 10.

Another problem the journalists are facing is that they often cannot prove the truthfulness of their statements. For example, reporters working for daily newspapers are subject to enormous pressure to comply with the editorial deadline. If they were required to double-check every piece of information it could deprive the news as a "perishable commodity ... of all its value and interest"<sup>24</sup>. Since the journalists have the duty to impart both information and ideas, a clear distinction has to be made between facts and value-judgements. A good example for the distinction provides the case of *Lingens v Austria*<sup>25</sup>. Mr Lingens who published two articles criticising the behaviour of Austrian Chancellor Kreisky by referring to his lack of respect towards victims of the Nazis as 'immoral' and 'undignified', was

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<sup>21</sup> Mahoney P., *Universality versus subsidiarity in the Strasbourg case law on free speech: explaining some recent judgements* [1997] 4 E.H.R.R. 364, 367

<sup>22</sup> *Otto-Preminger Institute v Austria* [1994] 19 E.H.R.R. 34, para 49

<sup>23</sup> [2005] E.C.H.R. 103

<sup>24</sup> *Observer and Guardian v UK* [1991] 14 E.H.R.R. 153, para 60

<sup>25</sup> [1986] 8 E.H.R.R. 407

required by Austrian law to prove the truth of his allegations. By founding that the “existence of facts can be demonstrated, whereas the truth of value-judgements is not susceptible to proof ... [and that regarding] value-judgements this requirement is impossible of fulfilment and ... infringes freedom of opinion itself”<sup>26</sup> the Court gave forceful protection to the press. Even rumours and stories coming from different sources were accepted by the Court.<sup>27</sup> However, the judges are willing to give “the safeguard afforded by Article 10 to journalists [only if] they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.”<sup>28</sup>

Hand in hand with the value-judgements, the Court recognised that freedom of the press “also covers possible recourse to a degree of exaggeration, or even provocation”.<sup>29</sup> Contrary to the opinions of Matscher and Thór Vilhjálmsón JJ who considered that “an insult can never be a value judgement,”<sup>30</sup> the majority in *Oberschlick v Austria (No. 2)*<sup>28</sup> held that journalistic freedom does outweigh the protection of a politician’s reputation.<sup>31</sup> Therewith, the ECtHR pursued the approach taken in *Handyside v UK*<sup>32</sup> where it was also held that statements which “offend, shock or disturb the State or any sector of the population”<sup>33</sup> are covered by Art. 10. The same applies as well to insulting statements about civil servants such as police officers.<sup>34</sup> However, as the decision in *Janowski v Poland*<sup>35</sup> illustrates the particular journalist has to act in his capacity as a ‘public watchdog’ in order to enjoy the protection of Art. 10.

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<sup>26</sup> Ibid. para 46

<sup>27</sup> Cf. *Thorgeirson v Iceland* [1993] E.C.H.R. 51

<sup>28</sup> *Bergens Tidende v Norway* [2000] E.C.H.R. 190, para 53

<sup>29</sup> *De Haes and Gijssels v Belgium* [1997] 25 E.H.R.R. 1, para 46

<sup>30</sup> *Oberschlick v Austria (No. 2)* [1997] E.C.H.R. 38

<sup>31</sup> Cf. Ibid. para 33-34

<sup>32</sup> [1976] 1 E.H.R.R. 737

<sup>33</sup> Ibid. para 49

<sup>34</sup> Cf. *Thorgeirson v Iceland* [1993] E.C.H.R. 51

<sup>35</sup> [2000] 29 E.H.R.R. 705

Regarding statements of fact the ECtHR generally requires that the facts presented by the journalists are true. Thus, untrue factual statements disguised as value-judgement do not fall within the protection of Art. 10.<sup>36</sup> Under specific circumstances, however, the Court is inclined to take a more press-friendly approach. In *Bladet Tromsø and Stensaas v Norway*<sup>37</sup> the applicants published several articles based on a doubtful official report. Stating that “the press should normally be entitled ... to rely on the contents of official reports without having to undertake independent research [since] otherwise, the vital public-watchdog role of the press may be undermined”<sup>38</sup> the Court rejected the Government's argument that the journalists had an obligation to double-check their information.

