PhD Thesis

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LIMITATIONS OF THE RIGHT TO FREEDOM OF EXPRESSION

"An Evaluative Study of the European Approach"

PhD Dissertation

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Contents

Opinion of the Supervisor

There is no doubt that the topic chosen by the PhD candidate *Raed Ghanem* as the focal point of his PhD Dissertation can be regarded as actual: considering the major shifts in the World and the rapid advancement of the digital technologies there is a growing need for research on the extent and the boundaries of freedom of expression. While Europe has always been considered as the cradle of democracy and the source of those ideas and theories that later served as inspiration of international and regional charters and covenants on human rights concluded after the Second World War, in the view of Raed Ghanem, reality today shows a clear discrepancy within Europe in considering the content and limits of the freedom of expression.

In order to provide answers for this issue, the researcher started to investigate the validity to four hypotheses. The first hypothesis elaborates on the influence of historical context on the development of the concept of the right to freedom of expression and the traditional concept of its restrictions. The second hypothesis revolves around the classification of the various forms of protected expressions. The third hypothesis focuses on restrictions that are not primarily based on the nature or goals of expression, but rather on considerations related to the protection of public or individual interests. In this regard the author seeks to analyse the delicate balance between protecting public interests and preserving the fundamental right at hand. The fourth hypothesis revolves around the approach of the European Court of Human Rights in dealing with issues of the cultural and legal diversity among member states and the principle of margin of appreciation and the evaluation of the Court's practice in this regard.

As for the chosen methods, the PhD candidate applied various methods, including the historical and doctrinal approaches for the first parts, while he applied the comparative analytical and critical methods for the later parts. It is my firm believe as the supervisor of the PhD candidate, that he showed excellent skills is applying these methods and his efforts resulted in a PhD thesis that would prove to be a worthy contribution to the scientific debate on the content of the freedom of expression and the Strasbourg Court's case-law on Article 10 of the ECHR. In this regard it is worth mentioning the PhD Candidate's origin of Middle East, which in my opinion may allow him to provide a fresh, 'outsider' perspective on the topic. Summarizing the above mentioned, I could only recommend this thesis for anyone interested in this actual and important topic.

Miskolc, 4 March 2024.

Dr. György Marinkás, PhD

Introduction

In 1950, the ECHR was adopted. Its main objective was to protect the rights and freedoms of citizens in Europe. However, the importance of the Convention went beyond the borders of Europe, as it constitutes an important reference for evaluating and regulating human rights at the international level.

The ECHR singled out Article 10 of it to regulate the right to freedom of expression through two parts, the first of which relates to emphasising the right to freedom of expression, while the other concerns the limits of that right. Although, in theory, freedom of expression has been the subject of great controversy for more than four centuries, the limits of the right to freedom of expression and the restrictions imposed on its exercise have brought that controversy to its climax. In this context, the ECHR approved the controls and limitations of freedom of expression and left it to national legislation to regulate its practice according to the framework of justifications created by the agreement.

On the practical side, the role of the ECtHR comes in dealing with cases related to human rights violations in Europe, including violations of the right to freedom of expression. The Court considers restrictions on freedom of expression imposed by the national legislation of European countries that fall under the jurisdiction of the Court in terms of their constitutionality and legality. In the context of research on the legality of restrictions imposed on freedom of expression, the court used the so-called proportionality test, which is based on the idea of balancing the limitations and benefits that arise from it with the harms that result from its application.

Given the data of the cases and judgements that were dealt with in the light of the jurisprudence of the ECtHR, it is not difficult to discover the clear discrepancy between the countries that fall under the jurisdiction of the European Court in respecting and protecting the right to freedom of expression. In this context, the number and type of cases related to freedom of expression before the ECtHR indicate the existence of many problems that at the same time reflect the decline of the democratic climate in many Eastern European countries compared to the rest of Europe.

Problem Statement

Despite the great importance of freedom of expression, which is embodied in philosophical and legal defences and discussions, legal and social logic necessitates regulating the exercise of freedom of expression by setting limits or restrictions based on certain justifications. However, these justifications have been the subject of discussion and disagreement. On one side are those who defend the right to freedom of expression as an absolute right that may not be restricted in any way. On the other side are those who view the matter from the perspective of public interests and the rights of others that may be affected by treating freedom of expression as an absolute right.

What is known as the "proportionality test" has emerged as a method of justification adopted in many judicial systems, including the ECtHR. However, the application of this test was not without controversy in light of the European Court's recognition of a set of principles and standards, including the margin of appreciation granted to member states of the ECHR. Some consider this as a way to frame the state's burden in justifying the imposition of restrictions on freedom of expression, thus being far from the path of justice.

The research's main focus on the objective considerations for determining the scope of the right to freedom of expression and the problematic nature of some forms of expression. Additionally, it delves into the foundations and justifications upon which the restrictions imposed on freedom of expression are based, and the method of evaluating the legitimacy of these restrictions, primarily based on the approach of the ECtHR.

Hypothesis

Through this dissertation, my primary objective is to comprehensively address and examine four hypotheses that are integral to the understanding of the right to freedom of expression and its limitations.

In the first hypothesis, I assume that the current concept of the right to freedom of expression and the idea of restrictions associated with it are the joint product of a group of historical, philosophical and political influences that emerged from the early beginnings of the Enlightenment in Europe and then the establishment of the doctrine of the First Amendment in the United States of America until the end of the World War and the adoption of the Universal Declaration of Human Rights. These influences also played a significant role in the establishment of freedom of the press and the development of censorship systems, influenced by the prevailing political and military climate.

In the second hypothesis, I assume that analysing the legal framework surrounding the right to freedom of expression in Europe and examining the delineated categories of protected expression—largely shaped by the European Court of Human Rights' interpretations of the European Convention on Human Rights—proves instrumental in delineating the boundaries of this fundamental right. This classification of protected expression is based predominantly on criteria intertwined with the content, objectives, and forms of the expression.

The third hypothesis focuses on the external restrictions included in the second paragraph of Article 10 of the European Convention on Human Rights as legitimate justifications for restricting the right to freedom of expression. I assume that these restrictions are not based primarily on the nature of expression or its goals, but rather on considerations related to protecting public or individual interests. These restrictions may constitute exceptions to freedom of expression, regardless of the content, form, or purpose of the expression. In this context, I aim to explore the approach of the European Court of Human Rights in assessing the legitimacy of these restrictions and the preference underlying the interests that are preserved. By examining the interplay between these restrictions and potential harm to the right to freedom of expression, I seek to analyze the delicate balance between protecting public interests and preserving the values associated with the exercise of this fundamental right.

The fourth hypothesis, through which I seek to show that the approach of the European Court of Human Rights in dealing with issues related to the right to freedom of expression has developed greatly, especially during the past two decades, by adopting criteria to evaluate the legitimacy of the authorities' interference in exercising the right to freedom of expression, which have significantly reduced Restrictions. At the same time, I discuss how cultural and legal diversity among member states, in addition to the existence of the principle of margin of appreciation, constitute the most important and greatest challenges to the European Court of Human Rights in deciding cases that may involve a violation of the right to freedom of expression.

Research Importance

In light of major shifts in global politics and the military landscape, as well as the rapid advancement of the digital world and the increasing impact of health and natural disasters, there is a growing need for research on the boundaries of freedom of expression.

Legal, philosophical and political studies related to human rights are of great importance as they often deal with sensitive topics and issues that have a direct impact on individuals and

governments alike. This applies to a large extent to studies and research related to freedom of expression. The importance of this study comes in that it discusses the procedural and substantive aspects related to the restrictions imposed on freedom of expression and examines the foundations and criteria that are adopted in imposing these restrictions. One of the important aspects of this research is linking the theoretical framework for freedom of expression in Europe, in particular the ECHR, with the judiciary of the ECtHR, to create a clear conception of the reality of freedom of expression in Europe between theory and practice.

Research justifications and Objectives

Europe has always been considered the cradle of democracy and the source of many ideas and theories that defended human rights and freedoms and later became a source of international and regional charters and covenants on human rights. But the reality today shows a clear discrepancy within Europe in considering freedom of expression, and this is what makes research into the causes of this discrepancy very important, especially since this research deals at the same time with the theoretical framework of the right to freedom of expression and the regulation of its practice.

The objective of this research is to conduct an evaluative study of Europe's current approach to addressing restrictions on freedom of expression, with a specific focus on the European Court of Human Rights' perspective. This study will delve into the tools and standards developed by the Strasbourg Court over the past decades, which have been utilized to strike a balance and assess the legitimacy of authorities' interventions in various forms of expression. Additionally, this research aims to shed light on the gaps and deficiencies inherent in the legal and procedural aspects of imposing these restrictions, providing a comprehensive evaluation of the justifications employed to curtail freedom of expression, particularly the proportionality test.

By achieving these goals, this study will contribute as a complementary assessment to previous studies on the same subject matter.

Research Methodology and the selected literature

The issue of the limits of the right to freedom of expression is a complex subject that touches on several scientific fields, including legal, political, social, and philosophical. In order to fully comprehend the topic, it is necessary to use research methods that are appropriate for each chapter according to its intended purpose.

Accordingly, the *historical approach* will be used to present the effects of the Enlightenment and some historical events that affected the formation and development of the current concept of the right to freedom of expression in Europe. This will include tracking the movement of charters, laws, and documents accompanied by the development of the right to freedom of expression and the establishment of censorship systems in Europe.

On the other hand, the *philosophical* approach will be used to research the theories and ideas presented by philosophers, jurists, and politicians, which had a great impact on the formation of the general theory of freedom of expression. This includes presenting arguments for and against the human right to freedom of expression and presenting objections that deny such a right or argue the need to limit it. In addition, the arguments and justifications for restricting the right to freedom of expression will be examined, based on the idea of avoiding harm and respecting the rights of others.

This research will also examine the legal texts of selected national legislation and international and regional charters that deal with the protection and regulation of the right to freedom of expression, including the basis for imposing restrictions on freedom of expression, in addition to researching case-law related to freedom of expression in cases raised before the ECtHR. To reach the required results from this part, the *doctrinal* approach will be followed.

As part of the research on the approaches used to assess the legitimacy and feasibility of restrictions on freedom of expression, the justification approach based on the proportionality test will be addressed. Since the arguments presented about the feasibility of this approach have differed between supporters and opponents, and since the ECtHR, as well as some European national courts, take it as a method in deciding issues related to freedom of expression, it is necessary to evaluate the advantages and disadvantages of this approach on a critical basis by following the *critical* approach.

Finally, after taking note of all the previous aspects, the *comparative analytical* approach will be used to identify the reasons for the discrepancy in the reality of the right to freedom of expression and the extent to which it is respected, and to analyse the reasons for that discrepancy. This includes comparing the legal methods of dealing with freedom of expression that are used in the national legal systems in Europe.

Research difficulties and Challenges

Perhaps any research is not without difficulties and challenges, some related to the nature of the research and others related to the researcher himself. Looking at the topic of the research,

there may be some challenges, the most important of which is the great philosophical aspect of the research topic, which is no less important than the legal aspect. However, the primary challenge the researcher encountered throughout this research lies in the disparity between the researcher's Middle Eastern legal background and the European legal system, which presents both a scholarly and personal challenge.

Considering that the legal language is specialised and since all the researcher’s previous research was done using another language, the language presented another challenge for the researcher. Especially since legal translation often requires a lot of care and precision to reach the exact meaning of the term.

Abbreviations

ECHR	The European Convention on Human Rights
ECtHR	The European Court of Human Rights
UDHR	The Universal Declaration of Human Rights
ICCPR	The International Covenant on Civil and Political Rights
DORA	Defence of the Realm Act
GLAVLIT	The General Directorate for the Protection of State Secrets (Главлит)
CHEKA	All-Russian Extraordinary Commission" (ВЧК)
UNHRC	United Nations Human Rights Council
HRC	The Human Rights Committee of the UN
ECTT	The European Convention on Transfrontier Television
CFR	The Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
FOIA	Freedom of Information Act
AAUP	The American Association of University Professors
ECRI	The European Commission against Racism and Intolerance
ECDC	The European Centre for Disease Prevention and Control

Chapter I

Theoretical Framework of The Right to Freedom of Expression

1. Introduction

The right to freedom of expression is a fundamental human right that has been enshrined in international law, national constitutions, and human rights declarations around the world. However, what exactly does this right entail, and why is it considered so important?

This chapter provides a comprehensive overview of the theoretical framework and historical origins of the right to freedom of expression.

In the first section, I will analyse the initial stages of the emergence and establishment of the modern notion of the right to freedom of expression in Europe. This will involve studying the influences of the Enlightenment era and the establishment of the First Amendment doctrine in the United States. Furthermore, I will delve into the origins of press freedom, the ongoing battle against censorship, and how the conflicts of the first half of the twentieth century played a role in the development of stringent censorship systems.

In the second part, I will examine four key theoretical justifications for this right: the pursuit of truth, democracy, personal autonomy, and human dignity. I will explore how each of these justifications provides a different rationale for protecting free speech, and how they are interconnected. We will also discuss the limitations of each justification, and the challenges that arise in balancing the right to free speech with other competing interests.

I think this chapter is essential in understanding the various restrictions on freedom of expression that exist today, including hate speech laws, restrictions on political speech, and limitations on freedom of the press. By understanding the theoretical and historical underpinnings of the right to free speech, we can better evaluate the legitimacy of these restrictions and the potential impact they have on the pursuit of truth, democracy, personal autonomy, and human dignity.

In summary, this chapter's examination of the theoretical framework and historical origins of the right to freedom of expression can provide a valuable lens for understanding the various restrictions on free speech that exist today and the debates surrounding them.

2. Establishing The Modern Concept of The Right to Freedom of Expression

The concept of freedom of expression has roots that extend far back in history, even before the Enlightenment in Europe. In ancient civilizations such as Greece and Rome, there were early inklings of this right, albeit often limited to certain privileged classes. Philosophers like Socrates, who famously defended his right to express dissenting views, laid foundational ideas that would later influence the development of this right. However, it wasn't until the Enlightenment that these ideas began to be more systematically explored and advocated for in Europe, paving the way for the modern understanding of freedom of expression.

2.1. The "Enlightenment" influences

The Enlightenment had a significant impact on the intellectual landscape of Europe, as well as other parts of the world, including America. This era brought about profound changes by promoting reason, individualism, and questioning traditional authority. It sparked a fundamental shift towards recognizing basic human rights, such as the right to freedom of expression. The Enlightenment's focus on rational inquiry and the open exchange of ideas created an environment that encouraged intellectual exploration and debate. This laid the groundwork for the modern concept of freedom of expression, which is now seen as a crucial pillar of democratic societies.

While the seventeenth century is often considered the beginning of this era, it is worth noting that the intellectual revolution had its early roots in Western Europe, particularly in the establishment of the Dutch Republic. During the Dutch Golden Age in the 17th century, the Dutch Republic fostered a cosmopolitan culture that embraced tolerance and free speech. As a result, it became a thriving hub for art, learning, publishing, philosophy, and science, solidifying its position as an early modern epicenter. [1]

Influenced by the ideas of Cartesian philosophy, Baruch Spinoza headed a stream of philosophers and thinkers who defended freedom of religion and conscience as well as freedom of expression. Spinoza's idea about freedom of expression can be summarized as the belief that individuals should be free to express their thoughts and opinions without fear of persecution or censorship. He argued that in a free state, everyone should have the liberty to think as they

[1] Mchangama, J. (2022). Free speech: A history from Socrates to social media. Hachette UK. 84.

please and to express their thoughts openly.[2] Spinoza believed that freedom of expression was essential for peaceful coexistence between individuals of different faiths and backgrounds. He also argued that the state should not limit speech, only actions, and that calm and reasoned intellectual debate was essential for the progress of society.[3] While he acknowledged that unlimited free speech would be baneful, he still believed that free speech was a precondition for social peace. However, his free speech doctrine was not all-encompassing, as he still believed in limits to speech based on the distinction between "good sense" and "sedition." [4]

Later, the intellectual movement in Europe started to shift towards a more all-encompassing and universal path, where some events, besides the special role of thinkers and philosophers in England and France, led to the establishment of a comprehensive intellectual renaissance that was later called the Enlightenment.

2.1.1. England

The 17th century was a time of great political and religious turmoil in England. [5] It was also a period of significant milestones in the history of freedom of expression. In 1628, the Petition of Rights was passed by Parliament and served as a charter of liberties that limited the monarch's power. It affirmed the right of citizens to petition the king and asserted that no taxes could be imposed without the consent of Parliament.[6] During the English Civil War (1642-1651), The conflict between the forces of King Charles I and the Parliament resulted in the establishment

[2] Pitts, E. I. (1986). Spinoza on freedom of expression. Journal of the History of Ideas, 47(1), 21-35.

[3] There are two opinions about the nature of Spinoza's defense of freedom of expression. The first opinion is that Spinoza's concept of freedom of expression is based on an individual liberal basis, while the other opinion considers that Spinoza based his calculation of freedom of expression on a democratic basis of a collective nature. For more see: Cooper, Julie E. "Freedom of Speech and Philosophical Citizenship in Spinoza's Theologico-Political Treatise." Law, Culture, and the Humanities 2.1 (2006): 91-114. Edward I. Pitts. Spinoza on Freedom of Expression, Journal of the History of Ideas, Jan. - Mar. 1986, Vol. 47, No. 1 (Jan. - Mar.,1986), 21-35

[4] Mchangama, J. (2022). Free Speech A History from Socrates to social media, p 887-89.

[5] The 1643 Act of Parliament led to the reformulation of arguments for freedom of the press. Still, subsequent acts restricted printing to London, Oxford, and Cambridge and required printing authorization and censorshi Oliver Cromwell further increased control over newspapers, leading to the muzzling of the opposition press. Tortarolo Edoardo (2016). The Invention of Free Press: Writers and Censorship in Eighteenth Century Europe. International Archives of the History of Ideas Archives internationales d'histoire des idées 219. Springer Netherlands, 21-22.

[6] Britannica, T. Editors of Encyclopaedia (2022, November 5). Petition of Right. Encyclopedia Britannica. https://www.britannica.com/topic/Petition-of-Right-British-history. Accessed 12.03. 2023.

of the Commonwealth of England, which was governed by Oliver Cromwell. During this time, there was a flourishing of intellectual and political debate, and many new ideas were expressed and debated.[7]

Following the death of Cromwell and the end of the Commonwealth, the monarchy was restored with the coronation of Charles II (Restoration 1660). While this marked a return to a more traditional form of government, it also led to renewed debates about the role of the monarchy and the power of Parliament, in addition to a revival of drama and literature. Then, in 1688 The Glorious Revolution was launched. This event saw the overthrow of King James II and the installation of William and Mary as joint monarchs. The Glorious Revolution established the principle of parliamentary sovereignty, which affirmed the power of Parliament over the monarch. [8]

After the revolution, what is known as the Bill of Rights 1689 was adopted. The Bill outlined various rights and liberties that were granted to English citizens, including the right to free speech and freedom of expression. The document was designed to limit the power of the monarch and to protect the rights of citizens. One of the key provisions of the Bill of Rights 1689 was the right to freedom of speech in Parliament. This provision ensured that Members of Parliament had the right to express their opinions and ideas without fear of reprisal from the monarch or other authorities.

The Bill of Rights 1689 also protected the freedom of the press, which allowed citizens to express their opinions and share information without fear of censorship or persecution.[9] In general, the Bill of Rights 1689, along with the Tolerance Act (1689),[10] constituted the culmination of a long century of political and religious turmoil and conflicts. These two documents had a great impact in perpetuating the rights of individuals and respect for their freedoms, including freedom of expression. [11] Albert Dicey compared the laws governing freedom of expression in England to those in France and Belgium in his book "Introduction to

[7] Britannica, T. Editors of Encyclopaedia (2021, April 29). English Civil Wars summary. Encyclopedia Britannica. https://www.britannica.com/summary/English-Civil-Wars. Accessed 12.03. 2023.

[8] Britannica, T. Editors of Encyclopaedia (2019, June 24). Restoration. Encyclopedia Britannica. https://www.britannica.com/topic/Restoration-English-history-1660. Accessed 12.03. 2023.

[9] Britannica, T. Editors of Encyclopaedia (2023, October 26). Bill of Rights. Encyclopedia Britannica. https://www.britannica.com/topic/Bill-of-Rights-British-history. Accessed 12.03. 2023.

[10] Britannica, T. Editors of Encyclopaedia (2023, May 17). Toleration Act. Encyclopedia Britannica. https://www.britannica.com/event/Toleration-Act-Great-Britain-1689. Accessed 12.03.2023.

[11] Bill of Rights 1689, Parliament UK, https://www.parliament.uk/, access date 12/03/2023.

the Study of the Law of the Constitution." He found that while the constitutions of continental countries guaranteed freedom of speech and press, England did not have any such laws. However, the English law permitted people to say or write whatever they wished, as long as it was not prohibited by law. Nonetheless, there were still restrictions on the expression of ideas, particularly those related to politics, social issues, and religion. Press freedom in England meant that there was no prior restraint on publication, but criminal laws could be enforced after publication. Censorship or licensing of print media had not existed in England since 1695.[12]

In conjunction with the events of the seventeenth century in the United Kingdom, important philosophical, legal, and political contributions were made by some English thinkers and philosophers. Most of those opinions and theories, which mostly centred around the relationship between power and individuals and the nature of rights that arise from that relationship, were in the context of the doctrine of natural law and the transition towards the idea of natural rights, and it established the so-called social contract theory.

John Milton was an influential English writer and thinker who lived in the 17th century, during a time of great political and religious upheaval in England. He is perhaps best known for his epic poem *"Paradise Lost"*, but he was also a strong advocate for freedom of expression. In his famous essay *"Areopagitica"*, published in 1644, Milton argued passionately for freedom of the press and the right to express one's opinions freely. The essay was written in response to a proposed law that would have required all books to be licensed by the government before they could be published. [13]

Milton's argument was based on the principle that truth and knowledge can only be discovered through open debate and discussion, and that censorship and repression only serve to stifle intellectual inquiry and creativity.[14] He believed that censorship was a form of tyranny, and that individuals should have the right to express their ideas freely, even if those ideas were unpopular or controversial. Milton's defence of freedom of expression was rooted in his belief in the power of reason and the importance of individual conscience. He argued that individuals

[12] Barendt, E. (2019). Freedom of Expression in Nineteenth Century England: Weak in Principle, Robust in Practice. Scandinavica, 58(2), 29-38. Dicey, A. V., & Wade, E. C. S. Introduction to the Study of the Law of the Constitution. London: Macmillan. 46-48.

[13] Blasi, V. (2021). 'The Classic Arguments for Free Speech 1644–1927', in Adrienne Stone, and Frederick Schauer (eds), The Oxford Handbook of Freedom of Speech, Oxford Handbooks (2021; online edn, Oxford Academic, 10 Feb. 2021), https://doi.org/10.1093/oxfordhb/9780198827580.013.2, accessed 11 Mar. 2023.

[14] Mchangama, J. (2022). Free Speech A History from Socrates to social media, 94.

have the right to form their own opinions and beliefs, and that they should be free to express those opinions without fear of censorship or persecution. [15]

The English philosopher *Thomas Hobbes* (1588-1679) was one of the most prominent founders of the "Natural Right" theory. And this, despite the great controversy caused by his writings, reached the point of describing him as "authoritarian monster". Hobbes presented his ideas on natural right in his famous book Leviathan 1651, in which he set off on a new idea that has been known since that time as the "state of nature." [16] Hobbes' views on freedom of speech seem to have been strongly influenced by his overall political philosophy, which emphasized the importance of the state and the need for absolute sovereignty. In Hobbes' view, the state is necessary to maintain order and prevent chaos. To achieve this, the state would need absolute power over its citizens.[17] Thus, Hobbes did not address freedom of expression directly, but rather spoke in his book about different accounts of freedom.[18] But in view of his ideas, especially in terms of support for absolute power, Hobbes' philosophy is related to censorship or restrictions on freedom of expression, that is, the state's right to restrict speech based on its absolute power. Perhaps this logic, which seems closer to authoritarianism, was the reason why Hobbes was not considered a liberal. However, it seems that this impression was not absolute, as some defended Hobbes on the basis that his ideas, which relate to the sovereignty of the state, do not negate the existence of freedom of expression. All there is that freedom of expression should not override sovereignty. This gives the state the right to regulate and restrict speech. [19]

John Locke (1632-1704) opposes Hobbes, who portrayed man as a savage and replaced the state of war Hobbes posits with the state of peace. And he attaches great importance to equality, as he believes that all individuals are equal, and therefore they are born and have equal natural rights. In his second treatise, Locke's description of natural rights begins with an account of “state all men are naturally in," which he calls a "state of nature." [20] He says that the state of

[15] Milton, J. (1644). Areopagitica (Jebb ed.). Cambridge University Press, 1644.

[16] Carmichael, D. J. C. (1990). Hobbes on natural right in society: The Leviathan account. *Canadian Journal of Political Science/Revue canadienne de science politique*, *23*(1), 3-21.

[17] Hobbes, T. Leviathan, London: Andrew Crooke, 1651. *Project Gutenberg*. Ch. 18.

[18] Hobbes (1651). Leviathan, XXI: Of the Liberty of Subjects. David van Mill (2018). Hobbes and Free Speech, in Shane D. Courtland (ed), Hobbesian Applied Ethics and Public Policy. Routledge, Taylor & Francis. New York and London, 182-183.

[19] Ibid, 181,182.

[20] Locke, J. (1980). Second treatise of government (C. B. Macpherson, Ed.). Hackett Publishing. 8,9.

nature is the state of complete freedom, as well as the state of equality since people in this state, are naturally free within the limits of nature. [21]

Locke wrote that all individuals are equal in the sense that they are born with certain "inalienable" natural rights. That is, rights that are God-given and can never be taken or even given away. Among these fundamental natural rights are "life, liberty, and property." [22]Locke believed that the most basic human law of nature is the preservation of mankind. To serve that purpose, he reasoned, individuals have both a right and a duty to preserve their own lives. Murderers, however, forfeit their right to life since they act outside the law of reason. [23] Locke also argued that individuals should be free to make choices about how to conduct their own lives as long as they do not interfere with the liberty of others, therefore liberty should be far-reaching. The purpose of government is to secure and protect the God-given inalienable natural rights of the people. According to Locke, "The end of law is not to abolish or restrain, but to preserve and enlarge freedom". [24] It is noted from the writings of John Locke that he has placed great emphasis on property right, by "property," Locke meant more than land and goods that could be sold, given away, or even confiscated by the government under certain circumstances. Property also referred to ownership of one's self, which included a right to personal well-being. [25] For their part, the people must obey the laws of their rulers. Thus, a sort of contract exists between the rulers and the ruled. But, Locke concluded, if a government persecutes its people with "a long train of abuses" over an extended period, the people have the right to resist that government, alter or abolish it, and create a new political system. [26] Consistent with those ideas, and following in the footsteps of Milton, John Locke played an important role in the fight against censorship of publications, which eventually led to the repeal of the Licensing Act. [27]

2.1.2. France

The eighteenth century saw the emergence of a revolutionary movement in Europe, known as the Enlightenment, which combined philosophical, cultural, and intellectual aspects. It was

[21] Kelly, P. (2007). Locke's' Second Treatise of Government': A Reader's Guide. Bloomsbury Publishing. 28.

[22] Bristow, W. (2017), "Enlightenment", The Stanford Encyclopedia of Philosophy, Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2017/entries/enlightenment/>.

[23] Locke, J. (1980). Second treatise of government (C. B. Macpherson, Ed.). 11.

[24] Locke, J. (1980). Second treatise of government (C. B. Macpherson, Ed.). 32.

[25] Ibid, 19.

[26] Raymond W. (2006), Philosophy of law, Oxford University press, 8.

[27] Mchangama, J. (2022). Free Speech A History from Socrates to social media, 102.

characterized by a focus on reason, individualism, and skepticism, and it had a profound impact on the development of modern Western society. The Enlightenment challenged traditional beliefs and values, including those held by the Church and the aristocracy, and emphasized the importance of scientific inquiry, education, and human rights. [28] As was the case in England in the seventeenth century, France in the eighteenth century was the field of many events and political tensions, which contributed to its transformation into a rich market full of ideas and legal and philosophical theories. Freedom had a large share of that intellectual production by confronting strict censorship of the press and freedom of speech and expression.

Voltaire was a prominent philosopher and writer during the 18th century. He was a strong advocate for free speech and believed that the power of reason and rational thought could bring about social and political progress.

In general, Voltaire's philosophy was characterized by his commitment to rational thought, tolerance and individual freedom, and his rhetorical skills and strength of language contributed to his literary contributions having a unique character. [29]He believed that reason and rational thought were the keys to understanding the world and making progress in society. Voltaire faced censorship throughout his life due to his controversial views and criticisms of established institutions such as the Catholic Church and the French monarchy. He criticized the arbitrary exercise of power and championed the principles of reason, tolerance, and individual liberty. However, he was a skilled writer and intellectual who found ways to express his ideas even under censorship. [30]

Unlike some of his contemporaries, Voltaire did not believe that reason alone was enough to solve all problems. He also believed in the importance of tolerance and respect for different viewpoints, arguing that everyone had the right to express their opinions freely and openly. Voltaire is often quoted as saying: "I do not agree with what you have to say, but I'll defend to the death your right to say it. [31] "Furthermore, Voltaire was a strong advocate for individual

[28] Duignan, B (2022). "Enlightenment". Encyclopedia Britannica, 30 Nov. 2022, https://www.britannica.com/event/Enlightenment-European-history. Accessed 19 March 2023.

[29] Tochard J. (1983). History of political ideas. Translated to Arabic by Ali Maklad. International House for Printing and Publishing, Beirut. 316-218

[30] Nicholas, C. (2002). "Voltaire" Encyclopedia of the Enlightenment. Ed. Alan charles Kors., 2005 by Oxford University Press, Inc. Encyclopedia of the Enlightenment: (e-reference edition). Oxford University Press. 18 June 2006 http://www.oxford-enlightenment.com/t173.e739.html.

[31] Mchangama, J. (2022). Free Speech A History from Socrates to social media, 115.

liberty, believing that individuals should be free to pursue their own goals and interests without interference from the state or other institutions. Voltaire believed that censorship and suppression of ideas were detrimental to society, and that free speech was essential for progress and development and to defend what he called "common sense". [32]

It seems that Voltaire's own philosophy and his unique style have created a kind of controversy in assessing the truth of his position on freedom of expression and speech. There is a belief that despite being inspired by England's press freedom, Voltaire did not advocate for absolute free speech. He believed in the right to publish without prior censorship but acknowledged that subsequent punishments were still possible. Voltaire acknowledged that freedom of expression came with risks, stating that individuals had the "right to make use of our pens as our language, at our own peril." In fact, he even attempted to manipulate the French censorship system to promote his own works and suppress those of his opponents, whom he also disparaged in his writings. Additionally, Voltaire viewed free speech as a privilege reserved for the enlightened few, much like Cicero. In essence, Voltaire's views on free speech were more similar to those of the Romans than the Athenians. [33]

The *Encyclopédie* was a major reference work that was published in France during the Enlightenment in the 18th century. It was edited by Denis Diderot and Jean le Rond d'Alembert and aimed to compile and disseminate knowledge in order to promote critical thinking and education.[34] One of the ways in which the Encyclopédie contributed to the development of freedom of expression was by providing a platform for the dissemination of new ideas and knowledge. The Encyclopédie contained articles on a wide range of topics, including science, art, politics, and philosophy, and it was one of the first works to attempt to bring together all human knowledge in one place. By making this knowledge available to a wider audience, the Encyclopédie helped to promote the spread of new ideas and to challenge traditional beliefs and values. [35]

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[32] Tochard, J. (1983). History of political ideas. Translated to Arabic by Ali Maklad, 317.

[33] Mchangama, J. (2022). Free Speech A History from Socrates to social media, 116.

[34] Bristow, W. (2017), "Enlightenment", The Stanford Encyclopedia of Philosophy, Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2017/entries/enlightenment/>.

[35] Raymond, B. (2002). "Encyclopédie" Encyclopedia of the Enlightenment. Ed. Alan charles Kors, 2005 by Oxford University Press, Inc. Encyclopedia of the Enlightenment: (e-reference edition). Oxford University Press. 17 June 2006 http://www.oxford-enlightenment.com/t173.e201.html.

However, the publication of the Encyclopédie was not without controversy. Many of the articles were critical of the established order and challenged the authority of the Church and the state. The French government and the Church attempted to suppress the publication of the Encyclopédie, and many of the authors and editors were arrested and imprisoned.

Denis Diderot faced censorship and repression throughout his career as a writer and editor. His most famous work, the Encyclopédie, was considered by the French government and the Church to be a threat to their authority, and Diderot was frequently targeted for his radical ideas and his opposition to traditional beliefs and values. In order to evade censorship and repression, Diderot employed a number of tactics. He often used satire and irony to express his ideas in a way that would be less likely to draw the attention of censors. He also frequently used pseudonyms to avoid detection, and he encouraged his collaborators on the Encyclopédie to do the same. [36]

Diderot was influenced by the democratic movements of his time and expressed support for various progressive ideas. His writings suggest that he advocated for the elimination of privileges based on social status, political connections, or religious affiliation. Specifically, he supported the abolishment of birth privileges, royal favor, and privileges of the clergy. He also believed in the separation of church and state, equality before the law and in taxation, freedom of expression and trade (including the abolishment of guilds), and religious toleration. Despite these efforts, Diderot was frequently arrested and imprisoned for his work on the Encyclopédie and his other writings. In 1749, he was briefly imprisoned in the fortress of Vincennes for his role in publishing a satirical work that was critical of the French government. He was later imprisoned again in 1757 for his work on the Encyclopédie, and he spent several months in prison before being released. [37]

[36] In the 1765 edition of the Encyclopédie, Diderot employed various tactics to encourage sympathetic readers to actively participate in evading the scrutiny of hostile examiners. One such article, Liberté de penser, appeared in the ninth volume and was attributed to the Abbé Mallet, a theologian who was aligned with the Jesuits, supported by Boyer, and had passed away in 1755. However, it is doubtful that the Abbé Mallet was the actual author of this crucial article. It is much more plausible that Diderot himself either modified or entirely wrote this pivotal contribution to the Encyclopédie. See: Tortarolo, E. (2016). The Invention of Free Press: Writers and Censorship in Eighteenth Century Europe, 71.

[37] Walter E. R. (2022) "Diderot, Denis" Encyclopedia of the Enlightenment. Ed. Alan Charles Kors. © 2002, 2005 by Oxford University Press, Inc. Encyclopedia of the Enlightenment: (e-reference edition). Oxford University Press. 17 June 2006 http://www.oxford-enlightenment.com/t173.e178.html.

Jean-Jacques Rousseau was one of the most important figures of the Enlightenment. His ideas on social and political philosophy, including the concept of the social contract, had a significant impact on the French Revolution and the development of modern democracy. Rousseau believes that man is not aggressive, he is peaceful and simple by nature, but he is also ignorant and irrational. [38] He also contradicts Hobbes in establishing right overpower and believes that force is incompatible with the existence of the right. He says: "Man was born free, and everywhere he is in chains". [39]

According to Rousseau's philosophy, there are two types of freedom, the passive freedom that people enjoy in the natural state (natural freedom), and it means individuals act as they like and in a variety of ways to get rid of restrictions and liberation. And positive freedom, which he links to the concept of will and awareness (civil freedom) and says that it is the supreme freedom because of the good it carries for all. Rousseau wrote:

> *"What man loses because of the social contract is his natural liberty and an unlimited right to anything that tempts him and that he can attain; what he gains is civil liberty ... So not to misunderstand these gains, we must clearly distinguish natural liberty, which is limited only by the powers of the individual, from civil liberty, which is limited by the general will".* [40]

Rousseau recognized the reality of literary control in the ancient regime and developed a systematic and complex idea of control in the literary sphere, based on his first-hand experiences and his interpretation of literary property centred on the author. Rousseau believed in the importance of authorial independence, autonomy, originality, and the consequent right to control their creations, but he did not reject the principle that the legitimacy of a manuscript ought to be verified before its publication. Rousseau complied with French laws on preventative censorship, and his relationship with Malesherbes, the director of the library and a supporter of the philosophes, defined his understanding of literary activity and the nature of freedom of the press. [41]

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[38] Rousseau, J. & Dunn, S. (2008). The Social Contract and The First and Second Discourses. New Haven: Yale University Press, 9.

[39] Ibid, 9.

[40] Ibid, 11.

[41] Tortarolo, E. (2016). The Invention of Free Press: Writers and Censorship in Eighteenth Century Europe, 88.

Rousseau's approach to limitations on freedom of the press looks contradictory, particularly regarding his acknowledgement of the magistrate's right to intervene, while also claiming that the persecution of books was illegal and unjust. Rousseau believed that writers must comply with laws and that governments have a right to control the dissemination of ideas among the people. However, he made the crucial distinction that this rule applies to all those who speak, while written words are not a menace. [42]He pointed out a fundamental difference between oral communication and printed books and believed that books were a medium for expressing thoughts, not for attacking the honour of individuals. Rousseau emphasized that the proper objective and content of books was to reason, and that reasoning cannot cause offence to anybody.[43]

Based on the foregoing, it can be said that Rousseau, although he had contributed a lot to the consolidation of some values of freedom and democracy, but it is difficult to say that he was an advocate of freedom of speech, especially with the contradiction he showed in his position on censorship of publications and the press.

The French Revolution was initiated in 1789 when the Third Estate and their supporters formed the National Assembly, in response to the financial and political crises caused by imprudent fiscal policies and excessive spending. The revolution commenced with the storming of the Bastille prison by an armed crowd on July 14, 1789.[44] The French Revolution was a much broad social and political upheaval that sought to fundamentally transform French society. The revolution was characterized by a focus on popular sovereignty and individual rights, and it led to the adoption of the Declaration of the Rights of Man and of the Citizen in 1789. [45]The Declaration of the Rights of Man and of the Citizen, adopted by the National Assembly of France, is considered a pivotal document in the history of human rights and democracy. The Declaration enshrined several fundamental rights, including freedom of expression.

> *"The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom,*

[42] Ibid, 91.

[43] Tortarolo, E. (2016). The Invention of Free Press: Writers and Censorship in Eighteenth Century Europe, 91.

[44] Mchangama, J. (2022). Free Speech A History from Socrates to social media, 148.

[45] Britannica, T. Editors of Encyclopaedia (2023, December 19). French Revolution. Encyclopedia Britannica. https://www.britannica.com/event/French-Revolution. Accessed 28.03.2023.

but shall be responsible for such abuses of this freedom as shall be defined by law." [46]

This article includes recognition of the right of every citizen to express his thoughts and opinions freely, whether through speech, writing or printing. And an affirmation that this freedom is the cornerstone of the formation of a free and democratic society and that it is necessary for the full exercise of other rights, such as freedom of assembly and association.[47] However, the article also placed limits on freedom of expression, stating that individuals would be held responsible for any abuses of this right as defined by law.[48] This reflected the fact that the French Revolution was a turbulent time, and there were concerns about the potential misuse of free expression to incite violence or threaten the stability of the new republic.

It seems that this declaration was not without influence from the political action of the American Revolution.[49] The French were highly interested in American constitutions prior to the adoption of the French Declaration of the Rights of Man and Citizen in 1789. They were particularly fascinated with the Constitution of Pennsylvania, which was seen as the most democratic constitution in America at the time. While some French historians claimed that the French Declaration was heavily influenced by American declarations and preambles, others argued that there were significant differences between the two. The French Declaration was meant to be a universal manifesto for all people, while the American declarations were more specific to their own country. [50]

Overall, the Declaration of the Rights of Man and of the Citizen represented a significant step forward in the recognition of individual liberties and human rights. Its affirmation of the right to free expression laid the groundwork for the modern concept of freedom of speech and has influenced the development of human rights law and philosophy around the world.

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[46] Article 11 of the Declaration of the Rights of Man and of the Citizen. National Assembly of France (1789).

[47] Tortarolo, E. (2016). The Invention of Free Press: Writers and Censorship in Eighteenth Century Europe, 160-163.

[48] Mchangama, J. (2022). Free Speech A History from Socrates to social media, 150.

[49] De Baecque, A. Cannizzaro, S. J. (2022) "Declaration of The Rights of Man" *Encyclopedia of the Enlightenment*. Ed. Alan Charles Kors. *© 2002, 2005 by Oxford University Press, Inc.*. Encyclopedia of the Enlightenment: (e-reference edition). Oxford University Press. 17 June 2006 http://www.oxford-enlightenment.com/t173.e166.html.

[50] Ludwikowski, R. R. (1990). The French Declaration of the Rights of Man and Citizen and the American Constitutional Development. *The American Journal of Comparative Law*, 445-462.

A summary of all of the above, the Enlightenment period in Europe was a crucial time for the development of freedom of expression and the press in Europe. The ideas of Enlightenment philosophers, such as Voltaire, Rousseau, and Diderot, paved the way for the recognition of the fundamental right of individuals to freely express their ideas and opinions. The publication of influential works, such as the Encyclopédie and the Swedish Freedom of Print Act, further reinforced the importance of free expression and helped to shape modern attitudes towards press freedom. This also led to the development of new ideas, publications, and legislation that helped to establish the foundation for the modern concept of freedom of expression and press freedom. for example, On 2 December 1766, the world witnessed the adoption of the first Swedish Freedom of Print Act which established definitive boundaries for the freedom of press. This legislation, comprising of fifteen paragraphs, comprehensively outlined the scope and limitations of the press. The Act operated on the principle of exclusivity, which meant that only offenses that were explicitly mentioned in the law could result in indictment. This ensured that any topic not excluded in the law could be freely discussed and published without the fear of facing any retribution.[51]

2.2. Establishment of the US First Amendment doctrine

Between 1765 and 1783, the American Revolution unfolded, in which thirteen British colonies in North America broke away from British rule and formed the United States of America. Several factors, including growing discontent with British rule, a desire for greater political representation, and economic tensions between the colonies and Britain, sparked the Revolution. [52]

One of the key events that led to the Revolution was the passage of the Stamp Act in 1765, which imposed a tax on printed materials such as newspapers, legal documents, and playing cards. This sparked widespread protests and boycotts across the colonies, as many Americans saw it as a violation of their rights as British citizens.[53]

[51] Nordin, J. (2016). The Swedish Freedom of Print Act of 1776-Background and Significance. J. Int'l Media & Ent. L., 7, 137.

[52] Wallace, W. M. (2021). American Revolution| Causes, Battles, Aftermath, & Facts. Encyclopedia Britannica, 27. https://www.britannica.com/event/American-Revolution. Accessed 25.03.2023.

[53] Britannica, T. Editors of Encyclopaedia (2024, January 26). Stamp Act. Encyclopedia Britannica. https://www.britannica.com/event/Stamp-Act-Great-Britain-1765. Accessed 25.03.2023.

The Virginia Declaration of Rights, which was adopted on June 12, 1776, was one of the important documents in the development of modern conceptions of freedom of expression. The Declaration was primarily authored by George Mason, a delegate to the Virginia Convention that adopted it, and it served as a model for the Bill of Rights that was later added to the US Constitution.[54] The Virginia Declaration of Rights included several provisions that affirmed the importance of freedom of expression as a fundamental right. For example, Section 12 of the Declaration states that "the freedom of the press is one of the great bulwarks of liberty and can never be restrained but by despotic governments." This provision suggests that freedom of the press is a crucial means of protecting individual rights and liberties, and that any attempt by a government to restrict or control the press is a sign of tyranny. [55]

The American Declaration of Independence, adopted by the Continental Congress on July 4, 1776, famously asserts the importance of freedom of expression as a fundamental human right. [56]

The relevant passage in the Declaration is as follows:

> *"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to affect their Safety and Happiness."* [57]

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[54] Britannica, T. Editors of Encyclopaedia (2016, July 20). Virginia Declaration of Rights. Encyclopedia Britannica. https://www.britannica.com/topic/Virginia-Declaration-of-Rights. Accessed 25.03.2023.

[55] McClellan, J. (1989). Liberty, Order, and Justice. Liberty Fund, 188-190.

[56] The American Declaration of Independence was primarily drafted by Thomas Jefferson, a delegate from Virginia to the Continental Congress. However, the final document was a result of collaboration and revision by other members of the Continental Congress, including John Adams and Benjamin Franklin. After several drafts, the Declaration was approved by the Congress on July 4, 1776, and it has since become one of the most important and influential documents in the history of the United States and the world.

[57] Rakove, J. N. (2006. Founding America: Documents from the Revolution to the Bill of Rights. Barnes & Noble Classics, 134.

This passage implies that individuals have the inherent right to express themselves freely, and that governments are created to protect and secure these rights. The Declaration goes on to state that the people have the right to alter or abolish their government when it fails to uphold these fundamental principles. Overall, the American Declaration of Independence can be seen as a foundational document in the development of modern conceptions of freedom of expression, as it affirms the idea that individuals have an inherent right to express themselves and that governments must respect and protect this right.

The Constitution of Pennsylvania, which was adopted on September 28, 1776, is another important document in the history of freedom of expression. Like the Virginia Declaration of Rights and the US Constitution, the Pennsylvania Constitution included provisions that affirmed the importance of individual liberties, including freedom of expression. One of the key provisions related to freedom of expression in the Pennsylvania Constitution was Article VIII, which stated that "the people have a right to freedom of speech, and of writing, and publishing their sentiments."[58] This provision echoed similar language in the Virginia Declaration of Rights, and it affirmed the idea that individuals have the right to express themselves freely through speech, writing, and publication.

In addition to protecting freedom of expression, the Pennsylvania Constitution also included other provisions that emphasized the importance of individual liberties and limited government power. For example, the Constitution established a system of checks and balances between the executive, legislative, and judicial branches of government, and it limited the power of the state to interfere in the lives and liberties of its citizens. [59]

In 1791, The United States Bill of Rights was adopted, and it included several provisions that protect freedom of expression. The First Amendment to the Constitution, which is part of the Bill of Rights, specifically states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." [60]

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[58] McClellan, J. (1989). Liberty, Order, and Justice. Liberty Fund, 435.

