

# FREEDOM OF EXPRESSION AND INFORMATION IN A DEMOCRATIC SOCIETY

The Added but Fragile Value of the European Convention on Human Rights

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**Abstract** / The right to freedom of expression and information is guaranteed by Article (10) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in all 47 member states of the Council of Europe. The jurisprudence of the European Court of Human Rights (ECtHR) applying Article (10) is to be considered an authoritative international standard regarding the protection of this human right, including the right to express, impart and receive opinions and information without interference by public authorities. The Court's case law has manifestly helped to create an added value for the effective protection of freedom of expression, journalistic freedom, freedom of the media, the right to receive information and public debate in the Convention's member states. However, some recent restrictive trends in the Court's approach have raised serious concerns regarding the (future) level of protection of freedom of speech and press freedom in Europe. This article focuses on the most important characteristics of the right to freedom of expression and information under the European human rights system and discusses some challenges for the future.

**Keywords** / access to information / conflicting human rights / democracy / European Convention for the Protection of Human Rights and Fundamental Freedoms / European Court of Human Rights / freedom of expression and information / participation / press freedom / public debate / public interest

## Introduction

*'Watchdogs' are not meant to be peaceful puppies; their function is to bark and to disturb the appearance of peace whenever a menace threatens. (Dissenting opinion by Judges Power and Guylumyan in ECtHR, Saygılı and Falakaoğlu (No. 2) v. Turkey, 17 February 2009)*

Europe has a long tradition, with ups and downs, of guaranteeing freedom of speech and press freedom. For more than two centuries these rights have been considered fundamental human rights in a democratic society. In 1789, Article (11) of the revolutionary *Déclaration des Droits de l'Homme et du Citoyen* (Declaration of the Rights of Man and of the Citizen) in France provided that 'free communication of ideas and opinions is one

of the most precious of the rights of man. Consequently, every citizen may speak, write and publish freely, although he may have to answer for the abuse of that liberty in the cases determined by law.' In the same period 'freedom of speech, and of the press' was also guaranteed by the First Amendment of the US Constitution (1791), prohibiting Congress from abridging these freedoms. The two most important arguments underpinning the right to freedom of expression and press freedom are discovery of truth and democracy. The first dictates open discussion, free exchange of ideas, freedom of enquiry and freedom to criticize (Sadurski, 1999; Schauer, 1982). The second facilitates free and independent media to monitor and scrutinize the democratically elected, and the citizens must therefore be free to receive information relevant to their choices in the voting process (Barendt, 2005; Meiklejohn, 1960).

Various laws and regulations are, however, restricting freedom of expression and media content. Until a few decades ago, the limits and restrictions of freedom of expression were determined by national states, ultimately scrutinized by their own domestic judicial authorities, without any further external control. This situation, this *paradigm*, has significantly changed in Europe, due to the achievement of the European Convention on Human Rights and the enforcement machinery in which the European Court of Human Rights plays a crucial role. Any individual or organization claiming to be a victim of a violation of the Convention may lodge directly with the Court in Strasbourg an application alleging a breach of one of the Convention rights, after having exhausting all relevant domestic remedies in the member state concerned. It has become clear that the European Court's case law regarding freedom of expression, media and journalism has substantially reduced the national sovereignty and the scope of national limitations restricting the right to freedom of expression and information.

This right to freedom of expression and information is actually guaranteed by Article (10) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: the European Convention) in all 47 member states of the Council of Europe, from Norway to Cyprus, from Iceland to Azerbaijan, and from Portugal to Russia.<sup>1</sup> As this freedom is not absolute, the crucial difficulty of its application and limitation lies in balancing competing rights and interests in order to determine what information needs or ought to be part of the public debate and thus benefits democracy, and what information causes unallowable harm to individuals and/or society and thus should be necessarily restricted or sanctioned in a democratic society. The jurisprudence of the European Court of Human Rights (hereafter: the European Court) applying Article (10) is to be considered an authoritative international standard regarding the protection of freedom of expression and information. This article, and the way it has been interpreted and applied, has manifestly helped to create an added value for the protection of freedom of expression, journalistic freedom, freedom of the media and public debate in the member states of the Convention, as it guarantees freedom of expression 'without interference by public authority' and 'regardless of frontiers' (Article (10) (1) ECHR). From this perspective, Article (10) of the European Convention is perceived as 'Europe's First Amendment' (Middleton, 1993; Voorhoof, 1998, 2004), being an ultimate guarantor of freedom of

expression and press freedom in Europe, under the scrutiny of the European Court of Human Rights.

