INTERIGHTS

Freedom Of Expression Under The European Convention On Human Rights (Article 10)

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Using this Manual

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The manual includes judgments of the European Court of Human Rights up to 13 October 2009. Any errors, omissions or faults are those of the authors.

Alternative formats of the manual are available upon request.

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Table of Contents

1 INTRODUCTION

> ARTICLE 10 – FREEDOM OF EXPRESSION
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartialit

1.1. General overview

International human rights law attaches particular importance to the right to freedom of expression and recognises it as a fundamental right in a democratic society. It is an established right under international law, which appears for example in Article 19 of the Universal Declaration of Human Rights (1948) and in Article 19 of the International Covenant on Civil and Political Rights (1966) and in Article 10 of the European Convention on Human Rights ('the Convention'). It is also protected in the domestic law of all democratic States.

Under Article 10 of the Convention freedom of expression includes at its very least the right to hold ideas and opinions and to receive and impart information. It is a wide ranging provision within which there is considerable scope for argument as to the nature of the rights and the legitimacy of any limitations imposed by the State.

The European Court on Human Rights ('the Court') gives a wide interpretation to the terms in Article 10(1) and it has continuously expanded the parameters of protection under Article 10(1). The classic statement which captures the Court's approach is found in the case of **Handyside v United Kingdom (1976)** at paragraph 49 where the Court said that freedom of expression:

> *constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".*

This is a useful starting point when considering a case under Article 10. It is clear that the Court recognises the centrality of Article 10 to the realisation of human rights in and of itself, but also emphasises the link between freedom of expression and the achievement of other human rights. It is arguable that the Court views freedom of expression as a prerequisite for the effective promotion and protection of rights generally. In the absence of free expression, and a free press particularly, rights violations can be overlooked and State abuses can go unchecked. Any consideration of Article 10 must therefore recognise not just the underlying principles behind freedom of expression but also the interrelationship between freedom of expression and democracy.

As a general point therefore, when assessing the merits of a claim under Article 10 some consideration should be given to the relationship between Article 10 and other rights in the Convention, in particular the right to respect for private life under Article 8 (1) and freedom of association under Article 11.

However, it is also to be noted that Article 10 is a qualified right, in that Article 10(1) allows the State to impose licensing requirements on broadcast media. Furthermore in a similar way to Articles 8, 9 and 11, Article 10(2) allows the State to impose limitations on the rights protected in Article 10(1). What is clear from **Handyside v United Kingdom (1976)** is that any limitations which are placed on the right must be viewed in the context of States being expected to give the broadest possible interpretation to freedom of expression, in the interests of promoting democratic values.

Under Article 10(2) an interference with the rights contained in Article 10(1) must satisfy the following criteria;

- It must be prescribed by law
- And be shown to be necessary in a democratic society
- It should pursue a legitimate aim under Article 10 (2) namely in the interests of national security, for the protection of health or morals, for the protection of the rights or reputation of others, to prevent the disclosure of information received in confidence or for maintaining the impartiality and independence of the judiciary
- Any measures taken must be proportionate to the aim being pursued

These criteria are spelt out in the text of Article 10(2) but they have also been developed by the Court through case law and this will be considered in greater detail in this Manual. It is notable as a general starting point however that the limitations are to be restrictively interpreted and the need for the interference with the right must be convincingly established. In practice the majority of cases hinge on the question of whether any measures taken by the State, which could have constituted an interference, were proportionate to the aims being pursued.

In determining the extent to which an interference with the right is permitted under Article 10(2) the Court will have regard to 'the margin of appreciation' which is to be afforded to the State, in matters of morality and national security particularly, but to an extent this applies to Article 10(2) in its entirety. The margin of appreciation is a measure of discretion given to States by the Court in recognition of the diversity of practice among States as to social mores and national security. The Court has taken the view that it may sometimes be necessary to tolerate an approach to Articles 8-11, which reflects national particularity and may on its face appear to be contrary to the Convention. The margin of appreciation is however subject to the supervision of the Court itself and it is ultimately a matter for the Court to determine whether it can be invoked by the State on a case-by-case basis. It is also notable that it does not have any relevance in the domestic arena.

A final introductory point to note in relation to limitations is that Article 10 comes within the reach of the derogations provision in Article 15. As a consequence freedom of expression can be subject to certain restrictions in times of war or a public emergency which threatens the life of the nation. It is notable however that the discretion of the State to impose such limitations is not unlimited in that the emergency must pose a real and actual threat to the State and the measures taken again must be proportionate to the threat. Ultimately it is up to the Court to determine both the existence of the emergency and the proportionality of measures taken by the State. It is to be noted that international tribunals do however afford the State a significant measure of discretion as to the appropriateness of measures taken during a 'state of emergency' and domestic courts also tend to do likewise.

1.2. Who can claim?

Article 10(1) provides that *'everyone'* has the right to freedom of expression and the approach of the Court has been to give that term its literal and linguistic meaning. As a consequence it includes legal and natural persons and this was clearly explained by the Court for example in the case of **Autronic AG v Switzerland (1990)** where a limited company sought to benefit from the protection offered by Article 10 as regards its commercial plans to transmit television programmes. At paragraph 47 the Court stated:

> *...neither Autronic's AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10. The Article...applies to "everyone" whether natural or legal persons.*

The rights in Article 10 have been interpreted by the Court as being available to a range of natural persons including journalists in **Goodwin v United Kingdom (1996**), civil servants in **Vogt v Germany (1995)** and serving members of the military in **Engel and Others v Netherlands (1976).** It has also been found to apply to publishers in **Unabhangige Initiative Informations Viefalt v Austria (2002)** and to newspapers in **Sunday Times v United Kingdom (No. 1) (1979).**

In circumstances involving freedom of the press, it is clear that the rights under Article 10 extend to both the journalist who may be the author or the producer of the publication or broadcast, but also to the newspaper or broadcasting organisation in which it was published or on which it was transmitted. Thus in **Jersild v Denmark (1994)** the Court found that the rights under Article 10 applied to both the producer of a programme and the television station on which it was broadcast.

Questions

1. Why is freedom of expression central in a democratic society?
2. What is the significance of the importance placed on freedom of expression in the context of legal practice?
3. What factors in Article 10(2) should be considered when assessing the merits of a claim under Article 10(1)?
4. Who can claim under Article 10(1)?
5. In domestic law, who may exercise the right to freedom of expression?
6. Are there any limitations with regard to who may exercise the right to free

1.3. Scope of the right to freedom of expression

It is clear that the Court has interpreted freedom of expression to cover all forms of expression and it extends to all forms of opinions and views. In **Handyside v United Kingdom (1976)** at paragraph 48 the Court, as noted above, indicated that the protection extends to those ideas which may be viewed as unpopular or offensive by the majority. Thus in **Wingrove v United Kingdom (1996)**, the protection of Article 10(1) was found to extend to a pornographic film which depicted a Catholic saint involved in sexual activities. Similarly in the matter of **Müller and Others v Switzerland (1988)** paintings of a sexually explicit nature constituted expression for the purposes of Article 10(1).

Article 10 also protects discussion or dissemination of information received even if it is strongly suspected that the information might not be truthful. The Court has observed that to suggest otherwise would deprive people of the right to express their views and opinions about statements made

in the mass media and would thus place an unreasonable restriction on freedom of expression, for example in **Salov v Ukraine (2005)**.

It is however important to bear in mind that the subject matter which constituted freedom of expression for the purposes of Article 10(1) may still be subject to an interference by the State which is compatible with Article 10(2).

1.3.1. Prohibited forms of expression – incitement to violence and hate speech

There is a delicate balance to be struck between the broad interpretation to be given to freedom of expression under Article 10(1) and the way in which extreme speech or hate speech interferes or undermines the rights of others. The Court has on occasion relied on Article 17 of the Convention which prohibits any group or person from engaging in activity which destroys the rights in the Convention. In the context of extreme speech Article 17 has been interpreted to exclude expression which could incite hatred or is so extreme as to negate the rights of others.

In **Glimmerveen and Hagenbeek v Netherlands (1979)** the Commission relied on Article 17 to exclude a complaint from Article 10 entirely. The Commission noted:

> *The applicants are essentially seeking to use Article 10 to provide a basis under the Convention for a right to engage in these activities which are, as shown above, contrary to the text and the spirit of the Convention and which right, if granted would contribute to the destruction of the rights and freedoms referred to above. Consequently, the Commission finds that the applicants cannot, by reason of the provisions of Article 17 rely on Article 10.*

The applicants in that case had been convicted for the possession and distribution of leaflets which called for the expulsion of non-white persons from the Netherlands. The stance taken by the Commission effectively excluded racist speech from the ambit of Article 10.

However in subsequent decisions the Court has taken a different approach and appears to take the view that Article 17 was best applied to Article 10(2) and in particular that it affected the determination of whether an interference was 'necessary in a democratic society'. In applying this approach the Court leaves intact the wide interpretation of Article 10(1) as to the right to freedom of expression including the right to hold and impart views and opinions which are offensive and disruptive.

Therefore in the case of **Lehideux and Isorni v France (1998)** the Court determined that the conviction of the applicants for public defence of war crimes, in relation to their advocating for the rehabilitation of a convicted war criminal, invited the protection of Article 10 because the applicants had not sought to deny the historically established fact of the Holocaust, but rather had questioned one person's contribution to it. This decision supports a view that when considering whether extreme speech or hate speech will be excluded from Article 10 by Article 17 considerations, the approach of the Court has been to focus on the context in which the views were expressed and it has developed the law in this area on a case-by- case basis.

A further issue which arises is the distinction which is made between hate speech per se and speech which incites racial or religious hatred and which incites violence. Hate speech and those who advocate such extreme views are without the protection of Article 10(1). However, as regards the reporting of such views and the potential effect this might have on others, it would appear that the Court has moved in the direction of considering such matters within the context of whether any interference by the State is justified by reference to Article 10(2) rather than limit the application of Article 10(1). In the case of **Gunduz v Turkey (2003)** the Court noted at para 40:

> *Tolerance and respect for the equal dignity of all human beings constitutes the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued. Furthermore...there can be no doubt that concrete expressions, constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention.*

By examining the context in which views are expressed the Court maintains its position that a distinction must be made between those who express extremist views, who do not always enjoy the protection of Article 10(1) and the media, which in covering the expression of those views may be acting in its role as public watchdog. Thus in the case of **Jersild v Denmark (1994)** the Court determined that a statement was less likely to be regarded as inciting violence or racial hatred if it was reported in the context of an informative documentary programme which had a reputation for covering difficult issues and treating them in a thoughtful and serious manner. It went on in that case to find that the conviction of the journalist who made the programme and his producer violated Article 10(1) and was not necessary to protect the rights of others.

In limited circumstances the Court has taken the view that there are certain topics and historical events which are viewed as being so sensitive that to deny them would be considered to be hate speech and accordingly Article 17 thereby excludes them from the protection of Article 10. In **Garaudy v France (2003)** the Court determined that Holocaust denial fell outside of Article 10(1) and it went on to state as follows:

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

It would seem therefore that in relation to the parameters of 'freedom of expression' the approach of the Court advocates as broad as possible an interpretation of Article 10(1). However some caution is advisable when dealing with extreme views and hate speech and in particular matters should be viewed in context with a distinction being made between those who espouse the views and those who report them. Again it seems appropriate that Article 17 be applied to Article 10(2) rather than restricting the very concept of acceptable expression under Article 10(1) but it is also clear that the context may require the Court or domestic tribunal to take a stronger line as was done in the matter of **Garaudy v France (2003)** above.

Questions

1. What are the justifications put forward by the Court for taking a wide interpretation of freedom of expression under Article 10(1)?
2. What factors inform the approach of the Court as to placing limitations on who may exercise the right to freedom of expression?
3. How should one assess the merits of an application under Article 10(1) when considering incitement to racial hatred or violence? Consider the Court' approach to Article 17 in your response.

1.3.2. Form of expression

The Court has established that Article 10 covers most forms of expression, through any medium. This includes the following:

- Artistic expression through paintings, films or photographs come within the protection of Article 10. In **Müller and Others v Switzerland (1988)** the Court considered that an application which concerns the confiscation of paintings from a public exhibition, because they included sexually explicit scenes, gave rise to an interference under Article 10(1). The Court made it clear that expression of ideas through art enjoyed the protection of Article10 (1), it stated at paragraph 27;

  > *Freedom of artistic expression – notably within freedom to receive and impart information and ideas, which afford the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds.*

  In **Otto-Preminger-Institut v Austria (1994)** ideas expressed in a film were found to enjoy the protection of Article 10(1). Similarly in **News Verlags GmbH and COKG v Austria (2000)** the Court found that photographic images constituted expression under Article 10 (1).

- Material which is broadcast on the radio is also covered by Article 10 regardless of whether it is light entertainment or news (**Groppera Radio AG v Switzerland (1990)**).

- Political expression is clearly covered by Article 10(1).

- Ideas and information contained in works of fiction are covered by Article 10(1), in **Alinak v Turkey (2005)**, the Court found that a novel which was based on real life enjoyed the protection of Article 10(1).

- Ideas which are published in an information leaflet are protected by Article 10. In **Open Door Counselling and Dublin Well Woman v Ireland (1992)**, the Court found that a leaflet which provided information about abortion clinics in the United Kingdom to women seeking to travel out of the jurisdiction to terminate a pregnancy came within Article 10(1).

- Commercial speech and expression is also covered by Article 10. In **Markt Intern Verlag GmbH v Germany (1989)** the Court took the view that information contained in an advertisement constituted protected speech,. At paragraph 26, the Court stated that information of a commercial nature:

  > *...cannot be excluded from the scope of Article 10 para 1 which does not apply solely to certain types of information or ideas or forms of expression.*

Questions

1. Do domestic law provisions protecting the right to freedom of expression in domestic law cover political, public interest and artistic expression?
2. Are all forms of media protected?

1.3.3. Means of expression

Article 10 covers not only content, but also the means by which opinions and information are conveyed. This is so, since interference with the means of expressing opinions or information, clearly interferes with the right to receive and impart information. As noted above it extends to the press, books, film, art, radio and television broadcasts, graffiti, displaying posters and banners and, by implication, the Internet.

It is important to bear in mind that although all kinds of expression fall within the protection of the Article 10, it does not follow that they must all be treated equally in terms of the limitations which may be imposed on them.

1.3.4. The right not to express a view

Freedom of expression under Article 10 also entails the right not to express oneself. In **Young, James and Webster v United Kingdom (1981)** the European Commission on Human Rights took the view that a 'closed shop' which required employees to be members of a trade union prevented the employee from dissenting from the common views expressed by the Trade Union on behalf of all employees. The Commission followed the same approach in **K. v Austria (1993)**, where it held that Article 10 was applicable to a person who refused to give evidence.

1.3.5. Freedom to hold opinions

Article 10 states that freedom of expression 'includes the freedom to hold opinions'. Holding opinions is to be differentiated from the right to freedom of conscience which is protected under Article 9(1).

While the holding of opinions is the precursor to expressing views it is not 'expression' itself (**Barthold v Germany (1985)**). Article 10 protects persons against adverse consequences of having opinions ascribed to them on the basis of their previous public expression and the negative freedom protects them against being compelled to reveal what opinions they hold.

1.3.6. Freedom of information

Article 10 speaks of the right to receive and impart information. The Court has been careful not to interpret this as meaning that the Convention guarantees freedom of information and until recently applications regarding access to information have been decided by reference to the right to respect for private life under Article 8(1). For example in **Leander v Sweden (1987)**, the Court took the right to receive information under Article 10 could not be relied upon to argue that an applicant had a right of access to government files concerning his application for a government job. Any issues arising came within Article 8(1). The Court noted at para 74:

> *...the right to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him.*

Similarly in the case of **Gaskin v United Kingdom (1989)** the Court considered an application by an adult seeking access to confidential social services files regarding his childhood in care and took the view that there was no obligation on the State to disclose information arising from Article 10. The Court stated at paragraph 52:

> *Article 10 does not embody an obligation on the State concerned to impart the information in question to the individual.*

Article 10 therefore provides the right to receive information, through the press, the television or other source or medium but the right in Article 10 presupposes a willing provider of information. For example:

- In **Open Door Counselling and Dublin Well Woman Clinic v Ireland (1992)** the applicants ran a counselling service for pregnant women. The Court found that an injunction which prohibited the distribution of information about abortion clinics in the UK to women seeking to travel out of the jurisdiction to terminate their pregnancies, amounted to an interference with the applicants' right to impart information. The Court has also noted that the press has a very important role to play in a democratic society in the provision of information, which in turn the public has a right to receive (see also **Sunday Times v United Kingdom (No. 1) (1979)** at paragraph 65).

- In **Roche v United Kingdom (2005)** the applicant was a former soldier who had severe health problems he claimed were caused by his participation in mustard and nerve gas tests carried out by the British army. He experienced considerable difficulty in getting disclosure of his army service records in order to claim a pension based on his ill-health. He claimed that he was denied adequate access to information in violation of both Articles 8 and 10 of the Convention. The Court (citing **Leander v Sweden (1987)**) recalled that the freedom to receive information prohibited a Government from restricting a person from receiving information that others wished or might be willing to impart and that that freedom could not be construed as imposing on a State, in circumstances such as those of the applicant's case, positive obligations to disseminate information. There had therefore been no interference with the applicant's right to receive information as protected by Article 10.

Nevertheless, the Court has recently advanced towards a broader interpretation of the notion of 'freedom to receive information' (see **Sdru ení Jihočeské Matky v la République tchèque (2006)**) and thereby towards the recognition of a right of access to information.

- Furthermore, a considerable shift was made by the Court in the recent judgment **Társaság a Szabadságjogokért v Hungary (2009).** This ruling can be interpreted as establishing that public bodies, including parliaments and courts, must make public information that they hold, when the information is needed to conduct a public debate on matters of public importance. The applicant, a non-governmental organisation active in the field of drug policies, applied to the Constitutional Court for access to a complaint submitted by an MP who was looking to have certain drug-related offences struck from the Criminal Code. The applicant's request was denied on the ground that the complaint pending before the Constitutional Court could not be made available to uninvolved parties without the approval of its author. In this case the Court found a violation of Article 10, although it did not confirm directly its recognition of the right to access to state-held information. The Court's reasoning was based on the fact that the applicant's intention was to impart to the public the information gathered from the constitutional complaint in question, and thereby to contribute to the public debate concerning legislation on drug-related offences. Thus, the Court concluded that its right to impart information, rather than the right to access to information, was impaired. The Court noted that the information sought by the applicant was ready and available and did not require the collection of any data by the Government. Therefore, the State had an obligation not to impede the flow of information sought by the applicant. The Court considered that obstacles created in order to hinder access to information of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as 'public watchdogs' and their ability to provide accurate and reliable information may be adversely affected in violation of Article 10.

Also, see **Kenedi v Hungary (2009)**, where the Court found a violation of Article 10 on account of the continued failure of the Ministry of Interior to grant the applicant access to documents concerning the Hungarian secret services and thus, to comply with the domestic court's decisions granting the applicant such access.

Questions

1. Does domestic law guarantee freedom of information? If so, how is it formulated?
2. What is the relationship between freedom of expression and freedom of information under Article 10(1)?

1.3.7. Article 10 and private life

The right to freedom of expression does not cover the expression of one's sexuality. Thus, in a number of cases involving the criminalisation of homosexuality, the Court has stated, it is 'an essentially private manifestation of human personality' falling outside Article 10(1) but coming with the meaning of the term 'private life' under Article 8(1) (see **Smith and Grady v United Kingdom (1999)** at paragraph 127).

2. STATE RESPONSIBILITY UNDER ARTICLE 10

2.1. Negative obligations

The primary obligation of States under Article 10 is to refrain from unlawful interferences with the exercise of the right to freedom of expression. The mechanisms of the State must avoid any legislative, judicial or administrative interference with the rights which Article 10 is seeking to promote. For example, the State should not impose unduly restrictive measures that protect the State monopoly of television broadcasting (see **Informationsverein Lentia v Austria (1993)**). Similarly it must also not apply law which inhibits the content of information or opinions that are expressed unless doing so is justified. As a general rule all restrictions on freedom of expression are to be discouraged under Article 10(1).

2.2. Positive obligations and the horizontal effect of Article 10

Article 10 also requires the State to take positive measures to promote the right to freedom of expression. While Article 10 is primarily concerned with regulating the activities of State authorities and those of State agents, it also has horizontal effect and applies to the actions of non State entities and private actors. The Court requires the State to act when an individual's rights under Article 10 are under threat from a non-state actor and a failure to do so could in and of itself give rise to an interference under Article 10.

States have argued before the Court that an interference in issue was not imposed by a State authority and therefore did not engage the responsibility of the State. It must be clearly shown that an interference either emanated from the State or was ratified by a State authority such as a court, or that it arose as a consequence of State inaction, in order for Article 10 to be applicable. This is illustrated in the following examples:

- In **Casado Coca v Spain (1994)**, the applicant was a lawyer who was the subject of disciplinary proceedings by the Barcelona Bar Council, in which warnings were imposed on him for breaching rules on advertising. He appealed unsuccessfully to the Spanish courts. The respondent State argued that the interference had not been imposed by a 'public authority'. It asserted that the Barcelona Bar Council's warnings could be regarded as an internal sanction imposed on the applicant by his peers. The State had ratified by royal decree, a statute drawn up by the members of the Bar, in which professional advertising was banned. The Court, however, noted that the law on professional associations recognised that professional associations were public-law corporations. In the case of the Bar, this status was further buttressed by their purpose of serving the public interest through the furtherance of free, adequate legal assistance combined with public supervision of the practice of the profession and of compliance with professional ethics. Furthermore, the impugned decision was adopted in accordance with the provisions applicable to members of the Barcelona Bar and an appeal against it lay to the competent courts, all of which were State institutions. Accordingly, it was reasonable to conclude that there had been an interference by a public authority with the applicant's freedom to impart information.

Questions

1. How does domestic law describe interferences with the right to freedom of expression?
2. Does domestic law ensure that bodies such as Bar councils are regarded as public authorities?
3. Under domestic law, what rules of interpretation apply to restrictions of the right to freedom of expression?

Under Article 10 it is also clear that inaction by State agents or a failure to react appropriately can also fall foul of the positive obligation in Article 10. This is clear from the following examples:

- In **Ozgur Gundem v Turkey (2000)** the applicant was a newspaper, the office of which had been repeatedly attacked, staff were injured and the paper eventually closed. In addition many of the people who were involved in the distribution of the newspaper were also attacked. The applicant, and others acting on behalf of the newspaper and its employees, addressed numerous petitions to the State authorities concerning the threats and attacks. There were no replies to the vast majority of these letters. The newspaper, its editor and others were then convicted of a number of offences. The Court found on the evidence that from 1992 to 1994 there were numerous incidents of violence, including killings against the newspaper, its journalists, distributors and other persons associated with it. It found also that the concerns of the newspaper were brought to the attention of the authorities but no measures were taken to investigate the allegations. The authorities responded with protective measures only in two instances. The Court held that genuine, effective exercise of the right to 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. In determining whether or not a positive obligation existed, it noted that regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual. Such an obligation must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities. However, in this case, the authorities were aware of the attacks to which the applicant had been subjected, and had declined to address the vast majority of the petitions and requests for protection. The Court stated that even if the newspaper supported the PKK (Workers' Party of Kurdistan) as alleged by the respondent State, this was no justification for failing to take steps effectively to investigate and, where necessary, provide protection against unlawful acts involving violence. The Court concluded that the State failed to comply with its positive obligation to protect *Özgür Gündem* in the exercise of its freedom of expression.