[59] For more see: "Pennsylvania Constitution of 1776 (August 16, 1776)." Encyclopedia of the American Constitution. Encyclopedia.com. 20 Mar. 2023 <https://www.encyclopedia.com>.

[60] The first ten amendments were proposed by Congress in 1789, at their first session; and, having received the ratification of the legislatures of three-fourths of the several States, they became a part of the Constitution December 15, 1791, and are known as the Bill of Rights. See: McClellan, J. (1989). Liberty, Order, and Justice.

This amendment is widely recognized as one of the most important legal protections of freedom of expression in the world. It affirms the importance of the freedoms of speech and press, which are essential to holding government accountable, promoting public discourse and debate, and protecting individual rights and liberties. The amendment also protects the right of individuals to peacefully assemble and petition the government for redress of grievances. [61]

Over the years, the First Amendment has been interpreted and applied in a variety of ways by courts and legal scholars. For example, the Supreme Court has recognized that some types of speech, such as incitement to violence or obscenity, may not be protected under the First Amendment. [62]

This period of American history was characterized by the presence of many thinkers, philosophers, and jurists whose contributions had a major role in establishing the modern concept of freedom of expression. Among them was *James Madison*, who joined the ranks of those who supported the new constitution and the Bill of Rights, including freedom of speech and the press.

Madison held the view that the people held ultimate sovereignty, not Congress, and that implementing a bill of rights would act as a barrier against all forms of governmental power. He combined the idea that free speech was necessary for a sovereign people to govern themselves with Cato's belief that it acted as a safeguard for liberty, which would eventually become the First Amendment.[63] Madison also suggested that states could not violate individuals' equal rights of conscience or the freedom of the press. However, the ratification of the First Amendment brought Madison satisfaction as it secured the freedom of speech and explicitly safeguarded the liberty of the press from government interference.

> *"The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this government; the people may therefore*

Liberty Fund, 409. Britannica, The Editors of Encyclopedia. "Bill of Rights". Encyclopedia Britannica, 24 Mar. 2023, https://www.britannica.com/topic/Bill-of-Rights-United-States-Constitution. Accessed 26 March 2023.

[61] Volokh, E. (2024, February 7). First Amendment. Encyclopedia Britannica. https://www.britannica.com/topic/First-Amendment. Accessed 28.03.2023.

[62] One case that illustrates the Supreme Court's interpretation of the limits of free speech under the First Amendment is Brandenburg v. Ohio (1969). In this case, the Supreme Court considered the constitutionality of an Ohio law that prohibited advocating for violence or other unlawful actions as a means of achieving political reform. See: "Brandenburg v. Ohio." Oyez, www.oyez.org/cases/1968/492. Accessed 26.03.2023.

[63] Mchangama, J. (2022). Free Speech A History from Socrates to social media, 144.

publicly address their representatives; may privately advise them or declare their sentiments by petition to the whole body; in all these ways they may communicate their will." [64]

James Madison contributed to defending the freedom of expression by collaborating with Thomas Jefferson to draft resolutions challenging the constitutionality of the Sedition Act of 1798, which made it a crime to publish false and malicious writing against the government.[65] Madison then wrote a lengthy, anonymous Report on the Virginia Resolutions, which provided a detailed analysis of how the Act violated the First Amendment. Madison's Report argued that the First Amendment's protection of freedom of speech and of the press is necessary to ensure that citizens are able to participate in the political process and hold government officials accountable. Madison's defense of freedom of expression helped establish the principle that the government cannot use laws to silence its critics, a principle that remains a cornerstone of American democracy today.[66]

Thomas Jefferson was also a strong advocate for freedom of speech and expression throughout his life. He believed that a free press and the free exchange of ideas were essential to a healthy democracy.

One of Jefferson's most famous statements on free speech was made in a letter to Benjamin Rush in 1800, in which he wrote: "I have sworn upon the altar of God, eternal hostility against

[64] Cogan, N.H. (2015). The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins. Oxford University Press, 237.

[65] The Sedition Act of 1798 was a law passed by the United States Congress during the presidency of John Adams. It made it a crime to publish "false, scandalous, and malicious writing" against the government or its officials, with penalties including fines and imprisonment. The act was passed in response to political tensions between the Federalist Party, which controlled the government, and the Democratic-Republican Party, which was in opposition. The Sedition Act was widely criticized at the time for its potential to stifle free speech and dissent, and it was allowed to expire in 1801. The act remains a controversial episode in the history of American civil liberties and the First Amendment's protection of freedom of speech and the press. See: Britannica, The Editors of Encyclopaedia. "Alien and Sedition Acts". Britannica, T. Editors of Encyclopaedia (2023, September 27). Alien and Sedition Acts. Encyclopedia Britannica. https://www.britannica.com/event/Alien-and-Sedition-Acts. Accessed 02.042023.

[66] Blasi, V. (2021), 'The Classic Arguments for Free Speech 1644–1927', in Adrienne Stone, and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech*, Oxford Handbooks; online edn, Oxford Academic, 10 Feb. 2021), https://doi.org/10.1093/oxfordhb/9780198827580.013.2, accessed 2 Apr. 2023.

every form of tyranny over the mind of man."[67] This quote could be interpreted as a declaration of Jefferson's commitment to protecting the right of individuals to express their opinions freely, without fear of government censorship.

In 1779, Jefferson wrote the Virginia Statute for Religious Freedom, which declared that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever," and that everyone had the right to "exercise their religion in accordance with the dictates of conscience." This statute became a model for the First Amendment's protection of religious freedom and its prohibition of laws respecting an establishment of religion. [68]

Jefferson argued that robust political opposition was essential to a healthy democracy, and that citizens should be free to express their opinions even if those opinions were critical of the government. He famously wrote in a 1787 letter to Edward Carrington,

> *"The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.* But I should mean that every man should receive those papers and be capable of reading them*"*[69]

Although Jefferson did not attend the Constitutional Convention in 1787, he was a vocal advocate for the inclusion of a Bill of Rights in the Constitution. In particular, he argued that such a bill was necessary to protect individual liberties, including freedom of speech and the press. In a 1787 letter to James Madison, he wrote:

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[67] "From Thomas Jefferson to Benjamin Rush, 23 September 1800," Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/01-32-02-0102. [Original source: The Papers of Thomas Jefferson, vol. 32, 1 June 1800–16 February 1801, ed. Barbara B. Oberg. Princeton: Princeton University Press, 2005, 166–169.]

[68] Committee of the Virginia Assembly (18 June 1779). A Bill for Establishing Religious Freedom," Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082. [Original source: The Papers of Thomas Jefferson, vol. 2, 1777–18 June 1779, ed. Julian Boyd. Princeton: Princeton University Press, 1950, 545–553.]

[69] "From Thomas Jefferson to Edward Carrington, 16 January 1787," Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/01-11-02-0047. [Original source: The Papers of Thomas Jefferson, vol. 11, 1 January–6 August 1787, ed. Julian Boyd. Princeton: Princeton University Press, 1955, 48–50.]

> *"A Bill of Rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."*[70]

As President, Jefferson was involved in several important free speech cases, including the trial of journalist James Callender for sedition in 1800. Jefferson was personally opposed to Callender's criticisms of the government, but he recognized the importance of allowing him to express his views without fear of punishment. He later pardoned Callender and other individuals convicted under the Sedition Act of 1798, which had been used by the Federalist Party to suppress political dissent.[71]

Overall, Jefferson was a passionate defender of freedom of speech and expression, and his writings and advocacy had a significant impact on the development of these concepts in the United States.

2.3. Struggling against censorship: Press Freedom

The nineteenth century in Europe showed unevenness in terms of the level of protection as well as limits on the press's and people's right to freedom of expression, especially as the intellectual influences produced by the Enlightenment began to fade. While the idea of a free press gained momentum and led to brief periods of liberal euphoria, it was often met with fierce opposition from conservative governments and forces who saw it as a threat to social order and stability.

The press played a significant role in the battle between the ruling classes and the rest of society during the 19th century in Europe. It was a vital means for organizing popular political opposition, and one of the few ways that the middle and lower classes could affect governments and gain recognition. Consequently, major battles for freedom of the press took place in many European countries throughout the 19th century. Representatives of the traditional ruling elements detested the idea of a free press and frequently viewed journalists as members of a degraded profession.[72] Conservatives saw the press as a plague or a poison that threatened the

[70] "To James Madison from Thomas Jefferson, 20 December 1787," Founders Online, National Archives, https://founders.archives.gov/documents/Madison/01-10-02-0210. [Original source: The Papers of James Madison, vol. 10, 27 May 1787–3 March 1788, ed. Robert A. Rutland, Charles F. Hobson, William M. E. Rachal, and Frederika J. Teute. Chicago: The University of Chicago Press, 1977, 335–339.]

[71] Ridgway, Whitman, and Dictionary of Virginia Biography. "James Thomson Callender (1757 or 1758–1803)" Encyclopedia Virginia. Virginia Humanities, (22 Dec. 2021). Web. 02 .04.2023.

[72] Goldstein, R. J. (1989). Political Censorship of the Arts and the Press in Nineteenth Century. Springer. 26.

health of European society and blamed virtually all the world's ills on it. They viewed the press as fundamentally irresponsible and filled with lies and incitement to unrest. Despite this, the press continued to grow and develop during this period.[73]

In the 19th century, there were some repressive methods employed to manage the press in Europe. These techniques were broadly classified into two types: The first type is direct repression, which aims to stop inappropriate content from being printed (prior censorship) or penalize those accountable for publishing such content (punitive or post-publication censorship). The second type is indirect repression, which did not outlaw or punish specific journalists or published material but instead discouraged the lower classes from publishing or purchasing newspapers by placing financial constraints on the press.[74]

The Congress of Vienna, which took place from 1814 to 1815, aimed to establish a new balance of power in Europe after the defeat of Napoleon Bonaparte. The Congress was attended by representatives from most of the major powers in Europe, and the resulting treaties and agreements established a new political order on the continent.[75] The Congress of Vienna was characterized by a conservative and authoritarian political climate, in which the main goals were to restore traditional institutions and suppress revolutionary movements. The Congress sought to create a stable and predictable political order that would prevent future conflicts and maintain the existing power structures. [76]

One of the ways in which Congress entrenched this political order was through the establishment of a system of international alliances and agreements. The Congress created a system of balance of power that aimed to prevent any one country from becoming too dominant in Europe. This system was maintained through a series of alliances and treaties that committed countries to come to each other's aid in the event of war or aggression. Another way in which the Congress entrenched the traditionalist political order was through the restoration of monarchies and the suppression of revolutionary movements. The Congress sought to restore the old order and reinstate the ruling families that had been deposed during the Napoleonic

[73] Ibid, 26-28. Goldstein, R. J. (1983). Political Repression in 19th Century Europe. Routledge. 62.

[74] Goldstein, R. J. (1983). Political Repression in 19th Century Europe. 65-66.

[75] Britannica, T. Editors of Encyclopaedia (2023, November 14). Congress of Vienna. Encyclopedia Britannica. https://www.britannica.com/event/Congress-of-Vienna. Accessed 03.04.2023.

[76] Lesaffer, R. (2015). The congress of Vienna (1814–1815). Oxford Historical Treaties online.

Wars. The Congress also worked to suppress revolutionary movements that threatened to destabilize the new political order.[77]

In 1819, German authorities introduced a series of measures aimed at suppressing liberal and nationalist ideas that had emerged after the defeat of Napoleon. These measures were known as *Carlsbad Decrees (Karlsbader Beschlüsse)*.[78] The decrees were introduced in response to the assassination of the conservative writer *August von Kotzebue*, who was killed by a radical student in 1819.[79] The decrees had far-reaching effects, centralizing preventive censorship, and limiting academic freedom across the German Confederation.[80]

One of the key provisions of the Carlsbad Decrees was the establishment of a Central Commission in Mainz, which was tasked with enforcing preventive censorship across the German Confederation. The commission was responsible for monitoring the press, universities, and public gatherings, and had the power to suppress any ideas or opinions that were deemed dangerous to the political stability of the Confederation. [81]This centralization of censorship effectively suppressed any dissenting voices and prevented the spread of liberal and nationalist ideas. Another significant provision of the Carlsbad Decrees was the limitation of academic freedom. The decrees required universities to appoint government-approved professors and banned student organizations that were deemed subversive or dangerous. The decrees also mandated the expulsion of any students who were found to be participating in subversive activities or who were suspected of holding liberal or nationalist beliefs. These measures effectively curtailed the ability of universities to promote liberal or nationalist ideas and ensured that students were discouraged from engaging in political activism.[82]

The Carlsbad Decrees also established a system of surveillance and repression that lasted for many years in German Confederation. The decrees allowed for the arrest and imprisonment of

[77] Mchangama, J. (2022). Free Speech A History from Socrates to social media, 182-183.

[78] See: German Bundestag. The German unification and freedom movement (1800 - 1848). https://www.bundestag.de/en/parliament/history/parliamentarism/1800_1848.

[79] Britannica, The Editors of Encyclopaedia. "August von Kotzebue". *Encyclopedia Britannica*, 29.04. 2023, https://www.britannica.com/biography/August-Friedrich-Ferdinand-von-Kotzebue. Accessed 29.08.2023.

[80] Eyck, F. G. (1955). The political theories and activities of the German academic youth between 1815 and 1819. The Journal of Modern History, 27(1), 27-38.

[81] Jachmann, Maika. "The German Unification and Freedom Movement (1800-1848)." German Bundestag. https://www.bundestag.de/en/parliament/history/parliamentarism/1800_1848. 02 04.2023.

[82] "Carlsbad Decrees." Encyclopedia of Modern Europe: Europe 1789-1914: Encyclopedia of the Age of Industry and Empire. Encyclopedia.com. 20 Mar. 2023 <https://www.encyclopedia.com>.

individuals suspected of participating in subversive activities and gave the authorities broad powers to investigate and prosecute suspected subversives. [83]This system of surveillance and repression was highly effective in suppressing any dissenting voices and ensuring that the political stability of the German Confederation was maintained.

In 1832, two sets of laws that aimed to limit free expression and enforce censorship were passed. These laws were known as the *Six Articles* and the *Ten Articles*. The Six Articles stated that "the limits of free expression cannot… be exceeded in a manner that endangers the peace of an individual Confederal state or that of Germany as a whole." In other words, the government believed that free expression could be limited if it posed a threat to the peace and stability of Germany. While The Ten Articles, which were passed a few days later, went even further by forcing individual states within the German Confederation to enforce censorship. The articles required states to establish a censorship bureau, which would be responsible for reviewing all books, newspapers, and other publications before they were published. This censorship bureau would have the power to ban any materials that were deemed to be subversive or dangerous to the public order. [84]

Together, the Six Articles and the Ten Articles represented a significant curtailment of free expression in Germany. And they reflected the government's growing concern about political unrest and social upheaval, and its belief that censorship was necessary to maintain stability and order.

German writers like Heinrich Heine and Karl Marx faced significant challenges in their efforts to express their ideas and fight against censorship and repression in their time. Both writers were known for their critical views on the political and social institutions of their time, and their work often clashed with the conservative political climate of the German states in the 19th century.

Heinrich Heine, for example, was a poet and journalist who was known for his critical views on the government, religion, and society. Heine faced significant censorship and repression during his lifetime, and many of his works were banned or censored by the authorities.[85] Despite

[83] Mchangama, J. (2022). Free Speech A History from Socrates to social media, 182.

[84] See: The Six Articles (June 28, 1832) and the Ten Articles (July 5, 1832), German History in Documents and Images (GHDI). From Vormärz to Prussian Dominance (1815-1866). https://ghdi.ghidc.org/docpage.cfm?docpage_id=150. 05.04.2023.

[85] Sammons, J. L. (2023, December 9). Heinrich Heine. Encyclopedia Britannica. https://www.britannica.com/biography/Heinrich-Heine-German-author. Accessed 27.08.2023.

these challenges, Heine continued to write and publish his work, often using irony and satire to criticize the government and society. *"Where they burn books, they will also burn people in the end."*[86] What happened next during the Nazi era validated Heine's fears.

Karl Marx, on the other hand, was a philosopher and political theorist who is best known for his critiques of capitalism and his advocacy for socialism. Marx's work was highly controversial in his time, and he faced significant censorship and repression from the authorities. Marx's works were banned in many German states, and he was forced to flee to London to escape persecution. Despite these challenges, Marx continued to write and publish his ideas, and his work had a significant impact on the development of socialist and communist movements in Europe and around the world.[87]

Although Karl Marx's early writings on press freedom and communication have been relatively neglected compared to his later Marxist theories, they provide compelling evidence of his concern for public communication and the press's role in a democratic society. Marx placed great emphasis on freedom as a prerequisite for democratic practice and the importance of a free press. Specifically, his arguments on press freedom primarily aimed to challenge external restrictions, including state censorship. Marx recognized the significance of political expression and publicity and developed a model of intellectual authority that effectively engaged his readers. His political objective was the democratic emancipation of the working class, with a particular emphasis on the proletarian character.[88]

The March Revolution of 1848 ended state censorship in Germany temporarily. The Fundamental Rights of the German People included a guarantee of press freedom but did not gain validity. After the revolution, German states reintroduced press laws with restrictive provisions, but the liberal public sphere still developed. The Imperial Press Law in 1874 replaced state press laws and abolished restrictions on press freedom in the German Empire. However, special restrictions remained during times of war, threat of war, or internal upheavals. Chancellor Otto von Bismarck used these restrictions to limit the Catholic and Social Democratic press during the Kulturkampf and after the issuance of the Anti-Socialist Laws in

[86] Ziolkowski Th. (1983). Heinrich Heine. The Hudson Review, Vol. 36, No. 1, 35th Anniversary Issue (Spring, 1983), pp. 217-223.

[87] See more: Feuer, L. S. and McLellan, . David T. (2024, January 25). Karl Marx. Encyclopedia Britannica. https://www.britannica.com/biography/Karl-Marx. Accessed 04.04.2023.

[88] Hardt, H. (2000). Communication is freedom: Karl Marx on press freedom and censorship. *Javnost-The Public*, *7*(4), 85-99.

the 1870s.[89] The law was seen by many as a reactionary measure that aimed to suppress political dissent and maintain the power of the ruling class. It was opposed by journalists, writers, and intellectuals, who argued that it violated basic principles of freedom of expression and the press. Despite the opposition, the law was passed and remained in effect until the end of World War I.[90]

The Hungarian Revolution of 1848 saw the articulation of several demands pertaining to civil liberties, most notably the crucial call for press freedom. The "12 Points" constituted a series of requisitions put forth by Hungarian insurgents in the course of the revolution. Among these demands, the paramount one was the establishment of press freedom. Early in the revolution, a de facto freedom of the press had been achieved as a revolutionary mob commandeered a printing press, facilitating the dissemination of the "Twelve Points" as well as Sándor Petőfi's "Nemzeti dal" or "National Song." In subsequent months, the voices of the valiant figures from the "Great Day" found expression through the medium of the newspaper "Márczius Tizenötödike" (March Fifteenth), deliberately named to symbolize the Pest revolution's date.[91]

In the United Kingdom, During the nineteenth century, the Tories aimed to suppress the movement for parliamentary reform by using the crime of seditious libel to clamp down on radical speech and action. The restrictions on freedom of expression mainly consisted of common law offenses, and the most significant one was seditious libel. It was defined as publishing material with a seditious intention, but advocating reform through peaceful means did not amount to sedition. Another offense was blasphemy, which involved publishing a denial of God's existence or the divinity of Christ, or opposing the established Church of England. Defamation was also a criminal offense, and during the nineteenth century, civil actions for

[89] The 1874 press law in Germany, also known as the "Lex Heinze," was a controversial law that sought to limit freedom of the press. It was named after its chief architect, Adolf Heinze, who was the Minister of the Interior at the time. The law required journalists to obtain official government licenses, increased penalties for defamation and libel, and gave authorities the power to censor content that was deemed offensive or harmful to public order. See: Wilke, Jürgen: Censorship and Freedom of the Press, in: European History Online (EGO), published by the Leibniz Institute of European History (IEG), Mainz 2013-05-08. URL: http://www.ieg-ego.eu/wilkej-2013a-en URN: urn:nbn:de:0159-2013050204 [05.Apr.2023]. Goldstein, R. J. (1983). Political Repression in 19th Century Europe. 68.

[90] Howard Tumber, Marina Prentoulis. Freedom of the Press in Western Europe. Encyclopedia of International Media and Communications, Elsevier, 2003, 193-202.

[91] For example, see: Gángó, G. (2001). 1848–1849 IN HUNGARY. Hungarian Studies, 15(1), 39-49. Deme, L. (1972). The society for equality in the Hungarian revolution of 1848. Slavic Review, 31(1), 71-88.

damages became more common than criminal prosecutions. Juries played a significant role in determining what was permissible, and the vagueness of the offenses benefited publishers who were tried before sympathetic, liberal juries.[92]

One of the most famous cases of censorship in the 19th century was the trial of the publisher *William Hone,* in 1817. Hone had published a series of satirical pamphlets criticizing the government, and he was charged with blasphemy and seditious libel. He was acquitted by a jury, but the case demonstrated the government's willingness to crack down on dissent. [93]

The Peterloo Massacre in 1819, where troops killed and injured protesters, became a powerful symbol of oppression for democratic reformers. The government responded with the "Six Acts" of 1819, which increased punishments for seditious libel, limited freedom of association, and made newspapers unaffordable for the poor. [94]

The Reform Act of 1832 was a significant piece of legislation that reformed the electoral system in England and Wales. While it did not have a direct impact on freedom of expression, it did have indirect effects on the ability of individuals to express their opinions. Before the Reform Act, the majority of the population in England and Wales was excluded from voting, and many constituencies had very few voters. [95]This meant that those in power were often unaccountable to the wider population, and there was little opportunity for the public to express their opinions or influence government policy.

The Reform Act significantly increased the number of eligible voters and redistributed parliamentary seats more fairly. This meant that more people had a say in how the country was run, and there was greater accountability for those in power. This increase in political participation had an indirect impact on freedom of expression. As more people had a voice in government, there were more opportunities for public debate and discussion on political and

[92] Barendt, E. (2019). Freedom of Expression in Nineteenth Century England: Weak in Principle, Robust in Practice. *Scandinavica*, *58*(2), 29-38.

[93] Peterson, T. (1948). The Fight of William Hone for British Press Freedom. Journalism Quarterly, 25(2), 132–138.

[94] Mchangama, J. (2022). Free Speech A History from Socrates to social media, 174-177. See also: "Six Acts." The Oxford Companion to British History. Encyclopedia.com. 20 Mar. 2023 <https://www.encyclopedia.com>.

[95] Phillips, J. A., & Wetherell, C. (1995). The Great Reform Act of 1832 and the political modernization of England. *The American historical review*, *100*(2), 411-436.

social issues.[96] However, some scholars agree that the reform did not fulfil its promises and that many of the problems of the pre-reform system persisted into the Victorian era. While some scholars view the pre-reform system positively, others, like Gash, stress the negative consequences of the reform. Moore's quantitative analysis supported Gash's position and influenced later interpretations. The recent scientific consensus, such as Vernon's and Cox's, also diminish the significance of the 1832 reform, arguing that local and individual leaders, symbols, and loyalties had more influence on politics than the electoral system.[97]

The Second Reform Act of 1867 was also a significant piece of legislation passed by the British Parliament that extended the right to vote in parliamentary elections to a larger portion of the male population in the United Kingdom. Before the Second Reform Act, only men who owned a certain amount of property or paid a certain amount of rent were eligible to vote.[98] This meant that the vast majority of men in the UK were excluded from the democratic process. The Act created a new system of voter registration and redrew the electoral map of the country, increasing the number of parliamentary seats and redistributing them to better reflect the population. It also abolished some of the remaining "rotten boroughs" and gave more representation to fast-growing industrial towns and cities. [99]

The Second Reform Act was a major step towards a more democratic system of government in the UK, and it paved the way for further reforms in the years to come, including the Third Reform Act in 1884,[100] which extended the franchise to most men, and the Representation of the People Act 1918, which gave all men and some women the right to vote. [101]

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[96] Mchangama, J. (2022). Free Speech A History from Socrates to social media, 179. Britannica, T. Editors of Encyclopaedia (2023, May 28). Reform Bill. Encyclopedia Britannica. https://www.britannica.com/event/Reform-Bill. Accessed 06.04.2023.

[97] Phillips, J. A., & Wetherell, C. (1995). The Great Reform Act of 1832 and the Political Modernization of England. The American Historical Review, 100(2), 411–436. https://doi.org/10.2307/2169005.

[98] "Second Reform Act." St. James Encyclopedia of Labor History Worldwide: Major Events in Labor History and Their Impact. Encyclopedia.com. 20 Mar. 2023 <https://www.encyclopedia.com>.

[99] Himmelfarb, G. (1966). The Politics of Democracy: The English Reform Act of 1867. Journal of British Studies, 6(1), 97-138. doi:10.1086/385529

[100] Glen, W. C. (1885). The Representation of the People Act, 1884, with Introduction, Notes, and Index. Shaw & Sons.

[101] Blackburn, R. (2011). Laying the foundations of the modern voting system: The Representation of the People Act 1918. Parliamentary History, 30(1), 33-52.

In France, the laws regarding the press changed frequently during the 19th century due to political upheavals. *The Charte constitutionnelle* issued in 1814 guaranteed the right to express opinions publicly, but pre-publication censorship was reintroduced in 1814, and repressive censorship was extended in 1835.[102] After the February Revolution of 1848, pre-publication censorship was abolished but reintroduced again two years later. Under the French Third Republic, the Opportunist Republicans who were in power at the time sought to liberalize the press and encourage open public discussion. In 1881, they passed the Press Law which abolished a number of previous regulations and established the principle that "Printing and publication are free".[103] The press developed slowly and in a disrupted fashion due to the changeable political climate, with new publications frequently established to promote freedom of the press.

The struggle against censorship and limitations on political expression in 19th-century France was exceptionally fierce and persistent, largely due to the combination of a highly politicized population and authoritarian regimes. Other major European countries, including Russia, Germany, and the Hapsburg Empire, had a generally lower level of political engagement, and thus, challenges to restrictions on free expression were less prominent.[104] French authorities were especially fearful of visual forms of dissent, such as caricature and theater, given their perceived greater impact on illiterate "dark masses." Even after ending prior censorship of printed materials, France continued to heavily restrict freedom of expression, with the Liberal Press Act of 1881 finally abolishing most of these limitations and replacing 42 laws and 325 provisions enacted over 75 years by 10 different systems.[105]

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In 19th century USA, a democratic system emerged that favoured local control and excluded women from voting while granting voting rights to immigrants and former slaves after the Civil War. Despite this expansion of suffrage for some, the definition of those entitled to enjoy the "blessings of liberty" came to be defined by race, with black people excluded from citizenship and confined to second-class status. However, the struggle by abolitionists, slaves, and free

[102] See: Constitutional Charter of 1814, THE NAPOLEON SERIES. https://www.napoleon-series.org/research/government/legislation/c_charter.html. 06.Apr.2023.

[103] Goldstein, R. J. (1998). Fighting French Censorship, 1815-1881. *French Review*, 785-796.

[104] Goldstein, R. J. (1998). Fighting French Censorship, 1815-1881. The French Review, 71(5), 785–796.

[105] Goldstein, R. J. (1998). Fighting French Censorship, 1815-1881. The French Review, 71(5), 785–796.

blacks themselves reinvigorated the notion of freedom as a universal birthright. The movement for women's suffrage also arose out of the abolitionist movement, and women's suffragists concluded that women must form their organizations to press for equal rights.[106]

In 1836, The U.S. House of Representatives adopted gag rules preventing the discussion of antislavery proposals. The gag rules were a series of rules adopted by the United States House of Representatives in the early 19th century, which prohibited the consideration of petitions calling for the abolition of slavery. These rules effectively prevented debate on the issue of slavery and were supported by Southern congressmen who feared that discussion of slavery would lead to its abolition. The gag rules were eventually repealed after years of political and social pressure from abolitionists and their supporters.[107]

During the civil war, the government realized early on that newspapers could provide valuable information to the South and fuel their resistance. Consequently, measures were taken to limit their influence, including controlling reporters, censoring the telegraph system, banning them from the mails, closing newspaper offices, and using military force to arrest editors. [108]

In 1863, General Ambrose Burnside, who was commanding the Department of the Ohio, ordered the suppression of the Chicago Times for what he deemed disloyal and incendiary reporting. Burnside accused the newspaper of publishing "disloyal statements," "inciting resistance to the law," and "encouraging desertions." Burnside's order stated that the paper was to be suppressed "until further orders," and he also ordered the arrest of its editor and publisher, Wilbur F. Storey.[109]

The incident sparked a heated debate over the limits of free speech during wartime and the extent to which the government could restrict or suppress dissent. Many saw Burnside's actions as a dangerous precedent that could be used to suppress legitimate criticism and dissent, while

[106] See: "Free Speech in the Nineteenth Century." The Bill of Rights 1. Encyclopedia.com. 20 Mar. 2023 <https://www.encyclopedia.com>.

[107] Jenkins, J. A., & Stewart III, C. (2020). Causal inference and American political development: The case of the Gag rule. *Public choice*, *185*(3-4), 429-457.

[108] Carroll, T. F. (1923). Freedom of Speech and of the Press during the Civil War. *Virginia Law Review*, 516-551.

[109] See more: Paul, N. A. (1932). "Suppression of the Chicago Times: June 1863". Loyola University Chicago (master's Theses). 88-92.

others argued that the exigencies of war required strong measures to preserve national unity and protect against subversion.[110]

However, President *Abraham Lincoln* quickly rescinded Burnside's order, stating that he had no authority to suspend the publication of newspapers or to arrest civilians for disloyal sentiments, except where specifically authorized by law. Lincoln also feared that Burnside's actions would be seen as an abuse of power and a violation of civil liberties, which could alienate many in the North who were already critical of his war policies.[111]

In 1864, President Abraham Lincoln ordered General John A. Dix to suppress the New York Journal of Commerce and the New York World newspapers due to their publishing of false reports about a potential draft of soldiers. The newspapers were closed for two days before a federal judge ordered them reopened, stating that the government did not have the power to shut down a newspaper without a trial. The publishers and editors were released a few days later.[112]

This event also triggered a discussion on the limits of the government's authority to censor or silence the media and the extent of press freedom in times of war. Some contended that the government was obligated to safeguard the war campaign and that the newspapers were

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[110] Curtis, M. K. (1998). Lincoln, Vallandigham, and Anti-War Speech in the Civil War. *Wm. & Mary Bill Rts. J.*, *7*, 105.

[111] After the Vallandigham and Chicago Times affairs in July 1863, President Lincoln expressed his regret about the arrest of the Democrat editor and wrote to General John Schofield about the issue. Later in October of the same year, when General Schofield required all inhabitants of a county to leave their homes in an effort to eliminate rebels, Lincoln again wrote to him addressing the issue of suppression of speech and press. He urged General Schofield to exercise restraint and only arrest individuals and suppress assemblies or newspapers if they were causing harm to the military. Furthermore, Lincoln gave General Schofield the discretion to exercise caution, calmness, and forbearance in allowing the expression of opinion in any form, and to not allow it to be violently interfered with by others. See: Curtis, M. K. (1998). Lincoln, Vallandigham, and Anti-War Speech in the Civil War. *Wm. & Mary Bill Rts. J.*, *7*, 105. 156.

[112] The newspapers had published a fabricated presidential proclamation which called for 400,000 more men to be drafted into the Union Army. The false report caused panic in New York City and led to riots city. General Dix ordered the suppression of the newspapers and the arrest of the publishers and editors, claiming that they were interfering with the war effort and that their actions were aiding the Confederacy. See: Luther, M. F. (1962). American Journalism, A History: 1690-1960, 3rd ed. (New York: MacMillan, 1962), 181-82. Asp David. Civil War, U.S. The First Amendment Encyclopedia.
https://www.mtsu.edu/first-amendment/article/1059/civil-war-u-s. 08.04.2023.

engaging in hazardous and reckless conduct. In contrast, others viewed the occurrence as a breach of the First Amendment's safeguards for press freedom.[113]

The 14th Amendment to the United States Constitution was adopted on July 9, 1868, as one of the Reconstruction Amendments following the Civil War. Its adoption was a significant victory for African American civil rights. The amendment granted citizenship to all persons born or naturalized in the United States, including former slaves, and guaranteed all citizens equal protection of the laws. The amendment's first section, known as the Equal Protection Clause, prohibits states from denying any person within its jurisdiction the equal protection of the laws. It also includes the Due Process Clause, which prohibits state and local governments from depriving persons of life, liberty, or property without due process of law. [114]

The 14th Amendment's due process clause was ambiguous about whether it applied to all the guarantees in the Bill of Rights or only to those related to a fair trial. The Supreme Court avoided ruling on this matter in the first case interpreting the 14th Amendment in 1873. The Supreme Court did not apply the Bill of Rights to the states until 1925 in the Gitlow case. Following this decision, the Supreme Court gradually applied most of the guarantees of the Bill of Rights to the states, creating what amounted to a "second bill of rights" that limited the actions of state governments.[115]

In 1873, The Comstock Law was adopted, also known as the Federal Anti-Obscenity Act. it was a federal law passed by the United States Congress and signed into law by President Ulysses S. Grant. The law was named after its chief advocate, Anthony Comstock, who was a moral crusader against what he considered obscenity, particularly in literature and the arts.[116]

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[113] Carroll, T. F. (1923). Freedom of Speech and of the Press during the Civil War. *Virginia Law Review*, 516-551.

[114] The House Joint Resolution Proposing the 14th Amendment to the Constitution, June 16, 1866; Enrolled Acts and Resolutions of Congress, 1789-1999; General Records of the United States Government; Record Group 11; National Archives.

[115] Holmes Jr. in his dissent in the same case, said: "The general principle of free speech . . . must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States."
Frankfurter, F. (1965). Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment. Harvard Law Review, 78(4), 746–783. https://doi.org/10.2307/1338792.

[116] Britannica, T. Editors of Encyclopaedia (2023, December 13). Comstock Act. Encyclopedia Britannica. https://www.britannica.com/event/Comstock-Act. Accessed 08.04.2023.

The Comstock Law made it a federal offense to use the U.S. Postal Service to send any "obscene, lewd, or lascivious" material, including books, pamphlets, and other printed materials that were considered immoral or obscene. It also prohibited the importation, sale, and distribution of obscene materials in the United States, as well as the circulation of any literature or information related to contraception and abortion.[117] The law was criticized by some as a violation of the First Amendment's protection of free speech and the freedom of the press, and it was challenged in the courts. However, the law was upheld by the Supreme Court in 1877 in the case of United States v. Reynolds.[118]

Finally, the 19th century was a period of significant changes in Europe and America, particularly in relation to the concept of freedom of expression. While there were many challenges to this fundamental right, including censorship, government repression, and societal norms, there were also many advocates who fought tirelessly for the right to free expression.

Mill's essays, including *"On Liberty"*, had a significant influence on the development of freedom of expression in America. His ideas regarding the importance of free speech and the pursuit of knowledge were embraced by many American thinkers and politicians, who incorporated them into American law and society.

I will discuss Mill's ideas in the next part of the research, in particular, Mill's argument that freedom of expression is essential for the discovery of truth and the advancement of knowledge helped to shape American attitudes towards free expression. This idea was influential in the drafting of the First Amendment to the US Constitution, which guarantees freedom of speech and of the press.

2.4. The two world wars produced strict censorship systems

The early 20th century saw a significant expansion of freedom of expression in many parts of the world, particularly in Europe and North America. In the United States, the First Amendment to the Constitution, which was ratified in 1791, guaranteed freedom of speech, religion, the press, and assembly. However, the interpretation and implementation of the First Amendment was often controversial, and there were frequent debates and court cases over the scope of protected speech.

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[117] Blanchard, M. A. (1991). The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society--From Anthony Comstock to 2 Live Crew. *Wm. & Mary L. Rev., 33*, 741.

[118] Reynolds v. United States, 98 U.S. 145, 25 L. Ed. 244, 25 L. Ed. 2d 244 (1879).

In Europe, the situation was more varied. Many countries had laws that restricted free speech and the press, particularly if the speech was deemed to be offensive or subversive. However, in the early 20th century, there were also significant movements towards greater freedom of expression. For example, in Finland, A constitutional Act was passed in August 1906, which guaranteed freedom of speech, assembly, and association. However, this legislation remained open to interpretation until the end of Russian rule. In 1919, Finland adopted a new Constitution, including the same Article on freedom of expression, assembly, and association as the Act of 1906. This was followed by the Freedom of the Press Act, which banned censorship, allowed printing without prior permission, and specified the right to disseminate printed matter. It also established a censorship board for the distribution of moving pictures.[119]

During World War I, many countries enacted laws and policies that restricted freedom of expression, often in the name of national security. For example, in the United States: In 1917, the U.S. Congress passed the Espionage Act, which made it a crime to obstruct military recruitment or aid the enemy during wartime. According to the act, it is illegal to collect, publish, or communicate any information related to the armed forces or military operations during a time of war. Violation of regulations set by the President could result in a fine of up to $10,000 or imprisonment for up to ten years. In addition, the Espionage Act granted the Administration control over the press by declaring any publication violating its provisions as non-mailable and punishable by a fine or imprisonment. This included any material advocating treason, insurrection, or forcible resistance to any law of the United States. Violators could be tried and punished in the district where the unlawful material was mailed or delivered.[120] The law was later used to prosecute individuals for criticizing the war effort or advocating for peace, including socialist leader Eugene V. Debs.[121]

During World War I, the British government heavily restricted the freedom of the press. They had already been concerned about press censorship before the war and had laws in place to restrict sensitive information.[122] The government also declared martial law and banned

[119] Nordenstreng, K. (2017). Freedom of Speech in Finland 1766-2016: A Byproduct of Political Struggles. The Legacy of Peter Forsskål: 250 Years of Freedom of Expression.

[120] Carroll, T. F. (1919). Freedom of Speech and of the Press in War Time: The Espionage Act. Michigan Law Review, 17(8), 621–665. https://doi.org/10.2307/1277922.

[121] Debs v. United States, 249 U.S. 211, 39 S. Ct. 252, 63 L. Ed. 566 (1919).

[122] Klobas, M. B. (1996). And The Expansion of The British State, 1914-1921 (master dissertation, Texas A&M University). 54-55.

correspondents from the combat zone, and when reporters were allowed back in, all outgoing copies were censored to ensure military secrets were not divulged. Domestic censorship was mostly informal, but the lack of "hard news" led to wild rumours and exaggerated reports. To address this, the Cabinet established a Press Bureau to provide trustworthy information and screen outgoing and incoming cables and telegrams. While the system was voluntary, there were instances when the press overstepped their bounds, leading the government to use formal methods of censorship under the *Defence of the Realm Act (DORA)*, specifically Regulation 18 which prohibited the gathering and sending of information on Service matters and restricted the publishing of information on patents and other inventions.[123]

DORA gave the British government broad powers to control information and censor the media, including the ability to prohibit the publication of any information that was deemed harmful to the war effort or public order and safety. This led to the closure of many newspapers and publications, and journalists and publishers who violated the regulations could be punished with fines or imprisonment. The act also prohibited public gatherings critical of the government or the war effort and authorized the government to intern individuals without trial. Despite being intended as a temporary measure for the duration of the war, DORA remained in effect until 1921.[124]

The German government, like many other countries, imposed strict censorship on the press and media. The German authorities established a centralized censorship system in August 1914, shortly after the outbreak of the war. The system was run by the Press Office of the German General Staff (Pressestelle des Großen Generalstabs or Presseabteilung des Großen Generalstabs), which had the power to ban any publication that it deemed to be detrimental to the war effort. [125]

[123] Demm, E. (2017). Censorship (Version 2.0), in: 1914-1918-online. International Encyclopedia of the First World War, ed. by Ute Daniel, Peter Gatrell, Oliver Janz, Heather Jones, Jennifer Keene, Alan Kramer, and Bill Nasson, issued by Freie Universität Berlin. DOI: 10.15463/ie1418.10725/2.0. Klobas, M. B. (1996). And The Expansion of The British State, 1914-1921. 55

[124] Hynes, G. (2017). Defence of the realm act (DORA). 1914–1918. Online: International Encyclopedia of the First World War. 11. Apr.2023. "Defence of the Realm Act of 1914". HistoryLearning.com. 11.Apr.2023.

[125] Altenhöner, F. (2014): Press/Journalism (Germany), in: 1914-1918-online. International Encyclopedia of the First World War, ed. by Ute Daniel, Peter Gatrell, Oliver Janz, Heather Jones, Jennifer Keene, Alan Kramer, and Bill Nasson, issued by Freie Universität Berlin. DOI: 10.15463/ie1418.10404.

German newspapers had to follow an increasing number of rules and regulations, and the Higher Censorship Department provided guidance on censorship in an advisory capacity. About 2,000 regulations were issued by the censorship authorities by the end of 1916, and a 134-page reference book was published to outline the most significant regulations. The book not only served as a censorship guide but also reflected Imperial Germany's wartime situation. [126]

After the Bolsheviks seized power in October 1917, they immediately began to suppress political opposition and dissent. In 1918, the Bolsheviks enacted a law called the "Decree on Red Terror," which was aimed at suppressing counter-revolutionary activities. This law authorized the use of summary executions, mass arrests, and deportations of those who were deemed to be enemies of the state. The law was used to suppress political opposition and dissent, and it had a chilling effect on freedom of expression in the new Soviet state.[127]

The Bolsheviks also established the “All-Russian Extraordinary Commission" (ВЧК), also commonly known as *CHEKA*, which was tasked with enforcing these laws and suppressing opposition. The CHEKA became notorious for its use of torture, executions, and other brutal tactics to silence dissent.[128]

I have mentioned some examples of laws that constituted restrictions on freedom of expression and the press during the First World War. However, these restrictions are only a part of the censorship approach that prevailed during the war and spread in most countries of Europe and America.[129]

* * *

The period between World War I and World War II was marked by significant political and social upheaval in Europe. During this time, freedom of expression was a contentious issue, and the laws and attitudes surrounding it varied greatly across different countries. In many European countries, including Germany, Italy, and Spain, the rise of authoritarian regimes led

[126] Ibid.

[127] Llewellyn J., McConnell M., Thompson S. (2019). “The Red Terror”. Alpha History. https://alphahistory.com/russianrevolution/red-terror/. 08.04.2023.

[128] Cheka, the Soviet Secret Police | Origin, Purpose & Facts. (2023, January 8). Retrieved from https://study.com/academy/lesson/cheka-soviet-secret-police-origin-purpose-facts.html. 08.04.2023.

[129] Demm, E. (2017). Censorship (Version 2.0), in: 1914-1918-online. International Encyclopedia of the First World War, ed. by Ute Daniel, Peter Gatrell, Oliver Janz, Heather Jones, Jennifer Keene, Alan Kramer, and Bill Nasson, issued by Freie Universität Berlin. DOI: 10.15463/ie1418.10725/2.0.

to significant restrictions on freedom of expression. These governments often targeted political dissidents, journalists, and artists who were critical of the regime.

Following World War I (Weimar Republic 1918-1933), Germany became a republic with a new constitution that guaranteed freedom of expression.[130] But, Under Nazi rule in Germany, the government controlled all aspects of the media, including newspapers, magazines, radio, and film.[131] The Nazis used propaganda to promote their ideology and demonize minority groups, such as Jews, homosexuals, and Romani people. Any media that did not conform to the Nazi agenda was censored or banned. Journalists, writers, and artists who spoke out against the regime were often arrested, imprisoned, or even killed.[132]

For example, in 1933, the Nazis burned books written by authors deemed "un-German" and censored all literature that did not conform to Nazi ideology.[133] In 1943, the Nazi regime sentenced the German theologian Dietrich Bonhoeffer to death for his resistance activities, which included speaking out against the regime.[134]

In Fascist Italy, the government similarly controlled the media and used it to promote its ideology. Journalists who criticized the government or its policies could be imprisoned, exiled, or even killed. For example, in 1926, the Italian government passed the "Legge Fascistissime," which gave the government extensive powers to censor and control the press.[135] One of the most famous examples of media censorship in Italy was the trial and execution of the anarchist Carlo Tresca. Tresca was a vocal opponent of Mussolini's fascist regime, and he was assassinated in 1943 by Fascist agents in New York City.[136]

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[130] Article 118: "Every German has the right within the limits of the general laws, to express his opinion orally, in writing, in print, pictorially, or in any other way. No circumstance arising out of his work or employment shall hinder him in the exercise of this right, and no one shall discriminate against him if he makes use of such right."

[131] Hess, J. A. (1938). Free Speech and the Nazi Press. *The German Quarterly*, *11*(4), 191-195.

[132] Yourman, J. (1939). Propaganda Techniques Within Nazi Germany. The Journal of Educational Sociology, 13(3), 148–163. https://doi.org/10.2307/2262307.

[133] For example, see: Shameek S. (2014). Right To Free Speech and Censorship: A Jurisprudential Analysis. Journal of the Indian Law Institute , Vol. 56, No. 2, pp. 175-201.

[134] Sherman, F. (2023, April 5). Dietrich Bonhoeffer. Encyclopedia Britannica. https://www.britannica.com/biography/Dietrich-Bonhoeffer.

[135] Skinner, S. (Ed.). (2015). Fascism and criminal law: history, theory, continuity. Bloomsbury Publishing. 19.

[136] Pernicone, N. (1979). Carlo Tresca and the Sacco-Vanzetti Case. *The Journal of American History*, *66*(3), 535-547.

