

**ARTICLE 10 OF THE EUROPEAN CONVENTION
IN LIGHT OF THE JURISPRUDENCE
OF THE EUROPEAN COURT OF HUMAN RIGHTS**

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Abstract. *An important component of freedom of expression as a multifaceted human right is the right to free and unhindered transmission of information. Media are means of mass communication whose basic function is to spread general and complete information on matters of public concern. Being the primary transmitters of information in modern democratic societies, mass media may have a dual capacity: they may either be violators of freedom of expression or entities exposed to the infringement of freedom of expression. The European standards governing the observance of freedom of expression were established through the practice of the European Court of Human Rights, in cases concerning the relationship between Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the role of media in society. The established standards and restrictions should primarily be respected by the state and the media as the main actors in the process of information exchange.*

Key words: *European Convention for the Protection of Human Rights and Fundamental Freedoms, European Court of Human Rights, freedom of expression, restriction of freedom of expression, media, principle of proportionality.*

INTRODUCTION

The European Convention for the Protection of Human Rights and Fundamental Freedoms¹ (hereinafter: the Convention) guarantees the freedom of expression. The European Court of Human Rights (hereinafter: the Court) has significantly contributed to the interpretation of this freedom through the development of its jurisprudence². The freedom of expression is

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¹ More about the history of the Convention and its amendments: Z. Radivojevic, the European system of human rights' protection, "Human Rights - user guide", OGI, Niš, 2004, p. 59-64.

² Statistics say that there have been more than 600 cases so far regarding the freedom of expression; D. Voorhoof - H. Cannie, Freedom of Expression and Information in a Democratic Society: The Added but Fragile

guaranteed by Article 10 of the Convention, which reads as follows: "1. Everyone has the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring a construction permit for broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of public health or morals, protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"(ECHR, Art.10).

The first paragraph of Article 10 guarantees freedom of expression and determine its content, while the second paragraph specifies the circumstances in which this freedom may be subject to legitimate restrictions imposed by the state authorities. The language of Article 10 (1) indicates that it is a complex human right, composed of two components: the right to free and unimpeded transfer of information, and the correlated right to receive information and ideas, which implies active and passive right to information³. As means of mass communication, media have a fundamental obligation of spreading general and complete information on matters of public concern; thus, the first component primarily applies to media while the second one pertains to the general public as the holder of the right to receive information. Being the primary transmitters of information in modern democratic societies, media may have a dual capacity: they may either emerge as violators of freedom of expression or as entities exposed to the infringement of freedom of expression.

On the other hand, the Contracting States have certain obligations under Article 10 of the Convention. The negative obligation implies the obligation of the states to refrain from any illegal or unjustified interference with the exercise of freedom of expression. Since this freedom is a qualified right, the most common case of negative obligation concerns the state monopoly in issuing broadcasting permits and licenses⁴. In the last decade, the Court has exerted efforts to interpret the existence of the positive obligation of states. In cases where media representatives were abused, injured or killed, whereas the state failed to investigate the incident, the Court found a violation of Article 10 considering that the state must guarantee a safe environment for the enjoyment of freedom of expression⁵.

In the first part of the paper, forms of freedom of expression are being analyzed, followed by an explanation of the limits of freedom. The remaining parts of the paper will focus on some prominent issues pertaining to freedom of expression in the media which the Court case-law has considered relevant, including criticism of the holders of public authorities and debate on issues of public importance, the responsibility of the media for libel and slander, and journalistic sources of information.

Value of the European Convention on Human Rights, International Communication Gazette, 2010, p. 410, available at: gaz.sagepub.com/content/72/4-5/407 (25.7.2012.).

³ A. Jaksic, the European Convention on Human Rights - A comment, Belgrade, 2006, p. 296

⁴ ECHR cases: *Informationsverein Lentia v. Austria*, judgment of 24 November 1993; *Groppera Radio AG v. Switzerland*, judgment of 28 March 1990; *Autronic AG v. Switzerland*, judgment of 22 May 1990; *Demuth v. Switzerland*, judgment of 5 November 2002

⁵ The most famous case is *Özgür Gündem v. Turkey*, judgment of 16 March 2000, when the government failed to provide protection for journalists who had been the target of terrorist attacks. The Court found that there was not only negative but also positive obligation, which shall not be of such kind or scope as to impose an impossible or disproportionate burden upon the state.