- In **Appleby and Others v United Kingdom (2003)** the applicants campaigned against a proposed development on a playing field in the vicinity of their town centre. The first applicant set up stands at the entrance to a shopping mall, which had been built by a public development corporation as the new town centre and subsequently sold to a private company. The first applicant was forced to remove the stand, and although the manager of one of the supermarkets let her collect signatures in the store, the manager of the mall itself refused permission. The Court was not persuaded that any element of State responsibility could be derived from the fact that a public development corporation transferred property to the owner or that this had been done with ministerial permission. The applicants relied on case law from the United States and Canada, claiming that the freedom of expression includes a right to speak freely in any forum. The Court did not accept that there was an emerging consensus in this regard. Balancing the right to freedom of expression and the right to property, the Court did not find the State had failed in any positive obligation to protect the applicants' freedom of expression.

The Court has taken a more restrictive approach to the positive obligation in respect of freedom of information as is illustrated in the following examples:

- In **Leander v Sweden (1987)** the competent authorities refused to appoint Mr. Leander as a museum technician at the Naval Museum, relying on secret information about him. The Court held that:

  > *Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the State to impart such information to the individual.*

- In **Gaskin v United Kingdom (1990)** the Court upheld this approach and it found that the right to freedom of information does not impose a general obligation upon the State to impart information to individuals.

Questions

1. Does domestic law incorporate both the negative and positive obligations inherent in the meaning of the obligation to protect the right to freedom of expression? If so, by what means?
2. Consider what the nature of the positive obligation means in the context of freedom of information.
3. How can a State be found responsible for a violation of Article 10 which is committed by a private actor?

3. PERMISSIBLE RESTRICTIONS: LICENSING OF BROADCASTERS

Broadcasting is subject to wider regulation than the written word under Article 10. The third sentence of paragraph (1) explicitly permits the State to regulate broadcasting, television or cinema enterprises, by means of a system of licensing. The system of licensing does not however escape the scrutiny of the Court and any such system must be consistent with the objects and purposes of Article 10 as a whole. In **Groppera Radio AG v Switzerland (1990)** the Court noted that the purpose of this sentence is:

> *to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects.*

Thus, any system of licensing must, just as with any other interference with the right to freedom of expression, be prescribed by law, be 'necessary in a democratic society' and pursue one of the legitimate aims exhaustively identified in Article 10(2).

The Court expanded further on the relationship between the third sentence in paragraph (1), and paragraph (2) of Article 10, in **Informationsverein Lentia v Austria (1993)**. It stated that the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments. This in turn may lead to interferences whose aims will be legitimate under Article 10(1), even though they may not correspond to any of the aims set out in paragraph 2. The Court held (at paragraph 32) that the compatibility of such interferences with the Convention must be assessed in the light of the other requirements of paragraph 2. In short, every licensing decision amounts to an interference with the right to freedom of expression that must be examined for its compatibility with Article 10(2). The Court has further explored the parameters of this provision in the following examples:

- In **Groppera Radio AG v Switzerland (1990)**, the applicant company had radio transmitters stationed in Italy. It was prevented from broadcasting or transmitting programmes to Swiss cable companies for re-transmission in Switzerland. The Court held that the purpose of the third sentence of Article 10(1) was to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not provide that licensing measures shall not otherwise be subject to the requirements of Article 10(2) for that would be contrary to the object and purpose of Article 10 taken as a whole. The third sentence in Article 10(1) therefore applied, since it permits the orderly control of broadcasting in Switzerland. The ban on retransmission was fully consistent with the Swiss local radio system established in Swiss law. Accordingly, the interference was in accordance with the third sentence of paragraph 1. The Court then ascertained whether it was also compatible with Article 10(2).

- In **Autronic AG v Switzerland (1990)** the applicant company complained that Swiss licensing laws prohibited it from receiving un-coded transmissions from a Russian satellite of programmes intended for the Russian public. The applicant company wanted to receive the transmissions in order to use them in a demonstration to promote its satellite dishes at various trade shows. The applicant applied to the Swiss authorities for permission to do so. The Swiss authorities refused permission in the absence of consent from the Soviet authorities. The Court held that it was unnecessary to examine the case under Article 10(1). It pointed out that that sentence 'does not...provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2, since that would lead to a result contrary to the object and purpose of Article 10 taken as a whole'.

- In **Informationsverein Lentia v Austria (1993)**, the applicant company complained that the State monopoly over television broadcasting violated Article 10. The Court stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press and audio-visual media, it serves to impart information and ideas of general interest, which the public is entitled to receive. It stated that such an undertaking could not be successfully accomplished unless it was grounded in the principle of pluralism, of which the State is the ultimate guarantor. The Court affirmed the importance of the technical aspects of broadcasting in the context of Article 10(1) and held that the issue must also be examined under Article 10(2). It pointed out that, although the monopoly system operated in Austria was capable of contributing to the quality and balance of programmes through the supervisory powers over the media thereby conferred on the authorities, the central question was whether the existence of a monopoly was consistent with paragraph 2.

- In **Demuth v Switzerland (2002)** the applicant requested a license for his company to broadcast a television programme about cars on cable television. His request was refused, as it was not able to offer 'the required valuable contribution to comply with the general instructions for radio and television'. The programme focused on entertainment or reports on automobiles only. The Court held that the licensing system in Switzerland, which includes instructions as to the purposes, functions and contents of television programmes, is capable of contributing to the quality and balance of programmes and is therefore consistent with the third sentence of Article 10(2).

Questions

1. In domestic law, is the question of licensing of broadcasters etc subject to the scrutiny of the courts for consistency with requirements of Article 10(2)?
2. Does Article 10(1) impose greater restrictions on the broadcast media than it does on the written or spoken word?
3. Why should broadcast media be subject to a more stringent regulation under Article 10?
4. Is a state monopoly of broadcast media compatible with the provisions of Article 10?

4. THE GENERAL PRINCIPLES IN ARTICLE 10(2)

The Court has given a wide interpretation to the provisions of Article 10(1) and has taken the view that in principle most forms of expression and speech are protected. A consequence of the Court's approach has been to shift the evidential burden to the State and to require it to justify any interference in accordance with Article 10(2). The majority of cases which have come before the Court have considered the parameters of Article 10(2) and whether or not the State's interference can be justified by reference to its provisions.

As noted above once an interference has been established under Article 10(1) the evidential burden shifts to the State. The Court's practice in assessing whether a State measure constitutes an interference with the right to freedom of expression that breaches the Convention is to apply the following tests in sequence:

Test of the Court

1. Whether there was an interference with the right to freedom of expression under Article 10(1)?
2. Whether such interference was:
   - prescribed by law?
   - In the pursuance of one of the legitimate aims listed in Article 10(2)?
   - necessary in a democratic society in that it was required by a 'pressing social need'?
   - proportionate in terms of the measures taken by the State to achieve that aim?

4.1. Duties and responsibilities

Article 10(2) provides that the exercise of the rights contained in Article 10(1) for individuals must be in accordance with a person's duties and responsibilities.

This is a matter which has been the subject of much consideration by the Court and has arisen in the context of the rights of government employees, the military and civil servants in particular. It is clear that this provision cannot be relied on by the State to deny the rights contained in Article 10 to a whole class of persons. However the extent of the duties and responsibilities is dependant on the context in which the right is exercised and, where it occurs in the course of a person's job, then the nature of the employment and any particular responsibilities which go with that, may fall for consideration by the Court. The approach of the Court has been dependant on the nature of the employment and the consequences of any interference for the individual. For example:

- In **Vereinigung Demokratischer Soldaten Osterreichs and Gubi v Austria (1994)** the applicants were refused permission to distribute a publication to military conscripts which was critical of the administration of the military. In finding a violation of Article 10 the court noted that the publication did not advocate any particular course of action in response to the difficulties it identified and that as such it did not constitute a threat to military discipline and it did not 'overstep the bounds of what is permissible in the context of a mere discussion of ideas, which must be tolerated in the context of an army of a democratic State just as it must be in the society that any such army finds itself'.

- In **Vogt v Germany (1995)** the applicant was a civil servant who was dismissed from her employment as a teacher because she refused to take an oath of loyalty to the Constitution. The Court stated that it had to balance the interests of the individual with the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in

Article 10(2). In so doing, the Court found that the State may impose an obligation of discretion on civil servants on account of their status. The Court accepted that the unique status of civil servants may require them to be subject to broader restrictions than would apply to other persons under Article 10. It stated:

> *The Court will bear in mind that whenever civil servants' rights to freedom of expression is in issue, the 'duties and responsibilities' referred to in Article para 2 assumes a special importance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim.*

- In **Guja v Moldova (2008)** the applicant was a civil servant, who was dismissed from his office as a result of disclosing confidential information to the public. The Court, assessing the special role of civil servants in imparting information of confidential character noted, that a civil servant, in the course of his/her work, may become aware of in-house information, including secret information, whose divulgation or publication corresponds to a strong public interest and considered that the signalling by the latter or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. The Court stated that this could 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. However, the disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where that is clearly impracticable that the information could, as a last resort, be disclosed to the public.

The Court has further interpreted 'duties and responsibilities' so as to attach special responsibility to certain categories of person, engaged in certain activities. To an extent journalists are in a special category, in that their 'duties and responsibilities' are to be understood in relation to their position in a 'democratic society'. This is particularly acute when publication involves an attack on a person's character. In **Handyside v United Kingdom (1976)**, the Court stated (at paragraph 49) that the scope of the duties and responsibilities depends on the person's situation and the technical means he uses for expressing him/herself. Thus, since audio-visual media have a more immediate and powerful effect than newsprint, for example, the Court tends more readily to accept the necessity of a particular interference with the expression via the former than the latter medium (see **Jersild v Denmark (1994)**). The scope of duties and responsibilities also depends on the nature of the words, pictures etc., expressed. For example:

- In **Otto-Preminger-Institut v Austria (1994)**, the applicant cinema advertised a showing of a film at its premises. The advertising described the film as targeting in a caricature mode, the 'trivial imagery and absurdities of the Christian creed' and an investigation of 'the relationship between religious beliefs and worldly mechanisms of oppression'. Prior to its first showing, the film was confiscated. The Court held that amongst the duties and responsibilities that a person exercising the right to freedom of expression undertakes – in the context of religious opinions and beliefs – was an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights and do not contribute to any form of public debate capable of furthering progress in human affairs. The region in which the cinema was situated was deemed by the Court to be predominantly Roman Catholic, a large number of whom would potentially have been offended by the film. This was despite the fact that the film was to be shown in a private club, only to those persons who bought tickets specifically to see the film.

- In **Erdogdu and Ince v Turkey (1999)**, the applicants were the editor of a newspaper, and a journalist who had conducted an interview with a sociologist. The sociologist voiced his opinion on the Kurdish situation and spoke of 'Kurdistan', a concept that the Turkish State vigorously repudiated.

The applicants were convicted of crimes pursuant to anti-terrorist legislation. The Court noted (at paragraph 54) that the 'duties and responsibilities' which accompany the exercise of the right to freedom of expression by media professionals 'assume special significance in situations of conflict and tension'. It went on to state that particular caution is required when publishing the views of representatives of organisations which use violence against the State, in case the media becomes a vehicle for the dissemination of hate speech and the promotion of violence.

- In **Jersild v Denmark (1994)**, the application concerned a television programme in which racist views were expressed and challenged. The applicant journalist conducted a televised interview with 3 members of a racist organisation. During the course of the interview, the interviewees expressed their hatred for non-whites. The applicant distanced himself from views expressed, by stating that the purpose of the interview was to discover the mentality of the racists and to find out why they espouse such views. He did not attempt to sympathise with the racists. The applicant was convicted of aiding and abetting the expression of racist statements. The Court held that, when discussing the 'duties and responsibilities' of a journalist, the potential impact of the medium concerned is an important factor. It was commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media. The audiovisual media have means of conveying through images meanings which the print media are not able to impart. The Court also noted that the methods of objective and balanced reporting may vary considerably, depending, among other things, on the medium in question.

- In **Bladet Tromso and Stensaas v Norway (1999)**, the applicants were a newspaper and its editor who were found liable for civil defamation of the crew of a seal-hunting ship. The applicants published articles critical of the methods used by the crew in killing seals. The Court stated (at paragraph 65) that the 'duties and responsibilities' assume significance whenever there is question of attacking the reputation of private individuals and undermining the rights of others. The Court held by reason of the 'duties and responsibilities' inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. In the circumstances of the case, since the applicants had quoted from an official Government report, the journalists were not obliged to verify the factual statements that defamed unnamed members of the crew.

- In **Pedersen and Baadsgard v Denmark (2004)**, the applicants were TV journalists who produced two widely viewed television programmes concerning the handling of murder investigations by the police. Interview questions during one of the programmes suggested that a chief superintendent had tampered with the evidence in one of the cases. The applicants were prosecuted for criminal defamation and claimed a violation of freedom of expression. The Court reiterated its established principles in reviewing cases of this type – in particular, it stressed again the importance of freedom of the press and its role as 'public watchdog.' However, it again drew a distinction between statements of fact and value judgments. In this case, it considered that the journalists could not provide a sufficient factual basis for the accusation that the superintendent had actively tampered with the evidence. The Court's Grand Chamber held, by nine votes to eight, that there had been no violation of Article 10. See also the case of **Selisto v Finland (2004)**.

Questions

1. Are certain categories of person, or persons engaged in particular activities, accorded special duties and responsibilities? If so, how are the persons categorised and what are their respective special duties and responsibilities?
2. Do special duties and responsibilities attach to journalists and if so, what do they consist of?

4.2. Journalists and freedom of the press

The Court recognises that the rights contained in Article 10 have particular resonance for the press and it has repeatedly emphasised that robust protection of freedom of the press serves the public interest. In particular the Court has taken the view that the exchange of information and ideas in a democratic society is best achieved by the protection of press freedom. It is however striking that the Court has frequently noted that the primacy given to the freedom of the press under Article 10 is justified not because of any special or particular rights of journalists but because of the role of the press as 'public watchdog'. This creates a tension between the role of the press and that of government and this has regularly been considered by the Court. The importance of press freedom was considered by the Court in the case of **Sunday Times v United Kingdom (No. 1) (1979)** in which it stated:

> *the role of the press is to act as public watchdog...it is incumbent on it to impart information and ideas on political issues just as on these other areas of public interest. No only does the press have the task of imparting such information and ideas; the public also has a right to receive them...*

In order to benefit as such from the additional protection afforded to journalists a claimant must demonstrate that he was acting in his capacity as a journalist and not merely as a private individual (**Janowski v Poland (1999**). This matter is explored further in this Manual in the section on political expression.

4.3. Prior restraint

As a general principle the Court does not condone prior restraint of publication on the basis that news is a perishable commodity which loses its value. While Article 10 permits some restrictions on freedom of expression that constitute prior restraint it does so on the condition that there is compliance with the requirements of Article 10(2). See, for example, **Observer and Guardian v United Kingdom (1991)**. However, prior restraint is regarded by the Court as a very serious interference with the right to freedom of expression, requiring very careful scrutiny for its compatibility with Article 10.

Prior restraint includes injunctions preventing publication (see **Observer and Guardian**), seizure of material or film about to be published (see **Otto-Preminger-Institut v Austria (1994)**), and the subjection of films to classification. Where persons are not prevented from publishing information or opinions, but are punished for doing so afterwards, this also interferes with the right to freedom of expression. Among the types of interference that are imposed following publication or broadcast are criminal penalties (even where the sentence imposed is suspended (see **Sener v Turkey (2000)**), disciplinary penalties (see **Casado Coca v Spain (1994)**), damages in respect of civil proceedings (see **Tolstoy Miloslavsky v United Kingdom (1995)**) and seizure of published material (see **Vereniging Weekblad Bluf! v Netherlands (1995)**) or pieces of art (see **Müller and Others v Switzerland (1988)**). Sentences that are suspended are also counted as interferences with the right to freedom of expression.

In most cases, it is clear whether there is an interference with the right to freedom of expression. For example, where an injunction is served on a newspaper forbidding it to publish an article, this will clearly constitute an interference with the newspaper's right to freedom of expression. However, it may be less clear in other circumstances. An example of an obscure restriction on the right to freedom of expression can be found in the following case:

- In **VSDO and Gubi v Austria (1994)**, the State authorities circulated a number of military periodicals to members of the armed forces free of charge, but it did not confer this privilege upon the applicant publishers. The applicants asked for their publication to be included but

were refused. The Court held that whatever the legal status of that arrangement, such a practice was bound to have an influence on the level of information imparted to members of the armed forces and, accordingly, engaged the responsibility of the respondent State under Article 10. It noted that of all the periodicals for servicemen, only VSDO's periodical was not allowed access to this type of distribution. The Minister for Defence's rejection of its request was an interference with the exercise of its right to impart information and ideas.

Questions

1. Does domestic law permit prior restraint? If so, are such restrictions governed by the principles contained in Article 10(2)?
2. Are all post-publication interferences regarded as restrictions of the right to freedom of expression?
3. Is a suspended criminal sentence regarded as an interference with the right to freedom of expression?

4.4. Prescribed by law

Article 10(2) requires that all interferences with the right to freedom of expression, whether they involve licensing of broadcasters, or otherwise, must be 'prescribed by law'. The same phrase is used in Article 9(2) (concerning the right to freedom of religion) and Article 11(2) (concerning the right to freedom of assembly and association). Article 8(2) (concerning the right to private and family life) uses the phrase 'in accordance with the law'.

The reference to 'law' requires that the interference concerned should have its basis in domestic law. The Court has interpreted the phrase 'prescribed by law' as requiring, first, that the law must be adequately accessible in order that a person can have an indication of the legal rules applicable to a given case, and second, that it is formulated with sufficient precision to enable a person to regulate his/her conduct. A person should be able to foresee to a degree that is reasonable in the circumstances, the consequences which may result if he/she follows a particular course of action.

- In **Sunday Times v United Kingdom (No. 1) (1979)** at paragraph 49, the Court considered a claim that a blanket ban on publishing any comment on a matter once a legal writ had been issued and proceedings initiated constituted a violation of Article 10. The legal practice had been established in common law and was essentially judge made law. However it had never been codified by the legislature nor had it been sufficiently developed by the judiciary to allow a person to understand clearly all the circumstances which may give rise to a breach of the law. The consequence was that it was not possible to identify the precise nature of the law in question. The Court found this fell short of the precision and forseeability required by Article 10. The Court stated the general principle as follows:

  > *the following are the two requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible; the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able to see – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail....those consequences need not be foreseeable with absolute certainty; experience shows this to be unattainable.*

- In **Rekvényi v Hungary (1999)**, the applicant was a police officer and an official in the police trade union. The Hungarian Constitution was amended to prohibit members of the police and armed forces from engaging in any political activities. The head of the police force issued circular letters exhorting members of the police force, in accordance with the Constitutional amendment, not to take part in political activities. The Court held that 'political activities' was a term that was subject to interpretation and had to be read in conjunction with other domestic legal provisions. Since it was not possible to define with precision what amounted to 'political activities', the Court found it acceptable for various regulations and an Act to lay down the conditions for undertaking types of conduct and activities with potential political aspects, such as participation in peaceful assemblies, making statements to the press, participating in radio or television programmes, publications or joining trade unions, associations or other organisations representing and protecting police officers' interests. The Court was satisfied that these provisions were clear enough to enable the applicant to regulate his conduct accordingly. Even accepting that it might not be possible on occasions for police officers to determine with certainty whether a given action would or would violate the Constitution, it was open to them to seek advice beforehand from their superior or clarification of the law by means of a court judgment.

- In **Müller and Others v Switzerland (1988)**, the applicant was an artist whose works were seized from a gallery in which they were being exhibited, on the basis that they contravened obscenity laws. He was convicted of the offence of publishing obscene material. He complained that the word 'obscene' in the criminal code was too vague to enable the individual to regulate his conduct and consequently neither the artist nor the organisers of the exhibition could have foreseen that they would be committing offences. The Court noted that laws such as obscenity laws could not be defined with excessive rigidity, since this would make it impossible for them to keep pace with changing circumstances. It further noted that there were a number of consistent decisions by the Federal Court on the 'publication' of 'obscene' items. These decisions, which were accessible because they had been published and which were followed by the lower courts, supplemented the letter of the relevant provision of the Criminal Code. The applicants' conviction was therefore 'prescribed by law'.

- In **Hashman and Harrup v United Kingdom (1999)**, the applicants engaged in activities intended to disrupt a fox hunt. As a result, they were bound over for 12 months to keep the peace by the local magistrates' court, pursuant to the relevant public order legislation. The order had prospective effect only; the magistrates did not find the applicants guilty of any offence. The applicants complained that the law lacked sufficient objective criteria to satisfy the requirements of Article 10(2) and further argued that that an order not to act *contra bonos mores* could not be 'prescribed by law' as it did not state what it was that the subject of the order might or might not lawfully do. The Court noted that conduct *contra bonos mores* was defined in domestic law as behaviour which is 'wrong rather than right in the judgment of the majority of contemporary fellow citizens'. It concluded that this definition was 'conduct which is not described at all, but merely expressed to be "wrong" in the opinion of a majority of citizens'. It therefore failed to comply with the requirements of 'prescribed by law'.

- In **Gaweda v Poland (2002)**, the applicant was refused her request for registration of a title of a periodical *The Social and Political Monthly - A European Moral Tribunal* to be published in Kęty. The reason for refusal was that, according to the domestic authorities, the title gave the impression that a European institution was about to be established in Kęty. The Court held that the restriction was not prescribed by law. While Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publications, the Court held that relevant laws must provide a clear indication of the circumstances when such restraints are permissible, and, *a fortiori*, when the consequences of the restraint, as here, would completely block publication of a periodical. This was necessary because of the potential threat that such prior restraints, by their very nature,

pose to the freedom of expression guaranteed by Article 10. One of the grounds upon which the law provided for refusal of registration of a periodical, was where it would be 'in conflict with reality'. This was interpreted by the domestic courts as a power to refuse registration where it was considered that a title did not satisfy the test of truth, i.e. that the proposed titles of periodicals convey an essentially false picture. The Court pointed out that the law was ambiguous and the interpretation given in this case was inappropriate from the standpoint of freedom of the press. The Court held that the interpretation given by the domestic courts introduced new criteria, which could not be foreseen on the basis of the text, specifying situations in which the registration of a title could be refused. It failed therefore to satisfy the criteria of 'prescribed by law'.

- In **Kenedi v Hungary (2009)** the applicant, a historian specialising in the secret services of dictatorships, asked the State Security Service of the Ministry of Interior to grant him access to certain documents deposited with that institution. After refusal by the Ministry the applicant successfully appealed to the Budapest Regional Court, which granted him unrestricted access to the requested documents. This was confirmed by the Supreme Court. Despite these decisions, the Ministry failed to comply. The Court observed that the applicant had obtained a court judgment granting him access to the documents in question, following which the domestic courts had repeatedly found in his favour in the ensuing enforcement proceedings. In those circumstances, the Court explicitly stated that the reluctance of the respondent State's authorities to comply with the execution orders was in defiance of domestic law and tantamount to arbitrariness. Their obstructive actions also led to the finding of a violation of Article 6 of the Convention. The Court considered that such a misuse of power vested in the authorities can not be characterised as 'prescribed by law'.