In the Soviet Union, the General Directorate for the Protection of State Secrets in the Press, abbreviated as *GLAVLIT* (Главлит), was the main censorship body in the Soviet Union. It was established in 1922 under the People's Commissariat for Education, and its role was to ensure that publications and other media adhered to the government's ideological line and did not reveal any state secrets.[137]

GLAVLIT had the power to censor any written or printed materials, including books, newspapers, magazines, and other publications.[138] Its censorship practices were extremely strict, with entire paragraphs, pages, or even entire articles often cut from publications deemed unacceptable. GLAVLIT was also responsible for overseeing the licensing and distribution of all printed materials, and it worked closely with the police to investigate and prosecute individuals and organizations suspected of spreading "anti-Soviet" propaganda or engaging in other activities deemed subversive to the state.[139]

At that time, freedom of expression in the UK was evolving, but it was not fully established as an absolute right. The government was still involved in regulating and censoring certain types of expression, and there were limitations to what individuals could say and publish.

During this period, there were several key pieces of legislation that impacted freedom of expression. The Public Order Act of 1936 made it a criminal offense to incite racial or religious hatred,[140] while the Official Secrets Act of 1911 and 1920 restricted what government employees could disclose.[141] Additionally, the Obscene Publications Act of 1857 was still in force, which made it illegal to publish obscene material.[142]

However, there were also important developments that expanded freedom of expression during this time. The 1918 Representation of the People Act gave women the right to vote, and the subsequent growth of feminist movements and publications helped to challenge traditional

[137] Fox, M. S. (1992). Glavlit, Censorship and the Problem of Party Policy in Cultural Affairs, 1922-28. Soviet Studies, 44(6), 1045–1068. http://www.jstor.org/stable/152329.

[138] Vladimirov, L. (1972). Glavlit: How the Soviet censor works. Index on Censorship, 1(3-4), 31-43.

[139] "Glavlit." Encyclopedia of Russian History. Retrieved March 20, 2023 from Encyclopedia.com: https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/glavlit.

[140] Public Order Act, 1936, c. 6, § 5. (UK). Accessed 01.04.2023.

[141] Everett, M., Maer, L., & Bartlett, G. (2015). The Official Secrets Acts and Official Secrecy. House of Commons Library, Briefing Paper Number CBPO7422, 17.

[142] Britannica, T. Editors of Encyclopaedia (2017, April 17). Obscene Publications Act. Encyclopedia Britannica. https://www.britannica.com/event/Obscene-Publications-Act. Accessed 01.04.2023.

gender roles and push for greater rights for women.[143] Radio broadcasting became increasingly popular during this period, with the establishment of the British Broadcasting Corporation *(BBC)* in 1922. The BBC was initially subject to government control, but it eventually gained editorial independence in the 1930s.[144]

Between World War I and World War II, freedom of expression in the United States was a contentious issue. The period saw a significant push and pull between the desire to protect individual rights, including freedom of speech and the press, and concerns about national security and public safety. One of the most significant restrictions on freedom of expression during this period was the *Sedition Act* of 1918.[145] This act made it a crime to say or publish anything critical of the government, the military, or the war effort. As a result, many journalists, activists, and even ordinary citizens were arrested and prosecuted for expressing their opinions, and the Supreme Court upheld the convictions of many of the individuals prosecuted under the Sedition Act.[146]

In 1925, the Supreme Court struck down a state law that prohibited the teaching of evolution in schools in the famous case of Scopes v. State of Tennessee.[147] This was seen as a victory for freedom of speech and academic freedom, as it allowed educators to teach scientific theories without fear of censorship.

During the Great Depression, there were concerns about Communist and Socialist movements in the United States, and there were efforts to restrict their ability to organize and express their

[143] The Representation of the People Act of 1918 granted the vote to women over the age of 30 who met a property qualification. A woman may vote also for a university member if she is a graduate of a university that confers degrees on women, or if she has qualified for a degree in a university that does not admit women to degrees. See: Frederic A. Ogg (1918). Ogg, F. A. (1918). The British representation of the people act. *The American Political Science Review*, *12*(3), 498-503.

[144] Britannica, T. Editors of Encyclopaedia (2023, April 12). British Broadcasting Corporation. Encyclopedia Britannica. https://www.britannica.com/topic/British-Broadcasting-Corporation. Accessed 12.04.2023.

[145] Rudanko, J. (2012). Discourses of Freedom of Speech: From the Enactment of the Bill of Rights to the Sedition Act of 1918. Palgrave Macmillan. 161-179.

[146] See more: Boyd Christina L. (2009). Sedition Act of 1918. The First Amendment Encyclopedia. https://www.mtsu.edu/first-amendment/article/1239/sedition-act-of-1918#. 12.04.2023.

[147] For example, see: Foster James C. (2009). Scopes Monkey Trial. The First Amendment Encyclopedia. https://www.mtsu.edu/first-amendment/article/1100/scopes-monkey-trial#. 12.04.2023.

views. In 1940, the *Smith Act* was passed, which made it a crime to advocate for the violent overthrow of the government.[148]

During World War II, the legal and political status of freedom of expression and censorship was broadly similar to that of Europe and the United States during and after World War I. Freedom of expression and the press was often restricted by government restrictions in the name of national security and the war effort.

2.5. The Right to freedom of expression after the adoption of the UDHR

Following World War II, the Cold War era brought about increased limitations on freedom of expression, particularly in countries like the United States of America, which aimed to suppress communist ideals.[149] Nevertheless, a new chapter in the history of human rights unfolded as the UDHR was adopted in 1948, exerting a significant influence on the advancement and safeguarding of the right to freedom of expression in the ensuing decades. Among its fundamental rights, the UDHR recognized the right to freedom of expression, as stated in Article 19:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

The UDHR initiated the establishment of the legal framework to protect freedom of expression and regulate its practice at the international level. Additionally, the UDHR served as a foundation for other international and regional human rights instruments[150], such as the International Covenant on Civil and Political Rights, the ECHR, and the African Charter on Human and Peoples' Rights[151], which have elaborated further on the right to freedom of expression and ensured its universal application and protection. Freedom of speech, which is included in the UDHR, is now considered to be a norm of customary international law.[152]

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[148] Britannica, T. Editors of Encyclopaedia (2019). Smith Act. Encyclopedia Britannica. https://www.britannica.com/event/Smith-Act. 12.04.2019.

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[150] Howie, Emily (2017). Protecting The Human Right to Freedom of Expression in International Law. *International Journal of Speech-Language Pathology*, 1–4. doi:10.1080/17549507.2018.1392612.

[151] African Union. (1981). African Charter on Human and Peoples' Rights. African Union.

[152] Howie, Emily (2017). Protecting The Human Right to Freedom of Expression in International Law.

The universal and legal nature of the right to freedom of expression, as enshrined in the UDHR, has contributed significantly to its broad acceptance and promotion by international bodies, including the United Nations and regional organizations such as the European Union and the African Union. The declaration acknowledges that every individual has the right to express their views, and that states have an obligation to respect and safeguard this right. Governments must abstain from impeding individuals' freedom of expression or restricting access to information and the media.

With the adoption of the International Covenant on Civil and Political Rights (ICCPR) in 1966, the right to freedom of expression gained strong support. Article 19 of the ICCPR recognizes and protects the right to freedom of expression, which is a fundamental human right essential for the exercise of other human rights, democratic governance, and the promotion of human dignity and autonomy. This right includes both the right to express oneself and the right to seek, receive, and impart information and ideas through any medium, regardless of frontiers.

"Everyone shall have the right to hold opinions without interference.

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice." [153]

Between 1947 and 1966, there was a comprehensive review of the language in the Covenant that pertains to freedom of expression. Various proposals were put forward during this time, with some advocating for the promotion of the right, while others aimed to limit its scope. Negotiations were particularly contentious regarding the extent to which the right could be restricted, with differing opinions on whether to have a detailed listing of permissible restrictions or a more generalized statement.[154]

It should be noted that several countries have expressed reservations related to the right to freedom of expression, and the reason for this is the text of Article 20 of the same declaration, which states:

[153] ICCPR 1966, Art.19.

[154] O'Flaherty, M. (2012). Freedom of expression: article 19 of the international covenant on civil and political rights and the human rights committee's general comment no 34. *Human Rights Law Review*, 12(4), 627-654.

"Any propaganda for war shall be prohibited by law. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." [155]

As for Belgium, its reservation was that "Articles 19, 21 and 22 shall be applied by the Belgian Government in the context of the provisions and restrictions set forth or authorized in articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, by the said Convention. The Belgian Government declared that it does not consider itself obligated to enact legislation in the field covered by Article 20, paragraph 1, and that Article 20 as a whole shall be applied taking into account the rights to freedom of thought and religion, freedom of opinion and freedom of assembly and association proclaimed in articles 18, 19 and 20 of theUDHRand reaffirmed in articles 18, 19, 21 and 22 of the Covenant."[156] As For the USA, the reservation was that Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.[157] In 2011, General Comment No. 34 included text regarding the relationship with Article 20 because of the close connection between the two provisions and how Article 20 could potentially limit the rights outlined in Article 19.[158]

In the face of the complexities resulting from technical and technological development, which have led to rapid growth in the communications and visual media sectors, in addition to the recent emergence and growing role of the Internet and artificial intelligence, it was necessary to find mechanisms to ensure the continued effectiveness of international texts that protect the right to freedom of expression, specifically Article 19 of the International Covenant on Civil and Political Rights. This task is primarily the responsibility of the Human Rights Committee (HCR), which has adopted several mechanisms to confront the aforementioned challenges. Among these mechanisms are periodic reports that discuss important and sensitive issues within the framework of protecting and regulating the right to freedom of expression. Special

[155] ICCPR 1966, Art.20

[156] See: United Nations Treaty Collections. Human Rights, Part 4. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.

[157] Ibid.

[158] Human Rights Committee. (2011). General comment No. 34, Article 19: Freedoms of opinion and expression, UN Doc (pp. 33-6). CCPR/C/GC/34.

rapporteurs are often appointed to this task, which seems to yield results, at least in explaining and clarifying some problematic or emerging issues.[159]

For example, in the report issued by Special Rapporteur Irene Khan in August 2002[160], reference was made to the complementarity between international human rights law and international humanitarian law in protecting the right to freedom of expression during armed conflicts.

"The application of international human rights law alongside international humanitarian law is vital for the effective protection of the right to freedom of opinion and expression during conflicts. International humanitarian law is triggered only at the onset of armed conflict and is concerned primarily with the conduct of military operations and the protection of certain classes of persons in international and non-international conflicts. As such, it covers freedom of expression and access to information issues "only tenuously and non-systematically". Human rights principles and standards can provide clarity and protection where international humanitarian law is silent, absent or unclear. The mutually reinforcing nature of the two legal regimes offers important possibilities for upholding freedom of opinion and expression in the face of emerging and complex challenges in the digital age."[161]

The report prepared by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, discussed the impact of artificial intelligence on the right to freedom of expression. The report highlighted challenges in content moderation, particularly with automated processes. It mentioned that algorithms lack the ability to understand cultural context and critically analyse content, leading to a higher likelihood of

[159] After replacing the Commission on Human Rights, the Human Rights Council decided to extend the mandate for another three years in March 2008 (resolution 7/36). The mandate was renewed again for an additional three years in March 2011 (HRC resolution 16/4), March 2014 (resolution 25/2), March 2017(resolution 34/18) and again in March 2020 (resolution 43/4). See: https://www.ohchr.org/en/special-procedures/sr-freedom-of-opinion-and-expression. Accessed 18.08.2023.

[160] Khan, I. (2022). A/77/288: Disinformation and freedom of opinion and expression during armed conflicts - Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. United Nations, General Assembly.

[161] Khan, I. (2022). Disinformation and freedom of opinion and expression. United Nations, General Assembly.

inappropriate content blocking and restriction, thus undermining users' rights to be heard and access information.[162]

The report also stated that AI systems' governance of information dissemination raises concerns about media diversity and independent voices, as opaque algorithmic processes can conflict with an enabling environment. Moreover, the lack of transparency in AI-driven platforms prevents users from understanding how information is disseminated, restricted, or targeted. While some efforts, like identifying sponsored content or political ads, help slightly, they do not address the larger issue of algorithmic influence. The report concluded that there is currently no effective way to scrutinise or make transparent the technical workings of AI systems, often leaving individuals unable to understand why or how their expression rights are affected. [163]

In another report, prepared by Special Rapporteur Irene Khan in 2021. The report pointed out the seriousness of the challenge represented by Disinformation in light of the progress of digital technology and the Internet. It stated that "digital technology has enabled pathways for false or manipulated information to be created, disseminated and amplified by various actors for political, ideological or commercial motives at a scale, speed and reach never known before. Interacting with political, social and economic grievances In the real world, disinformation online can have serious consequences for democracy and human rights, as recent elections, the response to the coronavirus disease (COVID-19) pandemic and attacks on minority groups have shown. It is politically polarizing, hindering people meaningfully exercising their human rights and destroying their trust in governments and institutions."[164]

In addition to the periodic reports referred to, the UN Human Rights Committee has adopted public comments as one of the important mechanisms to express its views on issues related to the provisions of the treaty they oversee. The Committee considers general comments to be an authoritative legal analysis of treaty provisions, based on its experience in applying them. States, organizations, and individuals can provide feedback on draft general comments. These

[162] Kaye, D. (2018). Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (A/73/348). United Nations General Assembly.

[163] Ibid.

[164] Khan, I. (2021). Disinformation and Freedom of Opinion and Expression: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (A/HRC/47/25). United Nations General Assembly.

comments are highly detailed and incorporate all relevant jurisprudence and contemporary human rights issues. [165]

In July 2011, The Human Rights Committee adopted General Comment No. 34 on Article 19, which underwent multiple review sessions and feedback from interested parties before being adopted. This General Comment was one of the lengthiest the Committee had ever considered and covered various topics related to freedom of expression, including journalistic expression, access to information, and political expression. To develop the content, the rapporteur drew from four sources, including existing general comments, the jurisprudence of the Committee, and guidance from Concluding Observations.

The General Comment aimed to provide a legal interpretation of Article 19, and its language made it clear which elements were considered legally binding obligations.[166]

The obligation to respect freedoms of opinion and expression is binding on every State party as a whole. All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party. Such responsibility may also be incurred by a state party under some circumstances in respect of acts of semi-State entities. The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.[167]

In addition to the tools mentioned, the Human Rights Committee has adopted individual complaints as a tool to protect and promote the rights guaranteed by the International Covenant on Civil and Political Rights and to evaluate potential violations of those rights by member states. The committee considered many complaints against European countries, including countries in the European Union. For example, In the case of Kivenmaa v. Finland, Anneli Kivenmaa, a Finnish citizen, protested against Indonesia's human rights record outside the Presidential Palace in Helsinki during an official state visit by the President of Indonesia in 1989. She was fined by Finnish authorities for organizing the demonstration without prior

[165] O'Flaherty, M. (2012). Freedom of expression: article 19 of the international covenant on civil and political rights and the human rights committee's general comment no 34.

[166] Human Rights Committee. (2011). General comment No. 34, Article 19: Freedoms of opinion and expression, UN Doc (pp. 33-6). CCPR/C/GC/34.

[167] Ibid, Art. 7.

permission, as required by Finnish law. Ms. Kivenmaa claimed that this requirement violated her rights to freedom of expression and assembly under the International Covenant on Civil and Political Rights (ICCPR). The United Nations Human Rights Committee (UNHRC) reviewed her case and found that Finland's requirement for prior permission constituted a disproportionate restriction on her rights. The Committee concluded that while states can regulate public demonstrations, such regulations must be reasonable and necessary for public order and should not undermine the essence of the rights themselves. As a result, Finland was asked to review and adjust its legislation to ensure compliance with the ICCPR, affirming the importance of protecting individual freedoms in democratic societies.[168]

In Eglė Kusaite v. Lithuania, Eglė Kusaitė, then a teenager, was charged with terrorism and detained. During a 2012 hearing recess, Kusaitė insulted the prosecutors, calling them criminals. The Vilnius Regional Court then fined her 1,300 Litas (about 380 euros) for the insult. Kusaitė argued that this punishment disproportionately restricted her freedom of expression and lacked proper justification from the national courts.

Kusaitė appealed to the UN Human Rights Committee, represented by the Human Rights Monitoring Institute. The Committee concluded that her conviction for insulting the prosecutors restricted her freedom of expression. They assessed whether this restriction was lawfully justified and determined it was not, as it did not meet the necessary criteria to protect the rights or reputations of others, public security, public order, public health, or public decency. The Committee emphasized the importance of freedom of expression for personal development and societal function, noting that the courts did not sufficiently consider the context of Kusaitė's comments made during her criminal trial. They deemed the restriction disproportionate and unjustified, recommending that states consider decriminalizing defamation and using criminal law only in the most serious cases. [169]

3. Theoretical Justifications of The Right to Freedom of Expression

Why is it necessary to provide a justification for protecting a fundamental right like freedom of expression? The importance of this question may not be the same today as it was in previous centuries, given that international and regional human rights conventions and charters have already affirmed the need for protecting freedom of expression. However, the existence of legal

[168] UNHRC. Kivenmaa v. Finland, Communication No. 412/1990, U.N. Doc. CCPR/C/50/D/412/1990 (1994).

[169] UNHRC. Kusaitė v Lithuania.UN Doc CCPR/C/126/D/2716/2016.

texts does not diminish the significance of the justifications that led to the recognition of the need to safeguard freedom of expression. These justifications may be even more important in contemporary times when governments in many countries are increasingly intervening to restrict free speech, coinciding with significant developments in communication, media, and press tools.

Throughout history, different political and social conditions, legal traditions, and philosophical beliefs have produced various theories that justify the necessity of protecting the right to freedom of expression. These theories have led to debates about the factors and criteria used by the founders and proponents of such theories to justify free expression. The theoretical justifications for freedom of expression can differ depending on one's view of the role and nature of free speech. For example, the belief that the value of freedom of expression lies in the right itself may lead to different conclusions than the view that freedom of expression is a means to enable other rights or to exercise a specific right. [170] It is important to note that the diversity of arguments justifying freedom of expression may lead to different interpretations of the types of speech that should be protected.[171] In addition, it is often difficult to draw a line between legal and philosophical arguments in the context of research on the value of the right to freedom of expression.[172]

3.1. Truth argument

Among the arguments which were presented to justify the protection of the right to freedom of expression, open discussion that leads to the discovery of the truth is one of the strongest and most popular. [173] This argument is based on the importance of the role of expression and the exchange of views in discovering the truth. Therefore, it is necessary to consider all opinions, including those that are erroneous or may appear to be so.

Many legal and political theorists have adopted the theory of truth to present their ideas and theories in defence of the right to freedom of expression. Therefore, several versions of this argument can be observed. Truth may be viewed as an independent value or commodity, or it may be evaluated on utilitarian grounds related to individual and societal interests. [174] This

[170] Golash, D. (Ed.). (2010). *Freedom of expression in a diverse world* (Vol. 3). Springer Science & Business Media.

[171] Sadurski, W. (1999). *Freedom of speech and its limits* (Vol. 38). Springer Science & Business Media. 8.

[172] Barendt, E. M. (2005). Freedom of speech. Oxford: Oxford University Press.2.

[173] Ibid, 7.

[174] Barendt, E. M. (2005). Freedom of speech. 7.

argument was closely associated with *John Stuart Mill*, who based most of his classical liberal defence [175] of the right to freedom of expression on the theory of truth. [176]

John Milton has already pointed out in his book "Areopagitica" that freedom of expression leads to truth, and Mill seems to have been influenced by this idea. Milton wrote:

"And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?". [177]

In his book "On Liberty", Mill presented one of the strongest defences of liberty within an integrated theory that combines individual and social values. Mill based his defence on the individual's supremacy over himself, his body, and his mind, and thus his right to determine the form and style of his life according to what he believes. [178]It is logical (according to this strong conception of individual freedom) that interference in individual freedom by the state or society is not acceptable, therefore Mill adopted a single exception to interference with individual freedom, which he called the harm principle. Liberty (as well as other rights) when it involves harm to others, deprives it of its immunity against interference.[179] However, the scope within which the state or society can intervene is limited. Only when the expression of individual liberty may cause "harm to others" can restrictions through legal means or social coercion be legitimate. [180]

Mill presented his thoughts on the importance of protection of freedom of expression as necessary to discover the truth and eliminate error, and he argued that freedom of expression must be defended because it creates an environment in which people can discover the truth by

[175] Schauer, F. (2011). On the Relationship between Chapters One and Two of John Stuart Mill's on Liberty. Capital University Law Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=1809757.

[176] Mill J.S., Philp, M., & Rosen, F. (2015). On Liberty, Utilitarianism, and Other Essays, Oxford University Press. ISBN: 0199670803,9780199670802.

[177] Stone, A., & Schauer, F. (Eds.). (2021). *The Oxford Handbook of Freedom of Speech*. Oxford University Press. 46.

[178] Gray, J., & Smith, G. W. (Eds.). (2012). *JS Mill's on Liberty in Focus*. Routledge. 37.

[179] Ibid, 33.

[180] Ibid, 2.

allowing all ideas, including unpopular ones, to compete for acceptance. [181] In Mill's utilitarian framework, the discovery of truth is an important societal goal. [182]

Mill's theory of freedom of expression concentrated on the idea that societal progress is linked to individual development, in which independent-minded individuals advance their search for truth by following their ideas, even if it leads to conclusions that are uncomfortable for others. [183] Hence Mill defends even false opinions because they may contain some truth since it seems difficult if not impossible to suppress a false opinion without suppressing what is true. So, for the sake of truth, both are worth protecting. Accordingly, it is illegal to suppress an opinion simply because it is believed to be wrong, and therefore all opinions, including unpopular ones, are considered to clarify the truth.[184]

In *Abrams v. United States*, in the context of his dissent, *Justice Holmes* emphasized the idea that the expression of deviant opinions and ideas, no matter how contested they may be, deserves protection because of the role of such discourse in the pursuit of truth.[185]

The notion *"marketplace of ideas"* is attributed to Judge Holmes, which gained great popularity in America within the framework of the jurisprudence of the First Amendment and is considered one of the versions of the argument for the search for truth as a justification for freedom of expression.

"When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." [186]

Justice Holmes believed that the freedom of speech is of great importance to a society that values epistemic humility and adaptability as it allows for a continuous process of competing

[181] Ibid, chapter 2.

[182] Emerson, T. I. (1962). Toward a general theory of the First Amendment. *Yale Lj*, *72*, 877.

[183] Cate, I. M. T. (2010). Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendel Holmes's Free Speech Defenses. *Yale JL & Human.*, *22*, 35. 39.

[184] Emerson, T. I. (1962). Toward a general theory of the First Amendment.

[185] Cate, I. M. T. (2010). Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendel Holmes's Free Speech Defenses. 36.

[186] Abrams v. United States, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

ideas and discarding fallacious and obsolete beliefs. His interest in Darwinian theory influenced his belief in the importance of the marketplace-of-ideas metaphor, which emphasizes the role of time and adaptation in shaping ideas. According to Holmes, freedom of speech is a force for collective adaptation, capable of generating new ways of thinking and altering priorities of inquiry over time.[187]

Although the logic of Judge Holmes in emphasizing the importance of the role of freedom of expression in discovering the truth may be almost identical to what Mill presented, it seems that both arguments were built on different foundations. Mill places a high value on the contributions that dissenting individuals can make to society and wants to put protections in place to avoid dictatorial majorities from suppressing such individuals. While Holmes is particularly concerned with the process by which it gives minority viewpoints a fighting opportunity to gain critical mass and become a dominant force. [188]

From a similar standpoint, Thomas Emerson stresses the importance of freedom of expression, as it is "not only an individual but a social good." [189]Emerson argues for the role of freedom of expression in the acquisition of knowledge and the discovery of truth. He assumes that a rational and sound judgment is reached by considering all the facts and arguments that can be put forward for or against any proposition. Hence, the individual who seeks knowledge and truth must listen to all aspects of the question. [190]The best way to discover the correctness of judgment, according to Emerson, is through opposing opinions. Thus, suppressing dissenting debates and opinions would prevent one from reaching the most rational judgment and prevent the creation of new ideas. This is the idea of "open discussion" that Emerson talked about and asserted that it is the best way to reach a general or social judgment, given that social judgment consists of individual judgments. In addition, the same reasons why open discussion is essential to intelligent individual judgment make it essential to rational social judgments. [191] Emerson

[187] Blasi, V. (2021), 'The Classic Arguments for Free Speech 1644–1927', in Adrienne Stone, and Frederick Schauer (eds), The Oxford Handbook of Freedom of Speech, Oxford Handbooks (2021; online edn, Oxford Academic, 10 Feb. 2021), https://doi.org/10.1093/oxfordhb/9780198827580.013.2, accessed 11 Apr. 2023.

[188] Cate, I. M. T. (2010). Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendel Holmes's Free Speech Defenses. 40.

[189] Emerson,T. (1963), 'Toward a General Theory of the First, 881.

[190] Ibid.

[191] Ibid, 882.

concludes, consistent with Mill's assertion, that false opinions cannot be suppressed without suppressing true ones.

In practice, it seems that the argument for seeking the truth as a justification for freedom of expression has gained special importance in the United States of America more than in other countries and regions. The impact of truth theory as a justification for freedom of expression in America was not limited to the writings and opinions of thinkers, as its implications reached the Supreme Court. In contrast, it seems that this argument did not receive the same attention in the context of interpreting the text of Article 10 of the ECHR and the rest of the related articles. It also seems that the interpretations related to the ECHR have been based in support of freedom of expression on other arguments, foremost among which is democracy and human dignity. The US Supreme Court has relied on the logic of truth to extend freedom of expression to corporate discourse, ruling that speech protection does not depend on the rights of the speaker but on the notion that ideas entering the marketplace will facilitate the search for truth regardless of its source. [192] The court in *Citizens United v FEC* struck down restrictions on corporate campaign expenditures, even though it did not state that corporations are entities with free speech rights. [193]

Despite being one of the strongest and most persuasive arguments for protecting freedom of expression, the truth argument has been criticized on many grounds. There are those who hold that this argument, especially in Mill, assumes that the free expression of opinions leads automatically to the discovery of the truth. Also, this argument presupposes the existence of rational and wise individuals and societies, and as a result, the truth will triumph in its struggle with lies. This assumption contradicts the historical course of human societies that are affected by distortion. It is also incompatible with the nature of the human being who may be inclined to error and influenced by false opinions. [194]

One of the most important criticisms leveled at this theory is the narrow considerations that underpin the necessity of imposing restrictions on freedom of expression, the principle of "harm". especially the harm resulting from a person's embrace of false opinions and beliefs. This perception of the harm principle is inconsistent with the fact that there are many forms of

[192] Stone, A., & Schauer, F. (Eds.). (2021). *The Oxford Handbook of Freedom of Speech*. Oxford University Press. 49.

[193] Citizens United v. FEC558 ، US 310 (2010)

[194] Barendt, E. M. (2005). Freedom of speech. 9.

abusive speech that may not be harmful to the speaker but have serious consequences for society or individuals.[195]

I think that the theory of truth as a justification for freedom of expression, later, has formed a solid basis for adopting strict rules towards the authoritarian tendency to impose restrictions on freedom of speech, and no one can deny this. But at the same time, I partially support the first criticism on the grounds that freedom of expression is not the only way to discover the truth and that such an assumption would lead to the classification of many forms of human cognitive activities under the category of freedom of expression.

As for the criticism directed at the principle of harm, the reality today indicates that courts of different sects adopt a method that takes into account the harm resulting from expression that affects individuals and even institutions, whether the harm is material or moral. Thus, the principle of harm that Mill spoke of, whatever its intended meaning, has established one of the bases of an assessment process that courts carry out today called the "proportionality test".

3.2. Democracy and Freedom of Expression

The relationship between democracy and freedom of expression formed the basis for another argument has received no less attention than the previous one. This theory requires that citizens be free to exercise their freedom of expression including receiving all information that may influence their choices in the collective decision-making process and, in particular, in the voting process. There is no democracy in the absence of freedom of expression, which is a condition and standard for a democratic system. At the same time, freedom of expression gets valued and can only be effective in a democratic state. [196]

What distinguishes the theory of democracy as a justification for freedom of expression is the diversity of versions presented by a group of thinkers, legal theorists and politicians based on different considerations. Some arguments were put forward based on the nature of the relationship between democracy and the right to freedom of expression, while others focused on the function of freedom of expression in the service of democracy.[197]

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[195] Vernon, R. John Stuart Mill and Pornography: Beyond the Harm Principle'(1996). *Ethics*, *106*, 534.

[196] Sadurski, W. (1999). *Freedom of speech and its limits* (Vol. 38). Springer Science & Business Media. 20-21.

[197] Ashutosh. B, and Weinstein. J (2021), 'Freedom of Expression and Democracy', in Adrienne Stone, and Frederick Schauer (eds), The Oxford Handbook of Freedom of Speech, Oxford Handbooks (2021; online edn, Oxford Academic, 10 Feb. 2021), https://doi.org/10.1093/oxfordhb/9780198827580.013.5, accessed 15.10.2022.

Before democratic forms of government took hold, supporters of popular government had long advanced democratic justifications for freedom of expression. In 1670 Baruch Spinoza explained the importance of the role of freedom of expression in a democratic state, and there are also those who defend the right of the public to criticize officials, referring to the strong relationship between the right to freedom of expression and democracy. [198] But it seems, in one way or another, that a strong connection has developed between this argument and the name of *Alexander Meiklejohn* in the modern formulation of this theory.[199]

There are two important points in this argument. The first point is the relationship between freedom of expression and democracy. Where freedom of expression, especially political expression, is a necessary component of popular sovereignty. Voting is one of the most important manifestations of political expression. [200]Alexander Meiklejohn emphasized the importance of freedom of expression in democratic decision-making and emphasized the importance of freedom of expression in enabling citizens to access information necessary to make wise decisions and to participate in political processes such as voting. [201]In other words, Meiklejohn focused more on the audience than the speakers. [202]It follows from Meiklejohn's view that citizens have the right to receive information as an element of the right to freedom of expression. This concept of democracy as a justification for freedom of expression focuses on the right of the public, who are ultimately the political decision-makers, to democracy. [203]

Robert Post disagreed with Meiklejohn's view that he focuses more on the audience than on the speakers and defines democracy as collective decision-making rather than self-governance, which Post saw as a misinterpretation of democratic self-governance. According to Post, democracy is more than just a means of decision-making, and elections are just mechanisms. [204] To Post, democracy is about self-rule rather than collective decision making. Elections and other democratic processes of collective decision-making are merely mechanisms that exist to facilitate and maximize the authorship and relationship that exists between citizens and

[198] Ashutosh. B, and Weinstein. J (2021), 'Freedom of Expression and Democracy', in Adrienne Stone, and Frederick Schauer (eds), The Oxford Handbook of Freedom of Speech.

[199] Sadurski, W. (1999). *Freedom of speech and its limits* (Vol. 38). Springer Science & Business Media. 20.

[200] Ashutosh. B, and Weinstein. J (2021), 'Freedom of Expression and Democracy', in Adrienne Stone, and Frederick Schauer (eds), The Oxford Handbook of Freedom of Speech.

[201] Barendt, E. M. (2005). Freedom of speech, 18.

[202] Meiklejohn, A. (1948) Free Speech and Its Relation to Self-Government, New York: Harper Bros. 25.

[203] Ibid, 25.

[204] Post, R. (2011). Participatory democracy and free speech. *Virginia Law Review*, 477-489.

government.[205] The relationship between citizen and government is carried out through participation in democratic processes through which citizens elect representatives who, in turn, make the law on their behalf. Freedom of expression gives the citizen the opportunity to participate in and influence public discourse. The law is the product of this public discourse emerging in an environment where freedom of expression is highly protected.[206] The importance of this justification lies in the fact that it is based on the functions that freedom of expression plays in democracy, and not only on the nature of the relationship between freedom of expression and democracy. [207]

The second point relates to the democratic functions of freedom of expression, which may seem manifold. But often the focus is on two major functions. The first function is informing, which aims to inform the public, especially voters, of facts and information that may interest them and facilitate their decision-making or voting. [208] The informing function of freedom of expression can take different forms. One of these forms is the expression that informs voters and contributes to voting on a specific decision, hence Meiklejohn's emphasis on the importance of this function in the voters' management of their problems. The other form of informing expression is that which would assist the speakers in participating in the public discourse. [209]Expression may play a role in informing representatives of the opinions of voters. [210]

This function appears in the article 10 of ECHR, which stated:

"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". [211]

The *Australian Supreme Court* has also stressed the importance of the function of freedom of expression to ensure that information relevant to government performance reaches citizens. [212]

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[205] Ibid.

[206] Ibid.

[207] Ibid.

[208] Meiklejohn, A.(1948) Free Speech and Its Relation to Self-Government. 25.

[209] Post, R. (2011), *Participatory Democracy and Free Speech*. Virginia Law Review, , Vol. 97, No. 3, 482.

[210] Bhagwat, Ashutosh, and James Weinstein (2021), 'Freedom of Expression and Democracy', in Adrienne Stone, and Frederick Schauer (eds) 90-91.

[211] European Convention on Human Rights. Art 10.

[212] Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 560.

The second democratic function of freedom of expression is to strengthen political legitimacy. This job focuses on the role of freedom of expression in involving the citizen in the decision-making process in a manner that preserves his dignity and ensures mutual respect between the citizen and the law. This would enhance the feeling of the necessity of obeying laws, including those with which the citizen may disagree, given that his opinion of them has been taken into consideration. [213] Democracy, Post believes, refers to the value of authorship as well as to a certain relationship between people and their government. Thus, democracy is achieved when those who are subject to law believe that they are potential authors of the law. The value of democratic legitimacy occurs precisely through communication processes in the public sphere. [214]

One of the most distinctive features of the theory of democracy as a justification for freedom of expression is its ease of understanding and acceptance. This will not constitute a disturbance for the courts concerned with legal interpretation, as well as for the judges who may find it a logical basis for their rulings in many cases raised by freedom of expression. [215]

3.3. Autonomy

The two previous arguments (truth and democracy) are often seen on the basis that freedom of expression serves societal interests, in contrast to the argument of individual independence, in which the value of freedom of expression is understood as serving individual interests. [216]

Autonomy acquires special importance when approached in the context of liberal theory that focuses on the importance of self-expression and self-fulfillment for individuals through their autonomous action. There are various liberal principles, as some believe, constitute other forms of this argument. Among these principles are: "the equal moral agency of individuals, the neutrality of the state towards particular conceptions of the good, and the priority of the right over the good." [217]

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[213] Adrienne Ston, Frederick Schauer (2021), The Oxford Handbook of Freedom of Speech. 92-93.

[214] Robert Post, *Participatory Democracy and Free Speech*. Virginia Law Review, May 2011, Vol. 97, No. 3 (May 2011), 482.

[215] Barendt, E. M. (2005) Freedom of Speech, 18.

[216] Mackenzie, C., & Meyerson, D. (2021). Autonomy and free speech, in Adrienne Stone, and Frederick Schauer (eds), The Oxford Handbook of Freedom of Speech, Oxford Handbooks ; online edn, Oxford Academic. https://doi.org/10.1093/oxfordhb/9780198827580.013.33. Accessed 18.10.2023.

[217] Sadurski, W. (1999). *Freedom of speech and its limits* (Vol. 38). Springer Science & Business Media. 17.

This argument assumes that freedom of expression is crucial for self-reflection and decision-making, as it provides individuals with information and the means to review their beliefs and desires. Many decisions are expressive and require freedom of expression to be put into effect, including decisions that affirm one's values and forms of life. Therefore, freedom of expression is important not just for public discourse, but also for self-talk and personal development. Free speech is essential for individual autonomy and self-expression. Autonomy requires freedom of speech because a person cannot think freely if they cannot speak or hear others' thoughts. [218] Consistent with the aforementioned, restrictions imposed on freedom of expression would deprive people of valuable information about the decisions they make or could take, as well as affect the means to review their beliefs and desires. Since many actions are performed through various forms of oral, written or symbolic communication, the exercise of personal autonomy is thwarted if freedom of expression is restricted.[219]

The autonomy argument has origins in Mill's ideas in his book on freedom and is also found in First Amendment jurisprudence. Mill gives great importance to autonomy that contributes to making decisions, regardless of government interference. These ideas, later, formed the basis of *Thomas Scanlon's* defense of free speech. [220] Scanlon defends freedom of expression on the grounds that it is a necessary condition for human agents in deciding what to believe and in balancing competing reasons for action. In addition, it contributes to the formation of the conclusions and beliefs of individuals. [221]

Scanlon argues that an individual should be able to hear all opinions, even if they are likely to reinforce beliefs that are unwanted or harmful to others or lead to harmful actions. The opportunity for individuals to evaluate conflicting arguments contributes to achieving autonomy. For an individual to see himself as autonomous, he must see himself as the sovereign in assessing the causes of action, using his own criteria of rationality. [222]

Edwin Baker believed that the legitimacy of a legal system depends on how respectful it is for the autonomy it should grant to the people it requires obeying its laws. That respect would provide the appropriate basis for granting freedom of expression a constitutional status.

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[218] Lichtenberg, J. (1987). Foundations and Limits of Freedom of the Press. Philosophy & Public Affairs, 16(4), 329–355. http://www.jstor.org/stable/2265278.

[219] Peonidis, F. (1998). Freedom of expression, autonomy, and defamation. *Law & Phil.*, *17*, 1.

[220] Easton, S. (1995). Autonomy and the free speech principle. *Journal of applied philosophy*, *12*(1), 27-39.

[221] Scanlon, T. (1972). A theory of freedom of expression. *Philosophy & Public Affairs*, 204-226.

[222] Ibid

Therefore, the promotion of substantive autonomy, along with questions of collective self-definition, should be a major goal of the state and the legal system. [223]

Baker provided two conceptions of autonomy. The first is what he describes as the formal concept of autonomy, which consists of a person's power or right to make decisions about themselves as long as their actions do not exclude the similar power or rights of others. Formal autonomy does not include any right to exercise authority over others. However, it does include the rights of self-expression, which include the right to seek persuasion or to associate with, expose, or condemn others.[224] The second type is substantive autonomy, which is based on actual capacity and opportunities to lead the best, most meaningful, self-directed life possible.[225]

Baker believes that the state should promote substantive autonomy. However, that should not be at the expense of formal autonomy which, according to Becker, is a coherent concept and warrants almost absolute protection and respect by the state, particularly with regard to self-expressive behavior or expression of value.[226] While Scanlon's view of autonomy focuses on the audience, Baker's goal is to protect the freedom of speakers wishing to express their own values free from government interference. He is therefore interested in the source of speech in the self, rather than in its communicative aspect. [227]

Seana Shiffrin also supports the argument for autonomy as a core value for protecting the right to freedom of expression but differs from Baker on the source of autonomy. Whereas for Baker the source of autonomy rests on the state's respect for individuals, Seana believes that the source is the collection of capacities rational, emotional, perceptual, and sentient-that "correctly constitute the core of what we value about ourselves" and that together constitute "the individual mind and the autonomy of its operation. ' [228]

Autonomy as a justification for freedom of expression is considered one of the most extensive and complex arguments due to the large number and multiplicity of accounts that have been

[223] Baker, C. E. (2010). Autonomy and free speech. *Const. Comment.*, *27*, 251.

[224] Ibid, 254.

[225] Baker, C. E. (2010). Autonomy and free speech. *Const. Comment.*, *27*. 255.

[226] Ibid.

[227] Mackenzie, C., & Meyerson, D. (2021). Autonomy and free speech, in Adrienne Stone, and Frederick Schauer (eds), The Oxford Handbook of Freedom of Speech.

[228] Williams, S. H. (2010). Free speech and autonomy: thinkers, storytellers, and a systemic approach to speech. *Const. Comment.*, *27*, 399.

developed based on different perceptions of the concept of independence. In principle, such a development of the autonomy theory could form a solid basis for justifying the protection of freedom of expression. However, it seems that Susan J. Brison, who referred to different versions of the theory of autonomy and linked it to many philosophers and thinkers, did not agree with all these perceptions of the concept of autonomy as a justification for freedom of expression, especially with no explanation of the reasons why hate speech should be protected.[229]

3.4. Human dignity

After World War II, the concept of human dignity really took hold when it appeared in the Preamble to the Charter of the United Nations and then in different provisions of the UDHR of 1948. [230] After the Declaration, many national constitutions drafted included the term dignity. German Basic Law 1949 explicitly referred to human dignity and treated dignity as an overarching value of the German constitutional order. [231] This served as an important model for constitutions in Eastern Europe and other countries around the world.

Although human dignity as a legal constitutional concept was enshrined in the twentieth century, it should be noted that human dignity as a concept was used in the speeches of some reformist political and social movements during the nineteenth century. Human dignity at that time formed the basis for many claims, such as the abolition of slavery and the improvement of working conditions and workers.[232]

In the legal and philosophical context, some philosophers and thinkers set their own standards in defining different perceptions of the concept of human dignity and adapting them according to their perception of the nature of the role or function that the concept of human dignity serves.

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[229] Mackenzie, C., & Meyerson, D. (2021). Autonomy and free speech, in Adrienne Stone, and Frederick Schauer (eds), The Oxford Handbook of Freedom of Speech. 78. Brison, S. J. (1998). The autonomy defense of free speech. *Ethics*, *108*(2), 312-339.

[230] The Universal Declaration of Human Rights in its Preamble proclaims that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

[231] German Basic Law 1949. Art.1.1: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority”.

[232]McCrudden, C. (2008). Human dignity and judicial interpretation of human rights. *european Journal of international Law*, *19*(4), 655-724.

Proceeding from a legal more than a philosophical conception, *Aharon Barak* distinguishes between several forms of dignity, as he builds his first conception on the basis that dignity is a constitutional value. Based on this perception, the concept of dignity does not necessarily form part of the written constitution, but it can be adopted as a criterion and assumed basis in interpreting other rights. [233]The second perception is based on dignity as a right, just like other human rights, and this is what necessitates that it be included in the constitution. [234] As for the latter, it presents dignity as a framework right, or as Barak called it 'mother-right'. [235] This framework right, according to Barak, could also constitute a principle for other rights, but it follows that dignity cannot grant individuals an objective right. [236]

Neomi Rao also developed his own conception of three concepts of dignity. The first of these concepts is *Inherent Dignity*. According to Rao, in its most fundamental and basic form, dignity refers to each individual's intrinsic worth as a human being. [237]

The second perception is based on the *Substantive Conceptions of Dignity*. Positive notions of dignity, as opposed to inherent dignity, reinforce objective judgments about the good life. Thus, dignity here refers to what is of value to individuals and to society as a whole. Constitutional courts sometimes use this notion of dignity to justify political restrictions and to promote values relating to society or public morality. [238]

The final conception of dignity is *Dignity as Recognition*. This concept requires esteem and respect for the particularity of each individual. Dignity as recognition focuses on ideals of self-realization as well as third-generation "solidarity rights." It creates a political demand for the state and other individuals to accept and approve of one's lifestyle and personal choices. [239]

The multiple and different perception of the concept of dignity makes adopting it as a justification for freedom of expression problematic and not without complexity. The relationship between freedom of expression and human dignity is complex and sometimes conflicting. On one hand, freedom of expression is considered a fundamental human right and

[233] Barak, A (2015). Human Dignity: The Constitutional Value and the Constitutional Right, Cambridge University Press. 67-69.

[234] Barak, A (2015). Human Dignity: The Constitutional Value and the Constitutional Right. 139,143.

[235] Ibid, 156.

[236] Ibid, 164.

[237] Rao, N. (2011). Three concepts of dignity in constitutional law. *Notre Dame L. Rev.*, *86*, 183. 196.

[238] Rao, N. (2011). Three concepts of dignity in constitutional law. 221.

[239] Ibid, 243.

is essential for the protection and promotion of human dignity. It allows individuals to freely express their thoughts, opinions, and beliefs, which is important for their personal development and self-fulfillment. It also enables them to participate in public discourse, hold governments accountable, and challenge prevailing norms and values. On the other hand, there are limits to freedom of expression in order to respect human dignity. Some forms of expression, such as hate speech, can cause harm to individuals and groups and undermine their dignity. In these cases, the right to freedom of expression must be balanced against other rights and interests, such as the right to dignity, privacy, and equality.[240]

Justifying freedom of expression on the basis of dignity focuses on the speaker more than the listener, and that repression represents a form of contempt for citizens that is rejected regardless of its consequences. How this argument is dealt with depends on whether any infringement of liberty harms dignity and any infringement that is too selective impairs equality. The strong link between dignity and freedom of expression often appears in the restrictions imposed on certain types of expression and communication in a way that affects the essence of human dignity, given that the expression of beliefs and feelings is closer to the essence of a person than most of the actions that he performs. Thus, restrictions on expression may offend dignity more than most other restrictions, especially selective restrictions based on content, which may involve particularly large disparities. [241]

Ronald Dworkin argues that the dignity-based justification for free speech rests on the assumption that freedom of expression is valuable because of the consequences it entails as well as being an essential and constitutive feature of a just political society in which the government treats all its members as responsible moral agents. [242]

According to Dworkin, morally responsible people are entitled to make their own decisions about what is good or bad in life or politics, or what is right or wrong in matters of justice or faith. Thus, the government dishonours its citizens when it ignores their views and denies their

[240] There is a belief that the relationship between freedom of expression and human dignity is still ambiguous and difficult to explore, and that the two concepts should not be seen as harmonious, but rather as competing. For more see: Carmi, G. E. (2006). Dignity-The enemy from within: A theoretical and comparative analysis of human dignity as a free speech justification. *U. Pa. J. Const. L.*, *9*, 957. 559.

[241] Greenawalt, K. (1989), *Free Speech Justifications*, Columbia Law Review,Vol. 89, No. 1. 119-155.