## Freedom of Expression and the European Court of Human Rights

Article (10) (1) of the European Convention stipulates the principle of the right to freedom of expression and information, which includes freedom to hold opinions and to receive and impart information and ideas. Article (10) (2) on the other hand, by referring to 'duties and responsibilities' that go together with the exercise of this freedom, opens the possibility for public authorities to interfere with this freedom by way of formalities, conditions, restrictions and even penalties. The text of Article (10) reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Yet, the main characteristic of Article (10) (2) is that, by imposing the so-called *triple test*, it substantially reduces the possibility for public authorities to interfere with the right to freedom of expression: restrictions or sanctions are only allowed when these are *prescribed by law*, pursue a *legitimate aim* (only the aims or objectives integrated in the text of Article 10 (2) itself can justify an interference) and finally and most decisively, are *necessary in a democratic society*. The notion *prescribed by law* and its qualitative assessment by the European Court guarantees a minimum degree of protection against arbitrariness: according to the European Court's case law, the legal provisions an interference is based on must reflect the characteristics of foreseeability, precision and publicity or accessibility. Article (10) (1) covers a broad scope of application, including all aspects of the process of public communication in all its forms, while Article 10 (2) essentially reduces the possibility for public authorities to interfere with the rights of individuals, media and journalists receiving, imparting or expressing information and ideas, unless such an interference is considered necessary in a democratic society.

Since the judgement in *Sunday Times (No. 1) v. The United Kingdom* (26 April 1979), the impact of Article (10) of the European Convention has become obvious. In this case the European Court for the first time reached the conclusion that the right to freedom of expression and information had been violated by national authorities, in a case of prior

restraint of judicial reporting: an injunction restraining the publication in the *Sunday Times* of an article concerning a drug and the litigation linked to its use (the thalidomide case) was not necessary in a democratic society in the eyes of the European Court. Since this judgement an abundant case law has determined and elaborated the characteristics of this necessity test. In essence, it requires the European Court to determine whether the interference complained of corresponded with a 'pressing social need', and it must decide whether the reasons adduced by the national authorities to justify the interference were 'relevant and sufficient' and whether the measure taken was 'proportionate to the legitimate aims pursued' (e.g. ECtHR, *Karsai v. Hungary*, 1 December 2009; ECtHR, *Financial Times a.o. v. The United Kingdom*, 15 December 2009). The European Court has to satisfy itself that the national authorities applied standards that are in conformity with the principles embodied in Article (10) of the European Convention, and moreover, that they have based their decisions on an acceptable assessment of the relevant facts. The European Court also considers whether it has been demonstrated that effective and adequate safeguards and procedural guarantees, such as judicial review, were available in order to enhance the right to freedom of expression and information (e.g. ECtHR, *Steel and Morris v. UK*, 15 February 2005; ECtHR, *Manole a.o. v. Moldova*, 17 September 2009). It is important to notice that, according to the European Court's case law, national authorities should not only abstain from interferences with freedom of expression and press freedom that are not necessary in a democratic society. In addition, the state has also positive obligations to protect the right to freedom of expression against interferences by private persons or corporate organizations. The European Court has emphasized that 'in addition to the primary negative undertaking of a State to abstain from interferences in Convention guarantees, there may be positive obligations inherent in such guarantees. The responsibility of a State may then be engaged as a result of not observing its obligations' (ECtHR, *Fuentes Bobo v. Spain*, 29 February 2000; ECtHR, *VGT Verein gegen Tierfabriken v. Switzerland*, 28 June 2001). In the case of *Özgür Gündem v. Turkey*, the European Court developed this approach by claiming that 'genuine, effective exercise of freedom of expression does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals'. After a campaign that involved killings, disappearances, injuries, prosecutions, seizures and confiscation, the newspaper *Özgür Gündem* had ceased publication. According to the European Court, the Turkish authorities had failed to comply with their positive obligation to protect the newspaper and its journalists in the exercise of their freedom of expression (ECtHR, *Özgür Gündem v. Turkey*, 16 March 2000).

At the time of writing (January 2010), the European Court in more than 600 judgements has determined and clarified the scope and the limits of the right to freedom of expression and information in Europe, protecting journalists, publishers, broadcasting organizations, individual citizens, civil servants, academics, politicians, artists and non-governmental organizations (NGOs). Especially during the last 10 years, it has frequently come to the conclusion that the right to freedom of expression was violated by a member state (see Table 1).

TABLE 1

**The European Court of Human Rights on Freedom of Expression and Information and Press Freedom: Cases and Violations 1960–2009**

	No. of cases	Violations
1960–9 :	1	( <i>De Becker v. Belgium</i> , struck off the list)
1970–9 :	3	(1 violation: <i>Sunday Times No. 1 v. UK</i> )
1980–9 :	12	(2 violations: <i>Barthold v. Germany</i> and <i>Lingens v. Austria</i> )
1990–9 :	75	(38 violations)
2000–9 :	540	(360 violations)

As a consequence of this case law and due to the binding character of the European Convention, the member states are under a duty to modify and upgrade their standards of protection of freedom of expression and information in order to comply with their obligations under the European Convention (Article (1)). The practical, effective or real impact of Article (10) still differs from one member state to another, which by itself is an indication of the somewhat weak enforcement instruments of the European Convention and of the very different levels of development of democracy and respect for human rights in the Convention's member states (see also Reporters without Borders and Freedom House).<sup>2</sup>