This case also demonstrates that the press must have a right of access to information that is pertinent to the public to comply with its ‘Herculean task’. If the public has a right to receive information then it seems only logical that the purveyor of those information must have a way to obtain them “by legal and ethical means”<sup>39</sup>. As a matter of fact, the Commission in *X v Federal Republic of Germany*<sup>40</sup> was inclined to accept a right of access to information stating that “it follows from the context in which the right to receive information is mentioned ... that it envisages first of all access to general sources of information ... [T]he right to receive information may under certain circumstances include a right of access by the interested person to documents which although not generally accessible are of particular importance.”<sup>41</sup> However, without dealing with the question in depth, the ECtHR found that “Article 10 does not ... confer on the individual a right to access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart

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<sup>36</sup> Cf. *Perna v Italy*[2003] E.C.H.R. 230 para 45-47

<sup>37</sup> [1999] E.C.H.R. 29

<sup>38</sup> *Ibid.* para 68

<sup>39</sup> Parliamentary Assembly of the Council of Europe, Resolution 1003 (1993), para 25

<sup>40</sup> [1979] 12 D.R. 227

<sup>41</sup> *Ibid.* at 228-229

such information to the individual.”<sup>42</sup> Admittedly, this case did not deal with journalists. However, in the light of the decision in *Guerra v Italy*<sup>43</sup> where, despite a vital public interest and the participation of a whole village community, the Court denied a right to access to information, it is highly unlikely that the judges would make an exception for the press.

Since the access to information-sources is interconnected with their protection it is questionable whether the ECtHR interprets Art. 10 as to preserve the journalist-source confidentiality. If it comes to especially precarious matters of public importance the press had often no other source than an insider who would reveal precious information only when he could be sure that he will not be exposed in the following spectacle. Moreover, journalists may by definition as public watchdogs not become instruments of the police or the judiciary. This argument found favour with the judges of the ECtHR in *Goodwin v UK*<sup>44</sup>. Mr Goodwin was fined by the British courts because he refused to disclose the source of his information regarding financial problems of a company. Despite the subject matter not being political speech, the Court held that the “protection of journalistic sources is one of the basic conditions for press freedom ... Without such protection ... the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.”<sup>45</sup> Regarding a search of a journalist’s home and workplace, the ECtHR found recently that “even if unproductive, a search conducted with a view to uncover a journalist’s source is a more drastic measure than an order to divulge the source’s identity ... because investigators ... have access to all documentation held by the journalist.”<sup>46</sup> Even

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<sup>42</sup> *Leander v Sweden* [1987] 9 E.H.R.R. 433, para 72

<sup>43</sup> [1998] 26 E.H.R.R. 357

<sup>44</sup> [1996] 22 E.H.R.R. 123

<sup>45</sup> *Ibid.* para 39

<sup>46</sup> *Roemen and Schmit v Luxembourg* [2003] E.C.H.R. 102, para 57

in case of leaks in serious criminal cases journalistic freedom remains a 'trump card' protecting the journalist-source relationship.<sup>47</sup>

Of at least the same importance as the freedom of the media to impart information and to keep its sources confidential is its independence. Following the liberal understanding of a self-regulating free market it is not surprising that the media which besides its function as a public watchdog also constitutes a business entity was let mostly unregulated. However, pushing the media on the market remained not unproblematic. While four out of five daily newspapers have disappeared in the last eighty years,<sup>48</sup> the survivors were mostly swallowed up by non-media related companies that formed 'black holes' of media concentration absorbing more and more market shares. Since investigative journalism is more expensive and less profitable than sensational journalism there is no reason for the media conglomerates not to "treat information ... as a commodity"<sup>49</sup>. To see this development one does not have to look abroad. In Britain the "entire national press is owned by seven companies [while the] four largest of these account for about 90 per cent of the sales."<sup>50</sup> The ECtHR saw the red light when it emphasised that the media cannot fulfil its role as a public watchdog without resting on "the principle of pluralism, of which the State is the ultimate guarantor."<sup>51</sup> Speaking about "powerful financial groups [that] undermine the fundamental role of freedom of expression ... in particular where it serves to impart information and ideas of general interest"<sup>52</sup> the Court gave journalists a new weapon to fight media concentration in the shape of State's positive obligation to counter any private attempt to monopolise the media.