2. FORMS OF FREEDOM OF EXPRESSION

According to Article 10, freedom of expression is guaranteed to both physical and legal entities⁶, in both oral and written form. The right to transfer information is exercised in different ways, regardless of the number of publications, form (paper, audio-visual or electronic format), or used resources (financial or technical). In addition to the very content of information and ideas, the protection encompasses the ways of their presentation, such as: leaflets, books, works of art, the press, radio⁷, television, cinema or (nowadays) the Internet⁸. The protection also extends to all forms of expression, including not only the written or spoken words but also through images, drawings and photos⁹.

The Court provides a different level of protection to different categories of expression (political, commercial, artistic, academic, etc.). Depending on the content of information and ideas which are to be conveyed, the Court has established a hierarchy of values that are protected by Article 10. Due to the importance of preserving the functions of pluralism of opinions in society, the most protected forms of freedom of expression is so-called political speech, i.e. comments provided by the media and public figures on issues of public concern, whereas commercial speech is the least protected form of expression.

3. RESTRICTIONS ON FREEDOM OF EXPRESSION

The Convention contains two types of restrictions on freedom of expression. The first type is provided in Article 10 (2), where the state is allowed to derogate the rights under specific circumstances. Another limitation arises from Article 17¹⁰, which prohibits the abuse of rights and refers to the prohibition of hate speech¹¹.

⁶ In its practice, the Court has established that protection may be afforded to journalists, editors and producers as individuals, and media as legal entities, which was confirmed in the ECHR cases: *Goodwin v. UK*, judgment of 27 March 1996; *Vogt v. Germany*, judgment of 26 September 1995; *Unabhängige Initiative Informations Viefalt v. Austria*, judgment of 26 February 2002, *the Sunday Times v. UK*, no 1, judgment of 26 April 1979, *Jersild v. Denmark*, judgment of 23 September in 1994.

⁷ The material broadcasted on the radio is also protected by Art. 10, regardless of whether it is an informative and/or entertainment program, as confirmed in *Groppera Radio AG v. Switzerland*.

⁸ ECHR cases: *Times Newspapers Ltd. v. United Kingdom*, judgment of 10 March 2009; *Editorial Board of the Rights of Working and Shtekel in. Ukraine*, judgment of 5 May 2011, *Delfi v. Estonia*, communicated 11 November 2011. For more information: Research report - Internet: case-law of the European Court of Human Rights, Research Division of the Council of Europe, 2011, pp. 11-17.

⁹ As illustration, we can mention the case when a journalist was forbidden to publish photos of a politician in connection with a series of articles about his financial situation. Analyzing the context of this case, the Court pointed out that it is irrelevant whether a particular individual or a picture is known to the public; the only important fact is whether a person has entered the public sphere. In that particular case, it was clear that the politician entered the public sphere because his biography and photo were published on the website of the Austrian Parliament; *Krone Verlag GmbH & Co. KG. v. Austria*, judgment of 26 February 2002, para. 37. More: A. Mowbray, *Institutional Developments and Recent Cases Strasbourg*, Human Rights Law Review, 2005, p. 179

¹⁰ Art. 17: "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 these rights and freedoms or at their limitation to a greater extent than is provided for in the Convention."

¹¹ For more, see: A. Weber, *Manual on hate speech*, Council of Europe, 2009, pp. 22-23

3.1. Derogation of freedom of expression

As the freedom of expression is not an absolute right, Article 10 (2) provides the *numerus clausus* list of legal grounds of permitted limitations. The justification of each limitation is evaluated according to the so-called *three-stage test*, under which the Court seeks answers to the following questions: a) whether specific measures are prescribed by law or in accordance with the law; b) whether they pursue a legitimate aim, and c) whether they are necessary in a democratic society¹². At the same time, any restrictions must be narrowly interpreted and the expressed need for them has to be convincingly demonstrated¹³. The burden of proving justification, expediency, legitimacy and proportionality of measures lies with the state. In determining the justification of limitations, the Court allows a wider margin of appreciation in matters of morality or of commercial expression¹⁴, and a narrower margin of appreciation with respect to political speech.

Considering the legal reasoning in the Court decisions, it may be noted that the Court often rules in favour of the applicants, mainly because one of the three-stage test requirements has not been met, whereas the legal standard requires that they shall be fulfilled cumulatively.