A recent judgement illustrates the sometimes unexpected and far-reaching consequences Article (10) of the European Convention may entail. Relying on the European Convention, Adnan Khurshid Mustafa and his wife, Weldan Tarzibachi, both Swedish nationals of Iraqi origin, complained that they and their three children were forced to move from their rented flat in Rinkeby, a suburb of Stockholm. The reason of their eviction was their refusal to remove a satellite dish outside their apartment, after the landlord had initiated proceedings against them, as he considered the installation of a satellite antenna to be a breach of the tenancy agreement, which stipulated that 'outdoor antennae' were not allowed to be set up on the house. The proceedings continued after Mr Khurshid Mustafa and Mrs Tarzibachi had dismantled the outdoor antenna and replaced it with an antenna installation in the kitchen on an iron stand from which an arm, on which the satellite dish was mounted, extended through a small open window. A Swedish court found that the tenants had disregarded the tenancy agreement and that they had to dismantle the antenna, otherwise the tenancy agreement ought not to be extended. The judge held that the tenants were fully aware of the importance the landlord attached to the prohibition of the installation of satellite antennae and that, although the installation in the kitchen did not pose a real safety threat, their interests to keep the antenna installation relying on their right to receive television programmes of their choice could not be allowed to override the weighty and reasonable interest of the landlord that order and good custom were upheld. Although the conflict in this case was in essence a dispute between two private parties and not between an individual and a state, it considered Article (10) of the European Convention applicable. Indeed, the

European Court found that the family's eviction was the result of a domestic court's ruling, making the Swedish state responsible within the meaning of Article (1) of the European Convention for any resultant breach of Article (10). The European Court observed that the satellite dish enabled the applicants to receive television programmes in Arabic and Farsi from their country of origin (Iraq). That information included political and social news and was of particular interest to them as an immigrant family that wished to maintain contact with the culture and language of their country of origin. At the relevant time the applicants had no other means to establish access to such programmes and the dish could not be placed anywhere else. Nor could news obtained from foreign newspapers and radio programmes in any way be equated with information available via television broadcasts. It had neither been shown either that the landlord installed broadband or internet access or other alternative means that gave the tenants in the building the possibility of receiving these television programmes.

Furthermore, the landlord's concerns about safety had been examined by the domestic courts, which found that the installation was safe. And there were certainly no aesthetic reasons to justify the removal of the antenna, as the flat was located in one of the suburbs of Stockholm, in a tenement house with no particular aesthetic aspirations. Moreover, the fact that the family had effectively been evicted from their home, a flat in which they had lived for more than six years, was disproportionate to the aim pursued, namely the landlord's interest in upholding order and good custom. The European Court therefore concluded that the interference with the applicants' right to freedom of information was not 'necessary in a democratic society': Sweden had failed to fulfil its positive obligation to protect the right of the applicants to receive information. The European Court held that there had been a violation of Article (10) of the European Convention. Mr Khurshid Mustafa and Mrs Tarzibachi were awarded €6500 in respect of pecuniary damage, €5000 in respect of non-pecuniary damage and €10,000 for costs and expenses (ECtHR, *Khurshid Mustafa and Tarzibachi v. Sweden*, 16 December 2008).

### **Some Characteristics of the European Court's Case Law<sup>3</sup>**

#### ***Freedom of Expression and Public Debate***

One of the main characteristics of the European Court's case law over the years is the emphasis on the freedom of public, and particularly political, debate. On many occasions the European Court has emphasized the essential function the press fulfils in a democratic society, and it has even mentioned the duty of the press to impart, in a manner consistent with its obligations and responsibilities, information and ideas on all matters of public interest. In this regard it has recognized that there are wider limits of acceptable criticism towards politicians or public figures than towards private individuals, especially when directed against governments and executive bodies: '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' (ECtHR, *Romanenko a.o. v. Russia*, 8 October 2009). As a consequence, members of parliament,

local politicians, governments, public authorities or public figures in general have to accept even sharp criticism, sometimes expressed in a harsh or hostile tone. But also police officers, members of the military, public prosecutors and even judges can be sharply criticized under the protection of Article (10) of the European Convention (e.g. ECtHR, *Lingens v. Austria*, 8 July 1986; ECtHR, *Castells v. Spain*, 23 April 1992; ECtHR, *De Haes and Gijssels v. Belgium*, 24 February 1997; ECtHR, *Colombani a.o. v. France*, 25 June 2002; ECtHR, *July and SARL Libération v. France*, 14 February 2008).

However, public figures, such as heads of state, politicians, heads of industry or celebrities, may also legitimately expect to be protected against intrusion of their privacy or against the propagation of unfounded rumours relating to intimate aspects of their private life. Freedom of the press does not extend to idle gossip about intimate or extra-marital relations merely serving to satisfy the curiosity of a certain readership and not contributing to any public debate in which the press has to fulfil its role of *public watchdog* (e.g. ECtHR, *Von Hannover v. Germany*, 26 April 2004; ECtHR, *Standard Verlags GmbH (No. 2) v. Austria*, 4 June 2009). Yet, the European Court has accepted that it can be justified to give more weight to the freedom of the press to impart information of public concern than to a politician's or public figure's interest in protecting his or her private life or reputation (e.g. ECtHR, *Karakó v. Hungary*, 28 April 2009). By so deciding, it has clearly given priority to the interest of transparency on matters of public interest in a democratic society.

