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*“Constitutional control and development of a social state  
ruled by law”*

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**EUROPEAN STANDARDS IN THE FIELD  
OF FREEDOM OF EXPRESSION  
IN THE MASS MEDIA**

**Report**

**by  
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*Mr. President, honourable judges, ladies and gentlemen - I am delighted and honoured to be able to participate in this interesting conference to discuss freedom of expression of the the news media, a topic, which I will approach from the perspective of prevailing Council of Europe standards on press freedom. I cannot possibly hope to do more than touch briefly on the few of the main legal issues raised in relation to this important freedom and the role of the media in society.*

1. Freedom of expression of the press is considered crucial with regard to the **Council of Europe objective of an effective political democracy** and the further realization of human rights. The importance of press freedom has been recognized in rights philosophy throughout the ages and not only as an intrinsic liberty but also as serving the interests of rulers as freedom of expression may release tension in society and allow frustrated subjects **to blow off steam** so there will be rest and tranquility among the public.
2. In recent decades the **European Court of Human Rights has developed a rich jurisprudence concerning the role of the press in democratic society based on Article 10** of the European Convention on Human Rights read in light of other provisions of the Convention. The originality of the European Conventions control machinery lies in the fact that the protection of fundamental rights was entrusted to impartial and independent judicial bodies, initially the European Court and the European Commission of Human Rights. In subscribing to the Convention the Member States of the Council of Europe **agreed not only to adapt their domestic law and practices to the rights and freedoms guaranteed by the Convention**, but also to submit themselves to international supervision. The Convention is not merely a catalogue of basic fundamental rights and freedoms. It constitutes a body of law which has been tested, applied and developed by the Eur. Court of Human Rights for almost fifty years. In their case law the supervisory bodies have addressed many of today's critical human rights problems such as freedom of the mass media and its journalists.
3. **Article 10** of the European Convention, **which protects freedom of expression and opinion** and the right to receive and impart information and ideas **without interference by public authorities**,<sup>1</sup> does not mention the press as such but it is clear from Convention jurisprudence that **the mass media occupies a central role** in the Court's jurisprudence. Several cases brought before the Court have evidently been concerned with the personal freedom of expression often in a form very close to freedom of opinion which is everyone's right. The Court has held that the protection of personal opinions secured by Article 10 is one of the objectives of political participation.<sup>2</sup> If the forming of opinion and public opinion is not free of external coercion then protection is not effective and the press is not functioning as expected

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<sup>1</sup> 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 rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>2</sup> Cf. *Young, James and Webster v. the United Kingdom*, *supra* note 136, § 5; *Ezelin v. France*, 26 April 1991, Series A no. 202, § 37; *Vogt v. Germany*, 26 September 1995, *supra* note 99, § 64.

with the Article 10 guarantee. The right to form an opinion is also clearly dependant on the media's role in informing the public.

4. **A landmark case** in this respect was the case of *Sunday Times v. the United Kingdom* 1979 where the Court made explicit that press freedom has an instrumental value in society as Article 10 has come to mean not only the guarantee of the 'press to inform the public but also the right of the public to be **'properly informed'**,<sup>3</sup> In *Sunday Times v. the United Kingdom*<sup>4</sup> the Court rejected a claim that a finding of contempt of court against a newspaper for its writing on a pending litigation was necessary for maintaining the authority and impartiality of the judiciary. The *Sunday Times* judgment forms the basis for the interpretation of the three criteria necessary to justify restrictions which arise when considering whether an infringement of the rights enlisted in Article 10 § 1 meets the Article 10 § 2 conditions:
  - Is the restriction on freedom of expression 'prescribed by law'?
  - Does the restriction have a legitimate aim?
  - Is the restriction 'necessary in a democratic society'?
5. These requirements are cumulative. The first two are largely formal although compliance with domestic law will not necessarily suffice for the lawfulness standard. The third requirement demands strict scrutiny on behalf of the Court. The expression 'prescribed by law' requires firstly that the impugned measure should have a basis in domestic law. Any interference by the state must be 'proportionate to the legitimate aims pursued', such as the protection of the reputation and rights of others<sup>5</sup> and the reasons adduced by the national authorities to justify it must be 'relevant and sufficient'.<sup>6</sup> The third and most important criterions is that any restriction must imply a 'pressing social need',<sup>7</sup> and the reasons adduced by the domestic authorities to justify the interference must be relevant and sufficient. **Article 18 of the Convention submits** that restrictions cannot be applied 'for any purpose other than those for which they have been prescribed'. The degree to which interests listed in Article 10 § 1 will be protected will in practice depend on how widely the first paragraph of Article 10 is interpreted, how the preamble to the restriction clause is connected to current problems and how the democratic necessity test is interpreted.<sup>8</sup>
6. In its case-law the Court and Commission have referred to their previous decisions and methods of interpretation, which are relevant to a greater or lesser extent. **Perspectives from United States jurisprudence, Canada and the European Union legal order have been included.** The rules of interpretation for the Convention, are neither those of constitutional law, nor those of international law.<sup>9</sup> The judges at the Court come from all the different 'legal schools' of Europe and thus make use primarily of the empirical method, familiar to the 'common law'.<sup>10</sup> When a large body of case-law has accumulated major principles emerge. Principles of particular