[242] Dworkin R. (1996) Freedoms Law: The Moral Reading of the American Constitution, Cambridge: Harvard University Press, 200.

moral responsibility when it decides that they cannot be trusted, because their opinions may be based on dangerous or offensive beliefs.[243]

'We retain our dignity, as individuals, only by insisting that no one—no official and no majority--has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it.'[244]

In this quote, Dworkin emphasizes that individuals must insist on their right to receive and consider all opinions, even those that may be deemed inappropriate or unsuitable by others. He believed that individuals should have the freedom to evaluate and assess different viewpoints for themselves, and that this freedom is essential for preserving their dignity and autonomy as human beings. Dworkin believes that moral responsibility is not only limited to the formation of individual convictions but also has another aspect represented in expressing those individual convictions and communicating them to others.[245]

4. Summary

As a summary, the various arguments and theories surrounding freedom of expression highlight the multifaceted nature of this fundamental right. At the core of many of these theories is the belief that freedom of expression is crucial for the pursuit of truth, democracy, individual autonomy, and human dignity. By protecting this right, individuals and society as a whole can benefit in numerous ways.

The theories of the pursuit of truth and democracy, for example, emphasize the role of freedom of expression in fostering public debate and the exchange of ideas. They argue that allowing individuals to express their views freely and openly promotes better decision-making, encourages innovation, and leads to a greater understanding of social and political issues. Moreover, these theories contend that freedom of expression is a critical tool for holding those in positions of power accountable and ensuring that government and other institutions act in the public interest.

On the other hand, theories of autonomy and human dignity focus on the importance of individual self-expression and personal growth. These theories argue that individuals have a

[243] Ibid.

[244] Ibid.

[245] Dworkin R. (1996) Freedoms Law: The Moral Reading of the American Constitution, Cambridge: Harvard University Press, 200.

fundamental right to express their opinions, beliefs, and identities freely and without fear of government censorship or punishment. By allowing individuals to engage in meaningful dialogue and exchange of ideas, freedom of expression helps to promote personal development and self-discovery. It also allows people to challenge dominant ideas and power structures, leading to a more diverse and inclusive society.

Chapter two

Foundations and Scope of the Right to Freedom of Expression in European Jurisprudence

1. Introduction

Following the ratification of the Universal Declaration of Human Rights, the features of the European approach to human rights began to become clearer. The adoption of the European Convention on Human Rights served as a cornerstone for a strong commitment to safeguard fundamental human rights, especially the right to freedom of expression.

Article 10 of the Convention serves as a legal basis, providing a foundation upon which protection of the right to freedom of expression can be invoked and regulated. Simultaneously, it imposes upon state parties an obligation to align their national legislation with the Convention's principles. Thus, the legal framework for protecting freedom of expression in Europe is based on three interconnected tiers: international human rights law, European legal instruments, and the domestic laws of European countries.

Meanwhile, the European Court of Human Rights assumed a pioneering role in elucidating the Convention's provisions and shaping the standards and principles underpinning its interpretation. Through hundreds of cases, the Court delineated the contours and manifestations of protected expression, augmenting the scope of Article 10 beyond its explicit text. Although classifying the categories of protected expression is not sufficient to decide the limits of the right to freedom of expression, the role of the European Court of Human Rights should not be denied in deciding on controversial issues about what may fall within the scope of protected expression and which acts must be excluded from the scope of that protection.

2. Legal framework of The Right to Freedom of Expression in Europe

The right to freedom of expression in Europe is based on various international, regional and national sources of law. The legal framework that protects and regulates this right consists of principles and standards that have been developed through different treaties, conventions, and national legislation. The European national courts also play an important role in establishing and limiting the protection of the right to freedom of expression and the interference of the

authorities. The right to freedom of expression in Europe is based on three key pillars: international human rights law, European law, and the national laws of European countries. These foundations form the legal framework for protecting this fundamental right. As mentioned in the previous chapter, international human rights law was extensively covered. Additionally, European law and the national laws of individual European countries contribute to constitute the overall legal framework of the right to freedom of expression.

2.1. European Law

Following the conclusion of World War II and the adoption of the Universal Declaration of Human Rights, European nations, particularly those in Western Europe, experienced a palpable inclination towards the advancement and safeguarding of human rights and essential liberties, such as the right to freedom of expression.

The ECHR, complemented by the judiciary's established legal principles and jurisprudence of the ECtHR, in addition to certain specialized accords, were instrumental in creating a legal structure to defend the prerogative to free expression across Europe.

2.1.1. European Convention on Human Rights (ECHR)

In 1950, the ECHR was adopted. The convention comprised a set of articles designed to regulate and safeguard human rights and fundamental freedoms. Article 10 of the Convention outlines provisions for protecting the right to freedom of expression while regulating imposed restrictions.

"Everyone has the right to freedom of expression. This right includes the freedom to hold opinions and to receive and impart information and ideas without interference from public authority and regardless of borders."

Practically, the ECtHR is responsible for interpreting and enforcing the provisions of the Convention, including Article 10. The Court has developed a rich case law on the right to freedom of expression, balancing this right with other competing interests, such as the right to privacy or the need to prevent hate speech.

The ECtHR has emphasised the value of freedom of expression protection in its case law, particularly when it comes to topics of public interest and political discourse. The Court has also acknowledged that occasionally defending speech that is controversial, insulting, or shocking may be necessary to uphold one's freedom of expression. The right to freedom of expression is a cornerstone of democracy and is essential for the unrestricted exchange of ideas

and information within society. It enables individuals to express their thoughts, beliefs, and ideas freely without fear of censorship or persecution. [246]

Furthermore, the ECHR offers a solid legal foundation for the defence of freedom of expression in Europe, and the ECtHR is essential to assuring the protection of this right.

Subsequently, the values enshrined in Article 10 of the ECHR were emphasized on many occasions. For example, in 1982 the countries of the Council of Europe emphasized the importance of freedom of expression and information as a basis for democracy, the rule of law, and human rights. They have recognized its universal significance in key documents such as theUDHRand the ECHR. Countries pledged to protect this freedom through collective efforts and technological advancement, promoting diverse media sources and sharing information across borders. They reaffirmed their commitment to the open exchange of information and education, with the aim of mutual understanding and respect for diverse viewpoints.[247]

In addition to Article 10 of the ECHR, Article 3 of Protocol No. 1 to the ECHR is often cited to reinforce and provide a broader basis for the right to freedom of expression. Article 3 of Protocol No. 1 stated:

"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

This Article shall not prejudice the validity of elections held at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

While Article 3 of Protocol No. 1 can enhance comprehension of freedom of expression, Article 10 of the ECHR is the primary and more specific. Article 3 of Protocol No. 1 is frequently mentioned in matters involving political speech and activity because the ability to vote and express political beliefs is inextricably linked to the right to free expression.[248]

[246] ECtHR. Handyside v. The United Kingdom, No. 5493/72. 07/12/1976.

[247] See: Declaration on The Freedom of Expression and Information. Council of Europe (Adopted by the Committee of Ministers on 29 April 1982 at its 70th Session).

[248] For example, see: European Court of Human Rights. (2019). Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights.

2.1.2. The European Convention on Transfrontier Television (ECTT) 1989

This convention was adopted by the Council of Europe in 1989 to facilitate the free flow of television programs across national borders while ensuring the protection of certain fundamental rights and interests, including the right to freedom of expression.

The ECTT applies to television broadcasting services that originate in one state and are transmitted for reception in another state. It sets out several rules and principles for such services, including provisions on the promotion of cultural diversity, the protection of minors, and the prohibition of incitement to hatred.

The preamble of the European Convention on Transfrontier Television (ECTT) highlighted the importance of the right to freedom of expression and information, which is enshrined in Article 10 of the Convention. It stated that this right is essential for a democratic society, for human development, and for cultural diversity. It also affirmed the principles of free flow of information and ideas, independence of broadcasters, pluralism, and equality of opportunity among all democratic groups and political parties. It further recognized that the development of information and communication technology should serve to promote this right across borders, regardless of the source of information and ideas.[249]

The ECTT is implemented through a system of national and international regulatory authorities, which are responsible for ensuring compliance with its provisions. The Convention has been ratified by several European countries and is considered an important legal instrument for the protection of the right to freedom of expression in the context of transfrontier television broadcasting. Finally, it should be noted that some provisions of this agreement were amended in 1998 by the Protocol amending the European Convention on Transfrontier Television.[250]

2.1.3. The Charter of Fundamental Rights of the European Union (CFR)

Article 11 of the European Union Charter of Fundamental Rights deals specifically with the right to freedom of expression. According to the referred article:

[249] Council of Europe. (1989). European convention on transfrontier television: [Strasbourg, 5. V. 1989]. Conseil de l'Europe, Service de l'édition et de la documentation.

[250] Council of Europe. (1998). Protocol amending the European Convention on Transfrontier Television:[Strasbourg, 1.X.1998].

"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.

The freedom and pluralism of the media shall be respected."

In principle this article guarantees that people can freely share their opinions, beliefs and information. It includes both the right to opinions and the right to communicate and access information and ideas. The right to freedom of expression includes different modes of expression, such as spoken, written, artistic, and other forms of expression.[251]

Article 11 of the EU Charter of Fundamental Rights and Article 10 of the ECHR are similar in protecting the right to freedom of expression and information,[252] but they have different legal sources and some nuances in their wording and meaning. The main differences are:

- The scope and application of the two articles: Article 11 of the EU Charter only applies to the EU and its member states, and only when they act within the scope of EU law. While Article 10 of the ECHR applies to all member states of the Council of Europe and covers any actions by their public authorities.

- The case law and interpretation of the two articles: Article 11 of the EU Charter is interpreted and applied by the CJEU, which is the court of the EU. Article 10 of the ECHR is interpreted and applied by the ECtHR, which is the court of the Council of Europe. The ECtHR has developed a rich and influential case law on the meaning and scope of freedom of expression in the context of the ECHR. [253]

In short, Article 11 of the EU Charter and Article 10 of the ECHR protect freedom of expression, but they come from different legal frameworks, apply to different areas, and are interpreted by different courts. Despite these differences, their main principles and factors limiting freedom of expression are very similar.

[251] Official Journal of the European Union C 303/17 - 14.12.2007.

[252] Official Journal of the European Union C 303/17 - 14.12.2007.

[253] Emmert, F., & Carney, C. P. (2016). The European Union Charter of Fundamental Rights vs. the Council of Europe Convention on Human Rights on Fundamental Freedoms-A Comparison. *Fordham Int'l LJ*, *40*, 1047.

In addition to the EU CFR, the European Union has adopted several laws and regulations to address specific issues, including combating hate speech[254] and terrorist content online.[255] The most recent of these laws is the Digital Services Act (DSA), adopted in 2022 and will come into effect in 2024. The EU Digital Services Act (DSA) aims to promote online safety and transparency within the EU. It mandates that online platforms promptly remove illegal content and establish easy reporting mechanisms. Platforms are also required by law to disclose their content moderation processes and algorithms, as well as publish regular transparency reports.

Regarding its impact on the right to freedom of expression, the act seeks to strike a balance between combating illegal content and safeguarding freedom of expression. The law mandates that measures taken to remove content or suspend accounts must be proportionate and justified, preventing arbitrary censorship. The right to appeal ensures that users can challenge unlawful removal or suspension. Additionally, transparency requirements prevent opaque decision-making processes that can lead to censorship, while regulatory oversight through independent audits and risk assessments holds platforms accountable for their content moderation practices.[256]

2.2. National law of European Countries

In principle, the European legal system of human rights is based on the ECHR and the Charter of Fundamental Rights of the European Union. Therefore, Member States must harmonize domestic laws with the requirements of this system. As previously mentioned, the text of Article 10 of the ECHR urges the parties to the convention to respect the right to freedom of expression and to refrain from unjustified interference. This obligation to refrain from interference (negative obligation) is accompanied by a positive obligation, which is to take all measures to ensure the exercise of the right to freedom of expression and to provide protection even for those who hold objectionable or undesirable opinions. The ECtHR has declared that states have certain responsibilities when it comes to freedom of expression. It is not enough for them to

[254] European Commission (2016). The EU Code of conduct on countering illegal hate speech online.

[255] Regulation (Eu) 2021/784 of the European Parliament and of The Council of 29 April 2021 on addressing the dissemination of terrorist content online (Text with EEA relevance). Official Journal of the European Union, L 172/79, 17 May 2021.

[256] For more see: Regulation (Eu) 2022/2065 of the European Parliament and of The Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance). Official Journal of the European Union, L 277, 27 October 2022.

simply avoid interfering; they must also take measures to protect individuals' rights, even in their interactions with others. Additionally, member states are obligated to establish a supportive atmosphere for public discussions, allowing all individuals involved to freely express their thoughts and opinions without any fear.*§*.[257]

National legislation is regarded as a crucial means of positively intervening to safeguard the right to freedom of expression. It serves as a significant legal foundation for protecting various human rights, including the right to freedom of expression, encompassing press and academic freedoms, as well as the right to access information.

This section will focus on discussing national legislation from various regions of Europe. There are two key reasons for this choice. Firstly, it aims to demonstrate that nearly all countries have laws and legal texts that acknowledge and safeguard the right to freedom of expression. However, the actual challenge lies in the practices and customs associated with these countries, as later research will reveal. Secondly, there is a normative reason for selecting countries from different regions of Europe. These countries share legal traditions and possess historical, cultural, and common ties, which are reflected in their legal framework and approach to protecting human rights, including the right to freedom of expression.

Based on the previous chapter on the history of the right to freedom of expression, it seems that many Scandinavian and Western European countries have established long traditions of democracy, human rights, and the rule of law, which may have fostered a stronger culture of freedom of expression and media pluralism. Thus, it is logical that this matter should reflect on the legal structure of human rights, including the right to freedom of expression.[258]

For example, in Sweden, a composite legal framework has been put in place to protect this basic democratic principle. The cornerstone of this framework is the Freedom of the Press Act (1949: 105), the legislative foundation that has evolved over time. This law emphasized the importance of the role of the press in promoting unhindered exchange of opinion, unrestricted dissemination of information, and unrestricted artistic creativity. Central to this concept is the recognition that freedom of the press includes not only the freedom of individuals to express their thoughts,

[257] ECtHR. Dink v. Turkey. 14/09/2010 . § 106.

[258] For example, see: France Declaration of the Rights of Man and of the Citizen 1789 art (10,11). Constitution of the Netherlands art (7). Constitution of The Portuguese Republic Seventh Revision 2005 art (37). Luxembourg's Constitution of 1868 with Amendments through 2009 art (24). Constitution of Ireland 1937 art (40.6 1).

opinions, and feelings through print media, but also the right to publish official documents and impart information on a variety of topics. [259]

A central aspect of press freedom in Sweden is ensuring that individuals have the right to publish written content without prior restrictions from government or public bodies. Importantly, legal actions regarding the contents of published materials are limited to post-publication actions that take place within a court of law. This principle reinforces the prohibition against punitive measures for the publication of written content, unless such content expressly violates legal provisions designed to maintain public order while not suppressing vital information accessible to the public.[260] The dimensions of this legal framework extend beyond individual rights and address collective welfare and public safety. The safeguard clauses inherent in the Freedom of the Press Act emphasize the paramount importance of protecting individual rights and the public welfare while exercising freedom of the press. This comprehensive approach to balancing individual liberties with societal security exemplifies the complex interplay inherent in Swedish regulations on freedom of expression.

On the other hand, the Basic Law on Freedom of Expression (1991: 1469) complements Sweden's commitment to unrestricted expression. Emanating from this law clarify the purpose of freedom of expression, it firmly aims to promote the unrestricted exchange of opinions, the unimpeded circulation of comprehensive information, and the absolute freedom of artistic innovation.[261] This legislative text reinforces the fundamental right of individuals to express their thoughts, opinions and feelings before public institutions, using various means including audio radio, television, film production and digital transmission. Notably, the scope of this law extends to the entire society, and it categorically prohibits restrictions on freedom of expression except as provided within its jurisdiction.

Relying on both the Freedom of the Press Act and the Basic Law on Freedom of Expression,[262] Sweden has meticulously established a legal system to support its commitment to unrestricted

[259] The Freedom of the Press Act (1949: 105). Ch1, article 1.

[260] The Freedom of the Press Act (1949: 105). Ch1, article 1.

[261] The Fundamental Law on Freedom of Expression (1991: 1469). Ch1, article 1.

[262] In addition to the aforementioned laws, article 1 of the second chapter of the Instrument of Government (1974:152) states:

Everyone shall be guaranteed the following rights and freedoms in his or her relations with the public institutions:

expression in accordance with the standards of international law in enshrining freedom of expression on the one hand, and European law, especially Article 10 of the ECHR on the other.

In the United Kingdom, the Human Rights Act 1998 incorporates the rights and freedoms set out in the ECHR into UK law. This means that individuals can directly invoke their rights under the ECHR in UK courts without having to go to the ECtHR in Strasbourg. The Human Rights Act 1998 requires public authorities to act in a manner consistent with the right to freedom of expression.

The court must have particular regard to the importance of the Convention's right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material).[263]

The UK's legal system has a strong common law tradition that supports freedom of expression. This tradition has evolved over centuries through court judgments, creating a foundation for the protection of speech and expression. This means that the right to freedom of expression is also a fundamental common law right.[264]

One of the laws affecting freedom of expression in the UK is the Freedom of Information Act 2000 (FOIA), which gives the public access to information held by public authorities. The Freedom of Information Act aims to enhance transparency and accountability in the public sector by allowing people to request information about the activities, decisions, and policies of public authorities.

Any person making a request for information to a public authority is entitled: (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him. [265]

In addition to the above, many laws in the United Kingdom aim to regulate the exercise of the right to freedom of expression and freedom of the press and achieve a balance between these

1. freedom of expression: that is, the freedom to communicate information and express thoughts, opinions and sentiments, whether orally, pictorially, in writing, or in any other way.

2. freedom of information: that is, the freedom to procure and receive information and otherwise acquaint oneself with the utterances of others.

[263] UK Human Rights Act 1998, chapter 12.

[264] Derbyshire County Council v Times Newspapers [1995] AC 534

[265] Freedom of Information Act 2000. Part 1, art.1.

rights and other interests, like the Defamation Act 2013. The Act was introduced as a response to criticisms that previous defamation laws were overly stringent, potentially stifling public discourse, debate, and scientific inquiry. Key reforms include the introduction of a "serious harm" threshold for defamation claims, provisions for internet intermediaries, and defences such as truth, honest opinion, and public interest. These reforms seek to protect individuals' reputations while ensuring that free speech is not unduly compromised.[266]

In Germany, the right to freedom of expression is based mainly on the Basic Law of 1949.

"Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship... Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution."[267]

It can simply be noted how comprehensive this article is, as it is not limited to communicative rights such as the right to freedom of opinion, expression, press, etc. Rather, it extends to scientific and artistic freedoms. This comprehensiveness and clarity would contribute to presenting Article 5 as an effective legal framework for protecting the right to freedom of expression in general.[268]

In addition to what was stated in the aforementioned text of the Basic Law, the right to freedom of expression was strengthened by a set of laws and legislations for various purposes. one of those laws is Das Informationsfreiheitsgesetz IFG (Federal Act Governing Access to Information held by the Federal Government or Freedom of Information Act).[269]

This law gives the right to every individual, whether a natural or legal person, to obtain official information from the authorities of the federal government. From the point of view of the

[266] Jones, M. W. (2019). The Defamation Act 2013: a free speech retrospective. Communications Law, 24(3), 117-131.

[267] German Basic Law of 1949. Art. 5.

[268] Jouanjan, Oliver (2009) "Freedom of Expression in the Federal Republic of Germany," Indiana Law Journal: Vol. 84 : Iss. 3 , Article 5. Available at: https://www.repository.law.indiana.edu/ilj/vol84/iss3/5.

[269] This law was held by the Federal Government (Freedom of Information Act) of 5 September 2005 (Federal Law Gazette [BGBl.] Part I, p. 2722), last amended by Article 2 (6) of the Act of 7 August 2013 (Federal Law Gazette I, p. 3154).

researcher, this law is considered among the laws that most contribute to enshrining the right to freedom of expression by strengthening the right to access information.[270]

In addition to federal laws, provincial press laws in Germany also form one of the pillars of the right to freedom of expression. All these laws emphasized the freedom of the press and its importance in shaping public opinion and promoting democracy.[271]

For example, the Bavarian Press Law (Bayerisches Pressegesetz), which is considered one of the oldest laws still in force[272], emphasizes freedom of expression and the press and the importance of the role of the press in promoting democracy.[273] The same law also emphasizes the right to access information held by the authorities.[274]

* * *

Moving to the Central European countries, it seems that the matter is not much different from a legal point of view, as freedom of expression is supported in principle by many constitutional[275] and legislative texts. Especially in the countries of the European Union, who have a legal obligation under the Charter of Fundamental Rights, in addition to the ECHR.[276]

In the Slovak Republic, for example, the Slovak constitution affirmed the right to freedom of expression and information. Under this right, according to the constitution, all forms of expression are included, in addition to freedom of research and access to information. The constitution also addresses freedom of the press and broadcasting and the prohibition of prior censorship.[277]

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[270] Das Informationsfreiheitsgesetz (IFG). Section 1.

[271] Press laws in German states are very similar. Although there are slight differences, the essence of all these laws is based on the importance of the role of the press in building a democratic society and the prohibition of censorship in publishing, in addition to not subjecting publishing houses and newspapers to the restrictions of prior licensing. For example see: Pressegesetz für das Land Nordrhein-Westfalen 1966, Berliner Pressegesetz 1965.

[272] This law was issued in October 1949 and the last amendment was in 2018 through Article 39b Abs. 16.

[273] Bayerisches Pressegesetz (BayPrG). Art. 1,3.

[274] Bayerisches Pressegesetz (BayPrG). Art. 4.

[275] For example, see: Charter of Fundamental Rights and Freedoms 1992 in Czech art (17). Constitution of the Republic of Slovenia art (39). The Constitution of The Republic Of Poland 1997 art (54).

[276] Koltay, A. (2013). Freedom of speech: the unreachable mirage. Available at SSRN 2216655.

[277] Constitution of the Slovak Republic. Art. 26.

On the other hand, the Freedom of Information Act represents another basis for the right to freedom of expression, as stipulated in Article 10 of the ECHR, in that this right extends to include the right to receive information. The aforementioned law states:[278]

"Everybody shall have the right of access to information that the obliged persons have available.

The obliged person under Section 2, paragraph 3 shall disclose only information pertaining to the management of public funds, disposal of state property, the property of self-governing region or the property of municipality, the environment, and information on the tasks or professional services relating to the environment and on the content, performance and activities carried out on the basis of the concluded agreement.

Access to information shall be provided without proving any legal or other reason or interest for which information is required."

In Hungary, the right to freedom of expression and other communicative rights, such as freedom of information and freedom of information, are affirmed through certain provisions either in the constitution or in separate special legislation.

Hungary's Fundamental Law of 2011 deals with the right to freedom of expression, emphasizing through a clear text the right of everyone to freedom of expression, in addition to emphasizing Hungary's commitment to protecting press freedom on the basis of equality, given its importance in shaping public opinion.[279]

Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content includes important provisions that emphasize freedom of the press and ensure its diversity and independence from the state.

- The laws of the Republic of Hungary recognise and protect the freedom of the press and ensure diversity of the press.
- The freedom of the press also includes independence from the State and from any organisation or interest group.

[278] Reconstructed Act No. 211/2000 Coll (Freedom of Information Ac). Section 3.

[279] Fundamental Law of Hungary 2011. Article IX.

- The exercise of the freedom of the press may not constitute or encourage any acts of crime, violate public morals or the moral rights of others.[280]

On the other hand, Act CLXXXV of 2010 on Media Services and Mass Media guarantees freedom for media services and press products in Hungary. It also promotes the free transmission of information and opinions through mass media and emphasizes the importance of the right to information and the role of public media services in a democratic society. The law aims to protect democratic public opinion and the interests of public media services for a well-functioning democracy.[281]

In addition to following various directives set by the European Union, Hungary has also enacted national legislation, such as Act CVIII of 2001, to regulate activities on social media platforms. This legislation aligns with the E-Commerce Directive[282] and establishes the general rule that intermediary service providers are liable for the information they provide to the public. However, it also specifies certain cases where these providers are exempt from liability. It's worth noting that this regulation covers liability in civil law, criminal law, and public administration law, and it also addresses the possibility of exemption.[283]

In the Eastern European countries, the delineation of freedom of expression often lacks a distinct and well-defined legal framework. This phenomenon can be attributed to historical, social, and even religious factors that have significantly shaped the landscape. Legal provisions upholding the principles of freedom of expression and the press are frequently encapsulated within constitutional mandates, with explicit delineations of individual rights and liberties seldom taking precedence, in contrast to the norm observed within Western European jurisdictions.

A pertinent illustration of this paradigm can be found in the Turkish constitution, wherein it is stipulated that:

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[280] Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content. Article 4.

[281] Act CLXXXV of 2010 on Media Services and Mass Media. Articles 3,4,5,6.

[282] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') OJ L 178, 17.7.2000, p. 1–16

[283] András Koltay (2021) The Regulation of Social Media Platforms in Hungary. In: Marcin Wielec (ed.) The Impact of Digital Platforms and Social Media on the Freedom of Expression and Pluralism, pp. 79–110. Budapest–Miskolc, Ferenc Mádl Institute of Comparative Law–Central European Academic Publishing.

"Every individual possesses the entitlement to articulate and propagate their cogitations and viewpoints through speech, script, imagery, or other mediums, both individually and collectively. This entitlement encompasses the unrestricted conveyance and receipt of information and notions, free from the imposition of constraints by governmental authorities."[284]

When juxtaposed with the analogous constitutional clauses prevalent within Western European countries, the Turkish provision conspicuously stands out for its brevity in addressing freedom of expression. This compactness, however, belies the subsequent sections of the same article, which substantially impose delineations and encumbrances on this freedom, as the ensuing section of this research shall expound upon.[285]

In tandem with this constitutional tenet, the Press Law was enacted in 2004, amplifying the prominence of press freedom and unfettered access to information. Nevertheless, mirroring the concise nature of the constitutional edict on freedom of expression, this legal enactment similarly suffers from succinctness, accompanied by an assemblage of provisions imposing constraints that attenuate the practical realization of press freedom, thereby relegating it to a veneer of formality.[286]

Azerbaijan, which became a member of the ECHR in 2001, has stipulated several constitutional articles to uphold the right to freedom of expression and ensure its protection. These articles have undergone constitutional amendments, with the most recent one taking place in 2016. Article 47 focuses on freedom of expression and is referred to as freedom of thought and speech. It states that: "everyone has the right to freedom of thought and speech, and no one can be compelled to express or renounce their thoughts and beliefs." The same article links exercising these rights with not "inciting racial, national, religious, social discord or animosity, or relying on any other criteria through agitation and propaganda."[287]

Article 50 addresses freedom of information and states that: "Everyone is legally entitled to seek, receive, impart, produce, and disseminate information. Freedom of mass information is guaranteed. State censorship in mass media, including the press, is prohibited. Everyone has

[284] Constitution of the Republic of Turkey 1982. Art, 26.

[285] Ibid.

[286] See: Press law No. 5187 of 2004. Art, 3.

[287] Constitution of Azerbaijan 1995. Art. 47.

the right to refute or respond to information published in mass media that violates their rights or interests."[288]

Article 71 includes a provision that prohibits the imposition of restrictions on the rights and freedoms of citizens, except in specific cases mentioned in the Constitution and other laws. It also requires that any restriction "shall be proportional to the result expected by the state."[289] The Venice Commission criticised the last phrase of this article, stating that it lacked sufficient protective measures. The commentary further states:

"Not every result which the State may expect to reach from introducing restrictions on human rights would be a "legitimate aim" from the standpoint of the European Convention. It is thus necessary to amend the wording of Article 71 in order to duly reflect the concept of "legitimate aim". In this respect, the formula used by the 2002 constitutional law ("a legitimate aim provided by the Constitution") is clearly preferable and ought to have been reproduced in modified Article 71 of the Constitution."[290]

3. Scope and Categories of Protected Expression

In the researcher's estimation, defining the scope of the right to freedom of expression is not without complexity. Not only for researchers in the right to freedom of expression, but also for national and international human rights courts. This problem may seem more complex in the American model based on First Amendment jurisprudence, which treats freedom of expression as an absolute right if compared to the international model of human rights,[291] including the European one, where the right to freedom of expression is considered almost absolute. In addition, any research into the field of the right to freedom of expression is an indirect investigation into the limits of the right to freedom of expression, and this matter requires a

[288] Constitution of Azerbaijan 1995. Art. 50.

[289] Constitution of Azerbaijan 1995. Art. 71.

[290] European Commission for Democracy through Law (Venice Commission), Opinion No. 864 / 2016, on the Draft Modifications to the Constitution Submitted to the Referendum of 26 September 2016 (endorsed by the Venice Commission at its 108th Plenary Session, (Venice, 1415 October 2016), available at www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)029-e. Accessed 09.05.2024.

[291] The First Amendment approach in the United States is based on restricting the legislative authority of Congress in issuing any law that restricts freedom of expression or the press. This absolute and abstract formulation made it difficult to confine protected expression to specific categories or classifications.

classification of the actions, forms, and even means of expression that fall under the right to freedom of expression.

Since this research is based primarily on the provisions of Article 10 of the ECHR, this article will be relied upon in determining the scope of the right to freedom of expression in conjunction with the jurisprudence of the ECtHR in relevant cases.

Article 10 of the ECHR plays a vital role in safeguarding the fundamental right to freedom of expression. This article stands as a fundamental pillar of democratic societies, enabling individuals to openly express their thoughts, access information, and communicate their ideas without hindrance. The ECtHR jurisprudence has further nuanced Article 10's scope of protection as the linchpin of open discourse and the free exchange of ideas.[292]

Before addressing the scope of protection provided by Article 10 of the ECHR in terms of actions, conduct, and forms of expression, it is necessary to discuss the scope of this protection in terms of persons. Based on the text of the article, the phrase "everyone has the right to freedom of expression" came in a general formulation that could open many questions and possible interpretations. This matter is related to the ECtHR in the first place.

Examining the individuals who constitute the subject of the right to freedom of expression may not spark much debate within Europe, given the strong European stance on this right. However, the situation may appear distinct at the global level. In essence, the potential recipients of the right to freedom of expression can be categorized in various ways due to disparities in jurisdictions and legal systems associated with human rights, including freedom of expression:

a) All individuals under legal jurisdiction, encompassing both natural and legal entities.

b) All natural persons or individuals.

c) All citizens, with the exception of non-citizens.

d) Any subgroups established based on specific criteria, such as freedom of the press or academic freedom. [293]

[292] Macovei, M. (2004). A guide to the implementation of Article 10 of the European Convention on Human Rights. *Human rights handbooks*, (2).

[293] Gardbaum, S. (2021). 'The Structure of a Free Speech Right', in Adrienne Stone, and Frederick Schauer (eds), The Oxford Handbook of Freedom of Speech, Oxford Handbooks (2021; online edn, Oxford Academic, 10 Feb. 2021), https://doi.org/10.1093/oxfordhb/9780198827580.013.13, accessed 13 Sept. 2023.

Among the questions that arise regarding this issue within the scope of Article 10 of ECHR, does the scope of protection include European citizens, or does it extend to non-Europeans?

Through researching the various interpretive texts of Article 10, especially those submitted by the ECtHR, there is no indication that the scope of protection is limited only to European citizens, but rather extends to all residents within the jurisdiction of the Council of Europe states.[294] This seems normal given the nature of the right to freedom of expression as a universal right affirmed by the UDHR as well as the International Covenant on Civil and Political Rights.[295]

The second question is whether the scope of protection covers natural persons only or extends to legal persons. Given the objectives of the Convention and its historical and social background, it seems logical that Article 10 deals primarily with natural persons. However, the lack of reference in the ECHR to protect the right to freedom of expression for persons and legal entities does not negate the existence and affirmation of this right for these entities. Rather, freedom of expression may acquire special importance for some legal entities, such as trade and professional unions, which are responsible for expressing the demands and interests of the segments they represent.

Although the ECHR in the text of Article 10 did not explicitly refer to the right of legal persons to freedom of expression, this matter was confirmed by the ECtHR in its rulings in several cases. [296] This recognition came in the context of the historical development of more comprehensive recognition of some rights for companies, where key cases, such as the Sunday Times vs. the United Kingdom, have established precedents for recognising corporate human rights, including freedom of expression. However, applying human rights to companies is selective, acknowledging their unique legal nature and excluding rights like the right to life or protection from torture. Cases involving property rights, a fair trial, and freedom of expression

[294] McGonagle, T. (2014). Council of the EU: Human rights guidelines on free expression on-and offline. *IRIS: Legal Observations of the European Audiovisual Observatory*, (8), 7-8.

[295] It seems that there are those who do not support the idea that the right to freedom of expression is a universal human right. Larry Alexander has reached this conclusion by discussing the essence of freedom of expression as a principle, and by relying on a set of considerations, including the difference in occasional laws and regulations that regulate freedom of expression from one country to another and the varying damage resulting from it. For more see: Alexander, L. (2013). Is freedom of expression a universal right. *San Diego L. Rev.*, *50*, 707.

[296] See among others: ECtHR. Autronic AG v. Switzerland, No. 12726/87. 22/05/1990. § 47. See also: Case of The Sunday Times V. The United Kingdom (No. 1), No. 6538/74. 26/04/1979. Case of Markt Intern Verlag Gmbh and Klaus Beermann V. Germany, No. 10572/83. 20/11/1989. .

are common among corporate claims to the ECtHR, demonstrating the nuanced approach to applying human rights in a corporate context.[297]

Moreover, some constitutions and national laws in Europe granting the right to freedom of expression to legal persons based on a national approach regardless of the ECHR. For example, Basic Law for the Federal Republic of Germany (1949) granted legal persons the right to freedom of expression, similar to other rights, in proportion to the nature and composition of the legal person. [298]That is, the freedom of expression of legal persons was not explicitly referred to, but by analogy with the rest of the rights.

The ECtHR has considered cases relating to legal entities and their rights to freedom of expression under Article 10. However, on the merits of each case, the court's interpretation of the article differs depending on the specific circumstances of the case and its impact on freedom of expression. Legal entities may enjoy some level of protection under Article 10, but it is generally understood as a guarantor of individual rights.[299]

Additionally, there is a significant question to consider: does Paragraph 1 of Article 10 encompass all natural individuals without exception? In principle, all natural persons enjoy the right to freedom of expression, regardless of employment in the civil service, the judiciary, or other official positions. That is, the job a person occupies should not be a reason or an excuse to disrupt or affect his right to freedom of expression.[300]

But here it is important to distinguish between two cases. Some cases may make it difficult to distinguish in terms of the basis on which they are based between the fact that they constitute a violation of the right to freedom of expression and thus the application of the first paragraph of Article 10, or that these cases relate to the right to access to civil service jobs, which was not

[297] Luka Đurić (2023). Do Companies Have Human Rights?. Gecić Law. https://geciclaw.com/companies-human-rights/. Accessed 09.02.2024.

[298] Basic Law for the Federal Republic of Germany (1949). Art.5.

[299] In the case of Autronic AG v. Switzerland (1990) the court stated: “In the Court’s view, neither Autronic 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 (art. 10) applies to "everyone", whether natural or legal persons. The Court has, moreover, already held on three occasions that it is applicable to profit-making corporate bodies.”

[300] Van Dijk, P., Hoof, G. J., & Van Hoof, G. J. (1998). *Theory and practice of the European Convention on Human Rights*. Martinus Nijhoff Publishers. 776, 777.

addressed in the text of the European Convention on the Human Rights.[301] Also, some cases may constitute a reason for applying the restrictions under the text of the second paragraph of Article 10 as a kind of an exception to the right of all natural persons to freedom of expression without detracting from the value of this right. [302]

3.1. Freedom to Hold Opinion

To provide a clear idea of the researcher's perception of the process of producing the final expression, this process can be presented as a set of steps that must necessarily begin with adopting an opinion or idea and perhaps a specific orientation. This is what can be called the stage of adopting an opinion. Here several issues must be addressed.

First, it is necessary to examine the circumstances and factors that contributed to or led to, or under which a particular opinion was adopted. The importance of this lies in proving or denying that systematic pressure or guidance of some kind has been exercised through a political, religious, or social entity or authority. That is, research into the extent of the freedom of individuals to adopt a certain opinion or idea, even though this issue is not devoid of complexity. This matter is of great importance in proving not only that the state has not violated its positive obligations to protect freedom of opinion and expression, but that it has also committed to its negative obligation not to direct public opinion or indoctrinate its citizens in some way, or even disturb equality among citizens based on differences of opinion. The state's obligation, both positive and negative, was explicitly stipulated in the first paragraph of Article 10 with the phrase: "without interference by public authority". Moreover, the state's promotion of one-sided

[301] Ibid.

[302] In the case of Kosiek v. Germany, the Court concluded that Article 10 was not applicable to the case and that the issue was related to the right to access to civil service positions. But Judge Cremona, in his concurring opinion, said:

"While agreeing with the finding of no violation in the judgment, I am unable to agree with the essential reasoning behind it. The applicant was dismissed from a civil service post which he held in a probationary capacity. Now the crucial question is: why was he dismissed? And it is clear that he lost his job because of political opinions which he had expressed. Because of these opinions, he thus suffered a serious prejudice. This in my view discloses an interference with freedom of expression". On the other hand, he considered that the government intervention was justified under the second paragraph of Article 10. This view may explain how difficult the distinction I have referred to is.

See: ECtHR. Kosiek v. Germany, No. 9704/82. 28/08/1986.

information may constitute a serious and unacceptable obstacle to the freedom to hold opinions.[303]

The second issue lies in the difficulty of distinguishing between freedom of opinion (holding an opinion) and freedom of thought. The ECHR states that: "Everyone has the right to freedom of thought, conscience, and religion; This right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice, and observance."[304]

The difficulty of distinguishing between freedom of opinion and freedom of thought comes from the fact that the two matters have one origin, inside the individual. That is, they are internal factors that may be difficult to differentiate between or judge. The report of the Special Rapporteur on freedom of opinion and expression, Abid Hussein 1993, pointed out the difficulty of distinguishing between freedom of opinion and freedom of thought, as he stated:

"Exactly what aspects of the private realm of the individual are covered by the notion of "opinion" is unclear. It is clear, however, that freedom of opinion should be distinguished from, yet at the same time is closely linked to, the freedom of thought that is protected in Article 18 of the Covenant. On the relationship between opinion and thought one knowledgeable author has remarked that the notion of thought may be nearer to religion or other beliefs and the notion of opinion nearer to political convictions... He stresses that he finds the frontiers between the notions of thought and opinion not very clear. As a consequence, the protection of the freedom of opinion calls for the careful consideration of the specific aspects of each individual case."[305]

In principle, the opinion held by individuals is protected regardless of its nature, whether it is political, religious, or social. Therefore, there is no scope for applying the second paragraph of Article 10 to an opinion that has not reached the stage of expression.[306] Therefore, the third matter to consider is that, owing to the freedom to hold opinion, it is necessary to safeguard individuals from any adverse repercussions that may arise from the subsequent declaration of

[303] Bychawska-Siniarska, D. (2017). Protecting the right to freedom of expression under the European convention on human rights: A handbook for legal practitioners. Council of Europe. 13.

[304] European Convention on Human Rights. Art.9.

[305] See: Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights resolution1993/45. United Nations, Economic and Social Council. E/CN.4/1995/32 14 December 1994. Para, 25.

[306] Van Dijk, P., Hoof, G. J., & Van Hoof, G. J. (1998). Theory and practice of the European Convention on Human Rights. 776.

those viewpoints.[307] The perspective of the researcher upholds the notion of safeguarding freedom of opinion, which is grounded in the jurisprudence of the ECtHR, and the philosophical justifications and arguments presented in the first section of the study. Mill's philosophy constituted a robust defence of freedom of opinion by encompassing even the undesirable or socially outcast concepts within the realm of protected expression.[308] In addition, it is illogical for any punishment or blame to result from the process of adopting an opinion as a state that expresses the essence of the human self and the pursuit of self-realization.[309] It is in this context that Justice Thurgood Marshall advanced the individual fulfillment theory of freedom of expression in his concurring opinion in Prisoners' Rights Procunier v. Martinez (1974) when he wrote:

"The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity." [310]

3.2. Freedom of information

Based on the researcher's assumed perception of freedom of expression as a 'process,' obtaining information constitutes one of the stages and tools of this process at the same time. Returning to the text of Article 10 of the ECHR, this part of the right to freedom of expression was expressed in the following phrase: his right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

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[307] Bychawska-Siniarska, D. (2017). Protecting the right to freedom of expression under the European convention on human rights: A handbook for legal practitioners. 13

[308] J.S. Mill, On Liberty in Focus, Edited by John Gray and G.W.Smith, (Published July 11, 1991 by Routledge). 36. Irene M. Ten Cate, Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses, Yale Journal of Law & the Humanities 2010. [Vol 22:35. 39.

[309] In Case of Vogt V. Germany, the court stated:

Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. 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; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

[310] Hudson, D. (2017-2018). Justice Thurgood Marshall, Great Defender of First Amendment Free-Speech Rights for the Powerless. Howard Human & Civil Rights Law Review, 2, 167-178.

It can be noted that the circulation of information according to Article 10 includes two components, one of which is based on receiving information and the other is based on imparting information. Before analysing what is included in both matters, a comparison must be made between the text of Article 10 of the ECHR and the text of Article 19 of the International Covenant on Civil and Political Rights, which states: "This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers...".

Looking at both articles, it seems that Article 19 is superior to Article 10 in that it includes the right to 'seek' information, however, it seems that this difference is no more than formal.

It is important to note in this context that the term 'seek' was favoured over 'gather' when drafting Article 19. This is due to the belief that the word 'seek' connotes an active search for information, indicating an inherent right to active inquiry, While the word 'gather' was seen as perhaps indicating a passive acceptance of news provided by governments or news agencies. This prompted some members of the Third Committee of the UN General Assembly in 1961 to assert that the word 'seek' had acquired connotations related to unrestrained and bold investigation even into the affairs of others, while the word 'gather' simply lacked the assertive connotations associated with the word 'seek'.[311]

Receiving and imparting ideas and information cannot be limited to a specific behaviour, method, or mechanism, and this makes the task of determining what falls under protected expression a complex process. Some bills state this right in vague terms, assuming common knowledge, while other bills provide more specific content. So, there are often disagreements about what constitutes protected speech or expression. On the other hand, some laws specify restrictions on this right, such as prohibiting hate speech or incitement to violence, and thus the courts are entrusted with the task of interpreting and determining the limits of this right, taking into account the general constitutional principles, justifications for freedom of expression, and the specific context of its legal system.[312]

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[311] Hamilton, M. (2021). 'Freedom of Speech in International Law', in Adrienne Stone, and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech*, Oxford Handbooks (2021; online edn, Oxford Academic, 10 Feb. 2021), https://doi.org/10.1093/oxfordhb/9780198827580.013.12, accessed 14 Sept. 2023. Farris, M. P., & Coleman, P. (2020). *First Principles on Human Rights: Freedom of Speech* (No. 232). Heritage Foundation Special Report, 11.

[312] Stone, A., & Schauer, F. (Eds.). (2021). *The Oxford Handbook of Freedom of Speech*. Oxford University Press, 219.

Acknowledging the challenging task of restricting the forms or tools of the information receiving and imparting process as part of the safeguarded expression, it is imperative to address several issues of exceptional significance to determine what may fall within the ambit of the freedom of expression right.

There is no doubt that freedom of information and ideas constitutes the basic component of the right to freedom of expression. The formation of an opinion and then its expression is the result of the information that individuals receive and transmit, regardless of the validity of that information or the acceptability of the opinion that results from it. Therefore, the right to freedom of expression had to include another right, which the freedom to receive and impart information. This is confirmed by the ECHR and the International Covenant on Civil and Political Rights.

In practice, the ECtHR did not establish a specific definition or classification of what the right to receive and transmit information and ideas includes, and it seems that the Court today tends to address the circumstances of each case separately on the basis of general considerations of what may fall within the scope of this right. The first thing that can be discussed in this context is the right to access information.[313]

Based on the jurisprudence of the ECtHR, it appears that the right to access information was initially discussed in the context of examining issues not related to Article 10, but rather to Article 8. Indeed, until recently, the Court did not accept the idea of including access to information within the established scope of protection under Article 10. However, during the last three decades, the court moved to adopt a more expansive concept of the right to access information within the framework of Article 10.[314]

In principle, Article 10-1 created an obligation on member states to facilitate access to information and not to obstruct the flow of information and ideas through interference, whether positive or negative. This was confirmed by the ECtHR in examining many cases. For example, in the case of *Társaság a Szabadságjogokért v. Hungary* (2009), a human-rights non-governmental organization requested access to a pending constitutional case regarding drug-related offenses. The Constitutional Court refused the request, stating that complaints before it

[313] Van Dijk, P., Hoof, G. J., & Van Hoof, G. J. (1998). Theory and practice of the European Convention on Human Rights. 779.

[314] Bychawska-Siniarska, D. (2017). Protecting the right to freedom of expression under the European convention on human rights: A handbook for legal practitioners. 15.

could only be made available to outsiders with the approval of the complainant. The regional court dismissed the applicant's action, claiming that the requested data was "personal" and could not be accessed without the complainant's approval. The ECtHR held that the refusal of the request violated the applicant's right to freedom of information under Article 10 of the ECHR, as the information sought was ready and available and did not require any collection of data by the Government. The Court stated that the States had an obligation not to impede the flow of information sought by the applicant, and obstacles designed to hinder access to information of public interest might discourage those working in the media or related fields from performing their vital role of "public watchdog". The case was unanimously decided to be a violation.[315]

In *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria* (2013), The ECtHR found that the Tyrol Real Property Transactions Commission violated Article 10 of the Convention by refusing to provide a registered association with copies of its decisions regarding the transfer of ownership of agricultural and forest land. The association's request for information was deemed to be in the legitimate public interest, and the Commission's refusal to provide the information was disproportionate and not necessary in a democratic society. The Court emphasized the importance of the freedom to receive information and noted that authorities with an information monopoly must be subject to careful scrutiny when interfering with the role of a social watchdog.[316]

Although the public has the right to obtain information of public interest, Article 10 does not guarantee an absolute right to access information for certain types of documents or for specific categories, such as prisoners.