Of all the legal grounds envisaged in Article 10 (2), states have only sporadically called for the protection of public health¹⁵ or moral. More frequently, they call upon the risk to "national security, territorial integrity or public safety," asking the Court to prohibit the publication of articles and those specific topics¹⁶. However, the Court has always emphasized the importance of well-established rules of the narrow interpretation of exceptions, primarily in order to preclude the states from referring to this legal ground in an attempt to prevent the media from performing their basic duty: to provide information of public importance. In most cases, the Court ruled that the legal ground for imposing restrictions on media activities is "*protection of the reputation and rights of others, preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary*". When it comes to the publication of information and media commentary on court proceedings, it is necessary to reconcile two opposing interests: the interest of the public to be informed on matters of common concern, and the interest of ensuring the undisturbed exercise of the judicial function. Although not specifically mentioned in Article 10, freedom of the press

¹² The process of assessing the "justifiability" or "sufficiency of these measures and "the need in a democratic society" is called the principle of proportionality, which is inherent in the European system of human rights protection since the case *Lawless v. Ireland*, judgment of 1 July 1961. See: M. Nastic, *The Principle of Proportionality in the practice of constitutional courts and the European Court of Human Rights*, Pravni život: Pravo i prostor, br. 12, Beograd, 2010, p. 979-981

¹³ ECHR cases: *Observer and Guardian v. United Kingdom*, judgment of 26 November 1991, para. 59; *Ahmed at. al. v. United Kingdom*, judgment of 2 September 1998, para. 55 (1).

¹⁴ *VGT Verein Gegen Tier Fabriken v. Switzerland*, judgment of 30 June 2009, para. 77. More: O. Bakircioglu, *The Application of the Margin of Appreciation Doctrine and Freedom of Expression and Public Morality Cases*, German Law Journal, Vol. 8, No. 7, 2007, pp. 719-724, 731-733.

¹⁵ One of the few examples is the case of *Stambuk v. Germany*, judgment of 17 October 2002, where the Court discussed the journalistic article on laser treatment of vision. The Court held that it was necessary to publish the article in order to protect public health and raise public awareness about the issue.

¹⁶ States called upon these legal grounds in the following ECHR cases: *Observer and Guardian v. United Kingdom*, judgment of 26 November 1991; *Vereniging Weekblad Bluf! v. Netherlands*, judgment of 9 February 1995; *Süreker v. Turkey*, no 1, judgment of 8 July 1999; *Özler v. Turkey*, judgment of 22 November 2001; *Yamurdereli v. Turkey*, judgment of 4 June 2002; *Çetin and others v. Turkey*, judgment of 13 February 2003; *Duzgoren v. Turkey*, judgment of 9 November 2006; *Ergin v. Turkey*, no 6, judgment of 4 May 2006; etc.

is established in the Court case-law¹⁷. Some of the most significant cases are specifically related to this freedom, where the Court had to carefully balance these two interests.

The issue of disclosure of information was raised in one of the most famous cases¹⁸, which was still expected to have its epilogue in a national court. After weighing the conflicting interests, the Court concluded that the public has a right to certain information, even if the facts and raised issues were part of the already initiated judicial proceedings. In its judgment, the Court specifically emphasized the factors that contributed to this decision: the volume and unqualified prohibition restriction, the temperance expressed in the newspaper article, the length of pending court proceedings and settlement negotiations, and the extensive public debate concerning the problems which affected a large part of the society.

On the issue concerning criticism of the judiciary, the Court took a more restrictive stance as compared to the issue concerning freedom of the press or media criticism of other public and especially political figures. In case where the journalist criticized the legality of the national court judgment due to the fact that two out of three lay-justices were employed by the state authority (the respondent in the case), the Court noted that: "*The legitimate interest of the state to protect the reputation of the two lay-judges ... is not in conflict with the interests of the applicant to be able to be involved in the debate on the structural impartiality of the High Court.*"¹⁹ Accordingly, the Court found that the prosecution of journalists for libel was unjustified. The Court also held that there was a violation of Article 10 when the journalist criticized the judges for political bias in the sentencing process. Despite the harsh words, the Court eventually found that the journalist expressed his value judgment, which was supported by numerous facts and represented part of the public discussion on important social issues²⁰.

The Court has been guided by similar principles when media criticized public prosecutors and other government representatives participating in court proceedings but, in such cases, the Court emphasizes that the prosecutor is entitled to a lesser degree of protection than judges²¹. Besides, taking into account the differentiation between the objective and subjective elements of criticism, the Court noted that the criticism expressed was not a personal insult as it referred to the prosecutor's strategy and procedural activities²². On the other hand, although the Court made a clear distinction between facts and value judgments, it was necessary to substantiate the latter by providing factual grounds, which serve as the premise for the value conclusion. Therefore, the Court accepted the violation of Art. 10 only as pertaining to the substantiated statements; thus, despite the journalist's argument that the strong political bias of a member

¹⁷ A. Jakšić, op. cit. p. 298

¹⁸ In the case of *Sunday Times v. UK*, the newspaper company was to publish a text about the results of testing a drug (medicament) before its distribution to the market. The article was based on numerous allegations originating from independent sources, who claimed that the users had sustained severe deformations. Some of the affected families accepted an out-of-court settlement with the pharmaceutical company, some were still in the negotiation process, and some were in the early stages of court proceedings. The pharmaceutical company managed to put a ban on the article publication, arguing that its publication implied a disregard for the court and the pending national judicial proceedings. The Court found that the state ban on the issuance of a newspaper article failed to meet the proportionality three-stage test because the enforcement of the prohibition did not constitute a "pressing social need", i.e. that the measure was "proportional to the legitimate aim pursued".