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<sup>3</sup> *Sunday Times v. the United Kingdom*, *supra* note 60, § 66.

<sup>4</sup> *Sunday Times v. the United Kingdom*, *supra* note 60.

<sup>5</sup> *Jersild v. Denmark*, 23 September 1994, Series A no. 298, § 27.

<sup>6</sup> *Cf. Sunday Times v. the United Kingdom*, *supra* note 60, § 62; *Lingens v. Austria*, 8 July 1986, Series A no.103, § 40; *Barfod v. Denmark*, 22 February 1989, Series A no.149, § 28; *Janowski v. Poland*, 21 January 1999, RJD 1999-1, p. 187; *News Verlags GmbH & Co KG v. Austria*, 11 January 2000, RJD 2000-I, § 52.

<sup>7</sup> *Sunday Times v. the United Kingdom*, *supra* note 60, § 59.

<sup>8</sup> A. Tomkins, 'Civil Liberties in the Council of Europe' in C. A. Gearty, (ed.), *European Civil Liberties and the European Convention on Human Rights*, 1997 Kluwer Law International, p. 9.

<sup>9</sup> A. Clapham, *Human Rights in the Private Sphere*, 1998 Clarendon Paperbacks, p. 4.

<sup>10</sup> F. Matcher, *supra* note 16, p. 64.

importance as far as the press is concerned<sup>11</sup> have originated in landmark Article 10 cases.<sup>12</sup> These principles apply both to natural as well as legal persons, which opens the ground for conflicting interests between the practicing journalists, the receivers among the public, the individual subjects of journalism and the owners and the publishers of the media who may have their own agenda to pursue. The character of Article 10 is mysterious, protecting both the natural instinct of individual expression in every conceivable form **while** at the same time **being** loaded with the weight of civil and political obligations in society, giving it a character of a collective right rather than just an individual freedom. It protects the civil right of the individual not to be interfered with by the state. At the same time it protects the right of the citizen to be enlightened calling into question the positive obligation of authorities to ensure that process. It hands out a promise of citizen access to the governing process through democratic procedures, where the media serves a major role, shedding light on the indivisibility of all human rights whether of economic, social or cultural origin. The freedoms protected in Article 10 are useful only in the context of a social and economic structure where there is a sufficient range of choices. Accordingly, the freedoms of opinion, expression, imparting and receiving information and ideas are a collective rather than merely an individual good.

7. The Court has consistently emphasized ‘the pre-eminent role of the press in a state governed by the **rule of law**’.<sup>13</sup> The Court speaks of the ‘vital role’<sup>14</sup> of the **Public Watchdog** and its rightful role.<sup>15</sup> The term is analogous to the Fourth Estate, an original description of the role of the Press in England and frequently used in American jurisprudence. The core of both concepts is the implicit notion of what has become known as **investigative journalism**. The Eur. Court of Human Rights has consistently ruled that **any restrictions on the freedom of expression of journalists**, who discuss issues of public concern in their professional capacity, must be narrowly interpreted.
8. When the case-law is scrutinized with regard to Article 10 it becomes clear that freedom of the press is not merely the freedom to found a newspaper free of licensing, or to be free from discriminatory taxation or public interference. The press is more than a marketable commodity. There is much tension between the conception of the press as a private enterprise subject to the logic of the market and the press as an instrument of democracy. The instrumental value of press freedom is to begin with defined in terms of the paramount protection that the Court has afforded to political speech.<sup>16</sup> The press may not overstep certain bounds at the same time, as it must adhere to its duty of informing the public properly<sup>17</sup> and to that extent set things in an analytical context.<sup>18</sup> In order to do so journalism must be daring and not hesitate to go against accepted views,<sup>19</sup> as the importance of political opposition is crucial in democracy.<sup>20</sup> Journalistic conduct involves shocking and disturbing sections of the population to shed light on various sides of reality. Concerning the importance in

<sup>11</sup> *Observer and Guardian v. the United Kingdom*, *supra* note 59, § 59

<sup>12</sup> *Handyside v. the United Kingdom*, *supra* note 91; *Sunday Times v. the United Kingdom*, *supra* note 60; *Lingens v. Austria*, *supra* note 86.