It is not essential that the conditions and procedures for implementing a law be contained in the law itself. It may be sufficient for these to be set out in directives that do not themselves have the force of law, so long as they meet the test of foreseeability (see **Silver v United Kingdom (1983)** at paragraph 89, a case involving Article 8 but the principle is the same). Nor is it necessarily inconsistent with the requirements of foreseeability that a law confer discretion upon an official. However, the scope of the discretion and the manner of its exercise must be indicated with sufficient clarity, having regard to the legitimate aim in question, to give a person adequate protection against arbitrary interference (see **Margareta and Roger Andersson v Sweden (1992)** at paragraph 75, another case involving Article 8).

- In **Groppera Radio AG v Switzerland (1990)**, the applicant was a radio company engaged in cross-frontier broadcasting. The State issued an ordinance regarding broadcasting licences, referring to the rules of international law, and certain treaties by name. The applicant complained that the reference to international law was not sufficiently accessible or precise for a citizen to be able to adapt his behaviour to them – even after consulting a lawyer, if necessary. The Court held that the relevant provisions of international telecommunications law were highly technical and complex; they were primarily intended for specialists, who knew, from the information given in the Official Collection of Federal Statutes, how they could be obtained. It could therefore be expected that a company engaged in broadcasting across a frontier, would seek to inform itself fully about the rules applicable in Switzerland, if necessary with the help of advisers. As the relevant Ordinance and the International Telecommunication Convention had been published in full, such a company had only to acquaint itself with the Radio Regulations, either by consulting them at the Radio Rights Division head office in Berne or by obtaining them from the International Telecommunication Union in Geneva. Accordingly, neither the regulations nor the treaty were lacking in precision.

Questions

1. Are domestic laws restricting freedom of expression subject to the requirement of precision? If so, how is the test of precision formulated in domestic law?
2. What does 'forseeability' mean in the context of the State's obligation as described by the Court in the Sunday Times case?

4.5. Legitimate aims

Article 10(2) provides an exhaustive list of the circumstances in which a person's right to freedom of expression may legitimately be restricted. They are:

(i) In the interests of national security, territorial integrity or public safety;
(ii) For the prevention of disorder or crime;
(iii) For the protection of health or morals;
(iv) For the protection of the reputation or rights of others;
(v) For preventing the disclosure of information received in confidence;
(vi) For maintaining the authority and impartiality of the judiciary.

An interference with the rights contained in Article 10(1) can only be justified if it is in the pursuance of a legitimate aim as enumerated in the above list. It is to be noted that the categories are widely drawn and there is not usually any difficulty in establishing legitimate aim. Occasionally, the Court will find that an interference pursues more than one legitimate aim.

However, a restriction that does not fall within one of these categories will not be permissible, and will therefore constitute a violation of Article 10. When considering whether a particular interference pursues one of the legitimate aims, the Court conducts its own assessment based on the facts. The balancing act, between the individual's right to express themselves, and the State's legitimate interests, takes place once it has been established that an interference pursues a legitimate aim. In this section of the Manual each of the legitimate aims listed above is examined below.

Question

On what grounds does domestic law permit restrictions on freedom of expression? Are they consistent with the grounds in Article 10(2)?

4.5.1. The interests of national security, territorial integrity or public safety

The Court recognises that a State may have to take measures to address the actions of seditious groups and that in doing so it may have to limit freedom of expression. There is significant potential for conflict between the general principles of Article 10 which advocate a broad interpretation of the right to free speech and the actions of groups who may seek to overthrow democratically elected governments by violent means. In general the State is given a wide margin of appreciation in this area and once it can demonstrate a link between actions taken and a threat to national security the Court is reluctant to find a violation. However it is to be noted as with all other areas the actions of the State remain subject to the supervision of the Court.

- In **Zana v Turkey (1997)**, the applicant was the former mayor of Diyabakir in south-east Turkey and he made statements to journalists in which he expressed his support for the PKK (the Kur-

dish Worker's Party), which were then published in a national daily newspaper. He stated that he was not in favour of massacres, but that anyone can make mistakes, and that the PKK had killed women and children by mistake. His statements coincided with a number of killings of civilians by member of the PKK. The applicant was convicted of supporting the activities of an armed organisation, whose aim was to break up Turkey's national territory, and a sentence of imprisonment was imposed on him. The State argued that his statements constituted a danger to national security and public safety. The Court held that at a time when serious disturbances were raging in south-eastern Turkey, a statement coming from a political figure well known in the region could have had an adverse effect. This justified the interference with the applicant's right to freedom of expression, on the grounds of the need to maintain national security and public safety. The interference complained of therefore pursued legitimate aims under Article 10(2).

- In **Rekvényi v Hungary (1999)**, the respondent State claimed that the purpose of an amendment of the Constitution depriving members of the police from engaging in political activities was to depoliticise the police, at a time when Hungary was being transformed from a totalitarian regime to a pluralistic democracy. The Court noted that a number of contracting States restricted certain political activities on the part of their police. Given their coercive powers and the fact that police forces are in the service of the State, members of the public are therefore entitled to expect the police to be politically neutral. This aim was compatible with democratic principles. The Court further pointed to the special historical significance in Hungary because of that country's experience of a totalitarian regime that relied to a great extent on its police's commitment to the ruling party. Accordingly, the Court concluded that the restriction in question pursued legitimate aims, namely the protection of national security and public safety and the prevention of disorder.

- In **Observer and Guardian v United Kingdom (1991)**, the respondent State claimed, *inter alia*, that the reason it sought injunctions to prevent publication of material relating to the book *Spycatcher*, was that publication could lead to an undermining of the security service in the United Kingdom. Specifically, it claimed that publication would cause damage both to the service itself, to its officers and other persons identified by reason of the disclosures made. It would also undermine the confidence that friendly countries and other organisations and persons had in the security service and create a risk of other employees or former employees of that service seeking to publish similar information. The Court held that it was 'incontrovertible' that the protection of national security was one of the aims of the injunctions.

- In **Vereniging Weekblad Bluf! v Netherlands (1995)**, the applicants were publishers who had received a quarterly report of the internal security services, the BVD, marked confidential. It was some six years old, and showed that the security forces had been interested in the activities of the communist party of the Netherlands and a number of other organisations. The applicants proposed to publish the report, but immediately prior to publication, all copies were seized from their premises. Shortly thereafter, the applicants managed to print more copies and distribute them. The Court held that the proper functioning of a democratic society based on the rule of law may call for institutions like the BVD which, in order to be effective, must operate in secret and be afforded the necessary protection. It stated that in this way a State may protect itself against the activities of individuals and groups attempting to undermine the basic values of a democratic society. It accordingly accepted that the restriction pursued the legitimate aim of the protection of national security.

- In **Duzgoren v Turkey (2006)** the applicant was a journalist who distributed a leaflet outside the Ankara State Security Court which contained a statement from a conscientious objector to the compulsory military service for which he had been convicted and sentenced for inciting others to evade military service. The applicant then gave a statement to the public prosecutor stating that his aim in distributing the leaflet was to abolish compulsory military service in Turkey. He was convicted of

inciting others to evade military service and was sentenced to two months imprisonment. The Court noted that the words used in the leaflet did not encourage violence, armed resistance or insurrection although it was clearly against military service. The Court held that the sentence was not justified as action to protection national security because the leaflet was handed out in a public place in Istanbul and was not in the form or content to precipitate immediate desertion and that it had to be distinguished from cases where troops were directly encouraged to desert.

- In **Ergin v Turkey (No.6) (2006)**, the applicant was the editor of a newspaper which published an article about criticising the traditional ceremony which marked conscripts departure for military service. He wrote about how war seemed attractive due to the pomp and ceremony but then went on to describe the lives wasted and the poor treatment given to those wounded in war. He was subsequently convicted incitement to evade military service and he was sentenced to two months imprisonment and fined. The Court noted that the article was hostile to military service but that it did not exhort the use of violence or incite armed resistance or rebellion and that it was in a newspaper on sale to the general public and therefore did not seek to precipitate immediate desertion. The interference was therefore disproportionate and could not be shown to correspond to a pressing social need.

- In **Surek v Turkey (No. 1) (1999)**, the applicant was a major shareholder of a newspaper that published readers' letters concerning a massacre in a village in south-east Turkey. They were highly critical of the actions of the Turkish State against Kurds there. The applicant was convicted of disseminating propaganda against the indivisibility of the State and provoking enmity and hatred among the people. The Court accepted Turkey's claim that the aim of the restriction was to protect the territorial integrity of the Turkish State (see also **Yagmurdereli v Turkey (2002)** and the admissibility decision in **Ozler v Turkey (2001)**).

- In **Piermont v France (1995)**, the applicant, a member of the European Parliament, was expelled from French Polynesia during an election campaign, after taking part in a demonstration in which she made a speech deploring the French presence on the territory and nuclear testing there. She was then prevented from entering New Caledonia, also a French territory, and also in the throes of an election campaign. The Court accepted the French explanation that the reason for the restrictions on the applicant's right to freedom of expression was the protection of French territorial integrity, however, it reached the conclusion that the orders were not 'necessary in a democratic society'.

4.5.2. The prevention of disorder or crime

States frequently cite both the interests of national security and the prevention of disorder or crime as their justification for interferences with freedom of expression. This is particularly common where the actions taken by the State are directed toward limiting violence or incitement to violence. The Court accepts that such circumstances may amount to a threat to national security and at the same time pose a threat to public order and involve the commission of crimes. It is challenging for the Court to supervise the way in States carry out the balancing exercise between the rights of individuals to freedom of expression and the wider public interest in maintaining public order as illustrated by the following examples:

- In **Janowski v Poland (1999)**, the applicant witnessed municipal guards ordering street vendors to leave a town square. He intervened and told the guards they had no legal grounds for their actions. He accused them of being 'oafs' and 'dumb'. The applicant was subsequently convicted of verbally insulting the municipal guards. The respondent State claimed that the object of the conviction was to ensure that civil servants were not hindered in carrying out their duties. The Court accepted that the interference with the applicant's freedom of expression pursued the legitimate aim of the prevention of disorder.

- In **VSDO and Gubi v Austria (1994)**, the State authorities facilitated the circulation of a number of magazines free of charge to soldiers. It did not afford this privilege to the magazine published by the first applicant on the grounds that it would only allow the circulation of publications which identified, at least to some extent, with the constitutional duties of the army, did not damage its reputation and did not lend column space to political parties. The Court accepted that the restriction pursued a legitimate aim, namely the maintenance of order in the armed forces.

- In **Incal v Turkey (1998)**, the applicant was a member of the executive committee of a political party that represented Kurdish interests. The party decided to publish a leaflet criticising the measures taken by the local authorities, in particular against small-scale illegal trading and the sprawl of squatters' camps of mainly Kurdish origin, around the city of Izmir. The leaflets described the measures as acts of oppression and called upon Kurds and members of the proletariat to form neighbourhood committees to oppose these actions. Permission was sought from the State authorities to circulate the leaflets. Permission was denied, the pamphlets were seized and criminal proceedings were instituted against all the members of the executive committee of the political party concerned. The applicant was convicted of the offence of attempting to incite racial hatred and he was sentenced to more than six months' imprisonment and a fine. He was also debarred from the civil service and forbidden to take part in a number of activities within political organisations, associations or trade unions. While the respondent State failed to argue which of the aims in Article 10(2) it depended upon, the Court held that the restriction was based on the legitimate aim of the prevention of disorder.

- In **Groppera Radio AG v Switzerland (1990)**, the applicant company had radio transmitters stationed in Italy and was prevented from broadcasting or transmitting programmes to Swiss cable companies for re-transmission in Switzerland. The Court examined the drafting history of Article 19 of the International Covenant on Civil and Political Rights (right to freedom of expression), noting that it does not include a provision corresponding to the third sentence of Article 10(1). It noted that the inclusion of such a provision in Article 19 had been proposed in order to prevent chaos in the use of frequencies. However, its inclusion was opposed; it was decided that such a provision was not necessary because licensing of technical means of broadcasting was deemed to be covered by the reference to 'public order' in paragraph 3 of Article 19. The Court accordingly concluded that the restriction in this case pursued a legitimate aim, *inter alia*, the protection of the international telecommunications order which was covered by the phrase 'the prevention of disorder' in Article 10(2).

- In **Steel and Others v United Kingdom (1998)**, five applicants had been involved in a protest against grouse shooting and the extension of a motorway. The first two applicants were arrested for causing an obstruction which was considered by the Court to be justified due to the threat to public order and the possibility of endangering members of the public caused by a protest in which they were involved at the time. However, in respect of the remaining three applicants, the Court found their detention by police for distributing leaflets outside a conference centre, as part of the same organised protest, was not a necessary or proportionate measure to protect public order.

4.5.3. Protection of health or morals

Comparatively few cases before the Court have concerned restrictions imposed with the aim of the protection of health or morals. The most notable examples of the dependence on the protection of morals as justification for interfering with the right to freedom of expression has been in respect of restrictions of materials deemed to be obscene. Another concerns the provision of abortion advice (see **Open Door Counselling and Dublin Well Woman v Ireland (1992)**).

- In **Handyside v United Kingdom (1976)**, the applicant published a book intended for schoolchildren. The State authorities, believing the book contained obscene material, seized copies from the applicant's premises, and the applicant was later convicted of obscenity offences. The Court found that the interference with the applicant's right to freedom of expression pursued a legitimate aim, namely the protection of morals.

- In **Müller and Others v Switzerland (1988)**, the first applicant was an artist who took part in an exhibition organised by his nine fellow applicants. A number of the first applicant's paintings were seized on the basis of their obscenity. The applicants were later convicted of publishing obscene material. The Court accepted that the interference with their rights to freedom of expression pursued the legitimate aim of the protection of morals.

- In **Open Door Counselling and Dublin Well Women v Ireland (1992)**, the applicants were restrained by injunction from providing information to pregnant women about abortion clinics outside Ireland's jurisdiction. It was a crime to perform an abortion under Irish law. The Court accepted that the protection afforded under Irish law to the right to life of the unborn was based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion as expressed in the 1983 referendum. The restriction thus pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect.

- In **Wingrove v United Kingdom (1996)**, the expression under consideration was a video by the applicant portraying a woman dressed as a nun and described in the credits as 'Saint Teresa' (of Avila) having an erotic fantasy involving the crucified figure of Christ. The video was refused a certificate for distribution by the British Board of Film Classification. The Court considered that a wider margin of appreciation was generally available to the States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or religion. Consequently, the arguments of the State were accepted. In **Murphy v Ireland (2003)**, the Court gave the same reasoning when it found that a prohibition on religious advertising did not constitute a violation of Article 10.

- In **Stambuk v Germany (2002)** the domestic courts imposed a fine upon the applicant for disregarding the ban on advertising of medical treatment. The applicant, an ophthalmologist performed operations with a laser technique. A local newspaper published an article about his practice, describing in details his methods and the success rate. The Court observed that the protection of health is one of the legitimate aims that the disciplinary measures pursued.

4.5.4. The protection of the reputations or rights of others

Defamation laws and laws preventing the insult of others on religious grounds are normally justified by reference to the protection of the reputations or rights of others. Under this category the Court has also considered interferences with the legal and contractual rights of others which may arise particularly in commercial contexts. The following examples demonstrate the approach of the Court to these issues;

- In **Otto-Preminger-Institut v Austria (1994)** the applicant was an art centre which was prevented from showing a film which was thought to be offensive to Catholics and the film was seized. In considering the question of whether the interference had a legitimate aim, the Court noted that those who choose to exercise the freedom to manifest their religion cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the Court held that the manner in which religious beliefs and doctrines are opposed or denied is a

matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. It noted that the laws on which the restrictions were based, were intended to suppress behaviour directed against objects of religious veneration that was likely to cause 'justified indignation'. The Court therefore concluded that their purpose was to protect the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons. It held that the interference with the applicant's right to freedom of expression pursued the legitimate aim of protecting the rights of others.

- In **Castells v Spain (1992)**, the applicant, an opposition politician, virulently criticised the Spanish government in a newspaper article, for having failed to take proper steps to conduct investigations into a number of murders committed in the Basque region. He complained of inactivity on the part of the police as well as their collusion with the guilty parties. He further implied that the State was responsible. The applicant was convicted of the offence of insulting the State. The Court held that the interference with the applicant's right to freedom of expression pursued the legitimate aim of protecting the rights of others, (namely members of the police force and government) as well as the prevention of disorder.

- In **Tolstoy Miloslavsky v United Kingdom (1995)**, the applicant wrote an article alleging that a Peer of the Realm who was the warden of a prominent English boys' school, was responsible for the killing of thousands of men, women and children during the Second World War. The article which was published in a pamphlet was circulated to the parents of boys at the school and to Members of both Houses of Parliament and journalists. The applicant was subsequently found guilty of libel. The Court held that the interference pursued the legitimate aim of the protection of the rights of others.

- In **Goodwin v United Kingdom (1996)**, the applicant was a journalist who had obtained confidential information from an anonymous source which disclosed that a public company had some financial difficulties which was not generally known. He phoned the company for confirmation of his information. The company subsequently obtained an injunction to prevent the publication of the information and also obtained an order to require Goodwin to reveal his source. His refusal to do so was found to be a contempt of court and both he and his publisher were fined a substantial amount of money by the domestic court. The Court accepted that the protection of the 'rights of others' under Article 10(2) included legal rights such as proprietary or contractual rights and accordingly held that the company had legitimate reasons for trying to identify a disloyal employed in order to prevent further disclosures. The Court did go on to find that the actions were disproportionate in light of the need for journalists to protect their sources.

- In **I.A. v Turkey (2005)** the applicant, a proprietor and managing director of a publishing house, published a novel conveying the author's views on philosophical and theological issues in a novelistic style. He was subsequently convicted of blasphemy against 'God, the Religion, the Prophet and the Holy Book' through the publication of the book in question and ordered to pay a fine. He alleged that the criminal conviction infringed his right to freedom of expression. The issue before the Court involved weighing up the conflicting interests of the exercise of two fundamental freedoms, namely the right of the applicant to impart to the public his views on religious doctrine, on the one hand, and the right of others to respect for their freedom of thought, conscience and religion, on the other hand. The Court noted that this case concerned not only comments that offend or shock, or a 'provocative' opinion, but also an abusive attack on the Prophet of Islam. It therefore considered that the measure taken in respect of the statements in issue was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims. In that respect it found that the measure could reasonably be held to have met a 'pressing social need'. The Court concluded that the State had not overstepped its margin of appreciation

and the reasons given to justify the applicant's conviction were 'relevant and sufficient'. Moreover, the authorities did not decide to seize the book and the insignificant fine imposed on the applicant could not be considered disproportionate to the aims pursued. The Court therefore found no violation of Article 10.

- In **Klein v Slovakia (2006)**, the applicant was a journalist and film critic. A Catholic Archbishop commented on a film poster publicly and condemned it as profane and defamation of the Christian religion. The applicant criticised the stance of the Archbishop in a newspaper article noting that Slovakia was not a Christian state and that the Archbishop was stupid with no sex appeal. Criminal proceedings were taken by two Christian groups claiming the applicant had defamed their faith. He was convicted of defamation of nation, race and belief because he had defamed the highest member of the Church and he was fined. He unsuccessfully appealed. The Court accepted that the actions taken were to protect the reputation of the Archbishop and others. However, the Court went on to find that the statements made by the applicant did not discredit or disparage a sector of the population as they were directed only at the Archbishop. He had not pursued a claim against the applicant and given that the article criticised only the Archbishop the applicant should not have been convicted of defaming other person's beliefs.

- In **Giniewski v France (2006)** the applicant wrote an article which was published in a Paris newspaper which was critical of the Catholic Church. In particular the article made a link between certain Catholic beliefs and anti Semitism generally and the atrocities committed at Auschwitz in particular. A group of Christians brought criminal proceedings against the applicant who was convicted of publicly defaming a group of persons on the ground of membership of a religion. Both he and his publisher were fined and were ordered to pay the costs of the case. The domestic court found that his comments demonstrated personal animosity and a lack of good faith. The Court found that it could not be shown that the actions were necessary to protect the rights and reputations of others. It took the view that the article criticised a Papal doctrine and was therefore only concerned with Catholics and the analysis could not be extended to Christianity as a whole. In addition it noted that the views did not as such attach a religions belief but rather in analysing a doctrine the applicant expressed a view which he held as an historian and a journalist. The article was not gratuitously offensive or insulting and the penalty was not found to be necessary to protect the rights and reputations of others as the State had argued.

- In **Tonsbergs Blad As and Haukom v Norway (2007)** the applicants were a newspaper publisher and journalist. The journalist wrote an article which disclosed a confidential list of persons who were thought to be in violation of municipal laws which prevented ownership of second residences as holiday homes. The journalist did not name the sources of his information. A well known business man was among those named in the article on the basis of his appearing on the list. His wife owned the property in question and he informed the municipal authorities which removed his name from the list. He wrote to applicant informing him. The applicant published a second article saying the businessman had escaped penalties for breach of the law and was no longer on the list. A subsequent article noted that no action was to be taken against the business man. Criminal proceedings were taken against the applicants on the basis that the original article included him in a list of persons who were assumed to have broken the law. They were convicted and fined and ordered to pay costs. The Court found that while the actions taken by the State were directed towards protecting the rights and reputations of the businessman, they were neither necessary in a democratic society nor were they proportionate. The Court noted the need to be mindful of the chilling effect of preventing journalists from reporting accurately on matters of public interest which had occurred when the applicant had relied on confidential government information, which turned out to be true at the time.

- In **Standard Verlagsesellschaft MBH (No.2) v Austria (2007)** the applicant was the owner of a daily newspaper which had published an article concerning alleged misconduct by a regional Governor Mr Haider. The issue concerned appointment to a public board which had been carried out by the Governor on the basis of legal advice he had received. The article questioned the legal opinion and the action taken by the Governor suggesting that he had deliberately misled the regional assembly. Mr Haider initiated proceedings against the paper in defamation which were successful. He also made a subsequent application seeking an injunction and the applicant was ordered to revoke the statement and to pay his costs on the basis that the journalist had not consulted the legal expert and had acted irresponsibly. The Court accepted that the actions taken were to protect the reputation of Mr Haider which was impugned by the article.

- In, **Egeland and Hanseid v Norway (2009)**, the applicants, editors in chief of two major national newspapers, were convicted and sentenced to a fine for unlawful publication of photographs of a woman leaving a court building where she had just been convicted and sentenced to 21 years' imprisonment for a triple murder. The Court established that this case involved protecting 'the reputation of rights of others' and 'maintaining the authority and impartiality of the judiciary'. Although the photographs concerned a public event and were taken in a public place at a time when the woman's identity was already known to the public, the Court found that the applicants' portrayal of her had been particularly intrusive. The picture showed the woman in tears and great distress, emotionally shaken and at her most vulnerable psychologically. Furthermore, she had not consented to the photographs being taken or to their publication. The fact that she co-operated with the press on previous occasions could not justify depriving her of protection against the publication by the press of the photographs in question.