For example, in *Kalda v. Estonia* (2016), the ECtHR found a violation of Article 10.1, which guarantees the freedom to receive information. The case concerns a prisoner who was denied access to certain websites, including the website of the Council of Europe's Domestic Information Office and some state-run databases containing legal information.

The Supreme Court of Estonia said that granting access to these sites beyond what was permitted by prison authorities could increase the risk of illicit communications between prisoners, necessitating tighter surveillance. For its part, the ECtHR recognized that

[315] ECtHR. Társaság a Szabadságjogokért v. Hungary, No. 37374/05. 14/04/2009..

[316] EctHR. Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria, No. 39534/07. 28/11/2013.

imprisonment inherently entails restrictions on prisoners' communications and that Article 10 does not impose a general obligation to provide prisoners with access to the Internet. However, since Estonian law allows prisoners limited access to the Internet, including official legal databases, the denial of access to other websites containing legal information was considered an interference with the applicant's right to receive information. Especially since the sites in question included legal information and information related to basic rights that contribute to enhancing public awareness and respect for human rights. In addition, access to the Internet has been recognized as a right in many international instruments.[317]

Among the problematic points raised by the interpretation of the right to access information in the context of Article 10 is whether this access extends to the right to obtain public documents, or those official documents kept in state archives. The European Court has long refused to apply Article 10 in cases where access to public documents has been denied. In fact, this matter seems strange and is not without contradiction and perhaps hesitation on the part of the court, which has constantly emphasized the importance of receiving and transmitting information as a basic component of the right to freedom of expression, but at the same time, it has not gone far in enabling this right. This may seem clear in the case of *Leander v. Sweden* (1987), where the court stated:

"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."[318]

The shift towards recognizing the right of access to public documents, albeit implicitly, appears to have begun in a judgement issued in 2008, in which the Court expressed its opinion that particularly strong reasons must be provided for any action that affects the role of the press and limits access to information to which the public is entitled.[319]

The recent shift in the Court's stance on access to public documents, with a renewed emphasis on Article 10 of the Convention, marks an important step forward. The ECtHR has underscored

[317] ECtHR. Kalda v. Estonia, No, 17429/10. 19/01/2016.

[318] ECtHR. Leander v. Sweden, 9248/81. 26/03/1987.

[319] ECtHR. Timpul Info-magazin and Anghel v. Moldova, No. 42864/05. 27/11/2007

the fundamental nature of the right to access primary sources in state archives as an essential component of upholding the rights enshrined in Article 10. For example, in the case of *Kenedi v. Hungary* (2009), a historian sought access to certain documents related to the Hungarian State Security Service for research purposes. Initially denied access, the historian obtained a court order granting him unrestricted access to the documents. However, the Ministry of the Interior attempted to impose a confidentiality agreement, leading to prolonged legal battles that spanned over eight years. The ECtHR found that the Ministry's persistent refusal to comply with the court order violated the historian's right to freedom of expression under Article 10. Despite the dispute over the extent of access, domestic courts consistently ruled in favour of the historian in enforcement proceedings. The Ministry's unwillingness to abide by these orders, along with delays, also violated the "reasonable-time" requirement under Article 6 § 1 of the Convention. The Court concluded that the Ministry's behaviour amounted to arbitrariness and a misuse of authority, which could not be justified as a lawful measure.[320]

3.3. Press Freedom

Freedom of the Press is one of the most important components of the right to freedom of expression. In the previous chapter, the author referred to some important stations in the history of the struggle movement led by some writers, politicians, and thinkers who defended press freedom against censorship restrictions, especially in Europe. There is no doubt that the historical aspect referred to is part of a broader historical movement that monitored the development of the right to freedom of expression. Defenders of press freedom have long realized the importance of the role it plays in serving public debate, in addition to being one of the tools for general oversight of the work of governments and even legislative and judicial authorities.[321]

While Article 10 of the ECHR does not explicitly mention freedom of the press, it is evident that this freedom is encompassed within the first paragraph of Article 10. Furthermore, despite not being explicitly stated, freedom of the press enjoys special protection that sets it apart from other forms and modes of expression. The ECtHR has consistently played a crucial role in interpreting and highlighting the significance of freedom of the press as a prominent aspect of the right to freedom of expression.[322] The ECtHR has emphasised the importance of the role of

[320] ECtHR. Kenedi v. Hungary, No. 31475/05. 26/05/2009.

[321] For example, see: Milton, John (1644). Areopagitica, (Jebb ed.). Cambridge University Press, 1644.

[322] ECtHR. Jersild V. Denmark, No. 15890/89. 23/09/1994.§ 31..

the press.[323] In one of the earliest landmark cases, the European Court of Human Rights in *Sunday Times v. United Kingdom(1)* held that "Article 10 of ECHR guarantees not only the freedom of the press to inform the public but also the right of the public to be properly Informed." Moreover, freedom of the press is of particular importance, regardless of the extent to which the information is accepted by society.[324]

The ECtHR's assertion of the role of the press was accompanied by an emphasis on the obligations and duties of journalists. In the case of Castells v. Spain, the court stated:

"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 ... Freedom of the press 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, 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". [325]

Considering the pertinent cases in the ECtHR, it seems that the crucial function of the press as a "watchdog" has been given specific attention and highlighted with sagacity in numerous cases.[326] On another hand, the important role played by the press as a "public watchdog" was also mentioned in the European Parliament resolution of 21 May 2013 on the EU Charter. The resolution stated:

"Whereas the media play a fundamental 'public watchdog' role in democracy, as they allow citizens to exercise their right to be informed, to scrutinise and to judge the actions and decisions of those exercising or holding power or influence, in particular on the occasion of

[323] Mendel, T. (2012). a Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights. Centre for Law and Democracy, available at https://rm. coe. int/16806f5bb3. 14.

[324] ECtHR. The Sunday Times v. the United Kingdom, NO. 6538/74. 26/04/1979. §§65-66.

[325] ECtHR. Castells v. Spain, No. 11798/85. 23/04/1992. §43.

[326] See among others: ECtHR. Observer And Guardian V. The United Kingdom, No. 13585/88. 26/11/1991. § 59.

electoral consultations; whereas they can also play a part in establishing the public agenda using their authority as information gatekeepers and hence act as formers opinion".[327]

It is worth mentioning that the ECtHR recognised the role of non-governmental organisations (NGOs) that bring attention to public interest matters in a similar way to the press. The court acknowledged that these NGOs act as "watchdogs." The court stated that in press freedom, by reason of the duties and responsibilities' inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest was subject to the proviso that they were acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. The same principles apply to NGOs that take on a social watchdog function.[328]

Moreover, the Court has dealt with some individuals with the same logic based on the role they play as a watchdog. For example, in *Timur Sharipov v. Russia*, the court mentioned that the applicant had gathered information by supervising the election in his capacity as an election observer appointed by a political party to convey that information to the public. And it had been an essential part of his duties, which served the important public interest in free and transparent elections. Given the fundamental importance of such elections in any democratic society and the essential role of political parties in the electoral process, the Court considered that the applicant had exercised his freedom of expression as a "public watchdog" in a democratic society and that Article 10 protection therefore applied to his activity, which was of similar importance to that of the press.[329]

Based on the ECtHR' awareness of the importance of the role of the press in public debate, it was keen to establish special protection for press freedom.[330] The court affirmed that freedom of the press is not limited only to the transmission and circulation of information, but rather that this freedom extends to the transmission of shocking or disturbing information and ideas. Moreover, the court decided that freedom of the press also includes the possibility of resorting

[327] See: European Parliament resolution of 21 May 2013 on the EU Charter: standard settings for media freedom across the EU (2011/2246(INI)) (2016/C 055/05).

[328] ECtHR. Medžlis Islamske Zajednice Brčko and Others V. Bosnia And Herzegovina, No. 17224/11. 27/06/2017. (legal summary) Information Note on the Court's case-law 208.

ECtHR. Animal Defenders International v. the United Kingdom, No. 48876/08. 22/04/2013. § 103.

[329] ECtHR. Timur Sharipov v. Russia, No. 15758/13. 13/09/2022.

[330] Van Dijk, P., Hoof, G. J., & Van Hoof, G. J. (1998). Theory and practice of the European Convention on Human Rights. 797.

to a degree of exaggeration, or even provocation, especially when it comes to civil servants who work in their official capacity, such as politicians, and who are subject to broader limits of acceptable criticism than ordinary individuals.[331]

"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". [332]

The ECtHR reinforced the strong concept it adopted of freedom of the press when it rejected the fact that news and information circulated by the press should be verified as a condition for publication. This is most relevant in cases of spreading rumours and allegations that journalists cannot prove. Hence, the court stated that value judgments should not be subject to any evidentiary requirements.

One of the famous cases in this context, which constitutes an important precedent, is the case of *Thorgeir Thorgeirsson v. Iceland*. The plaintiff, a journalist, published two articles about police brutality in a local newspaper. After a series of investigations, the Public Prosecutor issued an indictment accusing the plaintiff of defaming unspecified members of the Reykjavik Police, which is contrary to Article 108 of the Penal Code. Accordingly, the plaintiff was convicted and sentenced to a fine or imprisonment on the basis that he had committed defamation, based on the fact that the information contained in the plaintiff's articles was not objective and had not been verified.

The ECtHR found that the plaintiff's conviction and sentence for defamation by the Criminal Court on 16 June 1986, which was upheld by the Supreme Court on 20 October 1987, constituted an interference with his right to freedom of expression. The court stated:

"In short, the applicant was essentially reporting what was being said by others about police brutality. He was convicted by the Reykjavik Criminal Court of an offense under Article 108 of the Penal Code partly because of failure to justify what it considered to be his own allegations...

[331] ECtHR. Thoma V. Luxembourg, No. 38432/97. 29/03/2001. §§ 46-47.

[332] ECtHR. Lingens V. Austria, No. 9815/82. 08/07/1986. § 42.

In so far as the applicant was required to establish the truth of his statements, he was, in the Court's opinion, faced with an unreasonable, if not impossible task."[333]

Protecting journalists is one of the most important factors in consolidating freedom of the press and media. This point formed one of the foundations adopted by the ECtHR to enhance the importance and privacy of press freedom. This matter comes in the natural context of exercising the right to freedom of expression and the exchange of information, on the one hand, and on the other hand, it reflects the commitment contained in Article 10 of the ECHR not to interfere with freedom of expression, as well as the positive obligation to take everything that would facilitate the exercise of this right, including Take measures to protect journalists.

In the case of *Özgür Gündem v. Turkey*, the editor-in-chief, assistant editor-in-chief and owners of Özgür Gündem newspaper, which ceased publication in 1994, alleged that their newspaper had been subjected to a systematic campaign of violence, including killings, disappearances, arson, harassment and intimidation of journalists, and the arrest of some of them, along with unjustified legal proceedings. They claimed that the government instigated committed these acts or tolerated them. The court indicated that searching the newspaper's headquarters constitutes a serious interference with freedom of expression and is not compatible with the goals of preventing crime and chaos. The legal measures taken against the newspaper were also examined, and the court found that some of the charges were unjustified, and others were disproportionate.

Accordingly, the ECtHR unanimously ruled that there was a violation of freedom of expression in this case and that the government has failed to take adequate protection and investigation measures and has imposed unjustified and disproportionate measures that serve no legitimate purpose.[334]

The final point regarding strengthening press freedom is protecting the confidentiality of journalistic sources. In fact, it is normal for such a point to attract the attention of the ECtHR, given that the nature and goals of the profession of journalism and media, in general, require such protection to ensure the continued flow of information and maintain the integrity of the

[333] ECtHR. Thorgeir Thorgeirson V. Iceland, No. 13778/88. 25/06/1992. § 65..

[334] ECtHR. Ozgur Gundem V. Turkey, No. 23144/93. 16/03/2000. (.

source.[335] Thus, providing an additional guarantee to protect the right to freedom of expression.[336]

As an example, in the case of *Sergey Sorokin V. Russia,* a journalist's home was searched, and his electronic devices were seized without adequate safeguards to protect the confidentiality of his journalistic sources. While there was a legal basis for the search and seizure, there were no clear provisions to protect journalistic sources in domestic law at that time. Additionally, the search lacked procedural safeguards to ensure the confidentiality of the journalist's sources, and the authorities did not take measures to protect unrelated personal and professional information. As a result, the ECtHR found that this action violated the journalist's freedom of expression and the interference with the journalist's freedom of expression was deemed unnecessary and disproportionate in a democratic society, and concluded unanimously that there was a violation of freedom of expression.[337]

In the case of *Sanoma Uitgevers B.V. v. The Netherlands* (2010), the ECtHR mentioned that he right of journalists to protect their sources is part of the freedom to "receive and impart information and ideas without interference by public authorities" protected by Article 10 of the Convention and serves as one of its important safeguards. It is a cornerstone of freedom of the press, without which sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information to the public may be adversely affected.[338]

The *Nagla v. Latvia* case further highlighted the ECtHR's commitment to safeguarding journalists and their sources. In this particular instance, a journalist had her home searched by authorities, resulting in the confiscation of data storage devices that contained her sources of information. The European Court of Human Rights ruled that this action violated the journalist's

[335] In the case of Tillack v. Belgium (2007), the court stated:

"The Court emphasises that the right of journalists not to disclose their sources cannot be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources but is part and parcel of the right to information, to be treated with the utmost caution. This applies all the more in the instant case, where the suspicions against the applicant were based on vague, unsubstantiated rumours, as was subsequently confirmed by the fact that he was not charged". ECtHR. Tillack v. Belgium, No. 20477/05. 27/11/2007. § 65.

[336] ECtHR. Goodwin V. The United Kingdom, No. 17488/90. 27/03/1996. § 39.

[337] ECtHR. Sergey Sorokin V. Russia, No. 52808/09. 30/08/2022.

[338] ECtHR. Sanoma Uitgevers B.V. v. The Netherlands, No. 38224/03. 14/09/2010. § 50.

right to both receive and share information, as well as her right to safeguard her sources. The court specifically criticized the lack of sufficient justification for the urgency of the search and stressed the significance of upholding journalistic freedom and protecting sources.[339]

3.4. Political Expression

The right to express political views constitutes a fundamental pillar of freedom of expression, a cornerstone of any democratic society that values political ideals. Consequently, it is entirely appropriate to regard political expression as a category deserving exceptional protection within the realm of freedom of expression.

While Article 10 of the ECHR does not explicitly mention political expression, it is possible to ascertain which forms of political expression fall under its purview through an examination of the case law and jurisprudence of the ECtHR. It is essential to note that not all categories of political expression receive the same level of protection. Distinctions must be drawn between political expression that aligns with the ideals of democratic strengthening and that which involves incitement to violence and hatred. [340]

Within the sphere of political discourse, it is critical to differentiate among various types of speech that fall under this umbrella. Notably, this includes discourse addressing matters of public interest or contributing to ongoing public debates.[341] Hence, certain nations, like Norway, assign a unique significance to political discourse. In Norway, political speech benefits from exceptionally robust protection within the constitutional framework, as evidenced by Article 100, paragraph 3, of the Constitution. This provision mandates that any limitations on political expression must be precisely defined and can only be imposed when justified by exceptionally vital considerations related to the fundamental underpinnings of freedom of expression.[342]

The European Court recognizes the profound value of such speech, given its capacity to foster transparency, accountability, and the fundamental right to access information. Consequently,

[339] ECtHR. Nagla v. Latvia. 73469/10. 16/07/2013.

[340] BeVier, L. R. (1978). The first amendment and political speech: An inquiry into the substance and limits of principle. *Stanford Law Review*, 299-358.

[341] See for example: ECtHR. Case of Steel and Morris v. The United Kingdom, No. 68416/01. 15/02/2005.

[342] See: The Constitution of the Kingdom of Norway 1814. Art. 100. (Last amendment 2023).

the court consistently affirms that political expression deserves the highest level of protection.[343]

In the case *of Makraduli V. "The Former Yugoslav Republic of Macedonia*," the applicant, a member of the SDSM opposition party and a parliamentarian, faced criminal libel charges filed by Mr. S.M., a senior member of the ruling political party who led the Security and Counterintelligence Agency at the time. The case centered around statements made by the applicant during press conferences held at his party's headquarters. In the first instance, the applicant accused Mr. S.M. of abusing his authority and misusing police wiretapping equipment for stock market trading. These statements were broadcast nationally and sparked a public exchange of comments between his political party and various state institutions. In the second instance, the applicant held a press conference discussing the public sale of state-owned land and alleged corruption in the selection process. The trial court found the applicant guilty of defamation, imposed a fine, and ordered him to pay court fees and Mr. S.M.'s expenses. The Court of Appeal upheld this verdict.

The applicant lodged constitutional appeals in both cases, contending that his convictions violated his right to freedom of expression. However, the Constitutional Court rejected these appeals, asserting that the applicant had interfered with another individual's protected rights (Mr. S.M.) and had not substantiated the truth of his statements, thus striking a fair balance between freedom of expression and the safeguarding of reputation and dignity.

The ECtHR determined that there was a violation of the right to freedom of expression based on the text of Article 10. In its judgment, the court emphasised that when it comes to political speech or matters of public interest, there is minimal room for restrictions under Article 10 § 2 of the Convention. Consequently, a high level of protection is typically afforded to freedom of expression, and authorities have limited leeway to intervene. Even if remarks are hostile or potentially serious, this does not negate the right to a high level of protection, given the existence of a matter of public interest.[344]

[343] In the case of Fatullayev V. Azerbaijan 2010, the ECtHR stated:

"It has been the Court's constant approach to require very strong reasons for justifying restrictions on political speech, since broad restrictions imposed in individual cases would undoubtedly affect respect for freedom of expression in general in the State concerned". .

[344] ECtHR. Makraduli v. "The Former Yugoslav Republic of Macedonia", No. 64659/11 24133/13. 19/07/2018.

Elections, in their essence, represent a vital facet of political expression, serving as a pivotal mechanism for translating the collective will of voters into action. The sphere of political expression in this context is expansive, encompassing not only the electorate but also candidates, the press, and all elements related to the electoral machinery, including information dissemination and public discourse. Consequently, it is incumbent upon states to uphold the right to vote, a form of political expression in itself, with unwavering guarantees, particularly concerning the unimpeded flow of ideas and information.

This commitment presents a formidable challenge, as highlighted in the Special Rapporteur's report, which underscores the imperative of dedicated attention to safeguarding the free expression rights of key stakeholders within the electoral realm. These stakeholders encompass voters, who rely on the right to freedom of expression for access to comprehensive and accurate information, and the ability to express their political preferences without apprehension. Equally, it extends to candidates and political organizations, who must be able to exercise their rights through unfettered campaigning and the unhindered communication of their political messages, devoid of interference or attacks. Moreover, the media also assumes a critical role, relying on the right to freedom of expression to fulfil their essential democratic function of informing the public, scrutinizing political parties and platforms, and providing crucial checks and balances within the electoral process. [345]

While the right to vote is inherently independent, it's essential to recognize that it represents one of the facets of expression. Likewise, elections, in their broader context, intersect significantly with the right to freedom of expression, particularly concerning matters of public discourse and the dissemination of information. In essence, the right to freedom of expression within the electoral framework serves as a potent instrument for political engagement and the administration of public affairs, whether exercised directly or through elected representatives.

In a related context, Article 25 of the International Covenant on Civil and Political Rights unequivocally upholds the right of every citizen to partake in the governance of public affairs, including the ability to nominate and elect representatives in a manner that ensures the unfettered expression of the voters' will. [346]Consequently, General Comment No. 25 (1996)

[345] See: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Human Rights Council, U.N. Doc. A/HRC/26/30 (Jul 2, 2014). Para. 11.

[346] Article 25 of ICCPR stated:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

underscores the pivotal role played by the right to freedom of expression in safeguarding the rights enshrined in Article 25.

"In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas."[347]

In Europe, Article 3 of Protocol No. 1 of the ECHR, in conjunction with Article 10 of the Convention, serves as a fundamental framework for addressing and assessing issues related to free expression during electoral processes.[348] The ECtHR has consistently emphasized the paramount importance of providing robust safeguards for the right to freedom of expression throughout electoral processes. These safeguards encompass not only the content of expression, such as ideas and information, but also the various means and mechanisms of expression.[349]

The case of *Magyar Kétfarkú Kutya Párt v. Hungary* exemplifies the ECtHR's stance on this matter. In this case, Hungary was found to have violated freedom of expression (Article 10) when it imposed a fine on a political party for offering a mobile application that allowed voters to share anonymous photographs of their ballot papers. The court's decision was grounded in the belief that the legal basis for the fine lacked the necessary foreseeability, primarily due to the ambiguity in the electoral procedure law. The Court emphasized that when legal provisions

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives.

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

(c) To have access, on general terms of equality, to public service in his country.

[347] UN Human Rights Committee. (1996). General Comment No 25 on the right to participate in public affairs, voting rights and the right of equal access to public service (Art 25). Para. 25.

[348] ECtHR. Bowman v. The United Kingdom, No. 24839/94. 19/02/1998. § 42.. See also: Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS 9, available at: https://www.refworld.org/docid/3ae6b38317.html. Accessed 28.09.2023.

[349] For example, see ECtHR.Jersild v. Denmark, No. 15890/89. 23/09/1994. §31. ECtHR. Oberschlick v. Austria, No. 11662/85. 23/05/1991. § 57.

form the basis for restricting freedom of expression, the foreseeability of these restrictions becomes a critical factor. This is particularly crucial in the lead-up to elections, where the free circulation of diverse opinions and information is essential for allowing "the free expression of the opinion of the people in the choice of the legislature." Moreover, it is of utmost significance when the freedom of expression pertains to political parties, as these entities play a pivotal role in ensuring pluralism and the proper functioning of democracy. Consequently, any limitations on their freedom of expression must undergo rigorous scrutiny. This principle applies equally, with necessary adjustments, to referendums aimed at ascertaining the will of the electorate on matters of public concern.[350]

In the *Teslenko and Others v. Russia case, Russia* was found to have violated the applicants' freedom of expression by prosecuting them for encouraging voters not to support a specific party or to abstain from voting in elections. The ECtHR deemed these prosecutions unnecessary in a democratic society and underscored citizens' right to express their views during elections. The verdict emphasized the importance of clear and less restrictive regulations concerning electoral expressions. The Court highlighted that democracy constitutes a crucial aspect of the European public order, with Article 3 of Protocol No. 1 playing a pivotal role in establishing and sustaining effective and meaningful democracies within all Contracting States. The court also noted that while electoral systems may vary significantly due to historical, cultural, and political differences, every democratic system relies on free elections and freedom of expression, particularly in the realm of political discourse. It stressed that freedom of expression is essential for enabling individuals to freely express their opinions during elections.[351]

The third facet of political expression encompasses criticism directed at state institutions, government performance, or public officials. From a researcher's perspective, including this type of criticism within the scope of political expression is crucial due to its role as a form, perhaps even a tool, of individual participation in governance, thereby contributing to the principles of democracy.[352]

[350] ECtHR. deMagyar Kétfarkú Kutya Párt v. Hungary [GC], No. 201/17. 20/01/2020.

[351] ECtHR. Teslenko and Others v. Russia, No. 49588/12. 05/04/2022. .

[352] Bhagwat, A., & Weinstein, J. (2021). Freedom of Expression and Democracy. In The Oxford Handbook of Freedom of Speech (pp. 82-105). Oxford University Press. https://doi.org/10.1093/oxfordhb/9780198827580.013.5

The ECtHR consistently leans towards ensuring robust protection for civil servants while sometimes placing limits on criticism directed at them, all within the framework of the right to freedom of expression.[353]

An illustrative case in this regard is *Janowski v. Poland*. The applicant, a journalist in Poland, found himself in a situation involving municipal guards instructing market vendors to vacate the area and relocate their makeshift stalls to a nearby market. The applicant contested this action, asserting its lack of legal basis and its infringement on economic freedom rights. He pointed out that no local authority had issued a decision authorizing the guards to clear the area. This exchange between the applicant and the guards was witnessed by a group of bystanders.

Subsequently, an accusation was filed against the applicant, alleging that he had insulted municipal guards in the performance of their duties, constituting a flagrant violation of legal order. This was a crime defined in Article 236 of the Criminal Code, read together with Article 59 § 1. The Regional Court convicted the applicant, handing down a suspended eight-month prison sentence along with a fine.

The applicant subsequently appealed the verdict, contending that his conviction lacked sufficient evidence. He highlighted that the regional court had not precisely determined the offensive words used by the applicant, only noting that he had referred to the guards as "ignorant." The applicant argued that this term should not be considered an insult but rather an acceptable form of criticism directed at public officials. As a result, the Regional Court annulled the prison sentence and fine. Notably, the judgment did not specify the derogatory words used by the applicant. Nevertheless, the Regional Court deemed the available evidence sufficient to conclude that the applicant had insulted the guards by labelling them as "ignorant" and "stupid." Consequently, the applicant's words were deemed to have exceeded the bounds of freedom of expression.

The European Court, in turn, upheld this conviction, thereby indicating that the ECtHR had excluded this type of criticism from the scope of the right to freedom of expression. As articulated in the judgment:

"*What is more, civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks, and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty. In the present*

[353] Flauss, J. F. (2009). The European Court of Human Rights and the freedom of expression. Ind. LJ, 84, 809.

case, the requirements of such protection do not have to be weighed in relation to the interests of the freedom of the press or of open discussion of matters of public concern since the applicant's remarks were not uttered in such a context."[354]

However, it appears that the European Court's approach in this context is not set in stone, as a shift towards considering criticism directed at public officials as a protected form of expression under Article 10 can be discerned. The court's approach is primarily based on proportionality, where the level of protection afforded to a government employee is commensurate with their responsibilities. The greater the level of responsibility, the greater the need to safeguard the right to criticize.[355] Moreover, the protection of a civil employee diminishes when criticism pertains to involvement in militant political activity, even if such criticism is harsh and provocative. This perspective was emphasized in the case of *Mamere v. France*, where the judgement stated:

"That being so, the Court points out first of all that the instant case is one where Article 10 requires a high level of protection of the right to freedom of expression, for two reasons. The first is that the applicant's remarks concerned issues of general concern, namely, protection of the environment and public health, and how the French authorities dealt with those issues in the context of the Chernobyl disaster; Indeed, they were part of an extremely important public debate focused in particular on the insufficient information the authorities gave the population regarding the levels of contamination to which they had been exposed and the public-health consequences of that exposure. The second reason is that the applicant was undeniably speaking in his capacity as an elected representative committed to ecological issues, so his comments were a form of political or 'militant' expression." [356]

3.5. Artistic Expression

As is the case with press freedom and academic freedom, the ECHR does not explicitly indicate that the protection of freedom of expression under Article 10 extends to artistic freedom. The concept of artistic freedom may seem broad to include unlimited categories of types of expression. Therefore, it may seem difficult to establish a precise definition of artistic freedom or limit it to specific people or groups. This is what was included in the report of the Special Rapporteur in this context, which stated:

[354] ECtHR. Janowski v. Poland, No. 25716/94. 21/01/1999. § 33.

[355] Flauss, J. F. (2009). The European Court of Human Rights and the freedom of expression. Ind. LJ, 84, 809.

[356] ECtHR. Mamere v. France, No. 12697/03. 07/11/2006. § 20..

"Art constitutes an important vehicle for each person, individually and in community with others, as well as groups of people, to develop and express their humanity, worldview and meanings assigned to their existence and development. People in all societies create, make use of, or relate to, artistic expressions and creations.

Artists may entertain people, but they also contribute to social debates, sometimes bringing counter-discourses and potential counterweights to existing power centres. The vitality of artistic creativity is necessary for the development of vibrant cultures and the functioning of democratic societies. Artistic expressions and creations are an integral part of cultural life, which entails contesting meanings and revisiting culturally inherited ideas and concepts. The crucial task of implementation of universal human rights norms is to prevent the arbitrary privileging of certain perspectives on account of their traditional authority, institutional or economic power, or demographic supremacy in society. This principle lies at the heart of every issue raised in the debate over the right to freedom of artistic expression and creativity and possible limitations on that right.

There is no intention to propose a definition of art, or to suggest that additional rights should be recognized for artists. All persons enjoy the rights to freedom of expression and creativity, to participate in cultural life and to enjoy the arts. Expressions, whether artistic or not, always remain protected under the right to freedom of expression."[357]

Returning to the provisions of the ECHR, the case-law of the ECtHR shows that the court adopted an approach based on considering artistic freedoms as part of the right to freedom of expression, and thus including them in the field of protection and perhaps granting them more specific protection.

In the case of *Karatas v. Turkey*, Mr Hüseyin Karataş, a Turk of Kurdish origin, was living in Istanbul and worked as a psychologist. In November 1991 he published an anthology of poems in Istanbul entitled "The Song of a Rebellion – Dersim". On 8 January 1992, the public prosecutor at the Istanbul National Security Court accused the applicant and his publisher of disseminating propaganda against the "indivisible unity of the State". He requested the application of section 8 of the Prevention of Terrorism Act No. 3713 and the confiscation of

[357] See: Shaheed, F. (2013). Report of the Special Rapporteur in the field of cultural rights: The right to freedom of artistic expression and creativity. UN Doc A/HRC/23/34, Human Rights Council.

the copies of the work concerned. The ECtHR found that there was a violation of the plaintiff's right to freedom of expression based on Article 10.

The court acknowledged that it is important to consider that the applicant's chosen medium was poetry, which is an art form that may appeal to only a minority of readers. The court observed that Article 10 of the law includes the freedom of artistic expression. This freedom, which falls under the freedom to receive and share information and ideas, allows individuals to participate in the public exchange of cultural, political, and social information and ideas of various kinds. The court emphasised that those who create, perform, distribute, or exhibit works of art contribute to exchanging ideas and opinions, which is crucial for a democratic society. Therefore, the state has an obligation not to excessively restrict their freedom of expression. The court indicated that it does not endorse the tone of the poems in the present case. However, it is important to remember that Article 10 protects not only the substance of the ideas and information expressed but also the way in which they are conveyed.[358]

The previous judgement shows unequivocally that the ECtHR has included artistic expression within the scope of the right to freedom of expression. From the author's point of view, this matter is very consistent with the valuable function that art performs as a tool for self-expression, which may be more influential in serving public debate and supporting democracy. Commenting on the aforementioned recent judgement, it appears that the court allocated these freedoms special protection when it decided that the scope of protection should not be limited to the content, but rather should extend to include the forms by which the expression took place.[359]

Recognizing the complexity of defining artistic expression under Article 10 protection, it is crucial to note that the court faces significant challenges in this regard. This is especially the case when considering the various factors outlined in the second paragraph of Article 10, which will be elucidated further. While reviewing the case law of the ECtHR, the author noted that there are no clear standards for the precise meaning of distinguishing artistic expression or determining its characteristics, but rather general standards related to the right to freedom of expression in terms of content, form, and purpose are often relied upon. This matter may be evident even in the judges' consensus on the judgement. As happened in the case *Vereinigung Bildender Künstler v. Austria*. This case concerns an art exhibition in Vienna that includes a

[358] ECtHR. Karatas V. Turkey, No. 23168/94. 08/07/1999. § 49..

[359] See also: ECtHR. De Haes and Gijsels V. Belgium, No. 19983/92. 24/02/1997. § 48.

controversial painting called “Apocalypse” which had been produced by the Austrian painter Otto Mühl. The painting depicts public figures performing sexual acts. One of the figures depicted, Mr. Meischberger, sued the association behind the exhibition, claiming that the painting insulted him personally. The court initially rejected Mr. Meischberger's claim, citing artistic freedom. However, the Vienna Court of Appeal later ruled in favor of Mr. Meischberger, considering that the painting exceeded the limits of artistic freedom and harmed his public image. The Supreme Court upheld this decision and ordered the association to comply with the injunction and pay the legal costs.

The ECtHR strongly emphasized the importance of freedom of expression as a fundamental pillar of a democratic society, including the right to express ideas that may be offensive or shocking to some, and that artists and their works contribute to the exchange of ideas and opinions, which is vital to a democratic society, and that should be carefully considered. There are no restrictions on this freedom. The court considered that the intervention was lawful and aimed at protecting Mr. Meischberger's rights. However, the court found that the intervention was not necessary in a democratic society. They pointed out that the painting used exaggerated and satirical elements and was clearly not intended to reflect reality. It has been viewed as a caricature rather than a realistic depiction. The court also noted that Mr. Meischberger, as a politician, must show a higher level of tolerance for criticism, and the painting could be viewed as a form of counterattack against his political party. The court therefore considered the injunction issued by the Austrian courts to be disproportionate and therefore in violation of Article 10 of the Convention, which protects freedom of expression. In this case, the controversial dimension referred to by the author appears, which is also reflected in the consensus of the judges. While 4 judges supported the previous judgement, it was opposed by 3 judges.[360]

It is worth noting that the Human Rights Committee adopted a position similar to that of the ECtHR when it affirmed that artistic expression falls within the scope of the right to freedom of expression referred to in Article 19 of the International Covenant on Civil and Political Rights. In Hak-Chul Shin v. Republic of Korea, the committee stated that:

“The Committee observes that the picture painted by the author plainly falls within the scope of the right of freedom of expression protected by Article 19, paragraph 2; It recalls that this provision refers specifically to ideas imparted “in the form of art”. Even if the infringement of

[360] ECtHR. Vereinigung Bildender Künstler V. Austria, No. 68354/01. 25/01/2007. .

the author's right to freedom of expression, through confiscation of his painting and his conviction for a criminal offense, was in the application of the law, the Committee observes that the State party must demonstrate the necessity of these measures for one of the purposes enumerated in article 19" (3).[361]

4. Special Issues

The interpretation and application of the provisions related to the right to freedom of expression raise some controversy that may result in treating some issues as private issues, either because they did not clearly fall within the legal framework or were not subject to judicial consensus or because of the nature of the activity related to those issues.

4.1. Academic freedom

Academic freedom and scientific research represent one of the manifestations of the right to freedom of expression. These freedoms are accorded a unique level of protection distinct from the standard safeguarding of freedom of expression.[362] The key distinction lies in the fact that while the right to freedom of expression, as established under Human Rights Law, encompasses all individuals without exception, academic freedoms are confined to members of the academic community, encompassing professors, researchers, and administrative and teaching staff. Furthermore, academic freedom enjoys a higher protection when compared to the general protection granted to freedom of expression.[363]

The concept of academic freedom, a term that emerged only in the twentieth century, is relatively recent. In medieval Europe, universities grappled with their relationship with society and Church authorities, with theologians navigating the delicate balance between their influence and adherence to Church doctrine while upholding academic freedom. During the Reformation, universities aligned themselves with the beliefs of rulers. In the 18th and 19th centuries, German universities embraced academic freedom for both professors and students. The advent of the research university model in Germany during the early 1800s, with an emphasis on Lehrfreiheit and Lernfreiheit, played a pivotal role in firmly establishing academic freedom as a cornerstone

[361] See: Communication No. 926/2000, Shin v. Republic of Korea (Views adopted on 16 March 2004, eightieth session).

[362] Downs, D. A. (2009). Academic Freedom: What It Is, What It Isn't, and How to Tell the Difference. John William Pope Center for Higher Education Policy (NJ1).

[363] Ronald Dworkin (1996) Freedoms Law: The Moral Reading of the American Constitution, Cambridge: Harvard University Press, p. 247.

in academic and scientific research.[364] By the twentieth century, academic freedom had come to symbolize a commitment to truth, the role of reason in matters of faith, the right of theologians to engage in open discourse, and the safeguarding of intellectual independence from external influences.[365]

Academic freedoms lack a precise definition when considered as constituents of the right to freedom of expression. However, the Lima Declaration of 1988 provides a distinct definition for academic freedoms, shedding light on what they entail and who qualifies to exercise them.

'Academic freedom' means the freedom of members of the academic community, individually or collectively, in the pursuit, development and transmission of knowledge, through research, study, discussion, documentation, production, creation, teaching, lecturing, and writing.[366] Thus, it can be said that the first aspect of academic freedom is the freedom of students and professors.[367]

Another dimension of academic freedom pertains to its relationship with institutional autonomy and the independence of academic institutions.[368] This implies that academic institutions must operate free from interference or undue influence originating from external sources, whether it be the state, market forces, or society at large. For instance, academic institutions must possess the capacity to determine their own curricula, research priorities, admission criteria, and evaluation methods, all while upholding their academic standards and values.[369]

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[364] European parliament (2023). State of play of academic freedom in the EU Member States: Overview of de facto trends and developments. Panel for the Future of Science and Technology. 4.

[365] HEFT, J. L. "Academic Freedom." New Catholic Encyclopedia. Retrieved September 18, 2023 from Encyclopedia.com: https://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/academic-freedom. Accessed 30.09.2023.

[366] The Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education (1988). https://www.hrw.org/legacy/reports98/indonesia2/Borneote-13.htm. Accessed 29.09.2023.

[367] American Association of University Professors. (2006). 1915 Declaration of Principles on Academic Freedom and Academic Tenure. AAUP Policy Documents and Reports, 291-301.

[368] Rabban, D. M. (1988). Does academic freedom limit faculty autonomy Texas Law Review, 66(7), 1405-1430.

[369] The Lima Declaration defined Autonomy as:

'Autonomy' means the independence of institutions of higher education from the State and all other forces of society, to make decisions regarding its internal government, finance, administration, and to establish its policies of education, research, extension work and other related activities.

https://www.hrw.org/legacy/reports98/indonesia2/Borneote-13.htm. Accessed 29.09.2023.

Similar to legal limitations on the right to freedom of expression, academic freedom is governed by a framework of professional regulations and norms. The 1915 Declaration of Principles, as issued by the American Association of University Professors (AAUP), underscored that academic freedom does not bestow boundless autonomy upon professors. Instead, it explicitly stated that professors may face disciplinary measures or even dismissal if they depart from established academic standards.[370]

In principle, certain theoretical foundations for the right to freedom of expression, as explored in the inaugural chapter of this research, may indeed lay the groundwork for justifying the protection of academic freedoms. Mill's theory of truth, in particular, emerges as highly persuasive within the context of academic freedom. Within the sphere of scientific research, it becomes abundantly clear that the relentless pursuit of truth assumes paramount significance, even in instances where the conclusions arrived at may prove erroneous or run counter to established precedents.[371]

Returning to the provisions of the ECHR, especially Article 10, academic freedoms were not explicitly mentioned, but by comparison with artistic and political freedoms, it can be concluded that the scope of protection established under Article 10 logically extends to include academic freedoms.

It is worth noting that the Charter of Fundamental Rights of the European Union stressed the necessity of respecting academic freedoms, as Article 13 stipulated:

"The arts and scientific research shall be free of constraint. Academic freedom shall be respected." [372]

However, it seems that the applications of this article before the Court of Justice of the European Union regarding academic freedoms are still very timid, especially if compared to the case law of the ECtHR concerned with the implementation and interpretation of the provisions of the ECHR, which did not mention academic freedoms.

On the other hand, in its Recommendation 1762 (2006), the Parliamentary Assembly of the Council of Europe declared to protect academic freedom of expression. The Recommendation

[370] Rabban, D. M. (1988). Does academic freedom limit faculty autonomy Texas Law Review, 66(7), 1405-1430.

[371] J.S. Mill, On Liberty in Focus, Edited by John Gray and G.W.Smith, (Published July 11, 1991 by Routledge). 37.

[372] EU Charter of Fundamental Right. Art. 13. Official Journal of the European Union C 303/17 - 14.12.2007. https://fra.europa.eu/en/eu-charter/article/13-freedom-arts-and-sciences#explanations. Accessed 01.10.2023.

stated: “In accordance with the Magna Charta Universitatum, the Assembly reaffirms the right to academic freedom and university autonomy which comprises the following principles:

- academic freedom in research and in training should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction.
- the institutional autonomy of universities should be a manifestation of an independent commitment to the traditional and still essential cultural and social mission of the university, in terms of intellectually beneficial policy, good governance and efficient management.
- history has proven that violations of academic freedom and university autonomy have always resulted in intellectual relapse, and consequently in social and economic stagnation.
- high costs and losses, however, could also ensue if universities moved towards the isolation of an “ivory tower” and did not react to the changing needs of societies that they should serve and help educate and develop; universities need to be close enough to society to be able to contribute to solving fundamental problems, yet sufficiently detached to maintain a critical distance and to take a longer-term view.”[373]

The ECtHR has consistently underscored the critical significance of safeguarding academic freedoms within the broader framework of the right to freedom of expression. Consequently, it has interpreted Article 10 to encompass and protect academic freedoms.[374] One illustrative case highlighting this interpretation is the *Sorguç v. Turkey* case. In this case, the applicant, a university professor, presented a paper at an academic conference in 1997, wherein he critiqued the university's system for appointing and promoting academics. He contended that the inclusion of non-experts on promotion committees resulted in the appointment of individuals lacking the requisite academic qualifications for assistant professor positions. While he cited an example without revealing the candidate's identity, an assistant professor filed a lawsuit seeking damages later that year, alleging that specific statements in the paper had harmed his reputation. Initially, the trial court dismissed the claim, but upon review, the claim was upheld, and the applicant was directed to pay damages. In response, the ECtHR unequivocally

[373] Parliamentary Assembly. Recommendation 1762 (2006): Academic Freedom and University Autonomy. https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17469&lang=en. Accessed 01.10.2023.

[374] ECtHR. Sapan v. Turkey, No. 44102/04. 08/06/2010. § 34. (French version).

established that Article 10 had been breached, reinforcing the overarching significance of upholding academic freedoms. This encompassed the fundamental rights of academics to openly and without constraint voice their opinions regarding the institutions or systems within their professional sphere, as well as their unimpeded liberty to disseminate knowledge and truth. This judicial pronouncement resolutely underscores the Court's commitment to preserving the free and unrestricted exchange of ideas within the academic realm.[375]

In conclusion, it is evident that the jurisprudence of the ECtHR has firmly established a framework of exceptional protection around academic freedoms, recognizing them as an integral facet of the right to freedom of expression, tailored to the inherent nature of this right and its imperatives. This enduring commitment of the Court was affirmed in the case of Mustafa Erdoğan and others v. Turkey, where the court stressed the importance of academic freedom. The court considered that academic freedom in research and training should guarantee freedom of expression and action, freedom to disseminate information, and freedom to conduct research and distribute knowledge and truth without restriction. It is therefore consistent with the Court's case law to submit to careful scrutiny any restrictions on the freedom of academics to carry out research and to publish their findings. This freedom, however, is not restricted to academic or scientific research but also extends to the academics' freedom to freely express their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise, and competence. This may include an examination of the functioning of public institutions in a given political system and criticism thereof. [376]

This jurisprudential stance serves as a steadfast affirmation of the Court's dedication to safeguarding academic freedoms as an essential component of the broader right to freedom of expression, fostering a vibrant and unrestricted academic discourse that is vital for the advancement of knowledge and the protection of democratic values.

4.2. Commercial activity

Commercial expression stands out as one of the most contentious issues in the realm of free speech, prompting researchers to categorize it as a distinctive area of inquiry. The fundamental question at hand revolves around whether the protective scope of the right to freedom of

[375] ECtHR. Sorguç v. Turkey, No. 17089/03. 23/06/2009. .

[376] ECtHR. Mustafa Erdoğan and others v. Turkey, No. 346/04 39779/04. 27/05/2014. § 40.

expression encompasses commercial expression, and if so, does it enjoy the same level of protection as other forms of expression?

In the United States before the 1970s, the Supreme Court refused to grant commercial speech First Amendment protection, but after that the Supreme Court began to recognize some level of First Amendment protection for commercial advertising, particularly in the case of *the Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc*, where this protection was based on the idea that consumers have a right to accurate information about goods and services. The court created an "intermediate scrutiny" standard for regulating commercial speech, which included standards such as that the regulation be relevant to the lawful activity, not be misleading, serve a significant government interest, and not be more comprehensive than necessary. This change in approach to protecting commercial advertising has faced criticism from different points of view. Some believed that commercial speech should enjoy the same level of protection as non-commercial speech. Others argue that the increased protection of commercial speech is excessive and runs counter to the courts' traditional approach to intervening in legislative decisions regarding commercial regulation. Despite these criticisms, commercial speech protections have continued to expand and remain a prominent feature of American constitutional law.[377]

. Notably, in the United States, the courts have adopted a "common sense" approach that draws a clear distinction between commercial speech and other modes of expression. Commercial speech is often categorized as market-related conduct subject to minimal judicial scrutiny, further reinforcing the perception that restrictions on commercial expression pose fewer threats to fundamental values when compared to political or artistic expression.[378]

Michael Davis has proposed a definition of commercial expression as any expression concerned with buying or selling.[379] It seems that there are those who took this broad definition, which may include non-commercial aspects, as a justification for protecting commercial expression

[377] Schauer, F (2021). Free Speech and Commercial Advertising, in Adrienne Stone, and Frederick Schauer (eds), The Oxford Handbook of Freedom of Speech, Oxford Handbooks (2021; online edn, Oxford Academic, 10 Feb. 2021), https://doi.org/10.1093/oxfordhb/9780198827580.013.24, accessed 1 Nov. 2023.

[378] Sharpe, R. J. (1987). Commercial Expression and the Charter. *The University of Toronto Law Journal*, *37*(3), 229-259.

[379] Davis, M. (1980). Should Commercial Speech Have First Amendment Protection?. *Social Theory and Practice*, *6*(2), 123-150.

on the basis that it may be difficult in many cases to differentiate between the overlapping aspects of this type of expression.[380]

While the ECHR did not explicitly acknowledge commercial expression as an integral facet of the right to freedom of expression, the court has construed that the protective purview delineated under Article 10 extends to encompass commercial expression.