The high level of protection of public debate has also been applied regarding demonstrations, peaceful protest activities, public speeches or other activities contributing to a debate on matters of public interest. Banning, hindering or stopping a demonstration, or the arrest and detention of protesters, especially when violence is used by the police, is likely to constitute a violation of Article (10) and/or Article (11) (freedom of assembly and association) of the European Convention (e.g. ECtHR, *Açik v. Turkey*, 13 January 2009; ECtHR, *Karapete a.o. v. Turkey*, 7 April 2009). At the same time, the media must be guaranteed access to places in order to be able to report on demonstrations or protest activities (ECtHR, *Gsell v. Switzerland*, 8 October 2009). In one case, the Court even considered the refusal to allow a ship with activists to enter territorial waters as a breach of Article (10) (ECtHR, *Women on Waves v. Portugal*, 3 February 2009). Article (10) also includes freedom of artistic expression: those who create, perform, distribute or exhibit works of art contribute to the exchange of cultural, political and social ideas and opinions, which is essential for a democratic society (e.g. ECtHR, *Vereinigung Bildender Künstler v. Austria*, 25 January 2007). In this respect, the European Court also recognized a high level of protection in the domain of academic speech and scientific writings or publications (e.g. ECtHR, *Hertel v. Switzerland*, 25 August 1998; ECtHR, *Karsai v. Hungary*, 1 December 2009). According to the European Court, this right includes academics' freedom to freely express their opinion about the institution or system in which they work and to distribute knowledge and truth without restriction (ECtHR, *Sorguç v. Turkey*, 23 June 2009).

A somewhat peculiar example of the impact of the European Court's jurisprudence on the freedom of political speech is the case of *TV Vest and Rogaland Pensjonistparti v. Norway* (11 December 2008), in which the European Court was not persuaded that the

application of a ban on paid political advertising had the effect desired by the Norwegian authorities. It came to the conclusion that the arguments in support of the prohibition of paid political advertising on television in Norway, such as the safeguarding the quality of political debate, guaranteeing pluralism, maintaining the independence of broadcasters from political parties and preventing powerful financial groups from taking advantage of having access to commercial political ads on TV, were relevant but not sufficient reasons to justify, in the specific circumstances of the case, the total prohibition of this form of political advertising. Therefore, the European Court concluded that there had been a violation of Article (10) of the European Convention. This judgement has initiated or renewed the debate in many countries in Europe whether or not a ban on political advertising on television, reducing the rights both of politicians and political parties and of broadcasters in this respect, is still a legitimate restriction on freedom of political speech (Lewis, 2009).

### ***Media, NGOs and Civil Society as 'Public Watchdog'***

In order to safeguard contributions to the public debate, the European Court has made clear that, in addition to the press, non-governmental organizations (NGOs), campaign groups or organizations with a message outside the mainstream must also be able to carry on their activities effectively and to rely on a high level of freedom of expression, both in terms of expressing ideas and opinions and in terms of having access to information of public interest (on the notion of the right to communicate and the public sphere, see Dakrouy and Birdsall, 2008). In a democratic society, public authorities are to be exposed to permanent scrutiny by citizens and anyone should be able to draw the public's attention to situations they consider to be unlawful (e.g. ECtHR, *Steel and Morris v. UK*, 15 February 2005; ECtHR, *Women on Waves v. Portugal*, 3 February 2009). The European Court also argued that freedom of expression is of particular importance for persons belonging to minorities. Referring to the hallmarks of a democratic society, it has attached particular importance to pluralism, tolerance and broadmindedness. In this context, it held that, although individual interests can on occasions be subordinated to those of a group, democracy does not simply mean that the views of the majority should always prevail: a balance must be achieved that which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (ECtHR, *Gorzelik v. Poland*, 17 February 2004; ECtHR, *Baczkowski a.o. v. Poland*, 3 May 2007).

Particular attention is paid to the public interest involved in the disclosure of information: 'The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence' (ECtHR, *Guja v. Moldova*, 12 February 2008). In such circumstances, journalists, civil servants, activists or staff members of an NGO should not be prosecuted or sanctioned because of a breach of confidentiality or the use of illegally obtained documents (e.g. ECtHR, *Fressoz and Roire v. France*, 21 January 1999; ECtHR, *Peev v. Bulgaria*, 26 July 2007). In its Grand Chamber judgement in *Stoll v. Switzerland*, the European Court confirmed that:



*... press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature. The conviction of a journalist for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest. As a result the press may no longer be able to play its vital role as 'public watchdog' and the ability of the press to provide accurate and reliable information may be adversely affected. (ECtHR, Stoll v. Switzerland, 10 December 2007)*

In its Grand Chamber judgement in *Guja v. Moldova*, the European Court recognized the need to protect whistleblowers under Article (10). It noted:

*... that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgation or publication corresponds to a strong public interest. The Court thus considers that the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large. (ECtHR, Guja v. Moldova, 12 February 2008)*

For this reason, the dismissal of a civil servant for leaking two confidential letters from the public prosecutor's office to the press, which could have the chilling effect of discouraging other civil servants or employees from reporting any misconduct, was found in breach of Article (10). The European Court's reasoning in the *Guja* judgement is undeniably an important support for whistle blowing and transparency in the public interest.