4.5.5. Preventing the disclosure of information received in confidence

This category has given rise to limited case law. However, the Convention does provide that when confidential government documents emerge into the public domain without consent, States are entitled, in order to protect a number of government interests, to claim this ground as the basis for interfering with the right to freedom of expression. Further, where domestic courts interfere with the right to freedom of expression to protect private interests, the same ground may be relied upon. For example, where a confidential business report emerges into the public domain, a domestic court's decision to grant an injunction against publishing material contained therein, may be justified on this ground. However the Court will examine both the context in which the information is disclosed and the nature of the information as illustrated by the following examples:

- In **Autronic AG v Switzerland (1990)**, the applicant was prevented from receiving transmissions from a Russian satellite. The respondent State claimed, and the Court accepted, that the interference pursued the legitimate aims of the 'prevention of disorder', and also 'preventing the disclosure of information received in confidence'. The State argued that the secrecy of telecommunications, which covered the television transmissions in question and was guaranteed in Article 22 of the International Telecommunication Convention, had to be protected.

- In **Fressoz and Roire v France (1999)**, the applicants were the publishing director and journalist of a newspaper. An article was published in the newspaper during a period of industrial unrest at the Peugeot Motor Company, when management refused to award pay rises demanded by the workforce. The article, citing the Peugeot boss's tax return, gave details of the substantial pay rise he had awarded himself during the past two years. The article concluded with a photocopy of the relevant section of the tax return concerned. The applicants were convicted of the offence of handling photocopies of the Peugeot boss's tax returns obtained through a breach of professional confidence by an unidentified tax official. The Court accepted that this restriction of the applicants' right to freedom of expression pursued the legitimate aim of preventing the

disclosure of information received in confidence. The Court also accepted a second ground, namely the intention of protecting the reputation or rights of others.

- In **Stoll v Switzerland (2007)** the applicant, a Swiss journalist, was convicted of publishing the 'confidential' strategy paper of the Swiss ambassador to the United States of America (USA) concerning negotiations on compensation due to Holocaust victims for unclaimed assets deposited in Swiss banks. The applicant submitted that his conviction had infringed Article 10. The Court noted that the criticism expressed in the articles had directly targeted a senior official, namely a member of the diplomatic corps having the rank of ambassador, who had had a particularly important mission to perform with the USA. It found that the confidentiality of diplomatic relations was justified in principle, but could not be protected at any price. Moreover, the role of the media as critic and watchdog also applied to matters of foreign policy. However, overruling the decision of the Chamber on violation of Article 10, the Grand Chamber found non-violation for the following main reasons. In assessing whether the measure taken by the Swiss authorities had been necessary, the Court took account of how the public interests at stake had been weighed up: the interest of readers in being informed on a topical issue and the interest of the authorities in ensuring a positive and satisfactory outcome to the diplomatic negotiations being conducted. The Court considered that the disclosure at that point in time of the extracts from the ambassador's report had been liable to have negative repercussions on the smooth progress of the negotiations in which Switzerland was engaged, on account not just of the ambassador's remarks themselves but of the way in which they had been presented by the applicant. As to the applicant's conduct, the Court took the view that, as a journalist, he could not have been unaware that disclosure of the report was punishable under the Criminal Code. It further considered that the content of the applicant's articles had been clearly reductive and truncated and the vocabulary used had tended to suggest that the ambassador's remarks had been anti-Semitic. The Court reiterated the need to deal firmly with allegations and/or insinuations of that nature. The Court noted that the way in which the impugned articles had been edited, with sensationalist headings, seemed hardly fitting for a subject as important and serious as that of the unclaimed funds. It also observed the inaccurate nature of the articles, which were liable to mislead readers. Finally, the Court considered that the fine imposed on the applicant had not been disproportionate to the aim pursued, and accordingly, it held that there had been no violation of Article 10.

4.5.6. Maintenance of the authority and impartiality of the judiciary

The rule of law is a central tenet of any democracy and depends upon the effective application of the law by the courts. In this regard, the State has an obligation to ensure that everyone has a right to a fair trial pursuant to Article 6 of the Convention. The State has a particular interest which is recognised by Article 10 to protect the sanctity of judicial processes and to limit the nature and extent of any criticism of active proceedings.

It is also common that the Court considers circumstances in which journalists' comments on the value of evidence or the likely verdict in criminal proceedings have been restricted. The rule of law also requires that the judiciary have the confidence of the people they serve. It may therefore become necessary to curb a journalist's right to comment on their conduct of trials and their general job performance. The Court has also recognised that the protection of the rights of the parties to legal proceedings amounts to a protection of the authority of the judiciary, since the parties are, in their capacity as litigants, involved in the machinery of justice (see **Sunday Times v United Kingdom (No. 1) (1979)** at paragraph 56). The Court always examines the necessity of such restrictions very closely.

- The Court explained the meaning of the phrase 'authority of the judiciary' in **Sunday Times v United Kingdom**. It stated that the term 'judiciary' comprises the machinery of justice or the judicial branch of government as well as the judges in their official capacity. The phrase 'author-

ity of the judiciary' includes the notion that the courts are, and are accepted by the public as being, the proper forum for the ascertainment of legal rights and obligations and the settlement of disputes related to those rights and obligations. Further, it signifies the public's respect for and confidence in the courts' capacity to fulfil that function.

- In **Barfod v Denmark (1989)**, litigants challenged a new law that imposed taxation on Danish citizens working on American bases in Greenland. The applicant wrote an article criticising the two lay judges who had adjudicated upon the case. He asserted that the two lay judges were disqualified under the Danish Constitution on the grounds that, since they were employed by the local government, their involvement in the case violated the principle that the judiciary should be separate from the executive. He also questioned their ability and power to decide impartially in a case brought against their employer. The applicant was convicted of the offence of insulting the judiciary. The Court accepted the respondent State's assertion that the interference with the applicant's right to freedom of expression pursued the legitimate aim of the maintenance of the authority of the judiciary.

- In **Weber v Switzerland (1990)**, a letter was published in a newspaper by a person named RM, which asserted that the applicant journalist was unscrupulous, that he begged money off people for suspect causes and that he did not keep proper accounts in respect of that money. The applicant sued RM in defamation. Once proceedings were underway, the applicant held a press conference in which he stated that RM was currently the subject of defamation proceedings. He further stated that he had produced certain documents to the trial court and that he had lodged a complaint against the investigating judge. Proceedings were then brought against the applicant for breach of the confidentiality of a judicial investigation, as a result of which the applicant was convicted and fined. The Court accepted that the proceedings against the applicant were intended to ensure the proper conduct of the judicial investigation and were therefore designed to protect the authority and impartiality of the judiciary.

- **Sunday Times v United Kingdom (No. 1) (1979)** concerned a number of children born with severe deformities as a result of the drug thalidomide that was taken by their mothers during pregnancy. Legal proceedings were instituted by many parents against the maker of the drug, Distillers Company. The applicant newspaper published an article concerning the drug and stated that it intended to publish a further article tracing how the tragedy occurred. Distillers Company obtained an injunction preventing publication of the second article on the ground that it would constitute contempt of court. The respondent State claimed that law of contempt of court serves the purpose of safeguarding not only the impartiality and authority of the judiciary but also the rights and interests of litigants. The Court accepted the State's assertion that the law of contempt in English law served to protect the position of the judges and to the functioning of the courts and of the machinery of justice. Accordingly, the Court held that 'maintaining the authority and impartiality of the judiciary' was one purpose of that law.

- In **Du Roy-Malaurie v France (2000)**, the applicants were a journalist and editor of a newspaper. The paper published an article by the journalist, critical of G, the former director of a company responsible for building workers' houses, and his relationship with the new management of the company. The new management had lodged a criminal complaint against G and had applied to join the proceedings as a civil party. The applicants were charged and found guilty of publishing information concerning applications to join criminal proceedings as a civil party, which was an offence. The Court of Appeal held that the provisions under which they had been convicted were designed to protect persons against whom a complaint is lodged, to safeguard the presumption of innocence and to prevent any external influence on the course of justice. The Court accepted that the interference was intended to protect the reputation and rights of others and to maintain the authority and impartiality of the judiciary.

- In **Perna v Italy (2003)** the applicant, a journalist, published in a newspaper an article about a public prosecutor that suggested he supported a statesman who was accused of connections with a mafia-type organisation. The domestic court found him guilty in defamation through the medium of the press, aggravated by the fact that the offence had been committed in respect of a civil servant in the performance of his official duties. The court sentenced him to a fine. The State argued that the interference with the journalist's right to freedom of expression pursued the maintenance of the authority of the judiciary.

- In the admissibility decision in **P4 Radio Hele Norge v Norway (2003)**, the Court declared inadmissible a complaint about the refusal of a permission to broadcast a major murder trial. The Court observed that there was no common ground among the Contracting States regarding the live broadcast of legal proceedings. Live broadcast could generate additional pressure on the participants and even unduly influence the manner in which they behave and hence cause prejudice to the fair administration of justice. The national authorities enjoy a wider margin of appreciation regarding the maintenance of the authority of the judiciary, which also includes the protection of the rights of those participating in the trial. The Court accepted the reasons given by the respondent State as relevant and sufficient.

- In **Tourancheau and July v France (2005)**, the applicants were a journalist and editor, respectively, of a French newspaper. They were prosecuted for publishing documents in the criminal case file concerning the murder of a young girl, while the criminal investigation was still pending and ahead of proceedings in open court. They complained that the criminal conviction violated their rights under Article 10. The Court considered that the interference with the applicants' rights was 'prescribed by law.' As experienced journalists, the applicants had been in a reasonable position to foresee that publication of extracts from the case file in the article might render them liable to prosecution. The Court considered that the aims of the interference had been to protect 'the reputation and rights of others' and to maintain 'the authority and impartiality of the judiciary'. The Court found that the reasons given by the French courts to justify the interference with the applicants' right to freedom of expression had been 'relevant and sufficient'. The domestic courts had stressed the damaging consequences of publication of the article for the protection of the reputation and rights of the criminal suspects and for their right to be presumed innocent, and also for the authority and impartiality of the judiciary, owing to the possible impact of the article on the members of a lay jury. The Court took the view that the applicants' interest in imparting information concerning the progress of criminal proceedings and the guilt of the suspects while the judicial investigation was still ongoing, and the interest of the public in receiving such information, were not sufficient to prevail over the considerations referred to by the courts. The Court further considered that the penalties imposed on the applicants were not disproportionate to the legitimate aims pursued by the authorities. The Court held, by four votes to three, that there had been no violation of Article 10. The three dissenting judges considered that greater weight should have been given to the legitimate interest of the public in being informed about the criminal process and, in particular, on the facts of an important and high profile case.

- In **Kobenter and Standard Verlags GMBH v Austria (2006)** the applicant was a journalist on a Vienna based newspaper published by the second applicant. A faith based magazine was the subject of a private prosecution by a group of homosexuals after it had published pictures of a demonstration in which they participated and identified them by name advocating that 'nazi methods' be applied to them. The private prosecution failed and in the judgment reference was made to the nature of homosexuality and the judge described same sex practices between animals. The judgment was widely criticised by the media including the applicants who commented on the intellectual and moral integrity of the judge and compared his judgment to a medieval witch trial. The judge removed the passages about animals from his judgment and he was given a warning

following disciplinary proceedings. The judge succeeded in a defamation claim against the first applicant and a compensation claim against the second. The Court found that the interference could not be justified by the public interest in protecting the reputation of the judge and the standing of the judiciary in general. The fact that the judge had removed the passages from his judgment and that he had been disciplined indicated that he had not discharged his duties in the manner entrusted and the applicants had been correct to point this out.

- See also **Egeland and Hanseid v Norway (2009)** and **Guja v Moldova (2008)**.

Questions

1. How are restrictions on the basis of national security and territorial integrity formulated in domestic law?
2. How are restrictions on the grounds of the prevention of disorder and crime formulated? Is public order defined so that it is wide enough to cover licensing?
3. How are restrictions on the ground of health or morals formulated? Are they formulated with sufficient clarity and flexibility so as to enable the law and practice to take account of changing public attitudes?
4. How are the restrictions on the basis of the protection of the reputations and rights of others formulated?
5. How are the restrictions based on the prevention of disclosure of information received in confidence formulated? Are they wide enough to cover the receipt of information concerning private interests?
6. How are the restrictions based on the maintenance and authority of the judiciary formulated?

4.6. Necessary in a democratic society

All restrictions to the right to freedom of expression, as noted above, must be interpreted narrowly. In addition, the Court has stated in **Observer and Guardian v United Kingdom (1991)** that the necessity of any restrictions to the right to freedom of expression must be 'convincingly established'. The word 'necessary' implies the existence of a 'pressing social need' (see **Handyside v United Kingdom (1976)** at paragraph 48).

The fundamental principles relating to the question of whether a restriction is necessary in a democratic society have been summarised on a number of occasions by the Court as illustrated in the following examples:

- In **Zana v Turkey (1997)** the Court noted that in determining whether or not actions were required by a pressing social need it must:

  > *look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was 'proportionate to the legitimate aims pursued' and whether the reasons given to justify it are 'relevant and sufficient'...In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.*

4.6.1. Margin of appreciation

States are allowed a certain margin of appreciation in assessing whether a particular measure of re-

striction is permissible. However, this goes hand in hand with European supervision of both legislation and the decisions applying it (see **Handyside v United Kingdom (1976)** at paragraph 49), including those of an independent court (see, for example, **Karhuvaara and Iltalehti v Finland (2004)** at paragraph 38). The duty of the Court is to give the final ruling on whether a restriction of freedom of expression is reconcilable with freedom of expression. In this regard, it looks at the impugned interference in light of the case as a whole, including the context of the remarks concerning the applicants and the context in which they made them. The Court's task is not to take the place of the national authorities in assessing the necessity of any restriction but to review under Article 10 the decisions they have taken pursuant to their power of appreciation (see **Karhuvaara and Iltalehti** at paragraph 41).

4.6.2. Proportionality

Inherent in the notion of necessity is the requirement that the restriction must be proportionate to the aim pursued. In other words, the national authorities must use the method that is least restrictive of the right to freedom of expression. In assessing the proportionality of a restriction, the Court will examine the nature and severity of the penalty or other action and will also review the context in which the interference took place.

- In **Tolstoy Miloslavsky v United Kingdom (1995)**, the applicant was ordered to pay £1,500,000 in damages for defaming Lord Aldington, following the jury's assessment of the damage done to his reputation. The sum awarded was three times the size of the highest libel award previously made in England. The applicant claimed that the size of the award of damages was disproportionate to the aim of protecting Lord Aldington's reputation. The Court noted that an award of this size was open to question where, as in this case, the substantive national law applicable at the time failed to provide a requirement of proportionality. The Court noted that the scope of judicial control of the award did not offer adequate and effective safeguards against a disproportionately large award. It concluded that there had been a violation of Article 10.

- In **Independent News and Media and Independent Newspapers Ireland Limited v Ireland (2005)** the applicants sought to rely on **Tolstoy** and claimed that the award granted against them by the jury in domestic proceedings for the defamation of a prominent politician was disproportionate. They argued that the exceptional size of the award and the absence of adequate safeguards against disproportionate awards violated their rights under Article 10. The Court examined in great detail the **Tolstoy** judgment and Irish law and practice regarding awards in defamation. It concluded that, having regard to the measure of appellate control in this case and the State's margin of appreciation, it had not been demonstrated that there were ineffective safeguards. Hence, there was no violation of Article 10.

- In **Incal v Turkey (1998)**, the applicant was convicted of the offence of stirring up racial hatred for his part in the attempt to distribute leaflets highly critical of Government actions taken against Kurdish street sellers. The respondent State argued that it had a duty to forestall any attempt to promote terrorist activities by means of incitement to hatred. However, the Court found that the leaflets contained information of interest to the population of Izmir, and that they could not be read as an incitement to violence, hostility or hatred between persons. The Court took into account the radical nature of the interference. It concluded that the impugned measure was disproportionate to the aim pursued.

- In **Zana v Turkey (1997)**, the Court found that the interference with the applicant's right to freedom of expression was proportionate. Here, the Court regarded the statement given by the former mayor of Diyarbakir as amounting to support of the PKK and its killings of innocent

persons. It held that the support given by the former mayor of Diyarbakır, the most important city in south-east Turkey, in an interview published in a major national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region. There was therefore no violation of Article 10.

- In **Sener v Turkey (2000)**, the applicant was given a suspended sentence in respect of an article written in the weekly news review of which she was owner and editor on condition that she did not commit any further offence as an editor within three years of its decision. Failure to comply with that condition would have resulted in an automatic sentence for the original offence. The Court held that the conditional suspended sentence had the effect of restricting the applicant's work as an editor and reducing her ability to offer the public views which have their place in a public debate. This was one of the factors upon which the Court held that the restriction was disproportionate to the legitimate aim pursued.

- In **Skałka v Poland (2003)**, the domestic court sentenced the applicant for eight months imprisonment for writing a defamatory letter to a judge. The Court held that the interest protected by the impugned interference was important enough to justify limitations on the freedom of expression. However, in the Court's assessment the eight months imprisonment was disproportionately severe.

- In **Damann v Switzerland (2006)**, the applicant was a journalist investigating a robbery who convinced an administrative assistant at the public prosecutor's office to provide him with data from their files. Although the applicant did not publish the information (or use it for any other purpose), he was convicted for inciting another to disclose an official secret. He claimed that the conviction violated his rights under Article 10. The Court noted that the case did not concern the restraining of a publication as such or a conviction following a publication, but a preparatory step towards publication, namely a journalist's research and investigative activities. That phase, which also fell within its scrutiny, called for the most scrupulous examination on account of the great danger represented by that sort of restriction on the freedom of expression. The Court observed that the information at issue was in the public domain and was information of a kind that raised matters of public interest. The Court further noted that no damage had been done to the rights of the persons concerned, as the applicant had not published the information. It concluded that, although the penalty imposed had not been harsh and had not prevent him from expressing himself, his conviction had nonetheless amounted to a kind of censure which would be likely to discourage him from undertaking research, inherent in his job, with a view to preparing an informed press article on a topic of current affairs. Punishing, as it did, a step that had been taken prior to publication, such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community and was thus liable to hamper the press in its role as provider of information and watchdog. In the circumstances the Court considered that the applicant's conviction had not been reasonably proportionate to the pursuit of the legitimate aim in question, having regard to the interest of a democratic society in ensuring and maintaining the freedom of the press.

- In **Koc and Tambas v Turkey (2006)** the first applicant was the owner of a magazine and the second applicant was its editor in chief. They published a number of articles about Kurd separatists in which criticism was directed at the Minister for Justice who was described as responsible for the ill treatment of Kurds in Turkish prisons and directly responsible for two prison deaths. The applicants were indicted for disseminating propaganda against the State and for designating a person as target for terrorist organisations by publishing the article. They were convicted and the magazine was closed for a month and they were personally fined. On appeal the execution of the sentence was suspended for three years and if after three years the applicants had not committed any new offences the sentence was nullified. The Court took the

view that the articles amounted to a critical assessment of the State's policies towards Kurdish separatists and although the articles painted a negative image of the State and the Minister for Justice as a whole they did not encourage violence, armed resistance or insurrection. In light of these considerations the Court found the sentences to be disproportionate because for three years the applicants faced the threat of a penalty which had a chilling effect and which censored them.

- In **Guja v Moldova (2008)** the applicant, a civil servant had been dismissed from his office for disclosing to the mass media confidential documents about alleged interferences with the administration of justice. In finding a violation of Article 10, the Court had regard to a number of factors including; (i) the public interest involved in the disclosed information; (ii) the authenticity of the information disclosed (iii) the damage, if any, suffered by the public authority as a result of the disclosure in question; (iv) the motive behind the actions of the reporting employee – it is important to establish that, in making the disclosure, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it and that no other more discreet means of remedying the wrongdoing was available to him or her; and finally, (v) the penalty imposed on the applicant and its consequences.

- In **Frankowicz v Poland (2009)** the applicant, a medical practitioner, wrote an opinion in which he criticised medical treatment received by a patient. The disciplinary authorities considered the applicant guilty of unethical conduct in breach of the principle of professional solidarity. The applicant based his report on the patient's medical file, and on the results of some additional medical examinations which the patient had undergone at his suggestion. The opinion was requested by the patient himself who turned to the applicant's company, which specialised in preparing assessments of medical treatment undertaken by patients. The opinion was then handed to the patient, who could use it for whatever purpose he intended. However there was no indication that it was subsequently published or otherwise made known to a wider public. The Court, stated that medical practitioners enjoyed a special relationship with patients based on trust, confidentiality and confidence that the former will use all available knowledge and means for ensuring the well-being of the latter, which could imply a need to preserve solidarity among members of the profession. But, on the other hand, a patient had a right to consult another doctor in order to obtain a second opinion about the treatment he had received and to expect a fair and objective evaluation of his doctor's actions. The fact that the opinion in question was critical of another doctor should not automatically deprive it of genuineness or objectivity. The Court observed that the domestic authorities, in finding that the applicant had discredited another doctor, did not examine the issues of the truthfulness of the statements included in the opinion. Instead they found that, since no criticism of another doctor was permissible, the question of whether the applicant's report actually reflected reality had been without importance. The Court stated that such a strict interpretation as to ban any critical expression in the medical profession 'was not consonant with the right to freedom of expression', as this approach to the matter of expressing a critical opinion of a colleague, even in the context of the medical profession, could risk discouraging medical practitioners from providing their patients with an objective view of their state of health and treatment received, which in turn could jeopardise the ultimate goal of the doctor's profession – that is to protect the health and life of patients.

Also relevant in an assessment of the proportionality of any interference under Article 10 are the procedural fairness of the domestic proceedings and the size of the penalty imposed.

- In **Steel and Morris v United Kingdom (2005)** the applicants were members of Greenpeace sued for defamation and ordered to pay large compensation for handing out leaflets criticising Mc-

Donalds. The Court considered that, although the plaintiff in the case was a very large multinational company, this should not exempt the applicants from the requirement to prove the truth of the statements made. The scrutiny of the acts of companies had to be balanced against the competing interest in their success and viability for the benefit of shareholders and employees and for the wider economic good. Hence, States are given a wide margin of appreciation in this area. Nevertheless, the State was obliged to ensure a measure of procedural fairness and equality of arms in granting a remedy to a corporate body to safeguard the countervailing interest in freedom of expression. In this regard, the Court considered that the lack of legal aid for the applicants in the domestic system was a significant factor in assessing the proportionality of the interference under Article 10. In addition, the size of the award against the applicants was important in assessing the appropriate balance of interests. These two factors were decisive in the Court's decision that the interference by the State was disproportionate in this case leading to a violation of Article 10.

- In **Marchenko v Ukraine (2009)**, the applicant, a teacher and head of a school branch of a trade union, has written letters to the national authorities demanding investigation against a person who allegedly misappropriated public funds. The applicant organised and participated in a demonstration where some slogans directly accusing the same person in misappropriation of public property publicly appeared. The applicant then was convicted of defamation and was sentenced to one year imprisonment postponed and a fine. In regard to the slogans, the Court found that in the absence of sufficient proof of their validity they could reasonably be deemed defamatory and undermining of the addressee's right to be presumed innocent of serious offences. The Court accepted that the domestic authorities had acted within their margin of appreciation in considering it necessary to convict the applicant for defamation. But, scrutinising the issue of proportionality of the sanction employed, the Court considered that, while the contracting States are permitted, or even obliged, by their positive obligations under Article 8 to regulate the exercise of freedom of expression so as to ensure adequate protection by law of individuals' reputations, they must not do so in a manner that unduly hinders public debate concerning matters of public concern, since one year imprisonment, even if suspended, was not proportionate in violation of Article 10.