In the case of *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, the applicants, a publishing company (Markt Intern Verlag GmbH) and its managing director (Klaus Beermann), were involved in the publication of a newsletter that provided specialized information to various professional sectors. The case arose after the newsletter published articles criticizing certain business practices of a company, which subsequently led to legal action in Germany. The German courts ruled against the applicants, finding that the articles had infringed upon the reputation and rights of the company in question, leading to an order for the cessation of those allegations and the imposition of a fine. The applicants alleged that the German courts' decisions constituted a violation of their right to freedom of expression. They argued that the penalties imposed on them restricted their ability to disseminate information and opinions.

The ECtHR determined that the intervention by the German courts in the applicants' freedom of expression was necessary in a democratic society to protect the reputation and rights of the company criticised in the newsletter. The Court noted that the contested article was targeted at a limited group of tradespeople and did not concern the public at large. However, it recognised that the article comprised commercial information, which cannot be excluded from Article 10's protection. The Court emphasised that Article 10 does not limit its application to specific types of information, ideas, or forms of expression.

However, the court mentioned that commercial expression, while protected under Article 10, is subject to distinct monitoring standards when compared to other forms of expression. Local courts are afforded a broader margin of appreciation in assessing restrictions on commercial expression, distinguishing it from other categories of expression. Consequently, the protective scope afforded to commercial expression is notably limited, and its evaluation often adheres to exceptional and unconventional standards within the customary context of Article 10. [381]

[380] Machina, K. F. (1984). Freedom Of Expression in Commerce. Law and Philosophy, *3*(3), 375-406.

[381] ECtHR. Markt Intern Verlag Gmbh And Klaus Beermann v. Germany, 10572/83. 20/11/1989..

Distinguishing between conduct involving commercial expression and other types of behaviour can be challenging, often necessitating the application of specific criteria, such as profit and unfair competition or even behaviour that violates the obligations of the profession, to determine whether a particular action falls within the realm of protected commercial expression.[382]

For instance, in the case of Barthold v. Germany, Dr. Barthold, a Hamburg-based veterinarian, was interviewed by a journalist regarding his emergency animal care service. The resulting article shed light on deficiencies in animal welfare services. Subsequently, fellow veterinarians accused him of unfair competition due to self-promotion.

The ECtHR, in its ruling, distinguished this case as one centered on public discussion rather than commercial advertising. Consequently, Dr. Barthold's conviction was deemed unjustified because it had the potential to discourage professionals from participating in community debates and could impede the press in its crucial role as an information provider and public watchdog.[383]

4.3. Internet

When the basic international and regional covenants and conventions on human rights were adopted, including the ECHR, the Internet was not known as it is today. This matter has constituted an obstacle in integrating and applying the modes of expression associated with the Internet and digital communication in general within the normal context established for the right to freedom of expression. Not only in terms of protection but also in terms of restrictions. Since most local legal systems lack legislation specific to the Internet, especially when it comes to freedom of expression, this has led to giving judges in national courts discretionary power that may be broader than usual in creating and adopting special standards in dealing with such cases.[384]

[382] de l'Europe, C., & Oetheimer, M. (2007). Freedom of expression in Europe: case-law concerning Article 10 of the European Convention of Human Rights (Vol. 18). Council of Europe. 79-81.

[383] ECtHR. Barthold v. Germany, No. 8734/79. 25/03/1985.

[384] Bychawska-Siniarska, D. (2017). Protecting the right to freedom of expression under the European convention on human rights: A handbook for legal practitioners. Council of Europe. 108.

The Internet assumes a pivotal role in upholding the fundamental right to freedom of expression,[385] a fact reaffirmed by the Joint Declaration on Freedom of Expression and The Internet 2011. This declaration underscores the transformative potential of the Internet, which empowers billions of people worldwide by amplifying their voices, greatly improving their access to information, and fostering diversity and journalism. It also acknowledges the Internet's capacity to bolster the realization of other rights, encourage public engagement, and facilitate access to goods and services.[386] The declaration stated:

"Emphasizing the transformative nature of the Internet, which empowers billions of individuals across the globe by significantly augmenting their capacity to access information and promoting diversity in reporting; Acknowledging the Internet's potential to advance the realization of other human rights and foster public engagement, while also facilitating access to essential goods and services...The principles of freedom of expression extend to the Internet, just as they do to all forms of communication. Limitations on freedom of expression in the online realm are permissible only when they adhere to established international norms, including the requirement that they be prescribed by law and deemed necessary to protect an interest recognized under international law (as per the 'three-part' test)."[387]

The Internet is one of the means of expression rather than one of the components of expression. Therefore, the content of online expression may take on the character of one of the categories that were referred to in the context of research into the components of the right to freedom of expression. Especially in light of the advantages that the Internet providers, such as neutrality, ease of use, and free of charge.[388] Therefore, many artists, journalists, writers, and political critics may see digital platforms as a more flexible and more effective tool in expressing their opinions with less margin of censorship when compared to traditional publishing means.[389]

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[385] Norwegian Ministry of Culture and Equality (2022). Official Norwegian Reports NOU 2022: 9 Summary. The Norwegian Commission for Freedom of Expressthe Report. P. 14.

[386] La Rue, F., Mijatović, D., Botero-Marino, C., & Tlakula, F. P. (2011). Joint Declaration on Freedom of Expression and the Internet.

[387] Ibid.

[388] Marino, C. B. (2013). Freedom of Expression and the Internet. Office of the Special Rapporteur for Freedom of Expression & Inter-American Commission on Human Rights. P. 5.

[389] Benedek, W., & Kettemann, M. C. (2020). Freedom of expression and the internet: Updated and revised 2nd edition. Council of Europe. Ch, 2.

Indeed, the jurisprudence of the ECtHR pertaining to the Internet within the framework of Article 10 appears somewhat limited when juxtaposed with its treatment of other matters falling under the same article. This is mainly due to the fact that the emergence and spread of the use of the Internet with its various applications and platforms is relatively new. However, it is worth noting that the ECtHR has underscored the vital role of the Internet in upholding the right to freedom of expression, recognizing the advantages mentioned earlier. This affirmation is encapsulated in the case of *Times Newspapers Ltd v. The United Kingdom (Nos. 1 And 2)*, wherein the court's ruling underscored:

"The Court has consistently emphasised that Article 10 guarantees not only the right to impart information but also the right of the public to receive it. In the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general. The maintenance of Internet archives is a critical aspect of this role and the Court therefore considers that such archives fall within the ambit of the protection afforded by Article 10."[390]

Later, the court reiterated what it stated in the previous case, in addition to emphasizing that the scope of protection is not limited only to the content of the information, but extends to the means of dissemination. That is, the Internet is considered one of the means of expression covered by this protection.[391]

In a related context, the ECtHR indicated that freedom of expression, especially in the electronic press, requires strong protection. And that the absence of an appropriate legal framework for the use of information obtained via the Internet hinders freedom of the press and is considered a possible unjustified interference under Article 10. This implies a positive obligation to Countries to create an appropriate regulatory framework to protect the online expression of journalists.[392]

In fact, issues pertaining to the Internet and its various applications, particularly within the framework of the right to freedom of expression, can pose numerous challenges. These challenges stem from the inherent difficulty of effectively monitoring all websites and tools, as

[390] ECtHR. Times Newspapers ltd v. The United Kingdom (Nos. 1 AND 2), No. 3002/03 23676/03. 10/03/2009. § 29.

[391] ECtHR. Ahmet Yildirim v. Turkey, No. 3111/10. 18/12/2012.

[392] ECtHR. Editorial Board of Pravoye Delo and Shtekel V. Ukraine, No. 33014/05. 05/05/2011.

well as the intricate web of relationships among users, service providers, legislators, and regulators.

A case that exemplifies these complexities is *Delfi AS v. Estonia*, wherein the ECtHR grappled with a scenario in which an online news portal faced legal action due to offensive comments posted by anonymous users. Notably, this was the first case in which the Court had to examine a complaint concerning user-generated expressive activity on the Internet. In this landmark case, the court ruled that imposing damages on the news portal did not run afoul of Article 10, emphasizing the responsibilities of online platforms when they operate for economic purposes and facilitate user-generated content. The court's judgment underscored that the news portal could reasonably anticipate legal consequences for hosting illicit comments. Moreover, it took into careful consideration the delicate balance between online anonymity and the protection of other rights and interests.[393]

One of the significant outcomes of that case was the court's adoption of a set of standards for evaluating accountability regarding anonymous comments. These standards were established in the case of *Magyar Tartalomszolgáltatók Egyesülete and Index.Hu Zrt V. Hungary*. The case involved two applicants: a self-regulatory body of Internet content providers and the owner of an Internet news portal. They were accused of being objectively liable for user comments on their portals. These comments criticised certain real estate websites, resulting in a civil action for reputational damage. Despite the applicants promptly removing the offensive comments, the domestic courts held them responsible. The ECHR examined the balance between freedom of expression and reputation rights, taking into account the criteria outlined in the Delfi AS v. Estonia case. These criteria include the context and content of the impugned comments, the liability of the authors of the comments, measures taken by the applicants and the conduct of the injured party, consequences of the comments for the injured party, and consequences for the applicants. The ECHR concluded that the decision of the domestic courts infringed upon freedom of expression. They noted the absence of hate speech or direct threats and suggested that effective notice-and-take-down systems could safeguard reputation without excessively restricting expression.[394]

[393] ECtHR. Delfi As v. Estonia, No. 64569/09. 16/06/2015.

[394] ECtHR. Magyar Tartalomszolgáltatók Egyesülete and Index.Hu Zrt V. Hungary, No. 22947/13. 02/02/2016. $$ 71-88. See Also: Raisz, A. (2022). International Law From a Central European Perspective. © Central European Academic Publishing (Miskolc – Budapest, Hungary). 148-151.

5. Summary

The legal basis for freedom of expression in Europe derives from various sources according to three levels. The first is international human rights law, including treaties and agreements related to human rights, such as the International Covenant on Civil and Political Rights. The second is regional agreements such as the ECHR. The third is the domestic law of European countries, which shows variation in clarity and adequacy.

Searching the dimensions of the right to freedom of expression, as set out in Article 10 of the ECHR and based on the case law of the ECtHR, we observe an expanded scope that includes freedom of opinion, freedom of the press, freedom of access to information, political expression, Artistic expression.

Within this expanded framework, specific categories of expression and activities require careful consideration and sometimes warrant heightened or relaxed protection depending on the nature of the activity. This scrutiny extends to academic freedom, commercial expression, and the Internet, each of which requires a unique examination.

After discussing the historical and philosophical context of the right to freedom of expression in the first chapter, the researcher sought through this chapter to provide a specific vision of the scope of protected expression as one of the aspects that would contribute to providing a clear vision of the limits of the right to freedom of expression which related to the nature of the right itself. As for the other aspect that contributes to defining the limits of the right to freedom of expression, according to the researcher's perception, it is related to the legal restrictions imposed on the exercise of this right, and this is the topic that will be discussed in the last part.

Chapter III

Restrictions System: Conditions, Justifications, ECtHR Approach

1. Introduction

As the researcher mentioned in the previous chapter, carefully exploring and researching the field of the right to freedom of expression and defining the categories of protected expression contributes to defining the limits of the right to freedom of expression related to the nature of the right itself. Since these limits are related to the content of the expression, they can be called internal restrictions. On the other hand, there are restrictions imposed by considerations related to the interests of the state, society, or individuals, which may limit the right to freedom of expression. This type of restriction is often determined by the legislator and is called external restrictions.

This chapter examines the second type of restrictions that were drawn up based on various considerations and justifications referred to in the ECHR as well as the International Covenant on Civil and Political Rights.

Such restrictions, with their negative effects that may undermine the right to freedom of expression, must be subject to strict scrutiny. This examination would show the legitimacy of such restrictions and constitutes one aspect of commitment to the principle of the rule of law.

In this context, the ECtHR has adopted specific procedures to determine the legality of these restrictions and balance them with the harms that may result from them. This process is often called a proportionality test.

These points will be discussed in this chapter based on Article 10 of the ECHR and the case law of the ECtHR.

2. Intervention by Authority

The first paragraph of Article 10 of the ECHR included a reference to “interference by public authority” in the exercise of the right to freedom of expression. This means that public authorities or governmental bodies, including law enforcement agencies, legislatures and other governmental entities, may take actions that affect an individual's exercise of freedom of expression. Interference by authority usually involves government actions that limit, restrict or regulate the right to freedom of expression in some way. The ECtHR recognizes that such interference can be permissible in certain circumstances, provided that it is consistent with the

law and meets the criteria of necessity and proportionality.[395] Therefore, the first point to be examined in the context of considering issues related to the exercise of the right to freedom of expression before the ECtHR is whether there is interference by the public authority or not. Then the legitimacy of this intervention is considered.[396]

The right to freedom of expression may be subject to interference by public authorities in diverse manners, as articulated in the second paragraph of Article 10, encompassing procedures and penalties as particular instances of such interference.[397] It is worth noting that the ECtHR does not consider that there is a need for an examination of the characterization made by domestic courts to determine whether there has been an interference with the right to freedom of expression. The fact that the national courts based the applicant's conviction on evidence related only to forms of expression is considered sufficient reason for the ECtHR to confirm the existence of interference.[398]

In the case of *Yılmaz and Kılıç v. Turkey*, two people who were members of the Hadep Party (People's Democratic Party) were arrested during demonstrations protesting the arrest of Abdullah Öcalan, the former leader of the terrorist organization PKK (Kurdistan Workers' Party). They were sentenced to aiding and colluding with an illegal organization because they chanted slogans in support of that organization during the demonstrations, which led to the applicants objecting that this constitutes a violation of their right to freedom of expression. The ECtHR found that the applicants were convicted based on their expression during the demonstration, which constitutes an interference with their right to freedom of expression. While the government objected, arguing that this intervention was intended to protect national security and prevent unrest, the court noted that the demonstrations were not violent, and it was not proven that the applicants had chanted violent slogans themselves. Therefore, although the interference carried out by the national authorities in the applicants' right to freedom of expression may have been justified in relation to their need to prevent unrest, especially in the charged political atmosphere that prevailed in the country at that time, the punishment imposed

[395] ECtHR. Wille v. Liechtenstein, NO. 28396/95. § 43. 28/10/1999.

[396] Korff, D. (1987). The Guarantee of Freedom of Expression Under Art. 10 of the European Convention on Human Rights. *Journal of Media Law & Practice*, 9(3), 143-150.

[397] The second paragraph of Article 10 states:

(The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties…).

[398] Bahçeci and Turan v. Turkey, NO. 33340/03. § 26. 16/06/2009.

on them, which was approximately four years of imprisonment, was excessive in nature and severity compared to the legitimate purpose that supported their conviction. Therefore, the court unanimously found that interference had occurred and that the applicants' right to freedom of expression had been violated.[399]

In practice, it may be difficult to determine exclusively the forms of interference by the public authority in exercising the right to freedom of expression. The reason for this may be due, from the researcher's point of view to the fact that the forms of expression themselves may be difficult to limit. This is on the one hand, and on the other hand, the legal texts that regulate the exercise of the right to Freedom of expression are often characterized by being broad and subject to multiple interpretations, thus giving broad powers to the executive authority to regulate the exercise of the right to freedom of expression. It also grants broad discretionary power to national courts in evaluating the content and forms of expression and determining their suitability to the law, and thus deciding the appropriate action based on that assessment, which may constitute an interference with the right to freedom of expression.

Restrictions on freedom of expression can take one of two forms: either in the form of a prior restriction or in the form of subsequent punishment.[400] Therefore, public authority interference with the right to freedom of expression may come in many forms that may precede or follow expression. In reference to the provisions outlined in the second paragraph of Article 10 of the ECHR, where penalties and procedures constitute interference with freedom of expression, the ECtHR treated criminal conviction as interference with freedom of expression by the public authority.

In the case of *Radio France and Others v. France*, the court noted that the French courts convicted the two plaintiffs of defaming a government employee in news broadcasts broadcast by France Info, imposed a fine on them of 20,000 French francs each and ordered them to pay 50,000 French francs in compensation for damages. As a matter of civil compensation, the plaintiff company was ordered to broadcast an announcement about the ruling several times on France Info. The Court therefore confirmed that the applicants had suffered from "interference by public authority" in exercising the right guaranteed by Article 10; Such interference would

[399] Yılmaz and Kılıç v. Turkey, NO. 68514/01. § 58. 17/07/2008. (French version).

[400] Hare, I., & Weinstein, J. (Eds.). (2010). Extreme Speech and Democracy. Oxford University Press.

violate the Convention if it failed to meet the criteria set out in the second paragraph of Article 10.[401]

It is worth noting that the ECtHR, in the context of its view of the criminal conviction as a form of interference with freedom of expression, considered that even a conviction accompanied by a suspended sentence is considered an interference with the right to freedom of expression that would affect the exercise of this right.[402] From the same standpoint, the court considered that imposing fines and ordering the payment of compensation is also an interference by the public authority in freedom of expression.[403] Indeed, the ECtHR went further when it considered that an investigation in criminal proceedings, or an investigation on the basis of legislation that was vaguely formulated and was also interpreted vaguely by national courts, with the danger it poses to freedom of expression, is considered an interference.

In the case, *Altuğ Taner Akçam v. Turkey*, the plaintiff, a professor of history involved in research and publication on the historical events of 1915 relating to the Armenian population of the Ottoman Empire, published an editorial opinion in a bilingual Turkish-Armenian newspaper criticizing the prosecution of the late editor-in-chief of that newspaper for the crime of "denigrating Turkishness" under Article 301 From the Penal Code. Subsequently, a complaint was lodged against the applicant by a private individual in relation to the same offence. The public prosecutor took a statement from the applicant, but the charges were eventually dropped.

The ECtHR in turn held that although the applicant was not tried and convicted of the offense under Article 301, the criminal complaints lodged against him by extremists for his views on the Armenian question turned into a campaign of harassment and forced him to answer charges under this provision. Although the contested ruling has not yet been applied to the plaintiff, the mere possibility of investigating against him in the future has caused him stress and fear of prosecution. This situation has also forced the applicant to modify his behaviour by showing restraint in his academic work so as not to risk prosecution under Section 301. The court further observed that ideas and opinions on public matters are weak in nature. Therefore, the mere possibility of interference by the authorities or private parties acting without proper oversight

[401] ECtHR. Radio France And Others V. France, NO. 53984/00. § 28. 30/03/2004. See also: ECtHR. Lindon, Otchakovsky-Laurens and July V. France, NO. 21279/02. § 40, 59. 22/10/2007.

[402] ECtHR. Artun and Güvener v. Turkey, NO. 75510/01. 26/06/2007. § 33. (French version). See also: Otegi Mondragon V. Spain, NO. 2034/07. § 60. 15/03/2011.

[403] ECtHR. Tolstoy Miloslavsky v. the United Kingdom, NO. 18139/91. § 35, 51. 13/07/1995.

or even with the support of the authorities may impose a serious burden on the freedom to form ideas and democratic debate and have a chilling effect. The Court therefore held that there had been interference with the exercise of the applicant's right to freedom of expression under Article 10 of the Convention.[404]

In the context of its dealings with penalties on the basis that they are a form of interference with the right to freedom of expression, as stated in Article 10 of the ECHR, the ECtHR confirmed that the scope of interference extends to include disciplinary penalties, in conjunction with the court's affirmation that the special nature of the profession practised by the applicant the application must be taken into account when evaluating the application.[405]

In the case *Frankowicz v. Poland*, a consultant has been convicted of unethical conduct for expressing a negative opinion about the professional conduct of a fellow practitioner directly to a patient in a report on his treatment, which a provincial medical court deemed a violation of professional ethics. The ECtHR found that this disciplinary measure constituted a violation of the doctor's freedom of expression (Article 10). The court ruled that although protecting professional solidarity was a legitimate aim, the strict interpretation of domestic law prohibiting criticism of colleagues in the medical profession was disproportionate and discouraged objective assessments of medical treatment. The court unanimously concluded that the doctor's right to freedom of expression had been violated.[406]

On the other hand, the ECtHR dealt with publishing restrictions in their various forms as constituting an interference with the right to freedom of expression. This matter does not need much justification, given the many advantages offered by publications in their various forms as a means of receiving information as well as circulating it, as was mentioned in the section on freedom of the press of this research. Accordingly, the ECtHR considered that the publication ban constitutes an interference with the right to freedom of expression.[407]

In *RTBF v. Belgium*, the applicant company, a public service broadcaster, was broadcasting a monthly program called "Au nom de la loi" (In the Name of the Law), dealing with judicial matters. One program scheduled for 2001 contained footage relating to medical risks and used, for example, complaints from patients about their doctor that had previously been reported in

[404] ECtHR. Altuğ Taner Akçam v. Turkey, NO. 27520/07. § 75, 81, 82. 25/10/2011.

[405] ECtHR. Steur v. The Netherlands, NO. 39657/98. § 38. 28/10/2003.

[406] ECtHR. Frankowicz v. Poland, NO. 53025/99. § 44. 16/12/2008.

[407] ECtHR. Cumhuriyet Vakfi and Others v. Turkey, NO. 28255/07. § 46. 08/10/2013.

the press. Based on the lawsuit brought by one of the doctors mentioned in the programme, the President of the Court of First Instance issued an interim injunction prohibiting RTBF from broadcasting the relevant part of the program pending a decision on the merits, imposing a fine of 2 million Belgian francs per broadcast. The Court of Appeal later confirmed the judicial decision to ban the broadcast and requested the applicant company to submit recordings from the program for review. Accordingly, the company submitting the application claimed before the ECtHR that the prior viewing of the program in question by the Brussels Court of Appeal in order to monitor its content before its broadcast, and the subsequent ban of the program as a preventive measure, had violated freedom of expression. In turn, the ECtHR found that this prohibition and prior censorship constitute an interference with the right to freedom of expression. Especially since the Belgian Constitution allows for the punishment of crimes committed in the exercise of freedom of expression only after they are committed and not before. The Judicial Law and the Civil Law did not clarify the type of restrictions permitted, nor their purpose, duration, scope, or oversight.[408]

In a related context, the ECtHR considered that the confiscation of publications falls within the scope of public authority's interference in exercising the right to freedom of expression. The case of *Handyside v. the United Kingdom* is one of the most important precedents of the ECtHR in which the Court stated that the various measures challenged – the criminal conviction of the applicant, the subsequent seizure and confiscation and the destruction of the matrix and hundreds of copies of the schoolbook – were without a doubt intervention by the public authority in exercising of freedom of expression. The court considered that these interventions entailed a "violation" of Article 10.[409]

In addition to the previous forms, permits and approvals also constitute a form of interference by public authority with freedom of expression, as the ECtHR has made clear on several occasions. An example of this is what happened in the case *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland* where the plaintiff, a radio and television broadcasting company, requested permission to film a prisoner serving a sentence for murder, with the aim of broadcasting the interview in a special film about the trial of another person accused in the same case. The prisoner in question, whose case had received a great deal of media attention, agreed to be interviewed. The request was rejected for reasons related to the need to maintain peace, order and security in the prison and ensure equal treatment among prisoners. The

[408] ECtHR. Rtbf v. Belgium, NO. 50084/06. § 92. 29/03/2011.

[409] ECtHR. Handyside v. The United Kingdom, NO. 5493/72. § 43. 07/12/1976.

requesting company filed various appeals against the decision, but to no avail. The company claimed that as a result of this refusal, it was unable to broadcast the interview as scheduled on the "Rundschau" program about the trial of a person accused in the same murder case and it considered this a violation of its right to freedom of expression within the meaning of Article 10 of the Convention. In turn, the court indicated in its judgement that the applicant company is a private radio and television broadcasting company, and it considered that refusing to allow the company to film inside a prison to prepare a television program and interview a prisoner constitutes interference in its exercise of freedom of expression.[410]

In another case, a journalist was prevented from conducting interviews about living conditions in a reception center for asylum seekers. The ECtHR considered that the refusal to allow the applicant to conduct interviews and take photographs inside the reception center prevented him from collecting information directly and from verifying information from other sources about detention conditions. Consequently, the court considered that this refusal constituted an interference in the exercise of the applicant's right to freedom of expression because it hindered journalistic research.[411]

The forms mentioned above of public authority interference in exercising the right to freedom of expression, despite their importance, are merely examples that can be used as guidance to determine the approach of the European Court in dealing with this point. As noted, it is difficult to confine these forms within a specific classification. However, from the researcher's point of view, it is possible to derive a standard to determine what may constitute an interference with the right to freedom of expression, especially in the absence of a clear definition of the interference referred to in Article 10. The standard proposed is any act or behaviour, regardless of its form, that would obstruct the smooth flow of information within the framework of exercising the right to freedom of expression, or that would detract from one of the values or goals on which this right is based. In line with this standard, research into the forms of interference may seem less important, especially since the circumstances surrounding the intervention may differ from one country to another, and therefore what may constitute interference in one country may not fit the same description in another country.[412]

[410] Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland, NO. 34124/06. § 41. 21/06/2012.

[411] Szurovecz V. Hungary, NO. 15428/16. § 54. 08/10/2019.

[412] To support this assumption, for example, the variation in the legal structure in terms of clarity, accessibility, and predictability may constitute one of the conditions or considerations that may affect the adaptation of the public authority's behavior in terms of whether it constitutes interference or not.

3. Conditions for restrictions on freedom of expression (proportionality test)

After examining the theoretical framework and historical context of the development of the right to freedom of expression, as well as researching the scope of protected expression, it is not an exaggeration to say that protecting the right to freedom of expression constitutes the rule while imposed or potential restrictions constitute the exception. Consequently, any attempt to impose restrictions on freedom of expression must be accompanied by robust guarantees that affirm the legitimacy of these limitations and ensure they are not arbitrary or the result of authoritarian whims. These guarantees are of great importance in influencing the acceptability of those restrictions from the public, especially when they come in the form of laws or regulations, with a focus on the reasons behind those restrictions in line with the idea of 'Public Reason'.[413]

3.1. Overview: Proportionality test

In the previous paragraph, interference in freedom of expression by public authority was touched upon. In principle, this intervention can be legitimate or illegitimate. Judiciary has the authority to evaluate that income and assess its legitimacy. In Europe, the process of examining the legality of restrictions on rights, including the right to freedom of expression, begins with the national judiciary and may end with the ECtHR. In general, the approach followed by the judiciary in examining restrictions on the right to freedom of expression in Europe and Canada is based on what is called the proportionality test.

The proportionality test is the main model and method that is based on evaluating the legality of restrictions imposed on the exercise of rights and freedoms, including freedom of expression. The concept of proportionality in modern times can be traced back to administrative law in Prussia towards the end of the nineteenth century. During this period, the police had the authority to take the necessary measures to uphold public order. The Prussian court established that, in order to adhere to the principle of necessity, the severity of these measures should not

[413] The idea of public reason is that the moral and political rules that regulate society are justified and accepted by the people subject to the authority of those laws. It is an idea rooted in the works of many philosophers and thinkers, but it gained greater value with John Rawls and Jurgen Habermas. Sadurski, W (2021). 'Freedom of Speech and Public Reason', in Adrienne Stone, and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech*, Oxford Handbooks (2021; online edn, Oxford Academic, 10 Feb. 2021), https://doi.org/10.1093/oxfordhb/9780198827580.013.9, accessed 1 Nov. 2023. John Rawls (2005). Political Liberalism: Expanded Edition. Columbia University Press. ISBN: 9780231527538. 250.

exceed what is required to achieve the desired objective. Over time, the principle of necessity evolved into the principle of proportionality, which eventually became a constitutional principle that the legislative authority must abide by. Since the late 1950s, the German judiciary has been employing the proportionality test. This involves the Constitutional Court reviewing laws that restrict basic rights, as well as administrative and judicial decisions that implement these laws. [414]. From Germany, the principle of proportionality has spread to most other European countries with a system of judicial review, and to a number of jurisdictions outside Europe. Likewise, it is used in the ECtHR and in the European Court of Justice. [415] Most jurisdictions in Europe, and treaty bodies such as the United Nations Human Rights Committee, apply the proportionality test when assessing the permissibility of restrictions on freedom of expression.[416]

A typical proportionality test assesses whether the restriction of a right can be justified by reference to the gain of another benefit or value.

The test is based on four principles:

a) The state is obligated to have a compelling and "legitimate" interest in mind when imposing limitations on this right. The critical question at this juncture is to determine the precise nature of these legitimate goals and objectives. This becomes particularly pertinent because, in the realm of politics, these objectives are frequently intertwined with the agenda of decision-makers, namely those who represent the authority and its preferences. [417.] Among the applications of the legality test is the decision of the ECtHR in the case of *Bayev and Others v. Russia,* As stated in the conclusion of the decision:

"In the light of the above considerations the Court finds that the legal provisions in question do not serve to advance the legitimate aim of the protection of morals, and that such measures are

[414] The Focus (2013). The principle of proportionality and the concept of margin of appreciation in human rights law. Basic Law Bulletin, Issue 15. https://www.doj.gov.hk/en/publications/pdf/basiclaw/basic15_2.pdf. Accessed 26.02.2024.

[415] Grimm, D. (2007). Proportionality in Canadian and German constitutional jurisprudence. *U. Toronto LJ*, *57*, 383.

[416] Gunatilleke, G. (2021). Justifying limitations on the freedom of expression. *Human Rights Review*, 22(1), 91-108.

[417] Möller, K. (2012). Proportionality: Challenging the critics. *International Journal of Constitutional Law*, *10*(3), 709-731.

likely to be counterproductive in achieving the declared legitimate aims of the protection of health and the protection of rights of others."[418]

b) There must be a rational relationship between the specific procedure used to restrict the right and the legitimate interest. This is called a *"suitability test"*. The suitability test, the first limb of proportionality, is similar to the requirement, developed to assess restrictions on the rights under Articles 8–11 ECHR, that an interfering measure must pursue a legitimate aim. [419]

c) This action must be necessary to advance or prevent setbacks to that legitimate interest. This is called the *"necessity test".* The ECtHR has developed in its case-law the autonomous concept of whether an interference is "proportionate to the legitimate aim pursued", which is determined having regard to all the circumstances of the case using criteria established in the Court's case-law and with the assistance of various principles and interpretation tools. The Court's reasoning to assess the necessity of a given interference with freedom of expression is based on several considerations:

   - Existence of a "pressing social need
   - Assessment of the nature and severity of the sanctions
   - Requirement of relevant and sufficient reasons [420]

d) The action must be proportionate. That is, there should be a noticeable benefit in exchange for restricting the right. In other words, the act must represent a net gain, when the reduction in enjoyment of rights is weighed against the level of realisation of the aim[421.]

These proportionality tests are applied in a variety of ways that vary in different countries and jurisdictions systems [422]. Balance is an essential element in these tests, regardless of the stage

[418] ECtHR. Bayev and Others v. Russia, NO. 67667/09. 20/06/2017.

[419] Arai-Takahashi, Y. (2005). 'Scrupulous but Dynamic'--the Freedom of Expression and the Principle of Proportionality under European Community Law. *Yearbook of European Law*, *24*(1), 27.

[420] Council of Europe: European Court of Human Rights, *Guide on Article 10 of the European Convention on Human Rights - Freedom of Expression*, 31 August 2020, available at: https://www.refworld.org/docid/6048e2930.html [accessed 2 November 2023]. 22-24.

[421] Rivers, J. (2006). Proportionality and variable intensity of review. *The Cambridge Law Journal*, *65*(1), 174-207.

[422]Urbina, F. J. (2014). Is it really that easy? A critique of proportionality and 'balancing as reasoning'. *Canadian Journal of Law & Jurisprudence*, *27*(1), 167-192.

in which it comes. In addition, the priority in evaluating considerations of legitimacy, necessity and appropriateness differs from one judicial system to another.

Finally, it is worth noting that in the United States the level of scrutiny applied to restrictions on freedom of expression depends on the nature of the restrictions. Content-based regulations face the highest level of scrutiny, called "strict scrutiny," while content-neutral restrictions face "moderate scrutiny." General laws that have only incidental effects on freedom of expression are subject to "rational basis review." This approach involves classifying restrictions into specific levels with different levels of rights protection. However, this tiered approach still requires courts to balance conflicting government rights and interests, similar to the final step of a proportionality analysis.[423]

3.2. Examination by ECtHR: Article 10 criteria

One of the most profound concerns associated with freedom of expression restrictions is the potential for their abuse by authority to further its interests. This kind of misuse is a common occurrence in dictatorial regimes, but it is not beyond the realm of possibility in democratic systems as well. Thus, it becomes imperative to establish a set of criteria for assessing the legitimacy of such restrictions, ensuring the primacy of the rule of law. These criteria predominantly center around a fundamental concept: balance. This balance is founded on the comparison between the benefits or interests safeguarded by the restrictions and the potential harm that may arise from curtailing freedom of expression.

In this context, the European Court plays a fundamental role in evaluating the restrictions on freedom of expression based on standards that have been established over several decades based on the texts of the ECHR, especially Article 10-2.

The ECtHR has developed for itself a special methodology to follow when it examines the interference exercised by the authority in cases that may involve a violation of the right to freedom of expression. This methodology relies on proving that the intervention meets three criteria: law must prescribe it, pursue to achieve a legitimate aim and is necessary in a democratic society.

[423] Gardbaum, S. (2021). 'The Structure of a Free Speech Right', in Adrienne Stone, and Frederick Schauer (eds), The Oxford Handbook of Freedom of Speech, Oxford Handbooks (2021; online edn, Oxford Academic, 10 Feb. 2021), https://doi.org/10.1093/oxfordhb/9780198827580.013.13, accessed 01 Nov. 2023.

3.2.1. Prescribed by law

The authority may, for specific purposes, restrict freedom of expression through various forms of interference. According to the ECHR, such restrictions must adhere to certain conditions to avoid infringing upon the right to freedom of expression.[424] One primary condition is that the intervention must be prescribed by law. Consequently, when the ECtHR becomes aware of interference, it investigates the legality of that interference. This issue is of significant importance because it pertains to the rule of law and the quality of standards established by the European Court, particularly following a significant shift after the 1980s.[425]

Initially, the court primarily focused on the procedural aspects of intervention, assessing whether the executive authority remained within legal boundaries and paid little attention to the quality of the law. However, in the 1980s, a new principle emerged, emphasizing that laws should be accessible and predictable, exemplified by the Sunday Times case. In this case, the court began to scrutinize the terms and details of the law when testing the legality of intervention. It was acknowledged that the "law" mentioned in the agreement is not limited to written law but also includes unwritten law.[426] What became even more critical was establishing standards for the quality of law, as the ruling stated:

"In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, 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 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 blocked, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be forestalled 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

[424] European Convention on Human Rights. Art. 10-2.

[425] Van Der Sloot, B. (2020). The Quality of Law: How the European Court of Human Rights Gradually Became European Constitutional Court for Privacy Cases. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 11(2), 160-185.

[426] Lupo, N., & Piccirilli, G. (2012). European Court of Human Rights and The Quality of Legislation: Shifting to Substantial Concept of Law. Legisprudence, 6(2), 229-242.

greater or lesser extent, are vague and whose interpretation and application are questions of practice."[427]

Subsequently, the standard of the quality of law further developed, and the Court's present perspective on this standard can be summarized in one of the Court's recent rulings in the *Nit S.R.L. v. The Republic of Moldova* case:

"The Court reiterates that, as regards the words "in accordance with the law" and "prescribed by law" which appear in Articles 8 to 11 of the Convention, it has always understood the term "law" in its "substantive" sense, not its "formal" one. "Law" must be understood to include both statutory law – encompassing also enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament – and judge-made "law". In sum, the "law" is the provision in force as the competent courts have interpreted it."[428]

In another important development, the ECtHR expanded the scope of the law to include the case law of individual Member States, with an emphasis on stability and coherence for foreseeability. It considered that national jurisprudence is a law if it is stable and allows citizens to regulate their behaviour. Consequently, the ECtHR refused to recognize legitimacy in contexts characterized by wavering or incoherent judicial precedents.[429]

It is necessary to point out the close connection between the idea of quality of law and the concept of the rule of law. The condition that intervention must be prescribed by law finds a strong and logical basis for it in respect of the principle of the rule of law. The quality standards represented by the clarity, accessibility, and predictability of the law represent the same features provided by the rule of law. Therefore, the mere existence and use of the law is not sufficient for the rule of law, but rather it must be coupled with the aforementioned standards, and this is what distinguishes the rule of law from rule by law.[430]

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[427] ECtHR. The Sunday Times v. the United Kingdom, NO. 6538/74. 26/04/1979. § 49.

[428] ECtHR. Nit S.R.L. v. The Republic of Moldova, NO. 28470/12. 05/04/2022. § 57.

[429] Lupo, N., & Piccirilli, G. (2012). European court of human rights and the quality of legislation: shifting to substantial concept of law. Legisprudence, 6(2), 229-242.

[430] H.L.A. Hart and Lon Fuller have emphasized certain formal characteristics of legal rules, which are often associated with the rule of law. Fuller listed eight principles that make up the "internal morality of law," including generality, public availability, prospectiveness, comprehensibility, consistency, feasibility, stability, and conformity in administration. See: Krygier, Martin, 'Rule of Law', in Michel Rosenfeld, and András Sajó

A. Accessibility

An exploration of the ECtHR's case law concerning the standard of the quality of law when dealing with restrictions on various rights, such as freedom of expression, reveals several key considerations guiding the court's evaluation of the compatibility of interferences or restrictions with the law. Accessibility and predictability are often examined in tandem and closely tied to the criterion of clarity. The Court has underlined that the scope of concepts like foreseeability and accessibility largely hinges on the content and reach of the relevant legal instrument and the intended audience.[431]

In essence, the principle of accessibility underscores the necessity for laws, even those curtailing human rights, to be explicit, precise, and readily available to individuals. This implies that legal provisions should be devoid of ambiguity, avoiding arbitrary interpretations, and should grant individuals a clear comprehension of what actions are prohibited or restricted by the law.[432] Furthermore, laws and regulations must be published and accessible to the public, ensuring that individuals can reasonably access the legal texts governing their rights and freedoms. Consequently, secretive or concealed laws run counter to the principle of accessibility. The ECtHR establishes a minimum requirement for law, prioritizing accessibility. However, this requirement varies in the context of surveillance by secret services and intelligence agencies.[433]

It is worth noting that the ECtHR, as part of the evaluation process, relies before all interpretations of the national courts. In the Pasko v. Russia case, Grigory Pasko, a Russian journalist and former naval officer, faced charges and conviction in Russia for disclosing classified information related to environmental misconduct in the Russian Navy to a Japanese news organization, resulting in his prosecution for espionage offenses. Pasko argued that his conviction was based on legal interpretations that were inaccessible and unforeseeable. He

(eds), *The Oxford Handbook of Comparative Constitutional Law* (2012; online edn, Oxford Academic, 21 Nov. 2012), https://doi.org/10.1093/oxfordhb/9780199578610.013.0012, accessed 3 Nov. 2023.

[431] Council of Europe (2020). European Court of Human Rights, Guide on Article 10 of the European Convention on Human Rights - Freedom of Expression. Updated on 31 August 2022.

[432] Mendel, T. (2010). Restricting Freedom of Expression: Standards and Principles Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression. Centre for Law and Democracy.

[433] Van Der Sloot, B. (2020). The Quality of Law: How the European Court of Human Rights Gradually Became European Constitutional Court for Privacy Cases. Journal of Intellectual Property, Information Technology and Electronic Commerce Law, 11(2), 160-185

contended that domestic laws were unclear and not readily accessible. However, the court disagreed, finding that the legal provisions were clear, and Pasko, due to his position, had access to relevant documents before committing the offenses. Consequently, the court considered the interference with Pasko's rights lawful under the Convention.

The Court emphasized that the national authorities, particularly the courts, are primarily responsible for interpreting and applying domestic law, and the Court would only intervene if their interpretation appeared arbitrary or manifestly unreasonable. The Court found no reason to dispute the interpretation of the domestic courts and concluded that the State Secrets Act of 21 July 1993, along with Presidential Decree NO. 1203 of 30 November 1995, provided a sufficiently precise legal basis for the interference with Pasko's rights under Article 10 of the Convention. These documents were publicly available, enabling Pasko to foresee the consequences of his actions.[434]

Through an analysis of the case law of the ECtHR, it becomes evident that the accessibility criterion has not garnered the same level of interpretation and attention as other facets of the quality of law. Relying solely on a broad standard like publication in the Official Gazette as a presumption of accessibility is inadequate. The Court may have implicitly justified this by asserting that the Convention does not impose specific demands for the extent of publicity that a particular legal provision must attain.[435]

B. Foreseeability

Foreseeability is one of the criteria for the quality of law that is examined in the context of issues related to restrictions on the right to freedom of expression. This means that the law must be formulated in a way that enables citizens to predict the content and scope of the law and the consequences it may have.[436]

An in-depth examination of judicial precedents reveals that the ECtHR's perspective on the feasibility of predictability revolves around several key points:

- Clarity and Precision of Laws: The court places great emphasis on the necessity for laws to be clear, precise, and easily comprehensible for the general populace. This clarity is

[434] ECtHR. Pasko v. Russia. No, 69519/01. 22/10/2009.

[435] ECtHR. Nit S.R.L. v. The Republic of Moldova, NO. 28470/12. § 163. 05/04/2022. ECtHR. Špaček, s.r.o., v. the Czech Republic, NO. 26449/95. 09.11.1999. § 57.

[436] F. van Dijk, F. van Hoof, A. van Rijn, Leo Zwaak. (Eds.). (2006). Theory and practice of the European Convention on Human Rights (4th edition.). Cambridge; Intersentia.337.

paramount because it ensures that individuals are well-informed about what is expected of them under the law. For instance, the law should provide specific definitions for certain types of unprotected expressions, such as hate speech or incitement to violence. In the case of Savva Terentyev V. Russia, the ECtHR stated that it is vitally important that criminal law provisions directed against expressions that stir up, promote or justify violence, hatred or intolerance clearly and precisely define the scope of relevant offenses, and that those provisions be strictly construed in order to avoid a situation where the State's discretion to prosecute for such offenses becomes too broad and potentially subject to abuse through selective enforcement.[437]

- Regulation of Conduct: The court underlines that foreseeability in the content of laws holds the advantage of enabling individuals to regulate their behaviour in accordance with legal requirements. This empowers individuals to make well-informed decisions regarding their actions, and achieving this necessitates a clear understanding of the legal consequences associated with those actions.[438]
- Reasonable Foreseeability: While acknowledging that complete certainty in predicting the consequences of an individual's actions is unattainable, the ECtHR places significant emphasis on the concept of reasonable foreseeability.[439] This means that the law must offer individuals a reasonable expectation of the legal consequences that might result from their actions. While it is impossible to predict all outcomes with absolute certainty, individuals should have a general understanding of the potential legal repercussions of their behaviour.[440] However, Court deems that the law may still meet the foreseeability requirement even if an individual needs to seek appropriate legal advice to assess the potential consequences of a particular action to a reasonable degree, especially in the case of professionals who are accustomed to exercising a high degree of caution in their practice. In such situations, they are expected to exercise special care in evaluating the risks associated with their professional activities.[441]

[437] ECtHR. Savva Terentyev V. Russia, NO. 10692/09. 28/08/2018. § 85.

[438] For example, see ECtHR. Rekvényi V. Hungary, NO. 295390/94. 20/05/1999. §34.

[439] ECtHR. Tourancheau and July v. France, NO. 53886/00. 2005. (French version). § 54.

[440] ECtHR. Hertel V. Switzerland, NO. 25181/94. 25/08/1998. § 35. ECtHR. The Sunday Times v. the United Kingdom, NO. 6538/74. 26/04/1979. § 49.

[441] ECtHR. Tolstoy Miloslavsky V. The United Kingdom, NO. 18139/91. 13/07/1995. §37. ECtHR. Cantoni V. France, NO. 17862/91. 15/11/1996. § 35. ECtHR. Chauvy And Others V. France, NO. 64915/01. 29/06/2004. § 45.

- Flexibility and Adaptation: The Court also acknowledges the dynamic nature of society and the necessity for legal systems to adapt to evolving circumstances. Excessively rigid laws may fail to effectively address changes in social, technological, or cultural contexts. Consequently, the Court recognizes that some laws may contain terms or provisions that are somewhat ambiguous. However, the mere fact that a legal provision can be subject to multiple interpretations does not imply that it fails to meet the requirement of foreseeability.[442]

C. Safeguards against abuse

The principle of "guarantees against abuse" is one of the criteria that the ECtHR considers when assessing the quality of laws in cases related to restrictions on freedom of expression. In principle, this criterion assesses whether the law has built-in mechanisms and safeguards to prevent its misuse and ensure that it is applied in a manner consistent with the principles and values set out in the ECHR.

The need to restrict the discretionary power of officials in applying the law is based on clear considerations, especially in cases where officials have a large amount of discretion in applying the law, such that it is not possible to predict the laws.[443] Moreover, granting undue discretion essentially gives officials quasi-legislative jurisdiction, which is inappropriate when restricting freedom of expression.[444]

In *Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria*, a private company and its director applied for a broadcasting licence, but the National Radio and Television Commission (NRTC) rejected it without giving reasons for the decision. The applicants then sought judicial review, but the Supreme Administrative Court held that the discretion of the NRTC was not subject to review. In turn, the ECtHR found a violation of Article 10 because the NRTC did not hold a public hearing, kept its deliberations confidential, and did not provide reasons for its decision. The ECtHR considered that the lack of grounds, coupled with vague criteria, deprived applicants of legal protection against arbitrary interference with their freedom of expression, which is inconsistent with the guidelines issued by the Council of Europe.

[442] ECtHR. Perinçek V. Switzerland, NO. 27510/08. 15/10/2015. § 135.

[443] ECtHR. Editorial Board of Pravoye Delo and Shtekel V. Ukraine, NO. 33014/05. § 66.

[444] Mendel, T. (2012). a Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights. Centre for Law and Democracy. 36.