In particular, in cases where information is published on alleged corruption, fraud or illegal activities in which politicians, civil servants or public institutions are involved, journalists, media or NGOs can count on the highest standards of protection of freedom of expression. As the European Court held on many occasions, 'reporting on matters relating to management of public resources lies at the core of the media's responsibility and the right of the public to receive information' (e.g. ECtHR, *Busuioc v. Moldova*, 21 December 2004). Interference by public authorities with regard to the journalist's research and investigative activities calls for the most scrupulous examination from the perspective of Article (10) (e.g. ECtHR, *Thoma v. Luxembourg*, 29 March 2001; ECtHR, *Radio Twist S.A. v. Slovakia*, 19 December 2006; ECtHR, *Băcanu and SC 'R' SA v. Romania*, 3 March 2009). Also in this respect, journalistic sources can count on a very high level of protection under Article (10). According to the European Court:

*... protection of journalistic sources is one of the basic conditions for press freedom... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. (ECtHR, Goodwin v. The United Kingdom, 27 March 1996)*

As a consequence, the searching and confiscation of journalistic material in order to reveal the identity of an informant can be rarely justified: on several occasions the

European Court was of the opinion that searching the media offices or the journalist's home and workplace amounted to a violation of Article (10) (Banisar, 2007; Voorhoof, 2009). The European Court has also underlined that disclosure orders regarding journalistic sources have a detrimental impact not only on the source in question, whose identity may be revealed, but also on the newspaper to which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on the members of the public, who have an interest in receiving information imparted through anonymous sources and who are also potential sources themselves. Only in the case of an 'overriding requirement in the public interest' can a disclosure order, under certain circumstances, be justified, although the European Court is not very eager to accept that such an overriding public interest is at stake. It rather emphasizes that there will be a detrimental effect whenever journalists are ordered to assist in the identification of anonymous sources (ECtHR, *Financial Times a.o. v. The United Kingdom*, 15 December 2009).

An important new characteristic is the European Court's approach in recognizing a right of access to public documents within the scope of Article (10) (Hins and Voorhoof, 2007). On many occasions over the years, the Court has stated that Article (10) does not confer on the individual a right of access to a register containing information on his or her personal position, nor does it embody an obligation for the government to impart information or administrative documents to the individual. The general approach of the European Court was to hold that it was difficult to derive from the European Convention a general right of access to administrative data and documents (ECtHR, *Leander v. Sweden*, 26 March 1987; ECtHR, *Gaskin v. The United Kingdom*, 7 July 1989; ECtHR, *Guerra a.o. v. Italy*, 9 February 1998). In a judgement of 2007, the European Court seemed to be willing to reconsider this approach, as it expressed the opinion that 'particularly strong reasons must be provided for any measure affecting this role of the press and limiting access to information which the public has the right to receive' (ECtHR, *Timpul Info-Magazine and Anghel v. Moldova*, 27 November 2007), recognizing at least implicitly a right of access to information. In the spring of 2009 the European Court in two judgements explicitly recognized the right of access to official documents. It considered that when public bodies hold information that is needed for public debate, the refusal to open access to documents in this matter is to be regarded as a violation of the right to freedom of expression and information. The European Court has made clear that the state has an obligation not to impede the flow of information sought by a journalist or an interested citizen and that access to original documentary sources for legitimate historical research is an essential element of the exercise of the right to freedom of expression (ECtHR, *Társaság a Szabadságjogokért v. Hungary*, 14 April 2009; ECtHR, *Kenedi v. Hungary*, 26 May 2009).

### ***Opinions, Value Judgements and Defamatory Allegations***

Another characteristic of the European Court's case law reflects the distinction between (defamatory) allegations of fact and value judgements: 'The existence of facts can be

demonstrated, whereas the truth of value judgments is not susceptible of proof' (e.g. ECtHR, *Ukrainian Media Group v. Ukraine*, 29 March 2005). Defendants in defamation cases must be given the opportunity to prove the truth of their (factual) statements: depriving them of an effective opportunity to adduce evidence and to attempt to establish the truthfulness of their statements or to show that their content was not entirely without foundation, constitutes a disproportionate interference with the right to freedom of expression (e.g. ECtHR, *Alithia Publishing Company Ltd & Constantinides v. Cyprus*, 22 May 2008; ECtHR, *Băcanu and SC 'R' SA v. Romania*, 3 March 2009). In its recent case law the European Court also applied Article (10) in the digital context and regarding libellous internet content. In a recent case, it applied the so-called *internet publication rule*, accepting that the British courts' finding of libel by the continued publication on a newspaper's website of two articles did not represent a disproportionate restriction of the newspaper's freedom of expression, however emphasizing that 'libel proceedings brought against a newspaper after a significant lapse of time may well, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom under Article 10' (ECtHR, *Times Newspaper Ltd v. UK*, 10 March 2009). In the same judgement, the Court recognized the substantial contribution made by internet archives to preserving and making available news and information. According to the Court, 'such archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free'.