4.6.3. Relevant and sufficient reasons

The burden is upon the State authorities to prove the necessity of a restriction or interference with the right to freedom of expression by providing 'relevant and sufficient' reasons (see **Handyside v United Kingdom (1976)** at paragraph 50). This is in essence the proportionality test formulated in a different way. By this, the Court means that the national authorities must be satisfied that the interference was in accordance with the principles embodied in Article 10 and that they based themselves on an acceptable assessment of the relevant facts.

- In **Observer and Guardian v United Kingdom (1991)**, the applicant newspapers had published articles about the content of a book written by a former member of the United Kingdom security forces, which was at that stage in manuscript form in Australia. They wished to publish more articles relating to the allegations of wrongdoing by the security forces contained in the book. The United Kingdom domestic courts issued interlocutory injunctions on the applicants, preventing them from publishing further information pending the outcome of the trial of the action for breach of confidence brought by the Attorney General. Subsequently, the book was published outside the United Kingdom and summaries were published in three other British newspapers. Following these events, the House of Lords held that the injunctions should be continued. The Court examined the necessity of the injunctions both prior to and after publication abroad. In respect of both these periods, the respondent State argued that the injunctions were necessary for national security. In respect of the first period, the respondent

State argued that publication of material relating to the book would destroy the substance of the breach of confidence action and that it was necessary to prevent publication on the grounds of national security. The Court held that these were relevant reasons. Further, the Court held that in the light of the nature and possible content of the book, the interests of national security, and the potential prejudice to the action, the national courts were entitled to grant the injunctive relief, and their reasons for so concluding were sufficient. With regard to the second period, when the book had been published abroad, the fact that the further publication of *Spycatcher* material could prejudice the trial of the Attorney General's claims for permanent injunctions was a 'relevant' reason for continuing the restraints in question – with regard to maintaining the authority of the judiciary. However, the Court concluded that the potential prejudice to the Attorney General's action was not a sufficient reason for maintaining the injunction, since the confidentiality of the material had been destroyed by publication abroad. The Court further stated that the national security interests relied upon were not sufficient; by this time, the real purpose of the injunctions had thus become confined to the promotion of the efficiency and reputation of the Security Service. Thus the necessity for the continuation of the injunctions during the second period had not been established.

- In **Arslan v Turkey (1999)**, the applicant was the author of a book that accused the State of oppression and genocide of Kurds. He was convicted of offences in relation to the first and second editions of the book and the books were confiscated. The Court stated that, in determining whether the reasons given for the interference were 'relevant and sufficient', it had to be satisfied that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and that they based themselves on an acceptable assessment of the relevant facts. In holding that there had been a violation of Article 10, the Court found that the book took the form of a literary historical narrative and its impact on national security was considerably less than that of the mass media. While it was highly critical of the State, it did not incite violence, and the State had means available to it other than criminal law to reply to what it considered to be unjustified attacks on its reputation. The Court found that the reasons relied upon by the State were neither relevant nor sufficient. It concluded that the interference was accordingly disproportionate to the aim sought to be achieved.

- In **Goodwin v United Kingdom (1996)**, the applicant journalist was contacted by a source who had obtained sensitive financial information about a company but did not wish to be identified. The company, realising that the applicant was intending to publish the information, obtained an injunction to prevent him from doing so on the basis that the information had been derived from a confidential document and its publication could undermine the company. The applicant was ordered by a court to reveal his source, on the application of the company, which claimed it needed to take legal action against the person who leaked the information. Concluding that the order to reveal the applicant's source had the same purpose as the injunction, namely to prevent dissemination of adverse financial information about the company, the Court held that the order to reveal the source was not supported by relevant and sufficient reasons.

- In **Roemen and Schmit v Luxembourg (2003)** the first applicant published an article about a minister alleging that he had committed tax fraud. He also produced documents showing that a fine had been imposed on him. The article was followed by a public debate. The minister brought an action in damages against the first applicant arguing that he had been at fault in publishing information concerning the fiscal fine. The minister also lodged a criminal complaint. The investigating judge ordered a search at the first applicant's workplace and home. Later, a search warrant was issued for immediate search at the second applicant's office. He was the lawyer of the first applicant. The Court emphasised that there had been a fundamental difference between the instant case and **Goodwin**, since here searches

were carried out at the applicants' workplace and home. This constitutes a more serious measure than an order to divulge the source's identity. In the Court's opinion the reasons the State relied on might have been regarded as 'relevant' but were not 'sufficient' to justify the searches.

- In **Paturel v France (2005)** the applicant was convicted of criminal defamation for publishing a book attacking malpractice by private anti-sect movements which were in receipt of public funding. The applicant claimed breaches of Articles 9 and 10 of the Convention. The Court examined only the issue of whether the interference was 'necessary in a democratic society' under Article 10. Again, the Court considered that, contrary to the view of the French courts, the disputed statements had reflected a comment on matters of public interest and were to be regarded as value judgments rather than statements of fact. As value judgments were not susceptible of proof, the Court noted that the numerous documents submitted by the applicant constituted a sufficient factual basis. The Court further considered that the issue raised by the applicant was clearly a matter of public interest, despite the harsh, negative language used, and, therefore, any interference had to be narrowly interpreted. The French courts had relied on the applicant's personal animosity towards anti-sect movements as grounds for his conviction. The Court did not consider that such considerations could in themselves be regarded as 'relevant and sufficient' grounds. As these anti-sect associations had entered the arena of public debate they ought to have shown a higher degree of tolerance to criticism of their aims by opponents and to the means employed in that debate. The Court concluded that there had been a violation of Article 10.

- In **Albert-Engelmann-Gesellschaft mbH v Austria (2006)** the applicant was the owner and publisher of a religious magazine that published a letter suggesting that a senior Austrian cleric was a 'rebel' and disloyal to the Pope and expressing the view that all disloyal priests in influential positions should be replaced. The cleric who had been criticised was awarded compensation for defamation under Austrian media law, as the domestic courts considered, among other things, that the statements in the letter lacked a sufficient factual basis. The applicant company complained that this violated their rights under Article 10. In assessing 'pressing social need' and 'proportionality,' the Court gave particular weight to (i) the context of the statements at issue, (ii) the reasons given by the national courts and (iii) the nature of the interference. The Court considered that the reasons given by the Austrian courts were 'relevant' to justify the interference complained of. In deciding that they were not 'sufficient' to justify the interference, the Court noted first that the statements related to a religious debate which was of considerable interest to the concerned religious community at the time of the events. Second, the Court considered the statements in the letter to be value judgments rather than statements of fact, and in that light found that there existed sufficient factual basis for the statements even if they were somewhat exaggerated and provocative. Third, the Court disagreed with the domestic courts that the failure of the magazine to identify the author of the letter and distance itself from its contents was relevant. In that regard, the Court observed that a general requirement for the press systematically and formally to distance itself from the content of a statement of a third person that might insult or provoke others or damage their reputation was not compatible with its role of providing information on current events, opinions and ideas. The Court concluded that there had been a violation of Article 10.

- In **Giniewski v France (2006)**, the applicant, a journalist, sociologist and historian, claimed that he strived to promote closer relations between Jews and Christians in all his works. He published an article in a French newspaper concerning a papal encyclical and raised arguments about the relationship between a particular Catholic doctrine and the origins of the Holocaust. As a result of the article he was found civilly liable for defamation against the Christian community and ordered to pay a nominal sum of one franc in damages and to publicise the judgment

in a French newspaper. He claimed that this violated his rights under Article 10. The Court considered that the article contributed to discussion of the various possible reasons behind the extermination of Jews in Europe, a question of indisputable public interest in a democratic society. In such matters restrictions on freedom of expression were to be strictly construed. The Court considered it essential in a democratic society that a debate on the causes of acts of particular gravity amounting to crimes against humanity should be able to take place freely. While the article in question, contained conclusions and phrases that might offend, shock or disturb some people, the Court reiterated that such views did not in themselves preclude the enjoyment of freedom of expression. The article in question had, moreover, not been 'gratuitously offensive' or insulting and had not incited disrespect or hatred. Nor had it cast doubt in any way on clearly established historical facts. In those circumstances, the Court considered that the reasons given by the French courts could not be regarded as sufficient to justify the interference with the applicant's right to freedom of expression.

- In **Juppala v Finland (2009)** the applicant had been convicted of defamation, following expressing her suspicions to the doctor of her grandson about violence by his father. In particular, the boy said that the bruise on his back had been the result of his father's beatings. The doctor alerted the child protection services the same day. The boy's father requested that the police investigate whether the applicant had committed an offence. The domestic courts found the applicant guilty of defamation and ordered her to pay compensation for non-pecuniary damage and legal costs. The Court considered that the essential question was how to strike a proper balance when a parent was wrongly suspected of having abused his or her child, while, given the difficulties in uncovering child abuse, protecting children at risk of significant harm. The Court found it alarming that the domestic courts had taken the view that, even though there was no doubt that the applicant had seen her grandson's bruised back, she had not been entitled to repeat what the boy had told her. The Court stated, as a matter of principle, that voicing a suspicion of child abuse, formed in good faith, in the context of an appropriate reporting procedure should be available to any individual without fear of a criminal conviction or an obligation to pay compensation for harm suffered or costs incurred. It was not argued before the domestic courts or before this Court that the applicant had acted recklessly, that is without caring whether the boy's allegation of abuse was well-founded or not. On the contrary, even a health care professional, the medical doctor, had made his own assessment that the case should be reported to the child welfare authorities. The Court did not see any sufficient reasons for the restriction on the applicant's right to freedom of expression, and found that the interference failed to answer any 'pressing social need'.

- In **Sorguç v Turkey (2009)**, the applicant, a professor, made statement through distribution of a paper at a scientific conference in which he had criticised the system of appointment and promotion of academics in the university. Relying on his personal experience, he described a situation that a candidate, who did not have adequate qualifications, had been promoted to an assistant professorship, without mentioning the name of that particular candidate. Later, one of the colleagues instituted civil proceedings against the applicant on the account that the latter's statement included remarks which constituted attack to his reputation. The domestic judiciary ordered the applicant to pay the compensation, interest and court fees. The Court noted that the domestic judiciary did not convincingly establish that there was pressing social need for putting the protection of the personality rights of an unnamed individual above the applicant's right to freedom of expression and the general interest in promoting this freedom where issues of public interest are concerned. Therefore, the Court found that these reasons were not sufficient and relevant justification for the interference with the applicant's right to freedom of expression, and, accordingly, the national authorities had failed to strike a fair balance between the relevant interests of protection of reputation of others and right to freedom of expression of the applicant.

Questions

1. How is the test of necessity formulated in domestic law?
2. Does the test incorporate the notion of proportionality?
3. What factors must be taken into account in evaluating the proportionality of a restriction in domestic law?
4. What sort of reasons for a restriction are required to be given by a body responsible for imposing a restriction?
5. What are the differences between the concepts of necessity and proportionality as applied by the Court?
6. How has the notion of the margin of appreciation been rationalised by the Court?

5. POLITICAL EXPRESSION AND PUBLIC INTEREST SPEECH

The Court and the Convention attach the highest importance to political expression generally and it requires the most robust reasons to justify any interference as a consequence of which it will subject any interference with political expression to intense scrutiny. The reasons behind the premium placed on political expression by the Court derive from its perception of the centrality of free speech in the democratic process and the aims of Article 10 as articulated in the **Handyside v United Kingdom** case and noted in the introductory chapter to this Manual.

5.1. What constitutes political speech?

The right to freedom of political expression includes freedom of expression for politicians, including opposition politicians. The Court has emphasised that politicians, public officials and persons exercising functions of a public nature must tolerate a higher degree of scrutiny of their actions and be willing to accept criticism in the press and in particular the Court has sought to establish the principle that the limits of acceptable criticism of politicians are 'wider than as regards criticism of private individuals'.

- In **Lingens v Austria (1986)**, the applicant journalist wrote an article in which he criticised the Austrian Chancellor's support of leader of a political party who had been accused by Simon Wiesenthal, President of the Jewish Documentation Centre, of having been responsible for the massacre of civilians behind the German lines in Russia during World War II. The applicant also criticised the Chancellor's verbal attacks upon Wiesenthal; the Chancellor had accused Wiesenthal of having employed 'mafia methods'. The applicant's accusations included allegations that the Chancellor was guilty of the 'basest opportunism', was 'immoral' and 'undignified'. The applicant was found guilty of criminal defamation of the Chancellor. The Court held that since freedom of political debate is at the very core of the concept of a democratic society, the limits of acceptable criticism are wider as regards a politician than as regards a private individual. While Article 10(2) enables the reputation of all individuals to be protected, including politicians, the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues. The Court stated that:

  > *the politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10(2) enables the reputation of others – that is to say, of all individuals – to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.*

- In **Castells v Spain (1992)** the applicant opposition politician was convicted of the offence of insulting the government. The Court held that while freedom of expression is important for everybody, it is especially important for an elected representative of the people. S/he represents his/her electorate, draws attention to their preoccupations and defends their interests. The Court stated that therefore interferences with the freedom of expression of an opposition member of Parliament called for the closest scrutiny on the part of the Court. The fact that the applicant made his criticism not in Parliament, but in a newspaper, did not mean that he lost his right to criticise the State. The Court stressed the importance of freedom of the press, which affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, the Court stated, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society. Further, it held that in a democratic system the actions or omissions of the

State must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion.

- In **Roseiro Bento v Portugal (2006)** the applicant, the mayor of a Portuguese town, was ordered by domestic courts to pay a small amount in civil damages for 'insulting behaviour' as the result of statements he made during a heated exchange with a town councillor during a council meeting. The applicant contended that the judgment against him had infringed his right to freedom of expression. The Court noted that the statements at issue were made when both men were acting in their capacity as politicians; therefore, the limits of acceptable criticism were wider. The Court observed that political invective was apt to become personal in tone; that was one of the hazards of political life and free debate that acted as the guarantors of democratic society. Taken in context, the expressions used could not be regarded as excessive, particularly in view of the equally virulent remarks made by the town councillor. Moreover, as the remarks were made in the course of a spoken debate, the applicant had had no opportunity of rephrasing, refining or withdrawing them before they became public. The Court considered that a town council meeting, as a vital forum for public debate, was comparable to Parliament in terms of the interest to society of safeguarding freedom of expression. Hence, any interference with the freedom of expression exercised therein could therefore be justified only for compelling reasons. The Court did not consider that there were any such 'sufficient' reasons in this case. The Court concluded that there had been a violation of Article 10.

Question

Is political expression accorded a high degree of protection under domestic law? If so, by what means?

Private persons or associations that enter the arena of public debate may be required to withstand a greater degree of criticism than others. The Court has rejected arguments that they must be treated in the same way as politicians, but it takes account of the nature and extent of the person's contribution to a public debate, when assessing whether or not a particular restriction was proportionate (see **Jerusalem v Austria (2001)**).

Civil servants acting in their official capacity may, like politicians, be expected to withstand wider limits of acceptable criticism than private individuals. However, the Court has held that unlike politicians, civil servants do not knowingly lay themselves open to close scrutiny of their every word and deed (see **Janowski v Poland (1999)**). See for example;

- In **Kwiecien v Poland (2007)** the applicant wrote an open letter calling on a public servant not to run for local elections. The letter was sent to 1,000 inhabitants of the electorate and to local and national politicians. The letter accused the official of carrying out his duties 'ineptly' and of breaching the law on occasion and it listed incidences which caused him to have that view. The public official initiated proceedings under the Local Elections Act which prohibited the publication of untrue materials in election literature. The applicant was ordered to issue an apology in the local paper and to pay maximum damages to the public official. The Court noted that there was little scope under Article 10 to restrict political speech or debate on questions of public interest and as such the domestic court had failed to recognise that it needed to carry out a balancing exercise between the right to freedom of expression and the reputation of the public official. The Court also held that the domestic court had failed to distinguish between fact and value judgements and that as a result the penalty imposed on the applicant was disproportionate.

5.2. The parameters of the 'public interest'

The public interest is often relied on by the press or the media to justify publication of information. Considerations of the public interest must be balanced against other interests under Article 10 and this can require the Court to determine as a starting point whether the public interest is in fact at stake. Again context is important and where it can be demonstrated that a contribution is made to a public debate on a particular issue, whether local, national or international, the Court will generally take the view that the public interest is at stake. For example

- In **Prager and Oberschlick v Austria (1995)**, the first applicant wrote an article in the second applicant's news magazine in which he criticised judges of the Austrian criminal courts. The Court held that matters of public interest include the functioning of the system of justice, 'an institution that is essential for any democratic society'.

- In **Thorgeirson v Iceland (1992)**, the applicant journalist wrote two articles in a newspaper concerning alleged police brutality perpetrated by the Reykjavik police. Much of his article was based on stories he had heard from alleged victims. In his articles, the applicant urged the Minister of Justice to set up an independent enquiry into the allegations. The applicant was convicted of criminal defamation. The respondent State claimed that the wide limits of acceptable criticism in political discussion did not apply to the same extent in the discussion of other matters of public interest. The Court disagreed with this assertion and held that it was not possible to distinguish between political discussion and discussion of other matters of public concern in such a way. In so concluding, the Court noted that the articles appeared at a time when there was a public debate about police brutality and that they bore on a matter of serious public concern.

- In **Bladet Tromso and Stensaas v Norway (1999)**, the first applicant newspaper had, in a series of articles, published details from an official report that the second applicant had drawn up following his inspection of activities on board a seal-hunting vessel. Both applicants were the subjects of defamation proceedings, as a result of which they were ordered to pay damages and certain statements were declared null and void. The Court observed that the impugned articles were part of an ongoing debate of evident concern to the local, national and international public, in which the views of a wide selection of interested actors were reported. Therefore the issue was a matter of public interest.

- In **De Haes and Gijsels v Belgium (1997)**, the first applicant wrote, and the second applicant published, a series of five articles in which lengthy and virulent criticism was levelled at judges of the Antwerp Court of Appeal. They were accused of having behaved with bias and cowardice and for having, in a divorce suit, awarded custody of the children to the father, Mr X, a Belgian notary. In 1984 the notary's wife and parents-in-law had lodged a criminal complaint accusing Mr X of incest and of abusing the children, but the case had resulted in a ruling that there was no case to answer. Three of the Antwerp Court of Appeal Judges brought civil proceedings against the applicants in respect of the allegations of bias and cowardice, and were awarded compensation for the damage caused by these statements. The applicants asserted, and the Court implicitly accepted, that the articles had been written against the background of a public debate, reported by other newspapers, on incest in Flanders and on the way in which the judiciary was dealing with the problem. It was thus treated as a matter of public interest.

- In **Barthold v Germany (1985)**, the need for all night emergency veterinary services in the local town was held by the Court to amount to a matter of public interest.

- In **Guja v Moldova (2008)** the applicant, a civil servant – the Head of the Press Department of the Prosecutor General's Office, disclosed confidential documents, which included information

about the interference by a high ranked politician to the investigation of a criminal case. The Court noted that the disclosed letters concerned very important matters in a democratic society which the public had a legitimate interest in being informed about, as the information in question had a bearing in issues such as the separation of powers, improper conduct by a high-ranking politician and the Government's attitude towards police brutality.

- In **Csanics v Hungary (2009)**, the applicant, a trade union leader, made a statement in which he strongly criticised the management of a company. As a result of the proceedings brought against him, the applicant was made to publish rectification of his statement and pay the court costs. The Court observed that given the number of employees concerned, the dispute at issue had been a debate on matters of public interest, where there was little scope for restrictions.

- In **Frankowicz v Poland (2009)**, the applicant, a medical practitioner, wrote an opinion in which he criticised medical treatment received by a patient. As a result of disciplinary proceedings he was found guilty of unethical conduct in breach of the principle of professional solidarity. The Court noted that the applicant's opinion was not a gratuitous personal attack on another doctor, but a critical assessment, from a medical point of view, of treatment received by his patient from another doctor. Thus, it concerned issues of public interest.

Details about a politician's private life may sometimes be a matter of public interest, particularly where such details have a bearing on his or her public conduct. However, where details of the person's private emerge into the public domain, commentators appear to be expected to use temperate language in voicing their criticism.

- In **Tammer v Estonia (2001)**, the Minister of Interior, S, was forced to resign from his government post in 1995, when it emerged that secret tape recordings of his conversations with other politicians had been made. L, one of S's advisers, admitted full responsibility for the recordings and was also forced to resign. Thereafter, L wrote her memoirs with the help of a journalist R, in which she gave details of her affair with S, a married man, with whom she had had a child. L told of how her child had been entrusted to the care of her parents, and admitted sacrificing her child for her career. L had held a number of political posts associated with S over the years. S's marriage had broken up and S and L had later married. L mused in her book over whether she had been the cause of the break-up. After publication of the memoirs and extracts therefrom in a newspaper, the applicant conducted an interview with R, during which he asked whether R had made a hero out of a person who broke up another's marriage, was a careless and unfit mother, deserted her child and was not a good example for young girls. The actual words used in Estonian were insulting but not improper, and both phenomena were generally condemned in Estonian society. The applicant was convicted of insulting L. The Court noted that L had deliberately made details of her private life public and held that the use of the insulting words "had to be seen against the background that prompted their utterance as well as their value to the general public". It noted that at the time the words were used, L had resigned from her post. It held that despite her continued involvement in the political party, the use of the impugned terms in relation to L's private life was not justified by considerations of public concern nor did they bear on a matter of general importance. In particular, it had not been substantiated that her private life was among the issues that affected the public at the time of the interview. The applicant's remarks could not, therefore, be regarded as serving the public interest.

- In **Karhuvaara and Iltalehti v Finland (2004)**, the applicants were journalists convicted for infringement of privacy after revealing details of a politician's private life. In assessing the necessity of the restriction in question the Court had to examine the balance between the protection of private life (under Article 8) and freedom of expression under Article 10. The Court noted in particular the lack of bad faith or misrepresentation on the part of the applicants and the fact that

the subject matter of the contested reporting did not have any express bearing on political issues or any direct links with the subject's work as a politician. The Court felt that the public had the right to be informed which may extend in certain circumstances to the private lives of public figures, particularly politicians.

- Regarding the balance between Article 8 and Article 10 obligations of the State, see also the case of **Cumpana and Mazare v Romania (2004).** In that case, although the Court felt that the State may have been justified in intervening to protect the privacy of other individuals, the penalties imposed were manifestly disproportionate and had a potentially excessive effect on freedom of expression.