In its Judgement, the Court clearly indicated that domestic law must provide a measure of legal protection against arbitrary interference by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights, it would be contrary to the rule of law, one of the fundamental principles of democratic society enshrined in the Convention, for the legal discretion granted to the executive to be expressed in the form of unfettered power. Therefore, the law must indicate with sufficient clarity the scope of any such discretion and the manner in which it is exercised. It must also provide adequate and effective safeguards against violations, which in some cases may include procedures for effective scrutiny by the courts.[445]

Based on the discussed criteria and the ECtHR' approach to assessing legal compatibility, the researcher believes that the court primarily assumes an evaluative role concerning the legitimacy of laws or procedures underpinning public authority's interference with freedom of expression. While the court does pinpoint deficiencies in national legislation regarding safeguards against abuse, it tends to refrain from explicitly instructing states to reshape their legal frameworks in alignment with the Convention's values and objectives. Notwithstanding this, recent judicial precedents over the last decade suggest a notable development—the right to challenge a law without the requirement for the applicant to demonstrate personal harm. But this shift has thus far been predominantly applied in cases related to covert surveillance, where individuals might be unaware of being targeted.[446]

3.2.2. Legitimate aim

After the ECtHR finds that there has been interference by the public authority with the right to freedom of expression, and that such interference is prescribed by law, the court begins to examine the aim that the public authority seeks to achieve by imposing restrictions on freedom of expression. The central criterion in this examination is the legitimacy of the target, as determined by the express provisions of the ECHR.

In compliance with the principles set out in the ECHR, local authorities are obliged to justify their actions exclusively based on the legitimate objectives mentioned and defined in Article 10, paragraph 2. Any justification outside the limits of this comprehensive list is considered

[445] ECtHR. Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria, NO. 14134/02. 11/10/2007. § 46. See also: ECtHR. Gillow V. The United Kingdom, 9063/80. 24/11/1986. § 51.

[446] For example, See: ECtHR. Roman Zakharov V. Russia, NO. 47143/06. 04/12/2015. § 164,165. van der Sloot, B. (2020). The quality of law: how the european court of human rights gradually became european constitutional court for privacy cases. Journal of Intellectual Property, Information Technology and Electronic Commerce Law, 11(2), 160-185.

illegitimate in the context of restriction of freedom of expression.[447] However, the ECtHR indicated that when this paragraph is interpreted strictly, it grants, as an exception, due to its special role in society, protection to only one branch of public authorities, which is the judicial authority.[448]

From the researcher's point of view, this careful adherence to specific legitimate objectives is a guarantee that the restrictions imposed are consistent with the principles set out in the Convention, and it also represents one manifestation of the principle of the rule of law.

In principle, this standard places an obligation on national courts to engage in comprehensive analysis when deciding cases involving a conflict between legal provisions and freedom of expression. Evaluation extends beyond simply setting a project goal; It requires a careful examination of the extent to which the restriction is proportional to the intended goal. This matter is consistent with the view of the ECtHR about the important role of national courts, not only the interpretive aspect, but also the responsibility to distinguish the intrinsic value or benefit derived from enforcing a legal ruling that may infringe on the scope of freedom of expression.

The whole process underscores the need for a delicate balance between protecting the fundamental right to freedom of expression and recognizing legitimate interests that may justify restrictions, as set out in the ECHR. This multifaceted assessment by both the ECtHR and national courts ensures a careful and principled approach to reconciling conflicting interests in the context of exercising the right to freedom of expression. The ECtHR has rarely found a violation of Convention rights by reference to the "legitimate aim" criterion and this criterion is often assessed in conjunction with the third criterion "necessary in a democratic society", applying the proportionality test. [449]

The case of Macatė v. Lithuania [GC] has presented a recent and controversial application of the legitimate aim standard. It revolves around a children's author who wrote a book containing fairy tales depicting same-sex relationships. The author's intention was to promote tolerance and social inclusion among children. However, the book faced temporary suspension from

[447] ECtHR. OOO Memo V. Russia, NO. 2840/10. 15/03/2022.

[448] ECtHR. Morice V. France, NO. 29369/10. 23/04/2015. § 128.

[449] F. van Dijk, F. van Hoof, A. van Rijn, Leo Zwaak. (Eds.). (2006). Theory and practice of the European Convention on Human Rights. 340.

distribution and was later deemed harmful to children under 14, based on Lithuanian law that restricts information considered damaging to minors.

Challenging this decision in court, the author argued that it violated her freedom of expression. The European Court of Human Rights (ECHR) conducted a thorough examination of the case. They assessed whether the measures taken against the book could be attributed to the state, the legitimacy of the interference with freedom of expression, and the existence of a legitimate aim.

The Court acknowledged that the measures did indeed interfere with the author's freedom of expression. By limiting the availability of the book and negatively impacting her reputation, her rights were undoubtedly affected. However, the Court ultimately determined that the aim behind these measures, which was to restrict children's access to information about same-sex relationships, was not legitimate.

The Court stressed the importance of not perpetuating stigma and discrimination against the LGBTI community by limiting access to such information. They argued that this approach is incompatible with democratic values. Consequently, the measures imposed in this case were found to violate the author's right to freedom of expression under Article 10 of the European Convention on Human Rights.[450]

3.2.3. Necessity

This stage represents the essence of the proportionality test taken by the ECtHR as an approach to examining cases involving a violation of the rights established in the Convention, in particular Articles 9-11. Within the framework of examining the legitimacy of restrictions on freedom of expression, this test takes an objective character in that it is based on determining the extent of proportionality between the intervention prescribed by law by the public authority and the goal that the public authority seeks from this intervention.[451]

In the evaluation of the necessity of interference in a democratic society, national authorities are afforded a certain discretion, referred to as the *margin of appreciation.* It is worth noting that this principle is not mentioned anywhere in the ECHR and can therefore be considered a product of the ECtHR, where the phrase “margin of appreciation” was used for the first time in

[450] ECtHR. Macatė v. Lithuania [GC], No. 61435/19. 23/01/2023

[451] F. van Dijk, F. van Hoof, A. van Rijn, Leo Zwaak. (Eds.). (2006). Theory and practice of the European Convention on Human Rights. 340.

the Committee's report in the Lawless v. Ireland case.[452] However, this doctrine has been established in the Handyside case regarding Article 10 of the ECHR,[453] then it was further elaborated in The Sunday Times judgment.[454]

The margin of appreciation means that states have discretion in interpreting and applying laws related to freedom of expression. However, this discretion is not unlimited, as the ECtHR retains the authority to review whether a restriction aligns with freedom of expression protections under Article 10. The court's role is to scrutinize decisions made by national courts, ensuring they adhere to the principles of the Convention.[455]

The scope of the 'margin of appreciation' varies depending on the objective of the restriction, with more objectifiable interests allowing for a narrower margin. The doctrine has led to some complexity in the case law under Article 10.[456] The ECtHR has mentioned that the breadth of such a margin of appreciation varies depending on a number of factors, among which the type of speech at issue is of particular importance. Whilst there is little scope under Article 10 § 2 of the Convention for restrictions on political speech, a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Similarly, States have a broad margin of appreciation in the regulation of speech in commercial matters or advertising.[457]

Regarding 'necessary,' the ECtHR stated that the adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2) of the Convention, is not synonymous with "indispensable", neither does it have the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable"; rather, it implies a "pressing social need".[458]

In its report on the case of Handyside v. United Kingdom, the Commission noted that what restrictions on freedom of expression are necessary in a democratic society cannot be

[452] Hutchinson, M. R. (1999). The margin of appreciation doctrine in the European Court of Human Rights. International & Comparative Law Quarterly, 48(3), 638-650.

[453] ECtHR. Handyside v. The United Kingdom, NO. 5493/72. 07/12/1976. § 48.

[454] ECtHR. The Sunday Times v. the United Kingdom, NO. 6538/74. 26/04/1979. § 59.

[455] See, among others: Steel and Morris v. The United Kingdom, no, 68416/01. 15/02/2005. § 87.

[456] Korff, D. (1987). The guarantee of freedom of expression under art. 10 of the european convention on human rights. Journal of Media Law & Practice, 9(3), 143-150.

[457] See, for example: Mouvement Raëlien Suisse v. Switzerland, NO. 16354/06. 13/07/2012. § 61.

[458] See, among others: ECtHR. Barthold v. Germany, NO. 8734/79. 25/03/1985. § 55.

determined theoretically but must be determined by referring to the circumstances of each case and to the "democratic society" envisaged by the Convention. The Committee also noted that "democratic society" within the meaning of the Convention means referring to the member states of the Council of Europe.' [459]

In theory, the necessity criterion may seem to be one of a set of clear and specific criteria that are applied in applying the proportionality test, but the truth of the matter is that the court's use of some terms within this test may make the application of this criterion complex and inconsistent, leading to some ambiguity and lack of clarity. For example, the Court introduced the criterion of *"pressing social need"* to assess whether restrictions on Convention rights are justified. This criterion, which indicates the importance and urgency of the goals pursued, provides an additional requirement for evaluation that goes beyond examining the mere legitimacy of the interests served by these restrictions.[460]

Through research into a wide range of case-law of the ECtHR, the researcher noted that this standard adopted by the Court cannot be described as fixed in terms of its degree and effectiveness. In other words, the court did not clarify exactly what may considered "social need" and when it can be described as " pressing". This can be seen in judges' opinions, which may differ greatly in considering what constitutes an urgent need or not. Indeed, what the court may consider a pressing social need may, for some judges, be merely trivial and superficial reasons that do not rise to the level of interference that may violate the value represented by the right to freedom of expression. For example, in *Janowski v. Poland*, the court found that there was no violation of Article 10, but three judges based their objection to the ruling on the basis of the absence of considerations of necessity, namely the existence of a pressing social need. Judge Bonello's dissent stated:

"The basic tests for establishing the necessity of interferences with freedom of expression in a democratic society are whether the intrusion corresponds to a pressing social need and whether it is proportionate to the legitimate aim pursued by the authorities.

I fail to discern any urgent social exigency in condemning those who attempt to prevent abuses, even through immoderate disapproval. The State has a greater necessity to silence those who

[459] European Court of Human Rights (5493/72) - Commission (Plenary) - Report (31) - HANDYSIDE V. ROYAUME-UNI. Para, 145.

[460] Gerards, J. (2013). How to improve the necessity test of the European Court of Human Rights. International Journal of Constitutional Law, 11(2), 466-490.

usurp power than those who raise their voices when power is usurped. In this case I am aware of one manifestly pressing social need: that of curbing illegitimate excess of authority."[461]

In addition, the Court must determine whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient" and whether the measure taken was proportionate to the legitimate aims pursued. In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10.[462] meaning that a causal relationship must be proved between the restrictions imposed on the right to freedom of expression and the interests that the state seeks to achieve or preserve through the imposition of these restrictions.

One of the applications of this standard before the ECtHR is the case *Glukhin v. Russia*. The case involved the conviction of a solo demonstrator in Russia for an administrative offense due to failure to submit prior notification for a peaceful demonstration using a life-size cardboard figure of a political activist with a banner. The individual's act was an expression of protest against the imprisonment of the political activist. The police identified the demonstrator through facial recognition technology and CCTV footage from the Moscow underground, subsequently arresting and convicting him.

The ECtHR asserted jurisdiction despite Russia's withdrawal from the Convention, stating that it retained jurisdiction over cases arising before Russia's withdrawal. The Court continued communicating through electronic means and respected the adversarial nature of the proceedings.

Regarding Article 10 Freedom of Expression of the Convention, the Court acknowledged that the demonstrator's actions aimed to express a viewpoint on a matter of public interest. The interference with his freedom of expression through arrest and conviction constituted a violation of Article 10. The demonstration was peaceful, non-disruptive, and posed no threat to public safety. The conviction only stemmed from the failure to notify authorities, without any additional wrongful action. However, the authorities failed to demonstrate tolerance towards peaceful expression and did not consider whether the use of the cardboard figure and banner constituted a form of expression. The courts did not provide sufficient reasoning to justify the

[461] ECtHR. Janowski v. Poland, NO. 25716/94. 21/01/1999.

[462] ECtHR. Mahmudov And Agazade v. Azerbaijan. no, 35877/04. 18/12/2008. § 35. ECtHR. Chauvy and Others v. France, NO. 64915/01. 29/06/2004. § 70

interference with the demonstrator's right to freedom of expression. The Court unanimously concluded that the conviction of the solo demonstrator constituted a violation of Article 10 of the Convention due to the lack of relevant or sufficient reasons to justify the interference with the right to freedom of expression in this context.[463]

The researcher believes that the existence of a margin of appreciation granted to contracting states in assessing the existence of a pressing social need and also in estimating and determining the causal relationship would prevent the effectiveness of the criteria of pressing social need and related causes. The researcher does not believe that the presence of a supervisory authority by the ECtHR can reduce the role that this discretionary authority plays in wasting the value of the right to freedom of expression, especially since the court often relies on the reasons provided by the national courts in verifying these two standards within the framework of its dealing with each case in a manner separate. In other words, in the absence of comprehensive and clear standards for proving and evaluating necessity requirements.

Although the Court appears to intend this test to serve as a framework for subsequent cases, its application lacks consistency across rulings. In some cases, the Court examines the general balance of interests determined by national authorities rather than strictly adhering to specific criteria. Thus, the "necessity in a democratic society" test appears to function more as a rhetorical device than a structural tool for the Court's arguments.[464]

After explaining how the ECtHR evaluates interference by public authorities in exercising the right to freedom of expression, it is important to highlight some of the characteristics interpretive role that the Court has played in recent decades.

The ECtHR relies on Precedent-based adjudication, which means that it considers its previous judgments as authoritative interpretations of the ECHR. Although the ECtHR does not strictly adhere to binding precedent like common law systems, it heavily relies on past decisions, especially in politically sensitive cases and countries where domestic courts use precedent to ensure consistency and coherence in its jurisprudence. This practice helps to maintain predictability and coherence in the court's decisions. However, the authority of precedent in the ECtHR is determined by the legal substance of cases, not by country-specific factors like legal

[463] ECtHR. Glukhin v. Russia. No, 11519/20. 04/07/2023. § 56.

[464] Gerards, J. (2013). How to improve the necessity test of the European Court of Human Rights. International Journal of Constitutional Law, 11(2), 466-490.

culture. This may give the impression that the ECtHR behaves like a 'normal' court, with decisions influenced by ideology rather than national interests or cultural differences.[465]

The ECtHR developed the principle of margin of appreciation, referred to above, which is a principle that the Court uses to allow national authorities some discretion in applying human rights standards according to their own cultural, societal and legal contexts. This principle recognizes that countries have different histories, traditions and social circumstances, and therefore may interpret human rights differently. Therefore, the ECtHR grants a margin of appreciation to national authorities, allowing them some leeway in implementing human rights obligations. However, in principle, as previously noted, this margin is not unlimited; It is subject to the supervision of the ECtHR. The Court will intervene if it finds that national authorities have exceeded the acceptable margin or violated basic human rights principles. Understanding the margin of appreciation involves recognising it as one of the principles of interpretation within the European Convention on Human Rights. These principles, including the margin of appreciation, are derived from the 'teleological principle' of treaty interpretation outlined in the Vienna Convention on the Law of Treaties.[466]

The principle of evolutive interpretation is also an important tool utilised by the Strasbourg Court. It involves giving a term a meaning that evolves over time, rather than simply applying the term to new situations without any change in its meaning. It's important to note that a mere change of opinion does not qualify as an evolutive interpretation. The ECtHR has the flexibility to interpret a term differently in different cases, effectively altering its meaning over time. However, for this change to be considered evolutive, it must be intentional and agreed upon by all parties involved.[467] This tool is particularly valuable in the context of freedom of expression, especially in light of the significant digital transformation and development that the world is currently witnessing, which is vastly different from the time when the European Convention on Human Rights was adopted. Additionally, this tool allows the Court to discard outdated notions of the original definitional terms when significant and lasting changes occur across Europe that

[465] Lupu, Y., & Voeten, E. (2010). The role of precedent at the European court of human rights: A network analysis of case citations. URL: https://www. researchgate. net/publication/43787686_The_Role_of_Precedent_at_the_European_Court_of_Human_Rights_A_Network_Analysis_of_Case_Citations (дата звернення: 12.08. 2019).

[466] See more: Greer, Steven. (2010). The Interpretation of the European Convention on Human Rights: Universal Principle or Margin or Appreciation. UCL Human Rights Review, 3, 1-14.

[467] Helmersen, S. T. (2013). Evolutive treaty interpretation: legality, semantics and distinctions. Eur. J. Legal Stud., 6, 161.

impact European public opinion, such as the issues surrounding homosexuality and transgenderism.[468]

The principles mentioned above, including others like 'effective protection of individual rights', 'non-abuse of rights and limitations', 'implied rights and implied limitations', and positive obligations, have served as crucial instruments for the European Court of Human Rights.[469] These principles ensure that the provisions of the European Convention for human rights remain effective and appropriate, addressing concerns regarding adaptability and keeping up with significant changes.

4. Justifications; external limitations

The second paragraph of Article 10 refers to some considerations that may constitute justifications that allow governments to restrict the right to freedom of expression. These considerations may be of a general nature aimed at preserving the state or its security and independence, or they may be of a special nature related to individuals, their rights, and their interests. As previously noted, the assessment of these reasons and justifications is accompanied, according to the European Court's approach, by a margin of appreciation granted to member states and national courts.

4.1. National security and territorial integrity

Sometimes, some forms of expression or sharing of specific information can pose a real danger to the safety and stability of the country, especially in extraordinary circumstances. As a result, revealing sensitive details pertaining to defence strategies, intelligence operations, or classified data may have severe consequences for national security. The potential harm resulting from such actions may include a range of risks, including endangering individuals' lives, affecting ongoing investigations, undermining diplomatic relations, etc. Therefore, the ECHR recognizes the right of states to restrict freedom of expression when it poses risks that would disrupt national security and territorial integrity. It seems that this recognition resonated with the ECtHR, which emphasized national security considerations, in conjunction with the margin of appreciation, as a legal restriction on freedom of expression.

[468] Greer, Steven. (2010). The Interpretation of the European Convention on Human Rights: Universal Principle or Margin or Appreciation. UCL Human Rights Review, 3, 1-14.

[469] Ibid.

The broad concept of national security and the secrecy and ambiguity that often surround it would pose a real challenge to some fundamental rights, including the right to freedom of expression. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information pointed out that a state may not categorically deny access to all information related to national security but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.[470]

In a related context, in his report, Special Rapporteur Frank La Rue asserted that "the use of an amorphous concept of national security to justify invasive limitations on the enjoyment of human rights is of serious concern. The concept is broadly defined and is thus vulnerable to manipulation by the state as a means of justifying actions that target vulnerable groups such as human rights defenders, journalists, or activists. It also acts to warrant often unnecessary secrecy around investigations or law enforcement activities, undermining the principles of transparency and accountability."[471]

Reviewing most of the relevant national legislation, it can be said that restrictions imposed on freedom of expression for considerations related to national security often find their basis in national law in a way that may differ from one country to another within Europe. While some countries may single out specific legislation to protect national security and combat terrorism,[472] other countries may single out some articles from national constitutions or the penal code to indicate actions that may constitute crimes affecting state security.[473] The restrictions imposed on freedom of expression are often the result of the application of those

[470] Johannesburg Principles on National Security, Freedom of Expression and Access to Information, 1 October 1995, principle 12. Available at: https://www.refworld.org/docid/4653fa1f2.html [accessed 21 December 2023].

[471] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Human Rights Council, U.N. Doc. A/HRC/23/40. (17 April 2013). Para. 60.

[472] For example, the UK National Security Act 2023 includes many provisions that may constitute a restriction on the right to freedom of expression, such as some provisions related to obtaining or disclosing protected information. See: https://www.legislation.gov.uk/ukpga/2023/32/section/1. Accessed 14.12.2023.

[473] Most provisions relating to terrorism and state security in Germany are included in the Penal Code. See: Council of Europe – Committee of Experts on Terrorism (Codexter) (September 2016). Profiles on Counter-Terrorist Capacity, Germany, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680641010. In Türkiye ANTI-TERROR LAW NR. 3713 (Amended with the Law Nr. 5532 Regarding Amendment in the Anti-Terror Law) includes a definition of terrorism but at the same time includes a reference to some provisions in the Penal Code about what may constitute terrorist crimes.

legal texts that may directly affect the exercise of the right to freedom of expression, or one of their results may be to limit freedom of expression or narrow its scope.

In practice, it is difficult to limit the actions that may constitute a threat to national security in one category, and therefore, the assessment of these actions falls within the margin of appreciation that the agreement granted to member states. Thus, the right of states to preserve their national security authorizes them to take whatever restrictions and measures they deem appropriate. Consequently, certain situations may necessitate the imposition of additional constraints on the right to freedom of expression, regardless of whether these situations are internal or related to global events and changes. A prime example of this can be seen in the aftermath of the September 11 events, which prompted the adoption of stringent anti-terrorism laws and policies worldwide, several of which have limited freedom of expression.[474]

Governments often rely on national security and the fight against terrorism to justify excessive restrictions on the right to freedom of expression and other rights through various laws under the name of protecting national security. In this context, General Comment No. 34 included a clear reference to the necessity of interpreting such laws in a reasonable manner that does not prejudice the value of the right to freedom of expression. Where it was said in the comment:

"States parties should ensure that counter-terrorism measures are compatible with paragraph 3. Such offences as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities."[475]

In the case of *Leroy v. France*, the ECtHR ruled that the conviction of a cartoonist for complicity in condoning terrorism after publishing a caricature and caption was not a violation of freedom of expression (Article 10). The cartoon, published shortly after the 9/11 attacks, depicted the

[474] Callamard, A. (2015). Freedom of expression and national security: balancing for protection. Columbia Global Freedom of Expression. https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2016/01/A-Callamard-National-Security-and-FoE-Training.pdf

[475] Human Rights Committee. (2011). General comment NO. 34, Article 19: Freedoms of opinion and expression, UN Doc (pp. 33-6). CCPR/C/GC/34. Art.46.

destruction of the Twin Towers and had a caption that parodied a famous brand's slogan. The Court acknowledged that while the cartoon aimed to criticize American imperialism, it also appeared to support and glorify the violent destruction, expressing solidarity with the attackers and undermining the victims' dignity. Despite the artist's underlying intentions and the use of satire, the Court concluded that the conviction and modest fine imposed were not disproportionate given the sensitive timing, potential to incite violence, and impact on public order in a region sensitive to terrorism. The Court unanimously found no violation of the right to freedom of expression in this case.[476]

On the other hand, the Court asserts that the challenges posed by counterterrorism efforts cannot serve as a blanket justification for absolving national authorities of their obligations outlined in Article 10 of the Convention.[477] Furthermore, the guiding principles derived from the Court's jurisprudence concerning Article 10 equally apply to measures taken by authorities to safeguard national security and public safety in combating terrorism.[478]

Certain specific circumstances within a country can trigger heightened restrictions on fundamental human rights, particularly the right to freedom of expression. Instances such as being engaged in a state of war, experiencing internal conflicts, or facing chaotic conditions can justify imposing additional limitations on these rights. For instance, upon scrutinizing cases adjudicated by the ECtHR, it becomes evident that numerous cases brought before the ECtHR revolved around the Kurdish issue in Turkey. These cases specifically dealt with violations of the right to freedom of expression as outlined in Article 10 of the ECHR.

A relevant application is case of *Ceylan v. Turkey*. In this case, the applicant, who was the president of a petroleum workers' union, wrote an article in a weekly newspaper criticizing the Turkish authorities' actions in south-eastern Turkey, particularly concerning the Kurdish population. He expressed views regarding the Kurdish movement's struggle for freedom and democracy. The article was critical, using strong language such as "State terrorism" and "genocide."

The applicant was charged with incitement to hatred and hostility under Turkish law, convicted by the National Security Court, and sentenced to one year and eight months in prison along

[476] ECtHR. Leroy v. France, NO. 36109/03. 02/10/2008. (Legal Summary).

[477] ECtHR. Döner And Others v. Turkey, NO. 29994/02. 07/03/2017. § 102

[478] ECtHR. Faruk Temel v. Turkey, NO. 16853/05. 01/02/2011. § 58

with a substantial fine. He lost his position as union president and several political and civil rights due to the conviction.

The ECtHR assessed the case in light of Article 10, emphasizing that freedom of expression, especially in political speech or matters of public interest, is crucial in a democratic society. It noted that political speech is subject to broader limits of criticism concerning the government and that restrictions on it should be minimal. The Court recognized the government's role in ensuring public order but stressed the need for restraint, especially when dealing with criticism. Considering the context, including the turbulent situation in Turkey at the time, the Court observed that the applicant's article, though critical, did not incite violence or insurrection. It highlighted the severity of the penalty imposed and the significant impact on the applicant's professional and civil rights due to his conviction. The ECtHR concluded that the applicant's conviction and the associated penalties were disproportionate to the aim pursued and not necessary in a democratic society. Therefore, it found a violation of Article 10 of the ECHR in this case.[479]

And in another case, the Union of Salaried Employees in Education and Science defended the right to receive education in one's mother tongue in Turkey. The union faced multiple legal challenges when it included the term "mother tongue" in its statutes, which was considered by authorities to be against the Constitution and the principle of a unitary state.

Initially, the area governor and public prosecutor sought the dissolution of the union for including the term "mother tongue" in its statutes. The proceedings against the union continued over several years, during which the union amended its statutes twice to comply with the demands made by the authorities. Eventually, in 2005, the union deleted the words "mother tongue" from its statutes.

The ECtHR found the dissolution proceedings against the union constituted an interference with its freedom of expression. The provision in the union's statutes advocating teaching in the "mother tongue" was seen as defending the right to education in languages other than Turkish. However, this provision did not incite violence or threaten the integrity of the state. The court concluded that the dissolution proceedings were disproportionate to the aims pursued and were therefore unnecessary in a democratic society.[480]

[479] ECtHR. Ceylan v. Turke, NO. 23556/94. 08/07/1999. § 32-38.

[480] ECtHR. Eğitim ve Bilim Emekçileri Sendikası v. Turkey, no. 20641/05. 25/09/2012. § 75.

One of the most common considerations in maintaining national security is preventing access to or disclosure of classified information when doing so poses a threat to territorial integrity or poses a threat to potential violence or chaos. An application related to this case is *Šeks v. Croatia*. In this case the ECtHR addressed the denial of access to classified presidential records by Croatia's State Archive, citing national security concerns. The applicant, a retired politician intending to write a book on Croatia's history, requested access to these records. While some documents were declassified, others were withheld due to potential risks to national security, foreign relations, and the country's integrity. The applicant's appeals against this denial were unsuccessful.

The ECtHR acknowledged the applicant's right to seek information on a matter of public interest under Article 10, the freedom of expression. It recognized that denying access to the documents was an interference with this right, but it was lawful and pursued legitimate aims of protecting national security and foreign relations. Regarding the necessity of the interference, the Court emphasized the evolving nature of national security and the need for states to have a broad margin of appreciation in assessing such risks. It underscored the importance of ensuring procedural safeguards to protect individuals' rights, including access to an independent review process.

Ultimately, the Court unanimously found that the denial of access to the documents did not violate the applicant's freedom of access to information, considering the substantial procedural safeguards and the legitimacy of the national security reasons provided by the authorities.[481]

The complexity of justifying restrictions on freedom of expression in the context of national security and territorial integrity lies in navigating a delicate balance. This intricate challenge arises from the need to uphold the state's integrity and power while respecting the citizen's right to express opinions. Unlike other restrictions, the researcher underscores the unique nature of this equilibrium, attributing it to the heightened sensitivity of national security considerations, as national security considerations hold a distinct sovereign aspect and could potentially overshadow the supervisory authority of the ECtHR, particularly regarding the margin of

[481] The judgement stated: "The Court is cognisant that in the context of national security – a sphere which traditionally forms part of the inner core of State sovereignty – the competent authorities may not be expected to give the same amount of details in their reasoning as, for instance, in ordinary civil or administrative cases. Providing detailed reasons for refusing declassification of top-secret documents may easily run counter to the very purpose for which that information had been classified in the first place". See: ECtHR. Šeks v. Croatia, NO. 39325/20. 03/02/2022. § 71,72.

appreciation granted to governments. Even if the ECtHR has, in various instances, deemed state interventions based on national security considerations unjustified or illegitimate, the researcher posits that this alone may not be sufficient to curb such violations. The reasoning lies in the fact that the resolution depends on the collective will of the nation and is intricately linked to local and international circumstances influencing member states.

The quest for balance primarily hinges on the framework provided by national legislation and the actual practices of governing authorities. Therefore, the effectiveness of achieving this equilibrium is related to the interplay between legal frameworks, governmental actions, and the broader socio-political context within each nation.

4.2. Prevention of disorder or crime

In scrutinising restrictions on freedom of expression, the ECtHR considers authority concerns and arguments related to preventing disorder and crime. This delicate evaluation entails a balance between upholding freedom of expression and safeguarding public order and security. The goal is to guarantee that any imposed restrictions on freedom of expression are not merely justified for legitimate purposes, but are also deemed necessary to safeguard public order and prevent criminal activities. Consequently, such assessments must account for the broader context, specific circumstances, and individual considerations unique to each issue and country. This ensures a comprehensive and tailored approach to evaluating the necessity and legitimacy of restrictions on freedom of expression.[482]

4.2.1. Hate speech

Hate speech often constitutes a justification for the authorities' interference in exercising the right to freedom of expression on the grounds that it may lead to a state of chaos and violence or that it may harm the rights of others. Therefore, various strategies exist for addressing hate speech on a global scale. For example, in the United States, hate speech is generally safeguarded by the First Amendment, albeit with certain exceptions for direct threats, incitement to imminent unlawful acts, and defamation. In contrast, Europe exhibits a more diverse landscape,

[482] For example, in the case Z.B. v. France, the applicant was convicted of glorifying premeditated murder due to slogans with terrorist connotations on a T-shirt worn by his three-year-old nephew to nursery school. Despite the specificity of the case after the terrorist attacks in France, the court recognized the importance of the general context and the great weight it carries. It therefore concluded that the conviction was based on appropriate and sufficient grounds, meeting a pressing social need.
See: ECtHR. Z.B. v. France, no. 46883/15. 02/09/2021. (French version).

with each nation having its own set of laws combating hate speech, often tracing back to the aftermath of World War II. This array of approaches is mirrored in the stance of the ECtHR, which scrutinizes hate speech cases on an individual basis, acknowledging the nuanced legal frameworks across different European nations.[483]

The Committee of Ministers of the Council of Europe has indicated that hate speech covers all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.[484]

The European Commission against Racism and Intolerance (ECRI) provided another comprehensive definition of hate speech. According to the commission hate speech covers "the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression – that is based on a non-exhaustive list of personal characteristics or status that includes "race", colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, sex, gender, gender identity and sexual orientation."[485]

In this context, a fundamental question arises: Does Article 10 of the ECHR protect hate speech, similar to the way the First Amendment does in the United States?

Article 10 of the ECHR, which addresses the right to freedom of expression, does not explicitly mention hate speech. This absence of specific reference has led to debates regarding whether the protection provided in its first paragraph extends to encompass hate speech.[486] However, the practical application of Article 10 by the ECtHR suggests that the court tends to view hate speech as a category of expression that can justify restrictions imposed by authorities. These

[483] Heller, Brittan and van Hoboken, Joris V. J., Freedom of Expression: A Comparative Summary of United States and European Law (May 3, 2019). Available at SSRN: https://ssrn.com/abstract=4563882 or http://dx.doi.org/10.2139/ssrn.4563882.

[484] Recommendation No. R (97) 20 of the Committee of Ministers to member states on "hate speech" adopted on 30 October 1997.

[485] Council of Europe: European Commission Against Racism and Intolerance (ECRI), ECRI General Policy Recommendation N°15 on combating Hate Speech, 8 December 2015, available at: https://www.refworld.org/docid/58131b4f4.html [accessed 7 January 2024]

[486] Howard, E. (2017). Freedom of expression and religious hate speech in Europe. Routledge. 60.

restrictions are often based on the grounds of protecting public order and preventing chaos and crime.[487]

In the case of *Sanchez v. France*, the ECtHR examined the conviction of a local councillor and parliamentary candidate for not removing Islamophobic comments from his Facebook wall. The applicant was fined because these comments, made by third parties, were deemed to incite hatred or violence against Muslims. The Court found that this interference with his freedom of expression was lawful under Article 10 of the ECHR. It was necessary in a democratic society for the protection of others' rights and the prevention of disorder and crime, especially given the context of an election campaign and the potential impact of such speech. The case highlighted the responsibilities of politicians in moderating content on their social media platforms, particularly during sensitive periods like elections. The Court concluded that the conviction and the fine imposed were proportional and necessary and did not represent a violation of Article 10. This judgement underscores the delicate balance between safeguarding freedom of expression and preventing hate speech that could lead to societal unrest or criminal activity.[488]

In related context, the ECtHR has raised concerns about the amplification of hate speech through the Internet. It recognised the Internet's critical role in promoting free expression. However, the court noted that its capacity for widespread and rapid information dissemination significantly escalates the risks associated with hate speech. This kind of speech, which includes incitement to violence, can quickly reach a global audience and often remains indefinitely accessible online, posing a more substantial threat to human rights than traditional media forms. Therefore, in evaluating the impact of online hate speech, it is important to consider the breadth of its public reach, where the potential harm of a statement on the Internet is closely linked to the size and visibility of its audience, especially on popular platforms.[489]

On the other hand, it is imperative to scrutinize Article 17 of the ECHR, as it explicitly articulates a pivotal principle:

"Nothing in this Convention may be interpreted as implying for any State, group, or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights

[487] Ibid, 61.

[488] ECtHR. Sanchez V. France, no. 45581/15. 15/05/2023. § 144

[489] ECtHR. Savva Terentyev v. Russia, no. 10692/09. 28/08/2018. §79.

and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."[490]

The significance of this article lies in its role as a safeguard against the infringement of rights by invoking the provisions of the Convention. This is particularly pertinent when considering the protective scope that Article 10 may afford to certain categories of hate speech. The ECtHR has unequivocally affirmed:

"There is no doubt that any remark directed against the Convention's underlying values would be removed from the protection of Article 10". [491]

Hence, despite the absence of an explicit mention of hate speech within the text of Article 10, which some may interpret as a shield for such expression, the European Court possesses the authority to invoke the provisions of Article 17 to mitigate any adverse consequences stemming from the inclusion of hate speech under the umbrella of protected speech in the initial paragraph of Article 10.

4.2.2. Incite violence

Speech and various forms of expression that incite violence represent a complex and delicate area of legal consideration. In principle, Article 10 of the ECHR grants member states the authority to restrict this type of speech, particularly when it poses a credible risk of inciting violence, disorder, or criminal activities. The ECtHR has also recognised the legitimacy of such restrictions and established a framework for assessing speech restrictions that incite violence.

A case that exemplifies the ECtHR's approach to this matter is *Kilin v. Russia*. In this case, the applicant faced conviction for disseminating video and audio files on a social network account, which contained public calls for violence and ethnic discord. While acknowledging that the applicant's freedom of expression was indeed interfered with, the ECtHR found this interference justifiable. It was deemed necessary to maintain public order and safeguard the dignity of individuals belonging to non-Russian ethnic groups. The ECtHR's analysis hinged on the applicant's intent, which was perceived as an incitement to violence and a violation of the rights of non-Russian ethnicities. Importantly, the nature of the statements made by the applicant and the absence of any commentary that might have provided a context for the shared content did not align with a valid exercise of freedom of expression. Consequently, the ECtHR concluded

[490] European convention on human rights. Art. 17.

[491] ECtHR. Seurot v France, no. 57383/00. 18/05/2004.

that the domestic courts had convincingly demonstrated that the material disseminated by the applicant incited ethnic discord and hatred. Thus, the ECtHR ruled that there was no violation of the ECHR in this case.[492]

Within this context, it seems that the ECtHR placed considerable weight on the applicant's intent as a crucial factor in determining whether a violation had occurred or not. The court's stance suggests that when the expression or speech serves the purpose of protesting against injustice, even if done forcefully or with some degree of excess, or if it aims to inform the public about a particular situation, the court typically identifies a violation of the right to freedom of expression. Conversely, in cases where there is a clear intent to incite others to engage in violence, as exemplified in the aforementioned case, the court tends to conclude that there has been no violation of the right to freedom of expression.[493]

In the case of *Dmitriyevskiy v. Russia*, a newspaper editor faced conviction for publishing articles that delved into Chechen politics and made allegations of Kremlin-orchestrated genocide. The applicant, serving as the newspaper's chief editor, published these articles in 2004, believed to have been authored by sought-after Chechen separatist leaders. The charges against him included incitement to hatred associated with violence and the use of terrorist methods, resulting in a suspended sentence and probation.

Recognizing the impact on the applicant's freedom of expression, the ECtHR conducted a comprehensive assessment. This evaluation considered various elements, such as the content and context of the articles. Ultimately, the ECtHR determined that the articles did not constitute incitement to violence or hatred and were well within the boundaries of permissible government criticism. Furthermore, the court criticized the domestic court's approach, highlighting that the crucial finding of "hate speech" relied on a linguistic expert rather than the courts themselves.[494]

The ECtHR underscores the imperative of a comprehensive approach, emphasising the importance of considering all relevant elements and not focusing solely on the form and content of disputed statements without considering their potential to provoke harmful consequences within the broader political and social context.[495] Consequently, the Court establishes a clear

[492] ECtHR. Kilin v. Russia, no. 10271/12. 11/05/2021. § 65-66.

[493] Mendel, T. (2012). Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights. Council of Europe. 52.

[494] ECtHR. Dmitriyevskiy v. Russia, no. 42168/06. 03/10/2017.

[495] ECtHR. Savva Terentyev V. Russia, no. 10692/09. 28/08/2018. § 82.

principle: unless expressions explicitly incite violence, advocate terrorism, or breed irrational hatred, contracting states are precluded from restricting the public's right to be informed of such views. This principle holds steadfast even when pursuing aims outlined in Article 10, paragraph 2, such as protecting territorial integrity or national security.[496]

Finally, it seems that the ECtHR's approach to dealing with cases involving incitement to violence or hatred is based on two criteria related to the concept of the potential impact of disputed speech or forms of expression. The first criterion is the role and function of the person making the statements. This criterion seems logical, given that the potential impact of a speech issued by a person with a social or political status has double the impact of the same speech, perhaps if it was issued by an ordinary person. The second criterion is the social and political context surrounding the impugned speech or expression.[497]

4.3. Protection of public health and morals

In addition to the previous considerations related to the necessities of maintaining national security and public order, the European Convention recognized, through Article 10, the right of contracting states to impose restrictions on the right to freedom of expression for the legitimate goal of protecting public health and morals.

4.3.1. European approach on protection public health

Sometimes maintaining public health requires implementing complex procedures that may intersect with some fundamental human rights or affect their exercise or extent of enjoyment. This interaction is particularly evident during health crises, presenting countries with the challenge of adopting an approach that supports individual freedoms while addressing collective well-being. The anxiety resulting from such a situation may reach its peak with freedom of expression, especially in crisis situations that are accompanied by the declaration of a state of emergency.

In this context, the European approach can be summarised in the items included in the Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis, which stated:

[496] ECtHR. Nedim Şener V. Turkey, no. 38270/11. 08/07/2014. § 116. (French version).

[497] See: ECtHR. Zana v. Turkey, no. 18954/91. 25/11/1997. ECtHR. Yalçıner v. Turkey, no. 64116/00. 21/02/2008.

- Member states should not restrict the public's access to information in times of crisis beyond the limitations allowed by Article 10 of the ECHR and interpreted in the case law of the ECtHR.
- Member states should always bear in mind that free access to information can help to effectively resolve the crisis and expose abuses that may occur. In response to the legitimate need for information in situations of great public concern, the authorities should guarantee the public free access to information, including through the media.
- Member states should not use vague terms when imposing restrictions of freedom of expression and information in times of crisis. Incitement to violence and public disorder should be adequately and clearly defined.
- International and national courts should always weigh the public's legitimate need for essential information against the need to protect the integrity of court proceedings.
- Member states should constantly strive to maintain a favourable environment, in line with the Council of Europe standards, for the functioning of independent and professional media, notably in crisis situations. In this respect, special efforts should be made to support the role of public service media as a reliable source of information and a factor for social integration and understanding between the different groups of society.
- Member states should consider criminal or administrative liability for public officials who try to manipulate, including through the media, public opinion exploiting its special vulnerability in times of crisis.[498]

On the other side, the second paragraph of Article 10 of the ECHR refers to the right of contracting states to restrict the right to freedom of expression for considerations of protecting public health. This reference, like national security, may open a wide scope for interpretation that may ultimately lead to wasting the value of the right to freedom of expression and disrupting one of its primary functions, which is to inform the public and promote public debate, which is often undertaken by the press. Therefore, the European Court attaches great importance to freedom of expression in such cases and surrounds it with a greater degree of

[498] Council of Europe (2007). Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis. (Adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers' Deputies). https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ae60e. Accessed:20.01.2024.

protection, given the direct impact of speech that discusses health-related issues on the public interest.[499]

In the case of *Société de conception de presse et d'édition et Ponson v. France*, publishers, and publication directors of two magazines were convicted for illegal tobacco advertising. In the first case, a photograph of Formula 1 driver Michael Schumacher displaying a cigarette brand logo led to a fine under anti-tobacco laws. In the second case, an article on sports earnings featured images of Michael Schumacher with a cigarette brand logo, resulting in a fine for direct advertising. The ECtHR considered whether the measures were proportionate to protecting public health. The Court emphasised the importance of regulating tobacco advertising in the broader context of public health. It noted a European consensus supporting strict regulation and considered the potential impact of encouraging tobacco consumption, especially among young people. The Court found that blurring the logos, a simple process could have been employed without altering the substance of the photographs. Therefore, the Court concluded that the restrictions on freedom of expression in this context were justified by the pressing social need to combat smoking and were not disproportionate to the legitimate aim pursued.[500]

The recent ruling highlights its importance in two crucial aspects. Firstly, the court's decision is based on the broader European context, which strengthens the justification for the imposed restrictions and provides a strong foundation for the court's stance. Secondly, the court recognises that public health concerns may be more important than certain fundamental rights, such as the right to freedom of expression.[501]

In a related context, the ECtHR has unequivocally affirmed that states bear the responsibility to divulge information when confronted with imminent threats to human health or the environment. This obligation is intricately linked to the right to receive information as a fundamental component of the broader right to freedom of expression. The court's stance

[499] In the case of Hertel v. Switzerland, the ECtHR's judgement stated: It is, however, necessary to reduce the extent of the margin of appreciation when what is at stake is not a given individual's purely "commercial" statements, but his participation in a debate affecting the general interest, for example, over public health; in the instant case, it cannot be denied that such a debate existed.

See: ECtHR. Hertel v. Switzerland, no. 25181/94. 25/08/1998. § 47.

[500] ECtHR. Société de conception de presse et d'édition et Ponson v. France, no. 26935/05. 05/03/2009.

[501] Ibid, § 56.

underscores the pivotal role of readily available information in safeguarding human rights, particularly in the context of public emergencies and health crises.[502]

4.3.2. COVID-19; a special case

During the preparation period of this research, the world was still reeling from the COVID-19 pandemic effects and its impact on some human rights, including the right to freedom of expression. The researcher observed a dichotomy in the consequences of this pandemic. On one hand, there were negative effects characterised by restrictions and limitations on freedom of expression. On the other hand, there was a positive outcome in the form of increased reliance on the Internet and social media platforms, which emerged as an alternative channel for expression instead of traditional means. This shift resulted in the strengthening of the role of those platforms as a distinct tool and a manifestation of the broader landscape of free expression.

The COVID-19 crisis in Europe has presented a significant test for authorities and broader European society in navigating the delicate balance between public interests and individual rights, particularly the right to freedom of expression. Adding complexity to this challenge, within the context of freedom of expression, was the dual influence of Article 10. This article both shields against unwarranted interference by authorities and grants the authority to intervene for the protection of public health. Concurrently, the presence of Article 15 constitutes an additional element to the complexity, as it empowers member states with exceptional powers during emergency states, potentially leading to restrictions on certain individual rights. [503]

The whole matter relates to the motives for intervention, and this raises an important question about whether this intervention was a response to the crisis to preserve public health or was based on political motives, such as the exclusion of political opponents or media or press entities, against government policy. Therefore, the authorities' use of the COVID-19 crisis to

[502] ECtHR. Guerra And Others v. Italy, no. 14967/89. 19/02/1998.

[503] Article 15 stated: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law…".

implement certain policies or goals was the focus of concern for freedom of expression advocates during the height of the crisis.[504]

One of the most important concerns relates to laws aimed at preventing the spread of fake or misleading information. The difficulty of defining misinformation and determining the truth heightens these concerns, especially in situations where different parties may hold conflicting views. Therefore, restrictions on freedom of expression, particularly those related to disinformation, must be carefully crafted to avoid suppressing legitimate expression and to prevent their misuse by journalists and government critics.[505]

For example, A Russian opposition-leaning radio station interviewed a political analyst who claimed the government was concealing COVID-19 deaths. He suggested at least 1,600 deaths since mid-January. Following government pressure, the station removed the interview. Russian lawmakers approved fines up to $25,000 and prison terms, and the campaign against "fake news" intensified, prompting speculation about the scale of the outbreak. Ordinary Russians expressing doubts or alternative views on social media have faced legal action, with at least three receiving significant fines.[506]

In another case, *Dr. György Gődény*, a pharmacist and influencer in Hungary and a prominent figure among coronavirus sceptics in the country, was arrested. His arrest was linked to his public campaigns against COVID-19 preventive measures, such as mask-wearing, and the spread of misinformation. Dr. Gődény was given a suspended one-year prison sentence for spreading scaremongering news, but he did not accept the court's decision and sought a trial. The charges against him were based on a post he made on his website and social media

[504] According to a report by Human Rights Watch, at least 83 governments have used the COVID-19 pandemic as an excuse to violate people's rights to free speech and peaceful assembly. The report reveals that these violations include detentions, attacks, and prosecutions of critics, shutting down media outlets, and enacting ambiguous laws against speech that is deemed to pose a threat to public health.
See Human Rights watch. Covid-19 Triggers Wave of Free Speech Abuse, Scores of Countries Target Media, Activists, Medics, Political Opponents. https://www.hrw.org/news/2021/02/11/covid-19-triggers-wave-free-speech-abuse. Accessed: 16.01.2024.