The European Court has also considered that the media's reporting on 'stories or rumours – emanating from persons other than an applicant – or public opinion' is to be protected (ECtHR, *Cihan Öztürk v. Turkey*, 9 June 2009). On several occasions it accepted that allegations or statements only had a slim factual basis or were based on unconfirmed allegations or rumours, or that it was sufficient that there was no proof that the description of events given in the articles was totally untrue (e.g. ECtHR, *Nilsen and Johnsen v. Norway*, 25 November 1999; ECtHR, *Timpul Info-Magazine and Anghel v. Moldova*, 27 November 2007). In many cases, this approach resulted in finding a breach of Article (10) of the European Convention, guaranteeing a broader protection of critical speech or investigative reporting by reducing the risk of an adverse effect on those who participate in actual polemic debate on matters of public interest.

### **No Protection of 'Hate Speech', Incitement to Violence or Glorification of Terrorism**

Although the European Court has on many occasions reiterated that freedom of expression is applicable not only to ideas that are favourably received or regarded as inoffensive, but also to those that 'offend, shock or disturb' (e.g. ECtHR, *Handyside v. The United Kingdom*, 7 December 1976), it does not give much protection, or rather any protection at all, to hate speech, including incitement to violence, Holocaust denial, (neo-)Nazi propaganda, incitement to discrimination or glorification of terrorism (Weber, 2009). The former European Commission of Human Rights and later the European Court itself have declared applications in this regard, based on freedom of expression, manifestly

ill-founded and accordingly inadmissible (e.g. ECommHR, 12 May 1988, *Kühnen v. Germany*; ECommHR, 24 June 1996, *P. Marais v. France*; ECtHR (Decision), 23 June 2003, *R. Garaudy v. France*; ECtHR (Decision), 13 December 2005, *Witzsch v. Germany*). The European Court clarified in a few recent judgements that there can be no doubt that expressions propagating, inciting or justifying hatred based on intolerance and discrimination do not enjoy protection under Article (10), given that 'tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society' (e.g. ECtHR, *Féret v. Belgium*, 16 July 2009). Neither are sanctions or convictions for incitement to violence or terrorism or because of glorification of terrorism considered as violating Article (10) of the European Convention (e.g. ECtHR, *Zana v. Turkey*, 25 November 1997; ECtHR (Decision), 29 May 2007, *Dieter Kern v. Germany*; ECtHR, *Karapete v. Turkey*, 31 July 2007; ECtHR, *Leroy v. France*, 2 October 2008).

Incitement to racism and Holocaust denial in some cases were excluded from Article (10) protection in application of Article (17) of the European Convention, the so-called *abuse clause*, as this kind of hate speech was considered to aim at the destruction of the rights and freedoms of the European Convention itself. The general purpose of Article (17) is to prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated by the Convention (Weber, 2009). In the case of *Lehideux and Isorni v. France* (23 September 1998), the European Court in general terms made clear that 'there is no doubt, like any other remark directed against the Convention's underlying values, the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10'. The European Court also stated that a general and vehement attack on one ethnic group 'is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination' (ECtHR (Decision), 16 November 2004, *Norwood v. UK*; ECtHR (Decision), 20 February 2007, *Pavel Ivanov v. Russia*). In *Norwood v. The United Kingdom* (16 November 2004), the European Court considered the display of a poster on a window, with a photograph of the Twin Towers in flame and the words 'Islam out of Britain – Protect the British People' to be an act within the meaning of Article (17), which therefore did not enjoy the protection of Article (10). In other cases, the European Court did not explicitly or directly exclude the protection of Article (10), yet found no violation of the right to freedom of expression as the interferences against some forms of hate speech were considered to be necessary in a democratic society. If such expressions take place in an electoral context their impact is magnified. Recommending solutions to immigration-related problems by advocating racial discrimination is then likely to cause social tension and to undermine trust in democratic institutions (e.g. ECtHR, *Féret v. Belgium*, 16 July 2009).

In some judgements however, the European Court has provided protection to racist expressions or statements that could be interpreted as supporting the former Nazi regime, as the speech was related to a broader discussion on matters of public interest (ECtHR, *Jersild v. Denmark*, 23 September 1994; ECtHR, *Lehideux and Isorni v. France*, 23 September 1998; ECtHR, *Orban a.o. v. France*, 15 January 2009). In *Gündüz v. Turkey* (4 December 2003), it rejected the justification of a criminal conviction because of inciting the people to hatred and hostility. It underlined that merely defending Shari'ah

(a religious doctrine generally held incompatible with certain fundamental democratic values) during a TV debate, without calling for the use of violence to establish it, cannot be regarded as hate speech. In many cases against Turkey, the European Court found that the convictions or sanctions for separatist propaganda or incitement to hatred or hostility did violate Article (10), as the impugned statements, speeches, publications or programmes did not, in the Court's view, incite to violence or terrorism (e.g. ECtHR, *Incal v. Turkey*, 9 June 1998; ECtHR, *Bahçeci and Turan v. Turkey*, 16 June 2009).