- In **Standard Verlags GMBH v. Austria (No. 2) (2009)** the applicant, a company which owned a daily newspaper, published an article entitled 'A society rumour'. It commented on rumours that Ms Klestil-Loeffler, the wife of the then Austrian President, intended to divorce and had close contacts with a parliamentarian, Herbert Sheibner. The presidential couple subsequently brought proceedings against the applicant. They claimed that the latter reported on the strictly personal sphere of their life – alleging that Mrs Klestil-Löffler was a double adulteress and Mr Klestil a deceived husband – which had most likely undermined them in public. As a result of the court proceedings the applicant was ordered to reimburse the expenses of the plaintiffs and to pay them non-pecuniary damage. The Court confirmed the domestic courts' decisions and found their reasons to justify the interference as 'relevant' and 'sufficient'. It observed that the courts had fully recognised that the case involved a conflict between the right to impart ideas and the right of others to protection of their private life. The courts fairly balanced the various interests concerned. In particular they duly considered the claimants' status as public figures but found that the article at issue failed to contribute to any debate of general interest. The national courts had made a convincing distinction between information concerning the health of a politician which may in certain circumstances be an issue of public concern and idle gossip about the state of his or her marriage or alleged extra-marital relationships. The Court agreed that the latter did not contribute to any public debate in respect of which the press has to fulfil its role of 'public watchdog', but merely served to satisfy the curiosity of a certain readership. As far as the applicant complained that it was not allowed to prove that such rumours as reported by the article were circulating at the time, the Court observed that while reporting on true facts about a politician's or other public person's private life may be admissible in certain circumstances, even persons known to the public have a legitimate expectation of protection of and respect for their private life. The Court noted that at no time did the applicant allege that the rumours were true. However, even public figures may legitimately expect to be protected against the propagation of unfounded rumours relating to intimate aspects of their private life. Therefore, while the balancing the rights under Article 8 and Article 10 in these circumstances the priority were given to the protection of privacy upon the freedom of expression.

Questions

1. How does domestic law define public interest speech?
2. To what extent is public interest speech protected?
3. What is the nature of the balancing exercise which domestic authorities must conduct when considering the interests of politicians and public figures?

5.3. Restrictions on political and public interest speech: general principles

Despite the importance attached to the right to freedom of political and public interest speech, these rights are not absolute; they are subject to same restrictions as all other forms of expression. While politicians are expected to tolerate criticism and comment this does not go unchecked.

The general background against which the opinions were expressed is relevant, for example, opinions expressed in the context of the discussions about national security or, by contrast, during political debate or elections.

- In **Castells v Spain (1992)**, the Court noted that the dominant position which the State occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media. However, it does remain open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith. The applicant had several times offered to produce evidence proving the truth of his articles, but was refused permission by the domestic courts to do so. The Court held that this refusal was decisive in the case, and that such an interference in the exercise of the applicant's freedom of expression was not necessary in a democratic society.

- In **Arslan v Turkey (1999)**, the applicant author published a book giving an historical account of events in south-eastern Turkey. He was convicted of the offence of publishing separatist propaganda but his conviction was declared null and void because the provision on which it was based had been repealed. The applicant published a second edition, and was prosecuted and convicted of the offence of publishing propaganda against the unity of the State. Copies of the book were seized and later confiscated. The applicant was sentenced to one year and eight months' imprisonment. The book was expressed in virulent terms, accusing the Turkish authorities of genocide and other atrocities against the Kurds. Noting the importance attached to the right to criticise the government, the Court was concerned at the severity of the penalty imposed and the persistence of the prosecutor to secure a conviction. It held that the restriction on the applicant's right to freedom of expression was disproportionate to the legitimate aim pursued.

- **Brasilier v France (2006)** concerned a losing candidate in the French parliamentary elections who was held liable in tort (and told to pay one franc in damages) for public defamation of an elected public official. He had accused the winning candidate in his constituency of rigging the ballot because his ballot papers had not appeared at polling stations. In separate proceedings the Constitutional Court concluded that the candidates had failed to provide the municipal authorities with their ballot papers within the time laid down in the domestic law. The applicant claimed that the civil penalty in tort violated his rights under Article 10. The Court considered that the impugned statements concerned public-interest issues and were to be regarded, given the general tone of the banners and leaflets, more as value judgments than as statements of pure fact. The Court emphasised that freedom of expression was particularly important in the context of political debate and considered that political comment could not be restricted without pressing reasons. Interference with the freedom of expression of a member of the opposition, who represented his voters, relayed their concerns and defended their interests, required the Court to apply a stricter standard of scrutiny. In this connection, it reiterated that a person opposed to official ideas and positions had to be able to discuss the lawfulness of an election and that, in the context of an electoral contest, a certain vivacity of comment could be tolerated more than in other circumstances. As to the penalty imposed on the applicant, even though nominal damages of one franc was the smallest possible award, the Court considered that this fact did not suffice per se to justify interference with the applicant's freedom of expression. It had moreover indicated on many occasions that any interference with freedom of expression might have a 'chilling effect' on the exercise of that freedom. It concluded that there had been a violation of Article 10.

- In **Malisiewicz-Gąsior v Poland (2006)** the applicant was an independent candidate in the Polish Parliamentary elections who wrote newspaper articles accusing the deputy speaker of the Poland's lower House of Parliament of 'abuse of power'. The articles related to a complaint by

the deputy speaker to the public prosecutor that the applicant had kidnapped his daughter, and the subsequent investigation and detention of the applicant. This complaint later proved groundless as, in fact, the deputy speaker's daughter had run away from home with her long-term boyfriend, the applicant's son. As a result of the articles, the applicant was convicted of criminal defamation and given a suspended prison sentence and a fine. The applicant complained about her conviction for defamation, relying on Article 10. The Court observed that the applicant's comments were made in articles published during her electoral campaign as a parliamentary candidate. In addition, her comments were based on personal experience. The Court considered that the applicant's allegations of abuse of power were not a gratuitous personal attack but part of a political debate concerning a well-known politician. The Court reiterated that the right to stand as a candidate in an election was of prime importance in the Convention system and crucial to democracy. The deputy speaker, a politician, should have shown a greater degree of tolerance towards criticism. The Court considered that the defamation of a politician in the context of a heated political debate did not justify the imposition of a prison sentence. Thus, the conviction of the applicant must have had "a chilling effect" on the freedom of expression in public debate in general. The Court concluded that there was no reasonable relationship of proportionality between the measures applied by the domestic courts and the legitimate aim pursued. There had been a violation of Article 10.

Sometimes, the restriction will not concern written or spoken opinion expressed, but on a photograph or other details that accompany the opinion.

- In **Krone Verlag GmbH KG v Austria (2003)**, the applicant journalist made allegations against P, a member of the Austrian Parliament who was also a member of the European Parliament. He alleged that P was in receipt of three salaries, including his teacher's salary, contrary to law. He appended a photograph of P to the accusations. P obtained an injunction to prevent the applicant from publishing his photograph. It was granted in the basis that P was not well known and accordingly his legitimate interests had been infringed by creating the possibility of identifying him. The domestic courts held that the applicant company was entitled to report on the plaintiff's activities and financial situation, but there was no legitimate interest in publishing his photograph, as it had, *per se,* no informational value. The Court held that the domestic courts had failed take into account the essential function the press fulfils in a democratic society and its duty to impart information and ideas on all matters of public interest. Further, it stated that it was of little importance whether a certain person (or his or her picture) is actually known to the public. What counts is whether this person has entered the public arena. This was the case with respect to a politician on account of his public functions, a person participating in a public debate, an association that is active in a field of public concern, or a person who is suspected of having committed offences of a political nature that attract the attention of the public. P was a politician; accordingly he had entered the public arena and had to bear the consequences thereof. Thus, there was no valid reason why the applicant company should be prevented from publishing his picture. In this respect the Court attached importance to the fact that the published photographs did not disclose any details of his private life. The Court further noted that the Austrian Parliament's Internet site published the curriculum vitae and picture of P, who was at the date of judgment, still a member of the Austrian Parliament.

- In **Barthold v Germany (1985)**, an article containing an interview with the applicant veterinarian surgeon appeared in a newspaper, together with his name, the name of his practice and his photograph. In the interview the applicant expressed his view that veterinary practices should operate an all-night emergency service in the city of Hamburg; he stated that his practice did so, and discussed his experiences. An injunction was obtained preventing the applicant expressing his opinions on the need for night-time emergency veterinarian services on the basis that this was in breach of unfair competition laws preventing veterinarians from advertising. The Court noted

that the article in question pursued a specific object, that is to say, informing the public about the situation in Hamburg at a time when, according to the applicant and another practitioner interviewed, the enactment of new legislation on veterinary surgeons was under consideration. The Court noted that while the illustrations given by the applicant in the article may have had the effect of giving publicity to his own clinic, this effect was secondary to the principal content of the article and to the nature of the issue being put to the public at large. The application of the relevant law risked discouraging members of the liberal professions from contributing to public debate on topics affecting the life of the community whenever there was the slightest likelihood of their utterances being treated as entailing, to some degree, advertising.

- In **Eerikainen and Others v Finland (2009)**, the applicants, a journalist and an editor-in-chief of a publishing company, had published an article about criminal proceedings concerning a fraud which were then pending before a court. The domestic judiciary found, that by attaching accused woman's name and photographs, the applicants had violated her right to privacy, and ordered them to pay non-pecuniary damage. The Court in its assessment stated in this case that the publication of a photograph must, in general, be considered a more substantial interference with the right to respect for private life than the mere communication of the person's name. Although freedom of expression also extends to the publication of photos, this is an area in which the protection of the rights and reputation of others takes on particular importance. However, in finding a violation of the right to freedom of expression in that case the Court highlighted the significance of the fact that the photographs had been taken with the accused person's consent and with the intention of their being published, and, accordingly, it concluded that the grounds relied on, although relevant, were not sufficient to justify the interference with the applicants' right to freedom of expression, in terms of a 'pressing social need'.

> ***Question***
>
> Are domestic courts required to consider the importance of debate on matters of public interest in assessing whether an interference was necessary in any given case?

5.4. Defamation and similar restrictions

It is clear that the Court takes the view that criticisms levelled against politicians should not normally be restricted. The Court takes the view that the use of insulting or exaggerated language against politicians is to be expected as a natural part of the democratic process (see **Lopes Gomes Da Silva v Portugal (2000)**). Where, however, criticism is made of a politician's private life, even where such information is already in the public domain, the Court takes the view, as noted above, that those expressing the criticism should do so in a less polemical and exaggerated form (see **Tammer v Estonia (2001)**). Criminal defamation proceedings against journalists are commonly resorted to by politicians in many States parties to the Convention and have given rise to a significant body of jurisprudence. The Court emphasises that a distinction must be made between statements of fact which can be proven and value judgements which are only comment and may have to be tolerated in the Court's view. For example:

- In **Oberschlick (No. 2) v Austria (1997)**, Jorg Haider, the leader of the right wing Austrian Freedom Party, gave a public speech in which he praised all soldiers who had fought in the Second World War, regardless of the side on which they had fought. He implied that all soldiers had fought for peace and freedom and they alone were entitled to claim the right to freedom of expression. The applicant journalist responded to the speech in a newspaper article in which he called Haider an 'idiot'. He went on to give his reasons for using this word, one of which was the

fact that Haider had not himself fought in the army of the Third Reich and, according to his own argument, could not therefore claim to be entitled to the right to freedom of expression. The applicant was convicted of criminal defamation. The Court held that while the applicant's criticism of Haider was polemical, it did not constitute a gratuitous attack, since he had provided an objectively understandable explanation for them, namely Haider's own provocative speech. Accordingly, the applicant's expression formed part of a political discussion provoked by Haider and amounted to an opinion whose truth was not susceptible to proof. There was nevertheless a factual basis for the applicant's assertions. The Court held therefore that the word used by the applicant was not disproportionate to the indignation knowingly aroused by Haider. The interference to his right to freedom of expression constituted a violation of Article 10.

- In **Lopes Gomes da Silva v Portugal (2000)**, the applicant manager of a daily newspaper, wrote an editorial in which he criticised a right wing political party's choice of party leader, R, in the Lisbon City Council elections. He accused R of being 'ideologically ...grotesque and...buffoonish' and 'an incredible mixture of crude reactionary, fascist bigotry and coarse anti-semitism'. Numerous extracts of recent articles by R were published alongside the applicant's article, in which R called the then French Prime Minister a 'bald-headed Jew', and praised both the National Front and its leader Le Pen. The applicant was convicted of criminal defamation. The Court noted that the article contributed to a political debate on matters of general interest, an area in which restrictions on the freedom of expression should be interpreted narrowly. The Court stated that while the article was polemical in style, it did not convey a gratuitous personal attack because the applicant supported them with an objective explanation. It further pointed out that "political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society". The Court reiterated that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation. The Court also stated that it was reasonable to conclude that the style of the applicant's article was influenced by that of R, extracts of whose highly polemical articles appeared alongside. Furthermore, the Court attached great importance to the fact that, in printing the latter alongside the editorial in question, the applicant acted in accordance with the rules governing the journalistic profession. Thus, while reacting to those articles, he allowed readers to form their own opinion by placing the editorial in question alongside the declarations of the person referred to in that editorial. What mattered here was not the fact that the applicant was sentenced to the minimum penalty, but that he was convicted at all. His conviction was not therefore reasonably proportionate to the pursuit of the legitimate aim, having regard to the interest of a democratic society in ensuring and maintaining the freedom of the press.

- In **Thorgeirson v Iceland (1992)**, the applicant wrote articles criticising the police for their brutality. The Court noted that the articles bore on a matter of serious public concern. Although they were framed in particularly strong terms – the applicant repeatedly referred to the police in his article as 'beasts in uniform' – having regard to their purpose and the impact which they were designed to have, the Court held that the language used could not be regarded as excessive. Further, it held that the applicant's conviction and sentence for criminal defamation were capable of discouraging open discussion of matters of public concern. The interference therefore, was not proportionate to the legitimate aim pursued and accordingly, not 'necessary in a democratic society'.

- In **Bladet Tromso and Stensaas v Norway (1999)**, the applicants published articles critical of seal hunting techniques aboard a particular ship. The Court stated that the most careful scrutiny is required where measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern. The Court took account of the fact that the newspaper had ensured balanced reporting of the subject by publishing all points of view, including those of the seal-hunters concerned. Second, it

took account of the fact that the thrust of the impugned articles was not primarily to accuse but to contribute to the public debate. Third, while noting that journalists must act in good faith, the newspaper did not have an obligation to verify by independent research the contents of an official report. The Court concluded that the crew members' undoubted interest in protecting their reputation was not sufficient to outweigh the vital public interest in ensuring an informed public debate over a matter of local and national as well as international interest. There had therefore been a violation of Article 10.

- In **Nilsen and Johnsen v Norway (1999)** the applicants were police officers in Bergen. Two academics at the University of Bergen carried out an investigation into the phenomenon of violence in Bergen. The resulting reports were published. The book stated that the Bergen police force was responsible for a number of incidents of excessive or illegal use of force. The book gave rise to a heated public debate. The Ministry of Justice appointed an Inquiry Committee, of which Mr Bratholm was a member, and which concluded that the nature and extent of police brutality in Bergen was far more serious than was generally assumed. Mr Bratholm published further on the topic. The applicants made various statements through the press to reply to the accusations of police brutality. Mr Bartholm instituted defamation proceedings against the applicants who were subsequently convicted. The Court accepted the domestic courts' findings that the statements were capable of affecting Mr Bratholm's reputation and that the reasons for the prosecution given by the Norwegian authorities were relevant to the legitimate aim of protecting Mr Bratholm's reputation. However, the Court noted that the applicants were not entirely unjustified in claiming that they were entitled to 'hit back in the same way'. Moreover, a degree of exaggeration should be tolerated in the context of such a heated and continuing public debate of affairs of general concern. The Court concluded that the interference was not supported by sufficient reasons and was disproportionate to the legitimate aim of protecting the reputation of Mr Bartholm.

- In **Raichinov v Bulgaria (2006)** the applicant was an official in the Bulgarian Ministry of Justice. While attending a meeting of the Supreme Judicial Council attended by the chief prosecutor, he used words that suggested that the deputy prosecutor-general was corrupt. He was subsequently convicted of insulting an official in public. The applicant complained that he had been convicted for having voiced his personal opinion about the deputy prosecutor-general and that this was in breach of his right to freedom of expression under Article 10. The Court noted that the victim of the insult was a high-ranking official and that, while not limitless, the bounds of acceptable criticism geared toward him were wider than in relation to those of a private individual. The Court observed that the applicant's remark was made in front of a limited audience, at a meeting held behind closed doors and did not pose any threat or hinder the deputy prosecutor in the performance of his official duties. The negative impact, if any, of the applicant's words on reputation was therefore quite limited. Furthermore, the Court found that the applicant's opinion of Mr S. expressed, as it was, during a meeting, could be construed as forming part of a debate on a matter of general concern, which called for enhanced protection under Article 10. Another important factor was that the applicant was not subjected to a civil or a disciplinary sanction, but instead to a criminal penalty, initiated by the prosecutor-general. The Court considered that the reaction of the prosecutor-general and the ensuing conviction were disproportionate. The Court reiterated that the dominant position which those in power occupy made it necessary for them to display restraint in resorting to criminal proceedings, particularly where other means were available for replying to the unjustified criticisms of their adversaries. The applicant's resulting sentence, while being in the lower range of the possible penalties, was still a sentence under criminal law, registered in the applicant's criminal record. The Court concluded that there had therefore been a violation of Article 10.

- In **Csanics v Hungary (2009)**, the applicant, a trade union leader, made a statement in which he had strongly criticised the management of a company. As a result of the proceedings

brought against him, the applicant was made to publish rectification of his statement and pay the court costs. Firstly, the Court made a clear distinction in this case between the value judgements, where the applicant was assessing employing company's behaviour in general, and the statements of facts, where according to the applicant the employing company considered him and his colleagues as criminals. For the Court, such utterances were, at least in part, susceptible of proof. The Court found striking that the domestic courts considered the manner in which the applicant had expressed his statements 'gratuitously insulting, offensive and harsh' and had not given him any opportunity at all to prove the veracity of his assertions, in the situation when there were convincing arguments in part of the applicant. Based on the supporting factual proofs submitted by the applicant, the Court found, that it was more likely that the applicant's impugned statements had been well-founded or that at least he had voiced them in good faith, in compliance with the minimum requirement applicable to those who engage in public debate. Consequently, the Court considered that the domestic authorities should have had provided the applicant with an opportunity to substantiate his statements. In principle, it should be possible to make true declarations in public irrespective of their tone or negative consequences for those who are concerned by them.

- See also **Juppala v Finland (2009)**.

Question

How does domestic law protect the use by journalists and others of exaggerated and polemical expression in the context of political expression?

5.4.1. Fact and value statements

Defamation laws are frequently used to curb political speech. Defamation covers both allegations of fact and opinions expressed as value judgments. The Court draws a distinction between these two types of expression that is of consequence for the operation of defamation laws. There is usually no difficulty in identifying an allegation of fact. Thus, calling a person a liar, for example, is an allegation of fact. Value judgments are expressions of opinion, such as calling a person immoral or undignified. A problem that has arisen a number of times before the Court is that domestic laws fail to draw this distinction and requires both forms of expression to be defended by proving the truth of the allegations at issue. Another problem that has arisen is that some domestic laws and practice have failed to make provision for a defendant to defend him or herself with regard to allegations of fact, by proving the truth of the allegations.

The Court has made it clear that value judgments should not be required to be defended by proving their truth, since they are, as expressions of opinion, not susceptible to such proof. However, value judgments will not always be regarded as an acceptable form of freedom of expression; the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement. The Court has pointed out that value judgments may be regarded as excessive in the absence of any factual basis (see **Jerusalem v Austria (2001)** at paragraph 43). However, allegations of fact are in a different category; the existence of facts can be demonstrated. Therefore it is consistent with Article 10 for domestic law to provide an obligation to proof the truth of such allegations. Indeed, failure to allow a person to defend him/herself by proving the truth of the facts alleged in either civil or criminal proceedings for defamation, violates Article 10.

- In **Jerusalem v Austria (2001)**, the applicant politician voiced her opinion concerning an association, IPM, calling it a sect. She asserted that all sects have fascist tendencies and are

totalitarian in character. IPM obtained an injunction to prevent her from repeating her allegations. The applicant claimed that her statements amounted to value judgments, used in the context of a political debate. In ordering the injunction, the trial court determined that the applicant's statements amounted to allegations of fact, which she had failed to prove. The Court held that the statements amounted to value judgments. However, it further held that, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive. The Court noted that the applicant offered documentary evidence, including articles from newspapers and magazines on the internal structure and the activities of IPM, as well as a German court judgment on this matter. It stated that such material may have been relevant to show a *prima facie* case that the value judgment expressed by the applicant was fair comment. The applicant had also proposed the evidence of four witnesses and suggested that an expert opinion be sought; but the trial court had refused to take this evidence because it merely related to the term 'sect' and not to that term as explained by the applicant in her speech. The Court held that, in requiring the applicant to prove the truth of her statements, while at the same time depriving her of an effective opportunity to adduce evidence to support her statements and thereby show that they constituted a fair comment, the Austrian courts overstepped their margin of appreciation and that the injunction granted against the applicant amounted to a disproportionate interference with her freedom of expression.

- In **Dichard and Others v Austria (2002)** the applicants included journalists and the owner of a newspaper that was in competition with a media group represented by a lawyer, G. G became a member of Parliament, representing the Austrian People's Party. The applicants criticised G for simultaneously holding the position of Chairman of the Parliament's Legislative Committee, and representing the applicants' competitor in several proceedings concerning unfair competition against companies belonging to the applicants' media group. The applicants accused him of being involved in the adoption of an amendment to a law that was to the benefit of his clients, thereby abusing his position. The applicants were ordered not to repeat their allegations and to retract them. The Court noted that the test applied by the domestic court, that the applicants had to prove that the amendment exclusively served the interests of G's clients, imposed an excessive burden on the applicant. It concluded that there was sufficient factual basis for the value judgment in the article. The article was a fair comment on an issue of general public interest. The Court noted that G was a politician of importance, and the fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion, even where, strictly speaking, no problem of incompatibility of office under domestic law arises. Although the applicants had, on a slim factual basis, published harsh criticism in strong, polemical language, the restriction was not proportionate to the legitimate aim pursued.

- In **Feldek v Slovakia (2001)**, the applicant journalist wrote articles and poems expressing concern at the appointment of S as a Government minister in the newly independent Slovakia, in the light of S's fascist past. Prior to the applicant's allegations, S had published his autobiography in which he described his conviction by a Soviet military tribunal in 1945 on the ground that he had received orders to spy on Soviet Army after having been enrolled in a military course run by Germans. S sued the applicant for defamation and the Court ordered him to publish a text admitting his previous statements were defamatory. The Court noted that that the applicant's statement was made and published as part of a political debate on matters of general and public concern relating to the history of Slovakia which might have repercussions on its future democratic development. Further, although his statement did not indicate sources, it was based on facts that had been published both by S himself and the press prior

to the publication of the applicant's statement. The domestic court held that the term 'fascist past' implied that a person had propagated or practised fascism in an active manner. Since the applicant had failed to prove that S had a fascist past in that sense, it concluded that the applicant's statement had unjustifiably infringed S's personal rights. The Court held that his statement was a value judgment made in the context of a free debate on an issue of general interest, namely the political development of Slovakia in the light of the country's historical background. The statement concerned a State minister, in respect of whom the limits of acceptable criticism are wider than for a private individual. The Court rejected the respondent State's proposition that a value judgment can only be considered as such if it is accompanied by the facts on which that judgment is based. The necessity of a link between a value judgment and its supporting facts may vary from case to case in accordance with the specific circumstances. In this case, the Court was satisfied that the value judgment was based on information which was already known to the wider public, both because S's political life was known, and because information about his past was disclosed, by him in his book, and in publications by the press which preceded the statement by the applicant. The Court rejected the domestic court's restrictive definition of the term 'fascist past'. The term is a wide one, capable of evoking in those who read it different notions as to its content and significance. One of them can be that a person participated in a fascist organisation, as a member, even if it was not coupled with specific activities propagating fascist ideals. The domestic court did not convincingly establish any pressing social need for putting the protection of the personal rights of a public figure above the applicant's right to freedom of expression and the general interest of promoting this freedom when issues of public interest are concerned.