[505] Karanicolas, M. (2021). Even in Pandemic, Sunlight Is the Best Disinfectant: COVID-19 and Global Freedom of Expression. Oregon Review of International Law, 22, 1-22.

[506] Daria Litvinova (2021). Fake news or the truth? Russia cracks down on virus postings. The Associated Press. https://apnews.com/article/health-ap-top-news-international-news-moscow-virus-outbreak-dbbf02a747b11d8ffe3b07d5e33ff129. Accessed 21.01.2024.

platforms, where he criticised government pandemic measures and claimed that masks were harmful to health and ineffective.[507]

Direct censorship of journalists and restricting access to information constituted another facet of restrictions on freedom of expression during the Covid-19 crisis. For example, the Polish government, under the Law and Justice (PiS) party, has implemented changes during the COVID-19 pandemic, allowing officials to avoid answering public information requests, citing the need to focus on combating the virus. According to Dziennik Gazeta Prawna, a Polish newspaper, the procedural and legal deadlines for various proceedings, including access to public information, are suspended during an epidemic threat or status. This move has been criticized by watchdog organizations, such as Watchdog Polska, which argue that it amounts to censorship and a lack of transparency. Under the so-called anti-crisis shield, the standard 14-day deadline for responding to public information requests is not applicable, giving authorities the discretion not to answer uncomfortable questions without the possibility of appeal.[508]

In Moldova, the Audiovisual Council has issued a directive mandating that, during the state of emergency, all audiovisual media providers within the Republic of Moldova must broadcast the official positions of competent public authorities, including the World Health Organization, the Exceptional Situation Commission of the Republic of Moldova, the Government of the Republic of Moldova, and the Ministry of Health, Labor, and Social Protection. This directive extends to all presenters, moderators, and editors, who are expressly prohibited from expressing personal opinions on topics related to the COVID-19 pandemic. The aim is to ensure the highest level of accuracy and correctness in disseminating information during this critical period.[509]

In the European Union, the onset of the COVID-19 pandemic ignited intense discussions surrounding the limitation of fundamental rights, particularly those about peaceful assembly and freedom of expression, as enshrined in the Charter. Member states responded with diverse

[507] Kitti Erdő-Bonyár (2020)· Society Hungary's most popular virus denier taken by the police. Daily News Hungary. https://dailynewshungary.com/hungarys-most-popular-virus-denier-taken-by-the-police/ accessed 19.01.2024.
Gődény György. (2023. december 19). Wikipédia. Retrieved 2023. december 19. 19:17 from https://hu.wikipedia.org/w/index.php?title=G%C5%91d%C3%A9ny_Gy%C3%B6rgy&oldid=26705689.

[508] Warsaw Business Journal (2020). Poland's government blocks access to public information: daily. https://wbj.pl/polands-government-blocks-access-to-public-information-daily/post/126760. Accessed 22.01.2024.

[509] The International Center for Not-for-Profit Law (2020). COVID-19 Civic Freedom Tracker. https://www.icnl.org/covid19tracker/# accessed 22.01.2024.

levels of restrictions on the right to peaceful assembly as a preventive measure against the virus's transmission. Nevertheless, a notable perspective emerged, asserting that the principles of social distancing should not overshadow the right to peaceful assembly or dismiss other relevant considerations, as such a stance aligns with the imperative of proportionality. This viewpoint was confirmed by the Federal Constitutional Court of Germany (Bundesverfassungsgericht).[510]

The European Parliament underscored the significant public health challenge posed by disinformation about COVID-19. It urged the EU to establish a European information source, accessible in all official languages, ensuring citizens had access to accurate and verified information. The Parliament recommended that the European Centre for Disease Prevention and Control (ECDC) take charge of coordinating and aligning data among Member States to enhance quality and comparability. Furthermore, the Parliament called on social media companies to proactively implement necessary measures to counter disinformation and hate speech related to COVID-19.[511]

As of the time of compiling this research, no directly relevant applications have been brought before the ECtHR, highlighting the unprecedented nature of the crisis. However, there is an anticipation that the future will witness a surge in lawsuits challenging violations arising from measures and laws implemented during the pandemic. This is particularly noteworthy in Central and Eastern European countries, where some of these measures and laws may fall short of meeting the established standards of the rule of law upon closer scrutiny.[512]

4.3.3. Protection of morals

Those arguments related to protecting public security and public health may not raise much controversy if they are used to justify restrictions on freedom of expression. But it seems that the matter becomes more complicated with those justifications that are based on protecting

[510] Marinkás, G. (2022). Dealing with the COVID-19 Pandemic on the EU Level: Introducing the "Web of Competencies" Theory. Nagy, Z., & Horváth, A. Emergency Powers in Central and Eastern Europe: From Martial Law to COVID-19. Studies of the Ferenc Mádl Institute. 73.

[511] See: European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP)). Para. 54.

[512] Gosztonyi, G. (2023). Being honest with people? The state of freedom of expression and censorship in Central and Eastern Europe during the COVID-19 pandemic. Media Regulation during the COVID-19 Pandemic: A Study from Central and Eastern Europe, 1.

morals. Especially if the matter is addressed in the context of the decisions of the ECtHR, which show a great commitment to the values of pluralism and tolerance.[513]

Protecting morals is recognised as one of the legitimate justifications by the ECHR and Article 19 of the International Covenant on Civil and Political Rights to restrict the right to freedom of expression. This acknowledgement aligns with broader values of human dignity, which underpin the protection of the right to freedom of expression itself. Nevertheless, the multifaceted nature of the moral concept and the complex aspects of the right to freedom of expression have resulted in a conflict between morals and freedom of expression. This conflict is reflected in the interpretation of the principle of proportionality. The ECtHR seemingly had no alternative but to grant national courts and authorities a 'wider margin of appreciation' in determining acceptable limits to freedom of expression, especially in its artistic context, when it intersects with considerations of protecting morals.[514]

This margin of appreciation acknowledges the diversity of moral values across different cultures and societies. It accepts that what is deemed ethical in one context may not be viewed similarly in another. This approach provides national authorities with flexibility in imposing their own ethical standards, recognising the significant variation not only between Member States but also within different regions of the same country. The ECtHR, in the context of one of the cases, has stated that there is no consistent European understanding of morals due to variations in legal and social frameworks across contracting states. In addition, perspectives on moral requirements change over time and differ across various regions, particularly in the current era of evolving opinions on this subject. State authorities are generally better suited than international judges to evaluate the nature of these requirements and determine the "necessity" for imposing a "restriction" or "penalty" to address them, as they have direct and continuous contact with the vital forces of their countries.[515]

Later, in another case, the ECtHR stated that while there is limited room for restrictions on political speech, a wider margin of appreciation is generally granted to states when regulating expression related to matters offending personal convictions, particularly in the realm of morals and religion. However, it acknowledged the need for European supervision to prevent arbitrary

[513] Nowlin, C. (2002). The Protection of Morals under the European Convention for the Protection of Human Rights and Fundamental Freedoms. Human Rights Quarterly, 24(1), 264–286.

[514] Bychawska-Siniarska, D. (2017). Protecting the right to freedom of expression under the European convention on human rights: A handbook for legal practitioners. Council of Europe. 58.

[515] See: ECtHR. Müller And Others v. Switzerland, no. 10737/84. 24/05/1988. § 35.

interference with freedom of expression, especially in cases involving blasphemy and prior restraint.[516]

The extension of ethical considerations to philosophical, artistic, and religious aspects would add more complexity to the evaluation process by the ECtHR. Especially when the issue raises a multifaceted violation, such as the overlap that occurs between the texts of Articles 9 and 10 of the ECHR. Through reviewing the case law of the ECtHR, and as previously mentioned, in such cases, the Court examines requests within the different contexts and considerations of each case, taking into account the rights protected under other articles of the Convention.

In the case of Otto-Preminger-Institute v. Austria, the Otto-Preminger-Institute, located in Innsbruck, Austria, planned to publicly screen a film titled "Das Liebeskonzil" (Council in Heaven), which was considered by many to be offensive to the Christian faith, particularly to Roman Catholics. The film depicted biblical figures and God in a manner that was seen as blasphemous by the Austrian authorities. Following complaints from the public, the Tyrolean regional government confiscated the film before its scheduled screening, based on Austrian law that protected religious peace and sentiments from insult. The Otto-Preminger-Institut challenged the confiscation, arguing that it violated their right to freedom of expression.

The ECHR held that the confiscation of the film by the Austrian authorities did not violate Article 10 (freedom of expression) of the ECHR. The Court reasoned that the measures taken by Austria were justified as necessary in a democratic society for the protection of the rights of others, in this case, the right of citizens to respect their religious beliefs and to maintain religious peace. In its judgement, the court stated:

"The manner in which religious beliefs and doctrines are opposed or denied is a matter that may engage the responsibility of the state, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 (Art. 9) to the holders of those beliefs and doctrines. ... a state may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with the respect for the freedom of thought, conscience, and religion of others... that the Convention is to be read as a whole, and therefore the interpretation and application of Article 10 in the present case must be in harmony with the logic of the Convention."[517]

[516] ECtHR. Wingrove v. The United Kingdom, no. 17419/90. 25/11/1996. § 58.

[517] ECtHR. Otto-Preminger-Institut v. Austria, no. 13470/87. 20/09/1994. § 47.

The approach of the ECtHR in dealing with cases involving considerations of the protection of morals in the context of Article 10 has not been free from criticism. Critics argue that the Court's position on the concept of public morality in the context of Article 10 implies deference to domestic courts, especially when the national court is considered more appropriate to rule on a case. In addition, the principle of margin of appreciation enables states to give priority to collective goals over individual freedom, especially through items such as the moral clause. In addition, in cases involving public morality, the concern is that the ECtHR is likely to uphold restrictions on freedom of expression once it accepts that public morality is at stake.[518]

4.4. Protection of the Rights and Reputation of Others

One of the challenges that may arise from exercising the right to freedom of expression is the conflict between this right and other fundamental human rights recognized by law. This clash raises questions about the values each right represents and which values might be prioritized. Unlike cases where the public interest restricts fundamental rights, conflicts between fundamental rights such as privacy and freedom of expression are more complex. Courts often resort to a 'balancing' approach to resolve such disputes, but this balancing act is inherently difficult because it assumes that the underlying values of conflicting rights can be measured against each other. Moreover, these values are immeasurable, making it challenging to determine one as more valuable than the other.[519]

Article 10 of the ECHR indicates that the right to freedom of expression may be restricted to achieve the legitimate aim of protecting the rights and reputations of others. The key question here is: What are these rights that may conflict with the exercise of the right to freedom of expression? Based on the nature of the cases and the case law of the ECtHR, the most common conflicts seem to involve the rights referred to in Article 8 and, to a lesser extent, Article 9.

4.4.1. Right to Privacy

Judicial applications concerning the tension between the right to freedom of expression and the right to privacy in the European Court's jurisprudence are relatively recent. Initially, it appears that the court often leaned towards favoring the right to freedom of expression. This belief is further supported by the court's dismissal of the notion that Article 8 imposes an obligation on

[518] Sharma, Neha, & Bleich, Erik. (2019). Freedom of Expression, Public Morals, and Sexually Explicit Speech in the European Court of Human Rights. Constitutional Studies, 5, 55-80.

[519] Barendt, Eric. (2009). Balancing freedom of expression and privacy: the jurisprudence of the ECtHR. Journal of Media Law, 1(1), 49-72.

states to offer a remedy for privacy violations caused by the media, as well as the assertion that state laws already provide effective remedies that should be pursued before resorting to the court.[520]

The case of *Von Hannover v. Germany (I)* marked a significant turning point for the ECtHR in its approach to balancing conflicting rights. It recognised the importance of the right to privacy and a private life. The case involved Princess Caroline of Monaco, who challenged the publication of her photographs in German magazines, arguing that they violated her privacy rights. Initially, the German courts ruled against her, citing her status as a public figure and the public's interest in her life. However, the German Federal Constitutional Court partially supported her, particularly in relation to photos featuring her children, citing her personality rights. Princess Caroline then appealed to the ECtHR, claiming that the German decisions had violated her right to private and family life as stated in Article 8 of the Convention. The ECtHR rejected the German courts' decisions, which had considered the plaintiff to be a contemporary public figure who had to tolerate the publication of such images, even if they were unrelated to her official duties. The ECtHR ultimately ruled that the publication of these images had indeed infringed upon the applicant's right to privacy and family life, as outlined in Article 8 of the ECHR. Furthermore, the press reports on the personal details of the applicant's life were not within the purview of the media's oversight role and did not contribute to any debate of public interest.[521]

The case of *Von Hannover v. Germany (No. 2)* marked another important shift in the approach of the ECtHR towards finding a balance between the right to freedom of expression and the right to privacy. The ECtHR's ruling, which found no violation of Article 8, provided clear criteria for domestic courts to consider when weighing the right to privacy under Article 8 against the right to freedom of expression under Article 10. These criteria include:

a. The contribution of the information to a general debate of interest.

b. The level of public knowledge about the person involved and the subject matter of the report.

c. The prior behavior of the person involved.

d. The content, format, and consequences of the publication.

[520] Ibid.

[521] ECtHR. Von Hannover v. Germany, no. 59320/00. 24/06/2004. §§ 59-63.

e. The circumstances of the taking of the photographs.[522]

Considering the numerous cases of conflicts between the right to freedom of expression and the right to privacy that have arisen before the ECtHR in the past decade, it is evident that the court's approach to achieving a balance is characterised by stability. The court did not consistently favour one right over the other, as it sometimes ruled in favour of violating the right to privacy,[523] and other times in favour of violating the right to freedom of expression.[524] While the jurisprudence of the ECtHR may suggest a bias towards the right to freedom of expression, it is the researcher's view that this impression is a result of the court's emphasis on protecting freedom of expression within its proceedings, compared to its treatment of the right to privacy, particularly when it conflicts with freedom of expression.

To summarise, the court's method of achieving a balance between privacy and freedom of expression hinges on determining whether the information, particularly when disclosed by the media, is in the public interest due to its contribution to a discussion of matters that concern the public.[525]

4.4.2. Right to Reputation

Exercising the right to freedom of expression, which includes the circulation of information, comes with the risk of defamation and harm to one's reputation or honour. This presents various challenges concerning the purpose and context of speech, as well as the complexity of issues that may arise from defamation while exercising the right to freedom of expression. Additionally, different jurisdictions handle these issues differently, further adding to the complications.

While both the right to freedom of expression and the right to reputation are protected under the ECHR, there are instances where these rights may conflict, necessitating the need for a delicate balance between them. Achieving this balance has posed an additional challenge for the ECtHR.

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[522] ECtHR. Von Hannover v. Germany (No. 2), no. 40660/08 60641/08. 07/02/2012. §§ 108-113.

[523] See among others: ECtHR. Ruusunen v. Finland (2014). ECtHR, Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland (2017).

[524] See among others: ECtHR, Axel Springer AG v. Germany (2012). ECtHR. Ricci v. Italy (2013).

[525] Barendt, Eric. (2009). Balancing freedom of expression and privacy: the jurisprudence of the ECtHR. Journal of Media Law, 1(1), 49-72.

It is worth noting that applications regarding this matter before the ECtHR are relatively recent. This is particularly true because the court previously did not consider the protection of Article 8 to encompass the right to reputation. This stance was reaffirmed in the *Marlow v. United Kingdom* case, where the court decision explicitly stated that the court considers that the applicant's complaint relates to a perceived affront to his dignity and reputation caused by statements made by the trial judge when handing down sentence and by the Court of Appeal when upholding that sentence. This is not a matter which falls within the protection guaranteed by Article 8 of the Convention.[526]

During the past two decades, the approach of the ECtHR began to change and shift towards dealing more realistically with the conflict between the right to freedom of expression and the right to reputation. The court decided in the case Chauvy and Others v. France that Article 8 protects the right to reputation. The ruling stated that:

"In the exercise of its European supervisory duties, the Court must verify whether the authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in this type of case, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right of the persons attacked by the book to protect their reputation, a right which is protected by Article 8 of the Convention as part of the right to respect for private life."[527]

Following that, the ECtHR proceeded with its approach based on a balance between the right to freedom of expression and the right to reputation, which became more stable with every new case involving a conflict between the two rights. In this context, *Pfeifer v. Austria* is one of the important applications.

In this case, the ECtHR found a violation of Article 8 due to domestic courts failing to protect the applicant's reputation in defamation proceedings. The case involved a letter published in a magazine that accused the applicant, who had criticized a professor's article minimizing Nazi crimes, of contributing to the professor's suicide. The domestic courts deemed this accusation a value judgment with a factual basis, but the European Court disagreed, emphasizing that the accusation implied criminal behaviour without evidence, thus infringing on the applicant's reputation and private life.

[526] ECtHR. Marlow v. The United Kingdom, no. 42015/98. 05/12/2000. (Decision).

[527] ECtHR. Chauvy And Others v. France, no. 64915/01. 29/06/2004. § 70.

The significance of this case is highlighted by the Court's assertion that in addition to the negative obligation created by Article 8 to protect individuals from arbitrary interference by public authorities, there may also be positive obligations that are inherent in effectively respecting private and family life. These obligations may entail the implementation of measures aimed at ensuring such respect, even in the realm of individuals' interpersonal relationships. Furthermore, the Court emphasized the necessity of striking a fair balance between the competing interests of the individual and society, acknowledging that each country has a certain degree of discretion in this matter.[528]

It is worth noting that while the ECtHR acknowledges reputation and honour as two components of private life, the Court has emphasized that for a case to be considered under Article 8 of the Convention, the attacks on one's reputation and honour must reach a certain level of gravity, which prejudices the right to respect for life.[529]

On the other hand, the ECtHR distinguished between the reputation of a person and the reputation of a legal entity. The Court noted that a private company's interest in protecting its reputation through defamation proceedings may be compatible with the broader economic interest, and that, therefore, the State has a margin of appreciation regarding the means provided by domestic law to enable a company to challenge the truth of allegations that may harm its reputation. At the same time, the Court emphasized that there is a difference between the reputational interests of a legal entity and the reputation of an individual as a member of society. Whereas the latter may have repercussions on one’s dignity, the former are devoid of that moral dimension.[530]

In summary, the European Court adopts a specific approach to address conflicts between freedom of expression and the right to reputation. This approach involves distinguishing between factual allegations and value judgements in defamation cases. The ECtHR has determined that Article 10 is violated when defamation laws fail to differentiate between these two types of statements or when they require the media to prove the truth of value judgments. While national courts initially categorise statements, the ECtHR has the authority to reclassify them, which can significantly impact the outcome of a case. This is what happened when the ECtHR made rulings that certain statements, initially considered value judgments by national

[528] ECtHR. Pfeifer v. Austria, no. 12556/03. 15/11/2007. § 37.

[529] ECtHR. A. v. Norway, no. 28070/06. 09/04/2009. § 64.

[530] ECtHR. OOO Regnum v. Russia. No, 22649/08. 08/09/2020. § 66.

courts, were factual allegations. This has had consequences on defamation judgments and has invoked the protection of reputation under Article 8.[531]

4.5. Preventing the Disclosure of Information Received in Confidence

Finding a delicate balance between the right to freedom of expression and the need to protect confidential information is a challenge for both national courts and the ECtHR. The second paragraph of Article 10 of the ECHR allows states to impose restrictions on freedom of expression to prevent the disclosure of confidential information. The ECtHR has analysed this provision, particularly in relation to the differences in wording between the English and French versions of the agreement. The ECtHR noted that while the French version refers to measures necessary to prevent the disclosure of confidential information, the English version refers to measures necessary for preventing the disclosure of information received in confidence. The court rejected the interpretation that the provision only applies to individuals who have confidential dealings with the author of a secret document and does not extend to third parties, including media personnel. The court pointed out that, in accordance with Article 33 of the 1969 Vienna Convention on the Law of Treaties, which reflects international customary law on treaty interpretation in multiple languages, it is appropriate to interpret the phrase "preventing the disclosure of information received in confidence" to include confidential information disclosed by individuals bound by a duty of confidence, as well as by third parties, such as journalists in the present case.[532]

This approach is in line with the ECtHR's firm commitment to safeguarding the confidentiality of journalistic sources. The court has repeatedly emphasised that protecting these sources is crucial for upholding press freedom. Without this protection, sources may hesitate to assist the press in providing the public with important information. Consequently, the press's essential role as a public watchdog may be weakened, and its ability to deliver accurate and reliable information may be compromised.[533] However, the press 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. The court has also stated that journalists' protection under Article 10 is contingent upon their adherence to the principles of good faith and the ethical standards

[531] Barendt, Eric. (2009). Balancing freedom of expression and privacy: the jurisprudence of the ECtHR. 62.

[532] ECtHR. Stoll v. Switzerland, No. 69698/01. 10/12/2007. §§ 58-61.

[533] ECtHR. Goodwin v. the United Kingdom, No. 17488/90. 27/03/1996. § 39.

of journalism.[534] Furthermore, the court has underscored the special significance of media professionals' duties and responsibilities in situations of conflict and tension.[535]

In accordance with the court's interpretation previously stated, the disclosure of confidential information is not restricted to the press alone. It may also extend to individuals or entities entrusted with such information due to their professional responsibilities. The ECtHR has established specific criteria to determine the extent to which the information contributes to public debate, as well as considering the behaviour of the person responsible for the disclosure and the timing of the information's publication.[536]

In the case of *Editions Plon v. France*, the applicant company acquired the publishing rights for a book titled "Le Grand Secret" from a journalist and Dr. Gubler, who had been the private physician to President François Mitterrand. The book revealed the president's battle with cancer, which had not been officially disclosed until later. The publication of the book led to legal action by the president's widow and children, resulting in an interim injunction that prohibited its distribution. This injunction was later upheld on appeal by the court. The Paris tribunal de grande instance maintained the ban and ordered damages against the applicant company. The ECtHR analysed the case under Article 10, which protects freedom of expression. The Court made a distinction between the interim injunction, which was imposed shortly after the President's death, and the final ban in October 1996. The interim measure was considered justified due to the emotional context, the potential harm to the president's reputation, and its limited validity in terms of time. However, the Court deemed the decision to maintain the ban beyond October 1996 no longer necessary to meet a "pressing social need." This was because a considerable amount of time had passed and the information had already become widely known, thus reducing the need to protect medical confidentiality. In conclusion, the Court unanimously ruled that the interim injunction did not violate freedom of expression, given its justification and proportionality. However, continuing the ban beyond October 1996 was deemed a violation, as the pressing social need to protect confidentiality had diminished over time and the information had already been widely disseminated.[537]

[534] ECtHR. Fressoz and Roire v. France, No. 29183/95. 21/01/1999. §45, §54.

[535] ECtHR. Şener v. Turkey, No. 26680/95. 18/07/2000. § 42.

[536] Council of Europe (2020). European Court of Human Rights, Guide on Article 10 of the European Convention on Human Rights - Freedom of Expression. Updated on 31 August 2022. 66-69.

[537] ECtHR. Editions Plon v. France, No. 58148/00. 18/05/2004.

It is important to note that, in the case of Guja v. Moldova, the court has established specific standards to ensure a fair balance and protect individuals who disclose or report confidential information. This includes those who obtain such information through their work, particularly when the disclosure contributes to the public interest or debate.[538] The case of Halet v. Luxembourg [GC] exemplifies this, where a former employee of PricewaterhouseCoopers (PwC) leaked confidential documents to the media, exposing favourable tax agreements between PwC and the Luxembourg tax authorities, known as the "Luxleaks" scandal. The employee was convicted and fined for this action. However, the European Court of Human Rights ruled that this conviction violated the employee's freedom of expression, as stated in Article 10 of the Convention. The Court stressed the significance of safeguarding whistleblowers and established criteria for assessing the protection of their freedom of expression. These criteria include considering whether or not alternative channels for the disclosure were available, the public interest in the disclosed information, the authenticity of the disclosed information, the detriment to the employer, whether the whistle-blower acted in good faith and the severity of the sanction. Ultimately, the Court determined that the public interest in the disclosed information outweighed the harm to the employer, and the punishment imposed on the employee was excessive. As a result, the Court ruled in favour of the employee, declaring a violation of Article 10.[539]

In general, the approach of the European Court in evaluating restrictions on the right to freedom of expression, particularly in cases involving the disclosure of confidential information, is based on a careful balance. This balance takes into consideration the potential harm to the right to freedom of expression and the benefits associated with protecting private interests, such as a doctor safeguarding the secrets of their patients, or protecting public interests, such as national security or public order.

Despite the ECtHR defending the role of the press and emphasising the principle that publication of documents is the norm and classification is the exception, the Court still faces a significant challenge. This challenge arises from the varying rules among member states regarding the preservation of confidentiality for certain sensitive information. Which made the

[538] ECtHR. Guja v. Moldova, No. 14277/04. 12/02/2008.

[539] ECtHR. Halet v. Luxembourg [GC], No. 21884/18. 14/02/2023.

court resort again to recognising a margin of appreciation for the contracting states to deal with this challenge.[540]

4.6. Maintaining the Authority and Impartiality of the Judiciary

In certain situations, or forms, expression can pose a threat to the proper functioning of the judiciary. Therefore, when drafting the ECHR, special attention was given to Article 10, which allows for restrictions on the right to freedom of expression to uphold the authority and impartiality of the judiciary. Article 19 of the International Covenant on Civil and Political Rights does not explicitly mention this provision. But the phrase "the rights of others" has been interpreted to encompass rights related to the administration of justice, such as the right to a fair trial and the presumption of innocence.[541] Nevertheless, the ECHR remains exceptional in its detail and clarity, making it a crucial point of reference in international human rights law.

Despite the sensitive nature of the task, the ECtHR was determined to strike a balance between the right to freedom of expression and the effective functioning of the judiciary. The ECtHR acknowledged that matters concerning the operation of the justice system, which is a crucial institution for any democratic society, are in the public interest. The special role played by the judiciary in society must be taken into consideration. As the guardian of justice, a fundamental value in a society governed by the rule of law, the judiciary must have the trust of the public in order to successfully carry out its responsibilities. Therefore, it may be necessary to safeguard this trust against baseless and significantly damaging attacks, especially considering that judges, who are subject to a duty of discretion, are unable to respond to such criticisms.[542]

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 resolution of legal disputes and for the determination of a person’s guilt or innocence on a criminal charge; further, that the public at large have respect for and confidence in the courts’ capacity to fulfil that function.[543] While Impartiality' denotes the absence of prejudice or bias. Maintaining the impartiality of the judiciary is vital for preserving public confidence, and the media discourse outside the

[540] ECtHR. Stoll v. Switzerland, No. 69698/01. 10/12/2007. § 107.

[541] Background Paper on Freedom of Expression and Contempt of Court for the International Seminar on Promoting Freedom of Expression with the Three Specialised International Mandates Hilton Hotel London, United Kingdom 29-30 November 2000. https://www.article19.org/data/files/pdfs/publications/foe-and-contempt-of-court.pdf accessed 06.02.2024.

[542] ECtHR. Prager and Oberschlick v. Austria, No. 29369/10. 23/04/2015. § 34.

[543] ECtHR. Morice v. France, No. 29369/10. 23/04/2015. § 129.

courtroom should not unduly influence proceedings within it. The media's responsibility is to convey the litigation discourse to the public without replacing it.[544]

The delicate balance between upholding the right to freedom of expression and preserving the authority and integrity of the judiciary raises significant questions. One of these questions regarding the freedom of expression for judges and civil servants working within the judicial system. In order to address this, the ECtHR aims to strike a balance between the necessity for judicial discretion and integrity, while also safeguarding judges' freedom of expression as outlined in Article 10 of the ECHR. While acknowledging the importance of maintaining the judiciary's authority and impartiality, the ECtHR also places emphasis on safeguarding judges' rights to engage in public discourse, particularly on matters pertaining to the judiciary and the administration of justice. The court adopts a case-by-case approach to ensure a fair balance between individual rights and the public interest. It carefully examines any limitations imposed on judicial expression, taking into consideration the potential negative impact on judges' willingness to participate in public debates. This approach aims to protect both the independence of the judiciary and the fundamental right to freedom of expression.[545]

Another important question arises regarding the press's ability to make comments on criminal proceedings and the work of the judiciary. According to Recommendation Rec (2003)13 by the Committee of Ministers, it is crucial for the public to have access to information about the activities of judicial authorities and police services through the media. Consequently, journalists should have the freedom to report and provide commentary on the functioning of the criminal justice system, with some limitations.[546] This position was further reinforced by the ECtHR, which affirmed that the press serves as a means for politicians and public opinion to ensure that judges are fulfilling their heavy responsibilities in a manner consistent with their entrusted task's underlying goal.[547]

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[544] Oster, J. (2015). Media freedom as a fundamental right (Vol. 30). Cambridge University Press. 2019.

[545] In examining restrictions on judicial expression, the ECtHR conducts a thorough review considering the overall context, the nature of the statements, and the judge's position.
See: ECtHR. Baka v. Hungary, No. 20261/12. 23/06/2016. §§ 165,167.

[546] Council of Europe: Committee of Ministers (2003). Recommendation Rec (2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings. (Principle 1 - Information of the public via the media).

[547] ECtHR. July and Sarl Liberation v. France, No. 20893/03. 14/02/2008. § 66.

The third point pertains to the ability to criticise judges. In jurisdictions that follow common law, the act of criticising a judge or court can result in punishment under the concept of "scandalising the court." This form of contempt of court can be enforced at any given time. Its primary objective is to prevent the erosion of public trust in the administration of justice. The traditional application of this contempt involves instances where a judge or court is subjected to "scurrilous abuse," allegations of bias or partiality, or claims that they have succumbed to external pressures.[548] Advocates for criticising judges emphasise the importance of freedom of expression in this context. This is due to several factors, including the unique role and extensive discretion that judges possess in determining legal rights, private lawsuits, and criminal convictions, which necessitate special protection for this form of expression. Additionally, open discussion and criticism are necessary given that court decisions are typically final, with no other authority having the power to interfere with or alter judicial rulings.[549]

It appears that the ECtHR took a tolerant stance towards criticism directed at judges, except for those that involve "gravely damaging attacks that are essentially unfounded". The court considered that because judges form part of a fundamental institution of the state, they may, as such, be subject to personal criticism within the permissible limits, and not only in a theoretical and general manner. When acting in their official capacity, they may thus be subject to wider limits of acceptable criticism than ordinary citizens.[550]

5. Summary

The issue of balancing freedom of expression with legitimate restrictions is a complex one. The ECtHR, guided by Article 10 of the ECHR, plays a vital role in determining the legality of these restrictions. Through the analysis of relevant cases, it becomes evident that the court carefully examines and evaluates any intervention by public authorities to assess its legality. Factors such as the nature and severity of the intervention, the justifications provided, and the proportionality of the penalties imposed are taken into consideration. While recognising the necessity of certain restrictions, it is crucial to ensure that they adhere to the principles of the rule of law, necessity, and proportionality. The chapter also explores various justifications for external restrictions on

[548] Background Paper on Freedom of Expression and Contempt of Court for the International Seminar on Promoting Freedom of Expression with the Three Specialised International Mandates Hilton Hotel London, United Kingdom 29-30 November 2000. https://www.article19.org/data/files/pdfs/publications/foe-and-contempt-of-court.pdf. Accessed 06.02.2024.

[549] Segev, R. E. (2009). Freedom of Expression: Criticising Public Officials. Amsterdam LF, 2, 77.

[550] ECtHR. Morice v. France, No. 29369/10. 23/04/2015. § 131.

freedom of expression, such as national security, prevention of disorder or crime, protection of public health and morals, safeguarding the rights and reputations of others, prevention of the disclosure of confidential information, and maintaining the authority and impartiality of the judiciary. In summary, the examination of external restrictions on freedom of expression, the role of the ECtHR, and the application of the proportionality test highlights the complexity and significance of finding a balance between safeguarding individual freedoms and addressing societal interests. This chapter emphasises the crucial role of the ECtHR in ensuring that restrictions on freedom of expression are lawful, justified, and in line with fundamental principles of human rights.

Conclusion

1. Factors and circumstances for establishing the current concept of the right to freedom of expression and censorship in Europe

The right to freedom of expression has deep historical roots that date back to ancient times. However, this thesis demonstrates that the modern understanding of this right, including the idea of limitations and the emergence of censorship systems, resulted from intellectual and political influences that spanned from the Age of Enlightenment in Europe until the adoption of theUDHRin 1948.

During the Enlightenment period, which took place in the 17th and 18th centuries, there was a significant impact on the recognition of freedom of expression. The fight against censorship played a crucial role in establishing freedom of the press as a prominent aspect of this right. Thinkers and philosophers of that time, such as John Milton and John Stuart Mill, made compelling arguments in favour of allowing individuals to express their thoughts and opinions without undue censorship. They challenged traditional authority and advocated for individual rights and liberties.

Furthermore, revolutionary and liberation movements also played a vital role in solidifying the defence of the right to freedom of expression. The ideas and circumstances that coincided with the American and French revolutions led to the creation of legal and political frameworks that reflected evolving societal values, emphasising the importance of open dialogue and the unrestricted exchange of ideas. The First Amendment to the United States Constitution and the French Declaration of the Rights of Man and of the Citizen (1789) were instrumental in

presenting a strong concept of the right to freedom of expression, which later influenced international instruments like the 1948 Universal Declaration of Human Rights.

Additionally, the thesis highlights how wars, conflicts of ideologies, and influences contributed to the establishment of strict control systems, particularly during the twentieth century. All these circumstances and factors worked together to solidify Europe's current concept of the right to freedom of expression. This was further reinforced by important instruments like Article 10 of the European Convention on Human Rights, which became a fundamental reference for protecting and regulating this right.

2. Analysing legal frameworks contributes to revealing objective limitations to the right to freedom of expression

The right to freedom of expression in Europe finds its basis in various texts of international human rights law and European law, in addition to the national laws of European countries. While Article 10 of the European Convention on Human Rights constitutes the primary reference for protecting and restricting the right to freedom of expression in Europe, it does not provide a precise detail of the scope of protection, or the categories and forms of expression protected. Although defining the scope of protection does not necessarily mean defining the limits of the right to freedom of expression, it contributes significantly to discovering those limits. Especially since the standard formula in all international and regional instruments that protect freedom of expression is built on general phrases that emphasise the rights of individuals to hold opinions and receive and transmit information. Therefore, correctly interpreting these texts would reveal the forms and types of protected expression in a manner commensurate with the nature of the right to freedom of expression and the importance of its individual and social function. Moreover, clarifying the limits of the right to freedom of expression based on the nature or form of the act or speech would contribute to drawing boundaries between the right to freedom of expression and other rights, which may overlap or be linked in a way that may be confusing to the judiciary and individuals alike. Hence, it can be said that drawing these boundaries is based primarily on the nature of the act, its goals, and its method, and this is what contributed to the creation of multiple classifications of protected expression.

All of the above shows the importance of the role played by the European Court of Human Rights in interpreting the text of Article 10, which led to the production of classifications of categories of protected expression based on criteria developed by the Court over the past decades. These classifications are effective not only in determining the scope of protected

expression but also in determining the degree of protection based on the same criteria. For example, political expression receives a greater degree of protection compared to some other forms of expression. Hence, it can be said that these limits are of an internal nature imposed by objective considerations.

On the other hand, based on the legal analysis of the text of Article 10 and in response to the challenges created by the significant progress in digital means of communication and the complexities imposed by the massive spread of social media and platforms, the researcher suggests an update to Article 10. This update would involve implementing a protocol that establishes clear definitions and standards for digital expression. The protocol should address the following aspects:

1) Responsibility of Service Providers: It is crucial to set clear guidelines for the accountability of service providers, website owners, and public page administrators regarding content that incites violence or promotes hatred. This will ensure that these entities take proactive measures to monitor and manage harmful content.
2) Standards for Digital Expression: It is important to define what constitutes digital expression that may raise concerns related to terrorism, racial discrimination, or other forms of hate speech. By establishing these standards, it will be easier to identify and address content that poses a threat to public safety and social harmony.
3) Judicial Oversight: Any restrictions on digital expression should be necessary, proportionate, and subject to rigorous judicial oversight. This requires clear legal definitions and criteria that courts must apply to prevent abuse of power and protect freedom of expression.
4) Academic Freedom: It should be explicitly stated that academic freedom extends to digital platforms, safeguarding the rights of scholars and researchers to conduct and share their work online without fear of reprisal.
5) Protection of Digital Media: It is crucial to clarify that freedom of expression protections apply to digital media, including the internet and social media platforms. This ensures that these modern forms of communication are covered under the same legal standards as traditional media.
6) By implementing these specific measures, the updated Article 10 would provide a comprehensive framework for addressing the unique challenges posed by digital communication while safeguarding human rights and the rule of law.

3. External limitations

The dissertation has discussed how the theoretical justifications for protecting the right to freedom of expression vary, based on individual and collective considerations. The same logic can be used to justify restrictions on freedom of expression. If the exercise of freedom of expression confers a value that cannot be easily denied or infringed, the same practice may involve a violation of another individual or collective right. If this matter were left unchecked, the result would be a state of mutual violation, resulting in a war based on theoretical justifications. This ultimately led to the clear legal recognition of a set of justifications that allow states to intervene in the exercise of the right to freedom of expression. This intervention is necessary to maintain a balance between the value and benefit represented by the right to freedom of expression and the potential violations or threats that may arise from its exercise in certain ways, tools, or content. In other words, the criterion for determining these restrictions is based on considerations and external factors that are related to protecting vital interests when the exercise of the right to freedom of expression poses harm or poses a threat to those interests. Therefore, understanding and analysing the social, political, and cultural contexts play a significant role in evaluating these restrictions and determining their legitimacy.

The dissertation has explored how the ECHR allows for restrictions on freedom of expression to protect public interests such as national security and public safety, the prevention of disorder and crime, and the protection of health and morals. This is when freedom of expression constitutes a violation or threat to any of the aforementioned interests.

The ECHR also approved justifications based on protecting public and private interests, such as preventing the disclosure of confidential information whose disclosure might harm the interests of state agencies or public bodies of a sensitive nature, such as the army and intelligence, as well as harm the individual interests of specific people. Among the justifications that combine the protection of public and private interests are those that aim to preserve the authority and impartiality of the judiciary when expression would affect the conduct of the judiciary and affect the right of individuals to a fair trial.

The last type of justification is based on preserving individual interests, namely the rights or reputations of others. This includes defamation, slander, or making false statements that harm someone's reputation or violate someone's rights. The agreement allowed contracting states to intervene in such cases.

It is important to note that these justifications are not absolute and must be applied in a manner that is necessary and proportionate in a democratic society. The ECtHR considers the specific circumstances of each case and applies a balancing test to determine whether restrictions on freedom of expression are justified considering the competing rights and interests at stake.

4. ECtHR approach in evaluating the breach of the right to freedom of expression

Through its approach, the ECtHR has developed a body of case law that provides guidance and clarity on interpretations relating to the scope of the right to freedom of expression and the restrictions that may be imposed on its exercise. This appears to have significantly helped to enhance consistency and predictability in addressing violations across diverse legal systems.

The "three-step approach" followed by the ECtHR in assessing the legitimacy of the intervention by authorities on the right to freedom of expression involves three stages of analysis. These steps are commonly used by the Court to determine whether the interference with freedom of expression is justified. The three-step approach consists of the following:

The first step involves examining whether the interference with freedom of expression is prescribed by law. The Court assesses whether the restriction is based on a clear and accessible legal provision that meets the requirements of foreseeability and accessibility. It ensures that individuals are aware of the rules governing their expression and that restrictions are not arbitrary or based on subjective or ad hoc decisions.

The second step focuses on determining whether the interference serves a legitimate aim. The Court examines whether the restriction pursues one or more of the aims explicitly mentioned in Article 10(2) of the ECHR, such as protecting national security, public safety, preventing disorder or crime, protecting health or morals, or protecting the reputation or rights of others. The Court considers whether the interference is genuinely aimed at achieving a legitimate goal, as opposed to being implemented for improper purposes.

The third step involves evaluating whether the interference is necessary in a democratic society. This step is crucial and requires a thorough examination of several factors. The Court assesses whether the interference is proportionate to the legitimate aim pursued, considering the severity of the restriction imposed and the impact on the right to freedom of expression. It examines whether there were less restrictive measures available to achieve the same objective. The Court also considers the specific context, including the nature of the expression, the identity of the

person making the expression, and the potential impact on public debate and democratic discourse.

The margin of appreciation granted to member states is considered one of the most problematic points addressed in the thesis. The ECtHR recognises the principle of margin of appreciation, which allows Member States some discretion to restrict the right to freedom of expression within their legal systems based on specific considerations. Although this approach carries a recognition of the diversity of legal traditions and cultural contexts within Europe, at the same time, it may constitute a tool of tyranny that may be difficult to control, even with the authority of supervision by the ECtHR. This is what made some criticise this margin of appreciation on the grounds that it frames the state's burden of proving harm to the right to freedom of expression. Especially since the state's situation with the tools, powers, and database it possesses may make the task of the court, as well as the applicant, more difficult to evaluate the validity of the assessment of the state's behaviour and the extent of its proportionality with the margin of appreciation and its necessities, which may differ from one state to another.

Internal circumstances play a normative role in applying the principle of margin of appreciation and evaluating considerations in the second paragraph of Article 10. For instance, the Kurdish crisis in Turkey often constitutes a reason for deciding restrictions on the right to freedom of expression based on justifications for protecting national security and public order. In most cases, the court concludes violations of Article 10 even when such justifications are invoked. Although the ECtHR often seeks to set limits to ensure that member states do not disproportionately restrict freedom of expression or abuse their discretion, it seems that the court remains unable to reduce these violations due to the principle of margin of appreciation and the absence of clear definitions and criteria for justifications related to national security and public order.

Through this thesis, the researcher has explained in detail the mechanism for examining requests related to the right to freedom of expression by the ECtHR. The ECtHR uses the proportionality test followed by a large portion of national and international judicial systems, which is based on achieving balance, as a basis for evaluating cases involving violations of the right to freedom of expression. The proportionality sought by the ECtHR is based on the extent to which member states take into account considerations related to the value of free expression and the loftiness of their goals in comparison to the results that may affect some other rights or interests, taking into account the circumstances and context of each case.

However, while the test considers the circumstances and context of each case, there may be challenges in accurately assessing these factors. Contextual nuances and complexities may not always be fully understood or appreciated, resulting in decisions being made that fail to adequately address the underlying issues.

On the other hand, and in contrast to the concerns related to the margin of appreciation and what may result from the ECtHR being influenced by the decisions of national courts, there are fears that the ECtHR, in its attempt to achieve a balance between competing rights and interests, may exceed its authority by replacing its ruling with that of the national courts. This would undermine the principle of subsidiarity, which suggests that decisions should be made as locally as possible.

Additionally, there is a worry that the proportionality test may not always effectively protect minority views or unpopular speech. In some cases, the test may prioritise majority interests or societal norms, which can suppress dissent and limit the diversity of opinions.

The ECtHR has the authority to provide remedies for violations of freedom of expression. These remedies may include monetary compensation, declaratory rulings, and measures aimed at preventing similar violations from happening again. By holding Member States accountable for violations and providing remedies, the Court contributes to the overall effectiveness of addressing violations of freedom of expression. However, the successful implementation of its decisions relies on the cooperation of member states. Some countries may face difficulties in fully complying with the Court's rulings, which could affect the enforcement and effectiveness of freedom of expression protections. This was highlighted by Judge Julia Laffranque, president of the Organizing Committee of the seminar traditionally held to mark the opening of the judicial year of the ECtHR, in her speech, where she stated:

"Yet the European Court of Human Rights cannot be solely responsible for enforcing human rights standards across Europe. Upholding human rights and the rule of law is not only the duty of the ECtHR, it is also a national task that involves the legislature, executive, and courts."

This dissertation highlighted the pivotal role played by the ECtHR in interpreting and applying Article 10 of the European Convention on Human Rights. Over the past decades, the Court has sought to fill the gaps in the legal text by adopting clear criteria to evaluate restrictions on freedom of expression, such as the "quality of law" criterion. In addition to the court’s adoption of some interpretive tools and principles that ensure the continued effectiveness and appropriateness of the provisions of the European Convention on Human Rights, such as on

precedent-based adjudication, margin of appreciation, evolutive interpretation. Nevertheless, the Court has faced challenges arising from extreme differences in legal and political systems among member states and variations in the democratic climate. This is evident in the number of cases related to Article 10 violations, where Eastern and Central European countries show a higher frequency compared to Western European and Scandinavian countries.

The researcher believes that although the court has largely succeeded in developing a method to evaluate the legitimacy of authorities' interference in exercising the right to freedom of expression, it lacks effectiveness in influencing member states. The court's role is limited to approving or disapproving violations and ruling on material or moral compensation, which may not act as a sufficient deterrent. Additionally, reaching the European Court of Human Rights is challenging due to financial costs, procedural complexity, and stringent standards related to proving interest and exhausting remedies. Therefore, the Court and the Council of Europe face the challenge of increasing the court's effectiveness in reducing violations related to freedom of expression. This requires finding legal means that enable the court to intervene effectively and bindingly in changing state policies and seeking a general European legal approach with clear standards preventing violations of the right to freedom of expression.

One possible solution to this issue is implementing a comprehensive monitoring system that actively oversees member states' compliance. Additionally, it would be beneficial to establish a sanctioning mechanism that imposes greater consequences for violations. This could involve financial penalties and political repercussions, such as the suspension of certain privileges within the Council of Europe. Furthermore, it is crucial to enhance the capacity of national institutions to uphold human rights. This can be achieved by ensuring they are adequately resourced and independent, which would further strengthen the efforts of the ECtHR.

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