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<sup>47</sup> Cf. *Ernst v Belgium* [2003] E.C.H.R. 359

<sup>48</sup> Negrine R., *The Communication of Politics* (London, Sage Publications, 1996) 178

<sup>49</sup> Parliamentary Assembly of the Council of Europe, Resolution 1003 (1993), para 15

<sup>50</sup> Dohnanyi J. & Möller C., *The Impact of Media Concentration on Professional Journalism* (Vienna, Organization for Security and Co-operation in Europe, 2003) 120

<sup>51</sup> *Informationsverein Lentia v Austria* [1993] 17 E.H.R.R. 93

<sup>52</sup> *Vgt Verein Gegen Tierfabriken v Switzerland* [2001] E.C.H.R. 412, para 73

Apart from the danger that there could be only one newspaper to read and only one broadcasting station to listen to, self-censorship of journalists constitutes an even more imminent threat to freedom of the media and the democratic society as a whole. "Self-censorship is when journalists purposely avoid newsworthy stories as they anticipate negative reactions from their superiors, based on built-in penalties and rewards for doing what is expected."<sup>53</sup> Since journalistic freedom can only survive in the context of a social and economic structure where there is a sufficient range of choices, Art. 10 could hardly provide sufficient protection if it had no effect upon relationships between journalists and their superiors governed by private law. Such an effect could be a direct, *i.e.* imposing a duty on the journalist's employer to comply with journalistic freedom as enshrined in Art. 10, or an indirect one which would impose the duty on the national courts to interpret domestic legislation in the light of Art. 10. In the case of *Fuentes Bobo v Spain*,<sup>54</sup> the ECtHR decided in favour of the latter approach. Mr Fuentes Bobo who was employed by a television company as a producer was dismissed after he wrote a newspaper article criticising particular actions of the management. Although there was no direct interference by public authority, Spain was held to have a positive obligation to protect journalistic freedom even against interferences by private parties. However, such cases are rare and their existence is no proof that self-censorship is self-inflicted by the journalists who shy away from going to court. The burden of proof lasting upon their shoulders makes it hardly possible to succeed against the 'Goliath'.

In retrospect, the Court's interpretation of Art. 10 giving the media a far-reaching negative right and rendering the provision of particular relevance for journalists has long surpassed the modest expectations and managed to dispel the initial anxiety of the proponents of a Conventional

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<sup>53</sup> Thorgeirsdóttir H., *Self-censorship among journalists: A (moral) wrong or a violation of ECHR law*[2004] 4 E.H.R.R. 383, 384

<sup>54</sup> [2001] 31 E.H.R.R. 50

amendment.<sup>55</sup> However, Art. 10 is still far away from giving all the answers. The future will show whether the Court will be willing to qualify self-censorship “as a legal restriction under Art. 10(2), hence rendering the state liable for not guaranteeing the fundamental right of journalists and the public’s right to receive information and ideas on matters of crucial importance.”<sup>56</sup> This would be a way to fight the disease and not just the symptoms in order to secure media freedom and to transfer Napoleon’s sentence in the twenty first century.

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<sup>55</sup> Cf. Jacq C. & Teitgen F., *The Press in: Delmas-Marty M., The European Convention for the Protection of Human Rights* (Dordrecht, Kluwer Academic Publishers, 1992) 62-63

<sup>56</sup> Thorgeirsdóttir H, *Self-censorship among journalists: A (moral) wrong or a violation of ECHR law*[2004] 4 E.H.R.R. 383, 399