- In **Shabanov and Tren v Russia (2006)** the applicants owned a newspaper that published a series of articles on public appointed officials. In the first article they identified the head of the regional government legal department and remarked on her age and lack of qualifications. She took a defamation action and succeeded on the basis that the article was inaccurate and defamatory. In the second article the applicants commented on how a number of solidiers had fallen ill because their unit commander had failed to obtain dry boots for them. The commander sued and provided medical evidence which demonstrated that he was ill and he sought to claim this was as a consequence of the article which was published. The applicants published the details of his claim and his medical evidence in their paper. The commander failed in his defamation claim because it was accurate but the applicants were convicted and fined for publishing his medical details. The Court found that the first conviction was not a violation of Article 10 because the information published by the applicants while it was in the public interest was subsequently shown to be inaccurate. On the second claim the Court also found no violation because the approach of the domestic court was reasonably aimed at protecting the privacy of the military commander and the fines imposed were thus proportionate.

The distinction between value judgments and allegations of fact may be explicit in domestic law. However, such a distinction must be consistent with the Court's understanding. The categorisation used by domestic law is thus open to challenge before the Court.

- In **Jerusalem v Austria (2001)**, the Court noted that the domestic courts categorised the impugned statements as allegations of fact. The Court disagreed and stated they reflected fair comment on matters of public interest by an elected member of the Municipal Council, are to be regarded as value judgments rather than statements of fact.

With regard to the distinction between facts and value judgements see also the case **Lindon, Otchakovsky-Laurens and July v France (2007)**.

Questions

1. In domestic law, do defamation laws draw a distinction between value judgments and allegations of fact?
2. If so, what consequences flow from the distinction?

5.5. Criticising the police, army or judiciary

The Court does not readily accept exaggerated language used in relation to the police, armed forces and judiciary, the rationale being that unlike politicians such institutions perform special roles in society related to law and order and public confidence must be maintained. In such cases, the Court looks more closely at the context in which the words were spoken or written, particularly the intention served by the words expressed (see **Thorgeirson v Iceland (1992)**).

- In **Prager and Oberschlick v Austria (1995)**, an article had been published which was extremely critical of judges in the Austrian criminal court system. The article accused them of being 'arrogant' and 'bullying' and of ignoring the presumption of innocence. The article referred to some judges by name but it constituted an attack on all criminal judges. The first applicant gave as sources for the article, in addition to his own experience of attending a number of trials, statements of lawyers and legal correspondents and surveys carried out by university researchers. The applicants were convicted of criminal defamation. The Court stated that while the press is one of the means by which politicians and public opinion can verify that judges discharge their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them, regard must be had to the special role of the judiciary in society. It held that, as the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying to criticism. The Court noted that the applicants had not been convicted on the basis of criticism *per se,* but on the basis of the excessive breadth of the accusations, which, in the absence of a sufficient factual basis, appeared unnecessarily prejudicial. Further the Court noted that the first applicant's research was not adequate to substantiate his allegations. The Court concluded therefore that the interference was proportionate to the legitimate aim pursued.

- In **Schopfer v Switzerland (1998)**, the applicant lawyer held a press conference criticising the local criminal judiciary in respect of one of his clients whose case was then pending. He claimed that he was appealing to the press as a 'last resort'. In fact he later lodged an appeal that was partly successful. In the press conference, the applicant accused the judiciary of violating local laws and human rights over a period of years. He also criticised the manner in which his client was arrested and the response of the judiciary; he gave details of a conversation that a court clerk had with the wife of his client, namely that she should get her husband a different lawyer if she wanted to see him released from custody. In assessing the necessity of the interference, the Court noted that the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts, which explains the usual restrictions on the conduct of members of the Bar. It pointed out that the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence. It was therefore legitimate to expect lawyers to contribute to the proper administration of justice, and thus to maintain public confidence therein. The seriousness and general nature of the criticisms made by the applicant and the tone in which he chose to make them were taken into account. Noting that the press conference had not in fact been a last resort, the Court stated that the complaints were made at a time his client's case was pending. The Court pointed out that

there were other legal avenues that the applicant could have pursued. The Court finally had regard to the fact that the applicant's fine was a modest one. It concluded that the authorities did not go beyond their margin of appreciation in punishing the applicant.

- In **Constantinescu v Romania (2000)**, the applicant used the term '*delapidatori*' (embezzler) in describing three teachers. The Court noted that the applicant had a duty to react within limits fixed, *inter alia*, in the interest of 'protecting the reputation or rights of others', including the presumption of innocence. It found that the term '*delapidatori*', was offensive to the three teachers because they had not been convicted by a court. It stated that the applicant could perfectly well have expressed his criticism – and thus contributed to free public debate of union affairs – without using the word '*delapidatori*'. Accordingly, the legitimate interest of the State in protecting the reputation of the three teachers did not conflict with the applicant's interest in contributing to the above-mentioned debate. There was thus no violation of Article 10.

- In **De Haes and Gijsels v Belgium (1997)**, the applicants wrote articles criticising the local Court of Appeal judges with detailed information regarding decisions taken about the custody of Mr X's children. That information was based on thorough research into the allegations against Mr X and on the opinions of several experts who were said to have advised the applicants to disclose them in the interests of the children. The Court stated that the accusations in question amounted to an opinion, whose truth, by definition, is not susceptible of proof. Such an opinion may, however, be excessive, in particular in the absence of any factual basis, but it was not so in this case. Although the applicants' comments were severely critical, the Court was of the opinion that they were proportionate to the stir and indignation caused by the matters alleged in their articles. As to the journalists' polemical and even aggressive tone, the Court pointed out that that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed.

- In **Perna v Italy (2003)**, the applicant wrote a newspaper article criticising a judge whom he accused of bias in view of his adherence to the principles of the Communist Party. The Court stated that while judges must be protected against unfounded attacks, especially in view of the fact that they are subject to a duty of discretion that precludes them from replying, the press nevertheless is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them. By acting as a militant member of a political party, of whatever tendency, a judicial officer imperils the image of impartiality and independence that justice must always show at all times. Where a judicial officer is an active political militant, his unconditional protection against attacks in the press is scarcely justified by the need to maintain the public confidence which the judiciary needs in order to be able to function properly, seeing that it is precisely such political militancy which is likely to undermine that confidence. By such conduct, a judicial officer inevitably exposes himself to criticism in the press, which may rightly see the independence and impartiality of the State legal service as a major concern of public interest. In this regard, there had been a violation of Article 10.

While it is permissible to restrict the expression of criticism of the courts in certain circumstances in order to protect their independence, criticism voiced in court made by one legal representative of the other, should not normally be regarded as grounds for restricting freedom of expression.

- In **Nikula v Finland (2002)**, the applicant defence counsel, accused the Prosecutor in the case she was defending of 'role manipulation'. She was convicted of negligent defamation. The Court noted that the applicant's criticisms were strictly limited to the prosecutor's performance in the case, and were not aimed at his general professional conduct. The Court also noted that the context of the criticisms was significant, namely in court, during the conduct of the defence of

her client. The Court further noted that the trial judge before whom the criticisms were made, made no attempt to chastise her. It held that the threat of an *ex post facto* review of counsel's criticism of another party to criminal proceedings is difficult to reconcile with defence counsel's duty to defend his/her clients' interests zealously. Therefore, it should be counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the potential 'chilling effect' of even a relatively light criminal sanction or an obligation to pay compensation for harm suffered or costs incurred. Only exceptional circumstances would justify such a restriction of defence counsel's freedom of expression. The restriction on the applicant's freedom of expression failed to address any 'pressing social need'.

- In **Kyprianou v Cyprus (2005)** the applicant was a lawyer who, while representing the accused in a murder trial, alleged that members of the trial court were talking to each other and sending each other notes ('*ravasakia*' - which can mean, among other things, short and secret letters/notes, or love letters, or messages with unpleasant contents). The judges said they had been 'deeply insulted' 'as persons' by the applicant. They gave the applicant the choice either to maintain what he had said and to give reasons why a sentence should not be imposed on him or to retract. The applicant did neither. The trial court found him in contempt of court and sentenced him to five days' imprisonment, enforced immediately. The applicant complained that his conviction for contempt violated Article 10. The Court looked at whether a fair balance was struck between, on the one hand, the need to protect the authority of the judiciary and, on the other hand, the protection of the applicant's freedom of expression in his capacity as a lawyer. The Court observed in particular that the applicant's comments, albeit discourteous, were aimed at and limited to the manner in which the judges were trying the case, in particular concerning the cross-examination of a witness he was carrying out. Accordingly, the Court considered that such a penalty was disproportionately severe on the applicant and was capable of having a 'chilling effect' on the performance by lawyers of their duties as defence counsel. The Court's finding of procedural unfairness in the summary proceedings for contempt served to compound that lack of proportionality. The Court accordingly held that Article 10 had been breached, given the disproportionate sentence imposed on the applicant, even taking into consideration his early release from prison.

- In **Guja v Moldova (2008)** the applicant was Head of the Press Department of the Moldovan Prosecutor General's Office, when, acting in line with the President's anti-corruption drive, he gave the national newspaper two letters received by the Prosecutor General's Office, neither of which bore any sign of being confidential. The letters were written by the Deputy Speaker of Parliament and a vice-minister in the Ministry of Internal Affairs with an aim to influence investigation of one of the criminal cases. As a result, the applicant was dismissed from his office. The Court firstly noted that Moldovan legislation did not contain any provision concerning the reporting of irregularities by employees. Secondly, in view of the context and of the language employed by high-ranking officials in these letters, it could not be excluded that their effect was to put pressure on the Prosecutor's Office. Here the Court noted the reports of international NGOs, which had expressed concern about lack of judicial independence in Moldova. In conclusion, the Court considered that the public interest in the provision of information about undue pressure and wrongdoing within the Prosecutor's Office was so important in democratic society that it outweighed the interest in maintaining public confidence in the Prosecutor General's Office.

- In **Kudeshkina v Russia (2009)** the applicant, a former judge, complained before the Court that she had been dismissed from the judiciary because she had publicly accused higher judicial officials of putting pressure on her in connection with a high-profile criminal case. The Court first observed that nothing in the interviews Ms Kudeshkina had given to the media would justify the claims of disclosure, which had been made by the Judiciary Qualification Board of Moscow.

It further found that Ms Kudeshkina's allegations of pressure had not been convincingly dispelled in the domestic proceedings. Having noted that Ms Kudeshkina had publicly criticised the conduct of various officials, and had alleged that pressure on judges was common, the Court found that she had undoubtedly raised a very important matter of public interest which had to be open to free debate in a democratic society. Even if Ms Kudeshkina had allowed herself a certain degree of exaggeration and generalisation, the Court found that her statements had to be regarded as a fair comment on a matter of great public importance. Finally, the Court noted that the penalty imposed, Ms Kudeshkina's dismissal, had been capable of having a 'chilling effect' on judges wishing to participate in the public debate on the effectiveness of the judicial institutions. The Court therefore held that that penalty had been disproportionately severe, in violation of Article 10.

With regard to criticism of public servants in general, see also the cases of **Busuioc v Moldova (2004)** and **Janowski v Poland (1999)**.

Question

How does domestic law treat expressions of opinions critical of the judiciary or system of justice?

5.6. Incitement to violence

The Court has found that interference with Article 10 is justified where a person has used words or language which may be capable of inciting violence. Arriving at such a conclusion however is not without difficulties. As noted in relation to hate speech, the context is highly relevant.

- In **Surek v Turkey (No. 2) (1999)** the applicant said a named chief of police had called for the armed forces to open fire on Kurds and another member of the armed forces had told a former member of Parliament that 'your blood would not quench my thirst'. The applicant was convicted on terrorist charges in respect of those statements. The Court held that the words did not amount to incitement to violence, but were capable of exposing them to strong public contempt. However, the Court held that assuming that the assertions were true, in view of the seriousness of the misconduct in question, the public had a legitimate interest in knowing not only the nature of the conduct but also the identity of the officers. Furthermore, the press declaration on which the news report was based had already been reported in other newspapers and that the incriminated news coverage added nothing to those reports. No other newspapers were prosecuted for reporting these statements. Therefore, the reasons were not sufficient to justify the interference with the applicant's right to freedom of expression.

However, in many cases in which political views are expressed in aggressive terms, it is hard to determine whether the words used incite, or are liable to be read as inciting, violence.

- In **Surek v Turkey (No. 1) (1999)**, a magazine owned by the first applicant contained a two-part interview with the second applicant, a leader of the illegal organisation, the PKK. In the interview, the second applicant was critical of the State authorities for their part in the massacres in south-east Turkey. He spoke of Turkey's 'massacres' of Kurds in north and south-east Turkey. Further, he argued that the Kurds would continue to resist the Turkish attempts to drive them from their territory. The articles described tactics that were adopted to fight against the State authorities and justified the use of armed struggle against them. They spoke of continuing the armed combat because the Kurds had no other option. Any intensification of their struggle was designed only to match the State's intensification of the war against them. One of the interviews was fol-

lowed with a declaration made by four illegal socialist organisations calling 'all revolutionaries and democrats' to 'unite forces' against the State, though no reference was made therein to join together in armed struggle. The applicants were convicted of a number of terrorist offences; the first applicant was fined and the second applicant was sentenced to six months' imprisonment. The Court held that the fact that the interviews were given by a leading member of a proscribed organisation could not in itself justify an interference with the applicants' right to freedom of expression. The fact that the interviews contained hard-hitting criticism of official policy and communicated a one-sided view of the origin of and responsibility for the disturbances in south-east Turkey did not justify interference either. The message conveyed was one of intransigence and a refusal to compromise with the authorities as long as the objectives of the PKK had not been secured; however the Court held that the texts taken as a whole could not be considered to incite to violence or hatred. Rather, the virulent terms used were a reflection of the resolve of the opposing side to pursue its goals and of the implacable attitudes of its leaders in this regard. Accordingly, the interviews had a newsworthy content which allowed the public both to have an insight into the psychology of those who were the driving force behind the opposition to official policy in south-east Turkey, and to assess the stakes involved in the conflict. The Court considered the potential of the articles to exacerbate the security situation in the region. However, it noted that the domestic authorities failed to have sufficient regard to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them. The Court found a violation of Article 10.

- In **Surek v Turkey (No. 1) (1999)**, the applicant was the owner of a review, who published letters from readers voicing virulent criticism of the State authorities' actions in south east Turkey. The first letter used phrases such as the 'fascist Turkish army' which was accused of being responsible for 'massacres' of Kurds. It ended by saying that Kurds have nothing to lose but everything to gain. The second letter used phrases such as 'the hired killers of imperialism' alongside references to 'massacres', 'brutalities' and 'slaughter' of Kurds by the Turkish State. The Court, noting the importance of political expression and the fact that there is little scope under Article 10(2) for restrictions on political speech or on debate on matters of public interest, held that it remained open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks. Further, where such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression. The Court held that the tone of the letters amounted to an appeal to bloody revenge by 'stirring up base emotions and hardening already embedded prejudices which have manifested themselves in deadly violence'. Against the background of the security situation in south-east Turkey, the Court stated that the content of the letters must be seen as capable of inciting to further violence in the region by instilling a deep-seated and irrational hatred against those depicted as responsible for the alleged atrocities. In the opinion of the Court, the message that was communicated to the reader was that recourse to violence was a necessary and justified measure of self-defence in the face of the aggressor. Further, one of the letters identified persons by name, stirred up hatred for them and exposed them to the possible risk of physical violence. It stated that what was in issue was hate speech and the glorification of violence. In assessing whether the interference was justified by relevant and sufficient reasons and was proportionate, it was necessary to examine the nature and severity of the penalty imposed. The Court noted that the applicant was sentenced to a fine only. In conclusion, the Court held that the interference was proportionate to the legitimate aim pursued.

- In **Erdogdu v Turkey (2000)**, the applicant was the editor of a periodical that published an article highly critical of the government's policy in south-east Turkey. The applicant was convicted of the offence of disseminating separatist propaganda. The article employed terms such as 'war',

'conflict', 'armed conflict', 'massacre', 'violence' and 'fascist'. The Court examined each of the terms in the precise context in which they were used. The writer condemned the 'military solution' adopted by the State, which consisted in perpetrating 'a dirty war against guerrillas', or even 'an open war against the Kurdish people'. The Court noted that the article was written in the form of a political speech, both in its content and the terms used. It further noted that the article was not a 'neutral' analysis of events in south-east Turkey and that the purpose of the article was to stigmatise both the dominant political ideology of the State and the conduct of the Turkish authorities in the area. The Court concluded that it did not sympathise with the PKK, nor advocate violence. While use of the terms war, fascist etc conferred a certain virulence on the political criticism expressed by the author, the Court pointed out that the article can be clearly distinguished, in respect of the tone used, from the articles examined in the case of **Sürek (No. 1)**; there was nothing in this article that could have been construed 'as an appeal for bloody revenge' and/or to communicate to the reader "the message that recourse to violence is a necessary and justified measure of self-defence" in the face of the Turkish State.

Question

What criteria do the domestic courts employ to decide whether the language used in any given circumstances amounts to an incitement to violence?

6. SELECTED EXCERPTS FROM CONVENTION JURISPRUDENCE

6.1. The importance of the right to freedom of expression

Handyside v United Kingdom (1976)

49. Nevertheless, Article 10 para. 2...does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19) (art. 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court. In this respect, the Court refers to Article 50 (art. 50) of the Convention ("decision or measure taken by a legal authority or any other authority") as well as to its own case-law (Engel and others judgment of 8 June 1976...para. 100).

The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.

Müller and Others v Switzerland (1988)

27. Admittedly, Article 10 (art. 10) does not specify that freedom of artistic expression, in issue here, comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression. As those appearing before the Court all acknowledged, it includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Confirmation, if any were needed, that this interpretation is correct, is provided by the second sentence of paragraph 1 of Article 10 (art. 10-1), which refers to "broadcasting, television or cinema enterprises", media whose activities extend to the field of art. Confirmation that the concept of freedom of expression is such as to include artistic expression is also to be found in Article 19 § 2 of the International Covenant on Civil and Political Rights, which specifically includes within the right of freedom of expression information and ideas "in the form of art".

6.2. Means of expression

Vogt v Germany (1995)

43. The Court reiterates that the right of recruitment to the civil service was deliberately omitted from the Convention. Consequently, the refusal to appoint a person as a civil servant cannot as such provide the basis for a complaint under the Convention. This does not mean, however, that a person who has been appointed as a civil servant cannot complain on being dismissed if that dismissal violates one of his or her rights under the Convention. Civil servants do not fall outside the scope of the Convention. In Articles 1 and 14 (art. 1, art. 14), the Convention stipulates that "everyone within [the]

jurisdiction" of the Contracting States must enjoy the rights and freedoms in Section I "without discrimination on any ground". Moreover Article 11 para. 2 (art. 11-2) in fine, which allows States to impose special restrictions on the exercise of the freedoms of assembly and association by "members of the armed forces, of the police or of the administration of the State", confirms that as a general rule the guarantees in the Convention extend to civil servants (see the Glasenapp and Kosiek v. Germany judgments of 28 August 1986, Series A nos. 104, p. 26, para. 49, and 105, p. 20, para. 35). Accordingly, the status of permanent civil servant that Mrs Vogt had obtained when she was appointed a secondary-school teacher did not deprive her of the protection of Article 10 (art. 10).

6.3. Freedom to hold opinions

Barthold v Germany (1985)

42. Article 10 para. 1 (art. 10-1) specifies that freedom of expression "shall include freedom to hold opinions and to...impart information and ideas". The restrictions imposed in the present case relate to the inclusion, in any statement of Dr. Barthold's views as to the need for a night veterinary service in Hamburg, of certain factual data and assertions regarding, in particular, his person and the running of his clinic (see paragraph 18 above). All these various components overlap to make up a whole, the gist of which is the expression of "opinions" and the imparting of "information" on a topic of general interest. It is not possible to dissociate from this whole those elements which go more to manner of presentation than to substance and which, so the German courts held, have a publicity-like effect. This is especially so since the publication prompting the restriction was an article written by a journalist and not a commercial advertisement.

The Court accordingly finds that Article 10 (art. 10) is applicable, without needing to inquire in the present case whether or not advertising as such comes within the scope of the guarantee under this provision.

6.4. Freedom of information

Leander v Sweden (1987)

74. The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 (art. 10) does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.

[Note: see also **Gaskin v United Kingdom (1989)** at para. 52**]**.

6.5. The role of the press and broadcasting media.

Lingens v Austria (1986)

41. ....These principles are of particular importance as far as the press is concerned. Whilst the press must not overstep the bounds set, inter alia, for the "protection of the reputation of others", it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them (see, mutatis mutandis, the above-mentioned Sunday Times judgment....para. 65)...

[Note: see also **Ozgur Gundem v Turkey (2000)** at para. 58.**]**

Fressoz and Roire v France (1999) (Grand Chamber Decision)

45. The Court reiterates the fundamental principles under its case-law concerning Article 10.

(i) Freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society" (see Handyside....§ 49, and Jersild...§ 37).

(ii) The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see De Haes and Gijsels...§ 37). In addition, the Court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see Prager and Oberschlick....§ 38).

(iii) As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In cases, such as the present one, concerning the press, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10, whether the restriction was proportionate to the legitimate aim pursued (see...Goodwin...§ 40, and Worm v. Austria judgment of 29 August 1997...§ 47).

(iv) The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, among many other authorities, the Goodwin judgment cited above, pp. 500-01, § 40). **[See also Observer and Guardian v United Kingdom (1991) at paragraph 59].**

51. Not only does the press have the task of imparting information and ideas on matters of public interest: the public also has a right to receive them (see, among other authorities, the following judgments: Observer and Guardian...§ 59; Jersild...§ 31; and De Haes and Gijsels...§ 39). That is particularly true in the instant case, as issues concerning employment and pay generally attract considerable attention. Consequently, an interference with the exercise of press freedom cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest (see the Goodwin judgment cited above, p. 500, § 39).

Jersild v Denmark (1994)

31. A significant feature of the present case is that the applicant did not make the objectionable statements himself but assisted in their dissemination in his capacity of television journalist responsible for a news programme...

The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance (ibid.). Whilst the press....[etc.] the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (ibid.). Although formulated primarily with regard to the print media, these principles doubtless apply also to the audiovisual media.

In considering the "duties and responsibilities" of a journalist, the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media (see Purcell and Others v. Ireland, Commission's admissibility decision of 16 April 1991, application no. 15404/89...). The audiovisual media have means of conveying through images meanings which the print media are not able to impart.

At the same time, the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the Court recalls that Article 10 (art. 10) protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see the Oberschlick v. Austria judgment of 23 May 1991...para. 57).

The Court will look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are relevant and sufficient and whether the means employed were proportionate to the legitimate aim pursued (see the above-mentioned Observer and Guardian judgment...para. 59). In doing so the Court has to satisfy itself that the national authorities did apply standards which were in conformity with the principles embodied in Article 10 (art. 10) and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see, for instance, the Schwabe v. Austria judgment of 28 August 1992...para. 29).