While the European Court in some earlier cases accepted interferences with freedom of expression in order to protect the religious feelings of others (ECtHR, *Otto Preminger Institute v. Austria*, 20 September 1994; ECtHR, *Wingrove v. The United Kingdom*, 25 November 1996), its more recent case law indicates that defamation of a religious community or criticism directed towards a religion are certainly not excluded from protection under Article (10) (ECtHR, *Giniewski v. France*, 31 January 2006). In *Aydin Tatlav v. Turkey* (2 May 2006), the European Court found the prosecution and conviction of a journalist for publishing a book designed to defile and offend a religion a violation of freedom of expression. Although certain passages of the book contained strong criticism on religion in a social-political context, these had no insulting tone and did not contain an abusive attack against Muslims or against sacred symbols of Muslim religion. The European Court did not exclude the fact that Muslims could nonetheless feel offended by the caustic commentary on their religion, but this was not considered to be a sufficient reason to legitimize the criminal conviction of the author of the book.

## ***The Proportionality Test***

In its assessment of whether an interference complained of is necessary in a democratic society, the European Court integrates the proportionality principle, by evaluating whether the interference with freedom of expression, given the nature and severity of the penalties imposed, is proportional to the legitimate aim pursued. Although sentencing is in principle a matter for the national courts, the European Court considers that:

*... the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence. (ECtHR, Cumpănă and Mazăre v. Romania, 17 December 2004)*

In some cases, the European Court did accept that an interference reflected a pressing social need, but because of the severe character of the sanction, the excessive amount of an award of damages or the length of a prison sentence, it still found a violation of Article (10) (e.g. ECtHR, *Tolstoy Miloslavsky v. UK*, 13 July 1995; ECtHR, *Mehmet Cevher Ilhan v. Turkey*, 13 January 2009). Yet, also a light or lenient sanction, or even an order of rectification or an admonishment, can be a breach of Article (10), as the European Court does not accept that the limited nature of the fine is decisive as regards the

issue of necessity (e.g. ECtHR, *Barfod v. Denmark*, 22 February 1989; ECtHR, *Csánics v. Hungary*, 20 January 2009).

When a legitimate interference has only a restricted and relevant impact, is sufficiently fine tuned, is not categorical or leaves the applicants sufficient other possibilities to express their opinions or impart information, this will be an additional argument for the European Court to accept the justified character of an interference complained of in the light of Article (10), at least when a milder sanction was not possible or when the interference was sufficiently limited in time or in space (e.g. ECtHR, *Vogt v. Germany*, 26 September 1995; ECtHR, *Fuentes Bobo v. Spain*, 29 February 2000; ECtHR, *Wojtas-Kaleta v. Poland*, 16 July 2009).

The European Court's case law often refers to the risk of a detrimental effect, as sanctions imposed by national authorities could dissuade the press or others from taking part in the discussion on matters of public interest. Prison sentences are by their very nature supposed to have a detrimental effect on the exercise of journalistic freedom (ECtHR, *Mahmudov and Agazade v. Azerbaijan*, 18 December 2008). In applying a strict proportionality test, the European Court's case law has reduced the member state's margin of appreciation of what can be considered as an acceptable sanction for manifest abuse of the right of freedom of expression in disregard of the duties and responsibilities inherent to the exercise of this right.

### **Recent Restrictive Trends**

Although the European Court has manifestly upgraded freedom of expression within Europe, some restrictive trends in its case law have recently been identified. The outcome and rationale of some judgements in which the European Court has found no violation of the right to freedom of expression and information have raised serious concerns, which are also reflected in dissenting opinions annexed to some of these judgements. In *Lindon a.o. v. France* (22 October 2007), the European Court considered defamatory statements regarding the French far right politician Le Pen to be overstepping the permissible limits of criticism, and hence the interferences by the French authorities as necessary in a democratic society, finding no violation of Article (10). Three dissenting judges subsequently expressed the opinion that the judgement as supported by the European Court's majority is 'a significant departure from the Court's case law in matters of criticism of politicians' (dissenting opinion in annex to ECtHR, *Lindon, Otchakovsky-Laurens and July v. France*, 22 October 2007). In *Stoll v. Switzerland* (10 December 2007), the European Court judged the publication by a journalist of a strategic document, classified as confidential, concerning possible strategies regarding compensation due to Holocaust victims for unclaimed assets deposited in Swiss banks, capable of undermining the climate of discretion necessary for the successful conduct of diplomatic relations. Again, the Grand Chamber of the European Court found no violation of Article (10). In the dissenting opinions this judgement is qualified as 'a dangerous and unjustified departure from the Court's well established case law concerning the nature and vital importance of freedom of expression in democratic societies' (dissenting opinion in annex to ECtHR, *Stoll v.*