<sup>13</sup> *Cf. Castells v. Spain*, *supra* note 484, § 43; *Thorgeir Thorgeirson v. Iceland*, *supra* note 227, § 63.

<sup>14</sup> *Observer and Guardian v. the United Kingdom*, *supra* note 59, § 59 (b).

<sup>15</sup> *Cf. Dalban v. Romania*, *supra* note 1053, §49; *Bladet Tromsø and Stensaas v. Norway*, *supra* note 11, § 59.

<sup>16</sup> *Lingens v. Austria*, *supra* note 86; *Observer and Guardian v. the United Kingdom*, *supra* note 59

<sup>17</sup> *Sunday Times v. the United Kingdom*, *supra* note 60.

<sup>18</sup> *Lingens v. Austria*, *supra* note 86, § 30.

<sup>19</sup> *Handyside v. the United Kingdom*, *supra* note 91, § 49.

<sup>20</sup> *Castells v. Spain*, *supra* note 484.

processing information or putting it into perspective, the Court has expressly rejected the contention that ‘the task of the press [is] to impart information, the interpretation of which ha[s] to be left primarily to the reader’.<sup>21</sup> This is a notable description of the role of the press, assigning an active role of interpretation of facts to the journalists. It is accordingly not enough to submit the information in the form of news as spare parts on a conveyor belt. The media is responsible for putting facts into context within an analytical framework, grasping a complex situation in a nutshell. Subsequently this not only requires a voluntary press, but is also a requisition on journalists and their capability, skilfulness and competence.

9. The Court emphasizes that the promotion of free political debate is a very important feature of democracy. It attaches the highest importance to the freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech.<sup>22</sup> The media cannot achieve its democratic goals without representing conflicting views in society.<sup>23</sup> According to a recent declaration by the Committee of Ministers in February of this year **political debate requires that the public is informed about matters of public concern**, which includes the right of the media to disseminate negative information and critical opinions concerning political figures and public officials, as well as the right of the public to receive them.<sup>24</sup>
10. The potential of the media in the numerous member states of the Council of Europe varies with regard to achieving this objective. It is widely recognized that certain states have continued to exert and allow impermissible pressure on the media in their respective countries. The levels of harassment may be different but the general aim is the same: to suppress pluralism and open debate on issues of concern to citizens. In some of the older member states concentration in media ownership has evoked much concern on the supra national level, both of the Council of Europe and the European Union. The EU Charter of Human Rights’ Article 11 paragraph 2 provides that the freedom and pluralism of the media shall be respected. A recent EU report noted that the situation within many of the member states is characterized by high level of concentration on the media market in both television and press sectors. The European Court of Human Rights has ruled that the public’s independent right to receive information and ideas of legitimate concern cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor.’
11. The notion that member states have positive obligations to guarantee the Public Watchdog role of the press is increasingly surfacing in the otherwise rich jurisprudence that has emerged on Article 10 since the mid 1970s. The jurisprudence set forth in the multifaceted context of social and economic circumstances may directly and indirectly put member states under pressure to take affirmative action. An affirmative interpretation of Article 10 does not accept that a weak economy or neglectful authorities compel the media to find ‘a master’ in a political authority or an economic group, as a recent Report of the Parliamentary Assembly indicated.<sup>25</sup> The

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<sup>21</sup> *Lingens v. Austria*, *supra* note 86, § 30.

<sup>22</sup> *Feldek v. Slovakia*, *supra* note 312, § 83. *Cf.*, *supra* note 1176.

<sup>23</sup> *Handyside v. the United Kingdom*, *supra* note 91.

<sup>24</sup> *Declaration on freedom of political debate in the media*, adopted by the Committee of Ministers on 12 February 2004 at the 872nd meeting of the Ministers’ Deputies.

<sup>25</sup> Parliamentary Assembly Doc. 9000, 19 March 2001, *Freedom of Expression in the media in Europe*; Report Committee on Culture, Science and Education. (Rapporteur: Mr. Gyula Hegyi), p. 19.

Court has reiterated that it is not its ‘task to indicate which means a state should utilize in order to perform its obligations under the Convention’.<sup>26</sup> Article 1 of the Convention expresses a complete obligation on the state to secure rights and freedoms subsequently defined.<sup>27</sup>

Thank you.

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<sup>26</sup> *Vgt Verein gegen Tierfabriken v. Switzerland*, *supra* note 19; *De Cubber v. Belgium*, *supra* note 20, § 35.

<sup>27</sup> *Ireland v. the United Kingdom*, 18 January 1978, Series A 25 § 239.