6.6. State responsibility

6.6.1. Positive obligations

Ozgur Gundem v Turkey (2000)

42. The Court has long held that, although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned. It has found that such obligations may arise under Article 8 (see, amongst others, Gaskin...§§ 42-49) and Article 11 (see the Plattform "Ärzte für das Leben"...§ 32). Obligations to take steps to undertake effective investigations have also been found to accrue in the context of Article 2 (see, for example, the McCann and Others v. the United Kingdom judgment of 27 September 1995...§ 161) and Article 3 (see the Assenov and Others v. Bulgaria judgment of 28 October 1998...§ 102), while a positive obligation to take steps to protect life may also exist under Article 2 (see the Osman v. the United Kingdom judgment of 28 October 1998...§§ 115-17).

43. The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom 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 (see mutatis mutandis, the X and Y v. the Netherlands judgment of 26 March 1985...§ 23). In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (see, among other authorities, the Rees v. the United

Kingdom judgment of 17 October 1986...§ 37, and the Osman v the United Kingdom, § 116). **[Note:** see also **Appleby**, para. 39-40.**]**

44. In the present case, the authorities were aware that Özgür Gündem, and persons associated with it, had been subject to a series of violent acts and that the applicants feared that they were being targeted deliberately in efforts to prevent the publication and distribution of the newspaper. However, the vast majority of the petitions and requests for protection submitted by the newspaper or its staff remained unanswered...

6.7. Permissible restrictions: licensing of broadcasters

Groppera Radio AG and Others v Switzerland (1990)

60. The insertion of the sentence in issue, at an advanced stage of the preparatory work on the Convention, was clearly due to technical or practical considerations such as the limited number of available frequencies and the major capital investment required for building transmitters. It also reflected a political concern on the part of several States, namely that broadcasting should be the preserve of the State. Since then, changed views and technical progress, particularly the appearance of cable transmission, have resulted in the abolition of State monopolies in many European countries and the establishment of private radio stations – often local ones – in addition to the public services. Furthermore, national licensing systems are required not only for the orderly regulation of broadcasting enterprises at the national level but also in large part to give effect to international rules, including in particular number 2020 of the Radio Regulations (see paragraph 35 above).

61. The object and purpose of the third sentence of Article 10 § 1 (art. 10-1) and the scope of its application must however be considered in the context of the Article as a whole and in particular in relation to the requirements of paragraph 2 (art. 10-2).

There is no equivalent of the sentence under consideration in the first paragraph of Articles 8, 9 and 11 (art. 8, art. 9, art. 11), although their structure is in general very similar to that of Article 10 (art. 10). Its wording is not unlike that of the last sentence of Article 11 § 2 (art. 11-2). In this respect, however, the two Articles (art. 10, art. 11) differ in their structure. Article 10 (art. 10) sets out some of the permitted restrictions even in paragraph 1 (art. 10-1). Article 11 (art. 11), on the other hand, provides only in paragraph 2 (art. 11-2) for the possibility of special restrictions on the exercise of the freedom of association by members of the armed forces, the police and the administration of the State, and it could be inferred from this that those restrictions are not covered by the requirements in the first sentence of paragraph 2 (art. 11-2), except for that of lawfulness ("lawful"/"légitimes"). A comparison of the two Articles (art. 10, art. 11) thus indicates that the third sentence of Article 10 § 1 (art. 10-1), in so far as it amounts to an exception to the principle set forth in the first and second sentences, is of limited scope.

The Court observes that Article 19 of the 1966 International Covenant on Civil and Political Rights does not include a provision corresponding to the third sentence of Article 10 § 1 (art. 10-1). The negotiating history of Article 19 shows that the inclusion of such a provision in that Article had been proposed with a view to the licensing not of the information imparted but rather of the technical means of broadcasting in order to prevent chaos in the use of frequencies. However, its inclusion was opposed on the ground that it might be utilised to hamper free expression, and it was decided that such a provision was not necessary because licensing in the sense intended was deemed to be covered by the reference to "public order" in paragraph 3 of the Article (see Document A/5000 of the sixteenth session of the United Nations General Assembly, 5 December 1961, paragraph 23).

This supports the conclusion that the purpose of the third sentence of Article 10 § 1 (art. 10-1) of the Convention is to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2 (art. 10-2), for that would lead to a result contrary to the object and purpose of Article 10 (art. 10) taken as a whole.

[Note: see also **Autronic AG v Switzerland** (para. 52); **Informationsverein Lentia v Austria (1993)** (para. 29-33); and **Demuth v Switzerland (2002)** (para. 33-34).

6.8. Restrictions on the right to freedom of expression under Article 10(2)

6.8.1. Prior restraint

Alinak v Turkey (2005)

37. Article 10 does not prohibit prior restraint on publication as such. This is borne out by the words "conditions", "restrictions", "preventing" and "prevention" which appear in that provision (see Sunday Times (no. 1) cited above, and Markt intern Verlag GmbH and Klaus Beermann v. Germany, judgment of 20 November 1989, ...). However, the dangers inherent in prior restraint are such that they call for the most careful scrutiny by the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest. This danger extends to the censorship of publications other than periodicals that deal with a topical issue.

38. The Court therefore considers that these principles may apply to the publication of books in general or other written texts (see Association Ekin v. France, no. 39288/98, § 57, ECHR 2001 VIII).

6.8.2. Duties and responsibilities

Handyside v United Kingdom (1976)

49. From another standpoint, whoever exercises his freedom of expression undertakes "duties and responsibilities" the scope of which depends on his situation and the technical means he uses. The Court cannot overlook such a person's "duties" and "responsibilities" when it enquires, as in this case, whether "restrictions" or "penalties" were conducive to the "protection of morals" which made them "necessary" in a "democratic society".

Erdogdu and Ince v Turkey (1999)

54. The Court stresses that the "duties and responsibilities" which accompany the exercise of the right to freedom of expression by media professionals assume special significance in situations of conflict and tension. Particular caution is called for when consideration is being given to the publication of the views of representatives of organisations which resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence. At the same time, where such views cannot be categorised as such, Contracting States cannot with reference to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.

6.8.3. Special responsibility of certain groups

Vogt v Germany (1995)

53. These principles apply also to civil servants. Although it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 (art. 10) of the Convention...

Frankowicz v Poland (2009)

49. ...Medical practitioners also enjoy a special relationship with patients based on trust, confidentiality and confidence that the former will use all available knowledge and means for ensuring the well-being of the latter. That can imply a need to preserve solidarity among members of the profession. On the other hand, the Court considers that a patient has a right to consult another doctor in order to obtain a second opinion about the treatment he has received and to expect a fair and objective evaluation of his doctor's actions.

6.8.4. Prescribed by law

Rekvényi v Hungary (1999)

34. According to the Court's well-established case-law, one of the requirements flowing from the expression "prescribed by law" is foreseeability. Thus, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see the Sunday Times (no. 1)....§ 49, and the Kokkinakis v. Greece judgment of 25 May 1993...§ 40). The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (see...Cantoni v. France judgment of 15 November 1996...§ 32). The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see the previously cited Vogt judgment, p. 24, § 48). Because of the general nature of constitutional provisions, the level of precision required of them may be lower than for other legislation.

35. ....As has been recalled many times in the Court's case-law, it is primarily for the national authorities to interpret and apply domestic law (see, for example, the Chorherr v. Austria judgment of 25 August 1993....§ 25).

Müller and Others v Switzerland (1988)

29. In the applicants' view, the terms of Article 204 § 1 of the Swiss Criminal Code, in particular the word "obscene", were too vague to enable the individual to regulate his conduct and consequently neither the artist nor the organisers of the exhibition could foresee that they would be committing an offence. This view was not shared by the Government and the Commission.

According to the Court's case-law, "foreseeability" is one of the requirements inherent in the phrase "prescribed by law" in Article 10 § 2 (art. 10-2) of the Convention. A norm cannot be regarded as a "law"

unless it is formulated with sufficient precision to enable the citizen - if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see the Olsson judgment of 24 March 1988, Series A no. 130, p. 30, § 61 (a)). The Court has, however, already emphasised the impossibility of attaining absolute precision in the framing of laws, particularly in fields in which the situation changes according to the prevailing views of society (see the Barthold judgment of 25 March 1985, Series A no. 90, p. 22, § 47). The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague (see, for example, the Olsson judgment previously cited, ibid.). Criminal-law provisions on obscenity fall within this category.

In the present instance, it is also relevant to note that there were a number of consistent decisions by the Federal Court on the "publication" of "obscene" items (see paragraph 20 above). These decisions, which were accessible because they had been published and which were followed by the lower courts, supplemented the letter of Article 204 § 1 of the Criminal Code. The applicants' conviction was therefore "prescribed by law" within the meaning of Article 10 § 2 (art. 10-2) of the Convention.

Hashman and Harrup v United Kingdom (1999)

37. The Court first recalls that in its Steel and Others judgment, it noted that the expression "to be of good behaviour" "was particularly imprecise and offered little guidance to the person bound over as to the type of conduct which would amount to a breach of the order" (ibid., pp. 2739-40, § 76). Those considerations apply equally in the present case, where the applicants were not charged with any criminal offence, and were found not to have breached the peace.

38. The Court next notes that conduct contra bonos mores is defined as behaviour which is "wrong rather than right in the judgment of the majority of contemporary fellow citizens" (see paragraph 13 above). It cannot agree with the Government that this definition has the same objective element as conduct "likely to cause annoyance", which was at issue in the Chorherr case (see paragraph 29 above). The Court considers that the question of whether conduct is "likely to cause annoyance" is a question which goes to the very heart of the nature of the conduct proscribed: it is conduct whose likely consequence is the annoyance of others. Similarly, the definition of breach of the peace given in the case of Percy v. Director of Public Prosecutions (see paragraph 11 above) – that it includes conduct the natural consequences of which would be to provoke others to violence – also describes behaviour by reference to its effects. Conduct which is "wrong rather than right in the judgment of the majority of contemporary fellow citizens", by contrast, is conduct which is not described at all, but merely expressed to be "wrong" in the opinion of a majority of citizens...

41. The Court thus finds that the order by which the applicants were bound over to keep the peace and not to behave contra bonos mores did not comply with the requirement of Article 10 § 2 of the Convention that it be "prescribed by law".

6.8.5. Legitimate aim

Zana v Turkey (1997)

50. The Court notes that in the interview he gave the journalists the applicant indicated that he supported "the PKK national liberation movement" (see paragraph 12 above) and, as the Commission noted, the applicant's statement coincided with the murders of civilians by PKK militants.

That being so, it considers that at a time when serious disturbances were raging in south-east Turkey (see paragraphs 10 and 11 above) such a statement – coming from a political figure well known in the region – could have an impact such as to justify the national authorities' taking a measure de-

signed to maintain national security and public safety. The interference complained of therefore pursued legitimate aims under Article 10 § 2.

Observer and Guardian v United Kingdom (1991)

56. The Court is satisfied that the injunctions had the direct or primary aim of "maintaining the authority of the judiciary", which phrase includes the protection of the rights of litigants (see the abovementioned Sunday Times judgment, Series A no. 30, p. 34, para. 56)...

It is also incontrovertible that a further purpose of the restrictions complained of was the protection of national security...The Court would only comment – and it will revert to this point in paragraph 69 below – that the precise nature of the national security considerations involved varied over the course of time.

Müller and Others v Switzerland (1988)

30. The Government contended that the aim of the interference complained of was to protect morals and the rights of others...

The Court accepts that Article 204 of the Swiss Criminal Code is designed to protect public morals, and there is no reason to suppose that in applying it in the instant case the Swiss courts had any other objectives that would have been incompatible with the Convention. Moreover, as the Commission pointed out, there is a natural link between protection of morals and protection of the rights of others.

The applicants' conviction consequently had a legitimate aim under Article 10 § 2 (art. 10-2).

I.A. v Turkey (2005)

26. A State may therefore legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with respect for the freedom of thought, conscience and religion of others (see, in the context of Article 9, Kokkinakis v. Greece, judgment of 25 May 1993...and Otto-Preminger-Institut...§ 47). It is, however, for the Court to give a final ruling on the restriction's compatibility with the Convention and it will do so by assessing in the circumstances of a particular case, inter alia, whether the interference corresponded to a "pressing social need" and whether it was "proportionate to the legitimate aim pursued" (see Wingrove...§ 53, and Murphy...§ 68).

27. The issue before the Court therefore involves weighing up the conflicting interests of the exercise of two fundamental freedoms, namely the right of the applicant to impart to the public his views on religious doctrine, on the one hand, and the right of others to respect for their freedom of thought, conscience and religion, on the other hand (see Otto-Preminger-Institut...§ 55).

28. Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society" (see Handyside...§ 49). Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith (see Otto-Preminger-Institut, cited above, pp. 17-18, § 47).

6.8.6. Necessary in a democratic society

Handyside v United Kingdom (1976)

48. The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (judgment of 23 July 1968 on the merits of the "Belgian Linguistic" case...para. 10 in fine). The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (Article 26) (art. 26).

These observations apply, notably, to Article 10 para. 2 (art. 10-2). In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. The Court notes at this juncture that, whilst the adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), is not synonymous with "indispensable" (cf., in Articles 2 para. 2 (art. 2-2) and 6 para. 1 (art. 6-1), the words "absolutely necessary" and "strictly necessary" and, in Article 15 para. 1 (art. 15-1), the phrase "to the extent strictly required by the exigencies of the situation"), neither has it the flexibility of such expressions as "admissible", "ordinary" (cf. Article 4 para. 3) (art. 4-3), "useful" (cf. the French text of the first paragraph of Article 1 of Protocol No. 1) (P1-1), "reasonable" (cf. Articles 5 para. 3 and 6 para. 1) (art. 5-3, art. 6-1) or "desirable". Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.

Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force (Engel and others judgment of 8 June 1976, Series A no. 22, pp. 41-42, para. 100; cf., for Article 8 para. 2 (art. 8-2), De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 45-46, para. 93, and the Golder judgment of 21 February 1975, Series A no. 18, pp. 21-22, para. 45).

49. Nevertheless, Article 10 para. 2 (art. 10-2) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19) (art. 19), is empowered to give the final ruling on whether a "restriction" or penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court. In this respect, the Court refers to Article 50 (art. 50) of the Convention ("decision or...measure taken by a legal authority or any other authority") as well as to its own case-law (Engel and others judgment of 8 June 1976, Series A no. 22, pp. 41-42, para. 100)...

50. It follows from this that it is in no way the Court's task to take the place of the competent national courts but rather to review under Article 10 (art. 10) the decisions they delivered in the exercise of their power of appreciation.

However, the Court's supervision would generally prove illusory if it did no more than examine these decisions in isolation; it must view them in the light of the case as a whole, including the publication in question and the arguments and evidence adduced by the applicant in the domestic legal system and then at the international level. The Court must decide, on the basis of the different data available to it, whether the reasons given by the national authorities to justify the actual measures of "interference" they take are relevant and sufficient under Article 10 para. 2 (art. 10-2) (cf., for Article 5 para. 3 (art. 5-3), the Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 24-25, para. 12, the Neumeister judgment of 27 June 1968, Series A no. 8, p. 37, para. 5, the Stögmüller judgment of 10 November 1969, Series A no. 9, p. 39, para. 3, the Matznetter judgment of 10 November 1969, Series A no. 10, p. 31, para. 3, and the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 42, para. 104). **[Note:** see also **Arslan v Turkey (1999)**, para. 44.**]**

Steel and Morris v United Kingdom (2005)

87. The central issue which falls to be determined is whether the interference was "necessary in a democratic society". The fundamental principles relating to this question are well established in the case-law and have been summarised as follows (see, for example, Hertel v. Switzerland, judgment of 25 August 1998, Reports 1998-VI, § 46):
"(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which – as the Court has already said above – must, however, be construed strictly, and the need for any restrictions must be established convincingly...
(ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.
(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts...."

In its practice, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. Where a statement amounts to a value judgment the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive (see, for example, Feldek v. Slovakia, judgment of 12 July 2001, Reports 2001-VIII, §§ 75-76).

6.9. Political expression and public interest speech

6.9.1. Political speech

Lingens v Austria (1986)

42. Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.

The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 (art. 10-2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.

Castells v Spain (1992)

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

43. ...In this respect, the pre-eminent role of the press in a State governed by the rule of law must not be forgotten. Although it must not overstep various bounds set, inter alia, for the prevention of disorder and the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest (see...Sunday Times...para. 65, and Observer and Guardian...para. 59 (b))...

6.9.2. Public interest speech

Prager and Oberschlick v Austria (1995)

34. The Court reiterates that the press plays a pre-eminent role in a State governed by the rule of law. Although it must not overstep certain bounds set, inter alia, for the protection of the reputation of others, it is nevertheless incumbent on it to impart - in a way consistent with its duties and responsibilities - information and ideas on political questions and on other matters of public interest (see, mutatis mutandis, the Castells v. Spain judgment of 23 April 1992, Series A no. 236, p. 23, para. 43).

This undoubtedly includes questions concerning the functioning of the system of justice, an institution that is essential for any democratic society. The press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them.

Regard must, however, be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against

destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying.

6.10. Restrictions on political and public interest speech: general principles

Arslan v Turkey (1999)

46. The Court recalls, however, that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see the Wingrove v. the United Kingdom judgment of 25 November 1996, Reports 1996-V, p. 1957, § 58). Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks (see the Incal v. Turkey judgment of 9 June 1998, Reports-IV, p. 1567, § 54). Finally, where such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.

47. The Court will take into account the background to the cases submitted to it, particularly problems linked to the prevention of terrorism (see the above-mentioned Incal judgment, p. 1568, § 58)...

48. The Court observes, however, that the applicant is a private individual and that he made his views public by means of a literary work rather than through the mass media, a fact which limited their potential impact on "national security", public "order" and "territorial integrity" to a substantial degree...

49. The Court notes in that connection that the nature and severity of the penalties imposed are also factors to be taken into account when assessing whether the interference was proportionate.

Krone Verlag GmbH KG v Austria (2003)

30. The Court reiterates that under its case-law the States parties to the Convention have a certain margin of appreciation in assessing the necessity of an interference, but this margin is subject to European supervision as regards both the relevant rules and the decisions applying them (see markt intern Verlag GmbH and Klaus Beermann, cited above, p. 20, § 33). Such a margin of appreciation is particularly essential in the complex and fluctuating area of unfair competition. The same applies to advertising. The Court's task is therefore confined to ascertaining whether the measures taken at national level are justifiable in principle and proportionate (see Casado Coca...§ 50...

31. For the public, advertising is a means of discovering the characteristics of services and goods offered to them. Nevertheless, it may sometimes be restricted, especially to prevent unfair competition and untruthful or misleading advertising. In some contexts, the publication of even objective, truthful advertisements might be restricted in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions. Any such restrictions must, however, be closely scrutinised by the Court, which must weigh the requirements of those particular features against the advertising in question; to this end, the Court must look at the impugned penalty in the light of the case as a whole (see Casado Coca, cited above, § 51).

6.10.1. Defamation and similar restrictions

6.10.1.1. Fact and value statements

Pedersen and Baadsgard v Denmark (2004),

76. In order to assess the justification of an impugned statement, a distinction needs to be made between statements of fact and value judgments, in that while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see, for example, Lingens...§ 46 and Oberschlick (no. 1)...§ 63). The classification of a statement as a fact or as a value judgment is a matter which in the first place falls within the ambit of the margin of appreciation of the national authorities, in particular the domestic courts (see Prager and Oberschlick, cited above, § 36). However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive (Jerusalem v. Austria...)...

77. In news reporting based on interviews, a distinction also needs to be made as to whether the statement emanates from the journalist or is a quotation of others, since punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so (see Jersild, cited above, § 35). Moreover, a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas (see, for example, Thoma v. Luxembourg, cited above, § 64)...

78. The Court observes in this respect that protection of the right of journalists to impart information on issues of general interest requires that they should act in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism (see e.g. the Fressoz and Roire judgment § 54; the Bladet Tromsø and Stensaas judgment, § 58, and the Prager and Oberschlick judgment, § 37, all cited above). Under the terms of paragraph 2 of Article 10 of the Convention, freedom of expression carries with it "duties and responsibilities", which also apply to the media even with respect to matters of serious public concern. Moreover, these "duties and responsibilities" are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the "rights of others". Thus, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations (see, among other authorities, McVicar v. the United Kingdom, no. 46311/99, § 84, and Bladet Tromsø cited above, § 66). Also of relevance for the balancing of competing interests which the Court must carry out is the fact that under Article 6 § 2 of the Convention individuals have a right to be presumed innocent of any criminal offence until proven guilty (see, among other authorities, Worm v. Austria, judgment of 29 August 1997...§ 50, and Du Roy and Malaurie v. France, no. 34000/96, § 34...**[Note:** see also **Grinberg v Russia (2005)**, para. 28-34.**]**

6.10.2. Criticising the police, army or judiciary

Kyprianou v Cyprus (2005)

172. The phrase "authority of the judiciary" includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the settlement of legal disputes and

for the determination of a person's guilt or innocence on a criminal charge (see Worm v. Austria, judgment of 29 August 1997, ..., § 40). What is at stake as regards protection of the authority of the judiciary is the confidence which the courts in a democratic society must inspire in the accused, as far as criminal proceedings are concerned, and also in the public at large (see, mutatis mutandis, among many other authorities, Fey v. Austria, judgment of 24 February 1993...p. 12).

173. The special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein (see Amihalachioaie v. Moldova, no. 60115/00, § 27...Nikula v. Finland, cited above, § 45 and Schöpfer v. Switzerland... §§ 29-30, with further references).

174. Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. While lawyers too are certainly entitled to comment in public on the administration of justice, their criticism must not overstep certain bounds. Moreover, a lawyer's freedom of expression in the courtroom is not unlimited and certain interests, such as the authority of the judiciary, are important enough to justify restrictions on this right. Nonetheless, even if in principle sentencing is a matter for the national courts, the Court recalls its case-law to the effect that it is only in exceptional circumstances that restriction – even by way of a lenient criminal penalty - of defence counsel's freedom of expression can be accepted as necessary in a democratic society (see Nikula v. Finland, cited above, §§ 54-55).

175. It is evident that lawyers, while defending their clients in court, particularly in the context of adversarial criminal trials, can find themselves in the delicate situation where they have to decide whether or not they should object to or complain about the conduct of the court, keeping in mind their client's best interests. The imposition of a custodial sentence, would inevitably, by its very nature, have a "chilling effect", not only on the particular lawyer concerned but on the profession of lawyers as a whole (see Nikula v. Finland, cited above, §§ 54 and Steur v. the Netherlands, cited above, § 44). They might for instance feel constrained in their choice of pleadings, procedural motions and the like during proceedings before the courts, possibly to the potential detriment of their client's case. For the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation. The imposition of a prison sentence on defence counsel can in certain circumstances have implications not only for the lawyer's rights under Article 10 but also the fair trial rights of the client under Article 6 of the Convention (see Nikula v. Finland, cited above, § 49 and Steur v. the Netherlands, cited above, § 37). It follows that any "chilling effect" is an important factor to be considered in striking the appropriate balance between courts and lawyers in the context of an effective administration of justice.

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INDEX OF CASES