*Switzerland*, 10 December 2007). In *Flux No. 6 v. Moldova* (29 July 2008), the European Court came to the conclusion that a newspaper, by making unsubstantiated accusations of criminal offences, acted in flagrant disregard of the duties of responsible journalism, and therefore the interference with the exercise of its right to freedom of expression was justified. The dissenters expressed their concern that 'this judgment of the Court has thrown the protection of freedom of expression as far back as it possibly could', making it 'a sad day for freedom of expression' (dissenting opinion in annex to ECtHR, *Flux No. 6 v. Moldova*, 29 July 2008). These are only some examples of dissenting opinions in which the dissenting judges have expressed their concerns about a more restrictive approach by the majority in the European Court as to protection of the right to freedom of expression and information (see also the dissenting opinions in, for example, ECtHR, *Saygılı and Falakaoğlu (No. 2) v. Turkey*, 17 February 2009; ECtHR, *GCIL and Cofferati v. Italy*, 24 February 2009; ECtHR, *Sanoma Uitgevers BV v. The Netherlands*, 31 March 2009; ECtHR, *Standard Verlags GmbH (No. 2) v. Austria*, 4 June 2009; ECtHR, *Willem v. France*, 16 July 2009; ECtHR, *Féret v. Belgium*, 16 July 2009; ECtHR, *Aguilera Jiménez a.o. v. Spain*, 8 December 2009). It is obvious that also within the European Court these judgements have initiated a robust debate and have given rise to concerns about the (future) level of protection of press freedom in Europe, compared to the traditional high standards of the Strasbourg court's case law in this matter.<sup>4</sup>

## Conclusions and Challenges

The European Court of Human Rights has manifestly helped to increase the level of freedom of expression and information of individuals, journalists, artists, academics, opinion leaders, NGOs and activists regarding their rights to receive, gather, express and impart information contributing to public debate in society. It is obvious that in most of the judgements the European Court has emphasized, definitely more than the national authorities, that the impugned press articles, publications or statements needed protection as they were contributing to debate on matters of public interest. The European Court's case law clearly reflects the idea that freedom of critical expression, pluralist media and independent journalistic reporting can help democracy to take root and to develop in a country. It has also recognized the importance of access to information and the right to receive information from a public interest perspective.

Over the years, Article (10) of the European Convention has been more and more incorporated into the domestic law and practice of (most of) the member states. Press freedom and freedom of expression is, however, never finally accomplished: the tension between the principle of freedom of expression in a democracy and the need for public or private interests to restrict this freedom entails a continuous attempt to find a fair balance between the competing interests and values concerned, freedom of expression being nevertheless a precondition in a democratic society. From this perspective, the jurisprudence of the European Court applying Article (10) is to be considered an authoritative international standard regarding the protection of freedom of expression and information.

The challenge for the future is to bring more European Convention member states in line with the European Court's case law and to inspire, influence or persuade other states and regions in the world to upgrade freedom of expression of its citizens, to protect the freedom of news gathering and independent and critical reporting by journalists and NGOs, to give more weight to the public's right to be properly informed and to create more access to information and transparency regarding debate on matters of interest for society.

It is very important to uphold, consolidate and further develop the high standards guaranteeing this right. The European Court should not further reduce the acquired level of protection itself, a concern that is not imaginary given some recent restrictive trends in its approach. Protecting and effectively guaranteeing the right to freedom of expression and information is crucial in order to develop the quality of democracy, to stimulate diversity and tolerance, to guarantee the respect for human rights and ultimately to help to realize a more sustainable, and hence a better, world to live in.

## Notes

1. The 47 member states that at present have ratified the European Convention are Albania, Andorra, Austria, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom. Some 800 million people are actually living under the protection of the European Convention on Human Rights, as a 'minimum rule' of human rights protection (Article (53)). For more information on the Council of Europe and the European Convention on Human Rights, see [www.coe.int](http://www.coe.int) and [www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN).
2. Reporters without Borders; at: [www.rsf.org](http://www.rsf.org) (accessed 25 January 2010); Freedom House; at: [www.freedomhouse.org](http://www.freedomhouse.org) (accessed 25 January 2010).
3. All case law referred to in this article can be consulted in the European Court of Human Rights' HUDOC database; at: [www.echr.coe.int/ECHR/EN/hudoc](http://www.echr.coe.int/ECHR/EN/hudoc). Because of space and style considerations, case law is referred to in a supportive and illustrative, and certainly not in an exhaustive or integral way. A more extensive list of relevant case law can be obtained from the authors of this article.
4. See the proceedings and conclusions of the Seminar on the European Protection of Freedom of Expression: Reflections on Some Recent Restrictive Trends, Strasbourg, 10 October 2008; at [www-ircm.u-strasbg.fr/seminaire\\_oct2008/index.htm](http://www-ircm.u-strasbg.fr/seminaire_oct2008/index.htm) or [www.psw.ugent.be/dv](http://www.psw.ugent.be/dv) (recent publications, 2008).

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