¹⁹ *Barfod v. Denmark*, judgment of 22 February 1989, para. 29

²⁰ *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, para. 47

²¹ *Nikula v. Finland*, judgment of 21 March 2002, para. 5

²² *Ibid*

of the judiciary is an issue of great legal and social importance, the Court did not accept the unsubstantiated statement in which the journalist accused the prosecutor of being member of a militant political party.²³

In many cases, States parties to the Convention often provide for the legal ban on publication of information related to the issues pending adjudication before the national court. In this regard, the Court found that the criminal convictions of journalists for revealing procedural information²⁴ constituted a violation of Art. 10 of the Convention, for two reasons: first, due to the absolute character of the prohibitions provided and, second, for undermining the media to inform the public on matters clearly involving issues of public importance.

However, there are numerous examples where the Court found no violation of Art. 10 of the Convention, for example, in cases concerning repeated media speculation about the criminal conduct of persons against whom charges had already been dropped²⁵, or in cases involving the journalist's arbitrary evaluation of evidence from court proceedings or personal opinion about the defendant's culpability.²⁶

3.2. Prohibition of Hate speech

It is paramount to establish a delicate balance between the broad interpretation of freedom of expression and hate speech that constitutes interference and violation of the rights of others. When it comes to hate speech, the Court jurisprudence initially rested on the mutual exclusion of Article 10 and Article 17 of the Convention, with a prominent tendency to rely on Art. 17 in order to completely rule out the application of Art. 10 (1)²⁷. However, in its subsequent interpretation, the Court went in the direction of linking Art. 17 with Art. 10 (2), especially in terms of the condition "the necessary measure in a democratic society". With this approach, the Court stands by a broad interpretation of freedom of expression under Art. 10 (1), which ultimately implies that freedom of expression may entail the right to express views that are offensive or disturbing.²⁸

The next question that was put before the Court was the distinction between hate speech *per se* and racist statements and statements that incite violence. Hate speech does not enjoy any protection under Art. 10; on the other hand, the permissibility of racist and violence-inciting statements is examined on the basis of Art. 10 (2). Notably, the Court stated that: "*Tolerance and respect for the equality of dignity of every human being represents the foundation of a*

²³ *Perna v. Italy*, judgment of 25 July 2001. Unsubstantiated statements were also analyzed in *Selisto v. Finland*, judgment of 16 November 2004 and *Pedersen and Baadsgaard v. Denmark*, judgment of 17 December 2004.

²⁴ In the case of *Du Roy and Malaurie v. France*, judgment of 3 October 2000, two journalists published information that a person had filed a request to take part in criminal proceedings in the capacity of a private party. As the French law establishes a general and absolute ban on the publication of any information related to court proceedings (even technical data), the publication of such information is regarded as a criminal offense.

²⁵ *Constantinescu v. Romania*, judgment of 27 June 2000. The journalist was convicted of criminal defamation for publishing an article which included a comment about the criminal behavior of certain persons against whom criminal charges had already been dismissed.

²⁶ *Worm v. Austria*, judgment of 29 August 1997. The journalist stressed the importance of debate and public information, since the accused was a former deputy prime minister and finance minister.

²⁷ *Glimmerveen and Hagenbeek v. Netherlands*, judgment of 11 October 1979

²⁸ Freedom of Expression under the European Convention of Human Rights - Interights Manual for Lawyers, London, 2010, p. 4. For a critique of this view, see: H. Cannie - D. Voorhoof, The Abuse Clause and Freedom of Expression and the European Human Rights Convention, *Netherlands Quarterly of Human Rights*, Vol. 29/1, 2011, pp. 56-68

democratic and pluralistic society. Therefore, as a matter of principle can be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, encourage, promote or justify hatred based on intolerance (including religious intolerance), provided that all imposed "formalities", "conditions", "restrictions" or "penalties" are focused to the legitimate aim pursued. In addition... there can be no doubt that concrete expressions of hate speech that may be offensive to certain individuals or groups, are not protected by Art. 10 of the Convention."²⁹

In the famous case³⁰ involving racist statements transmitted by means of media, the Court said that special caution must be taken in reporting on such statements due to a stronger and more immediate impact created by the audio-visual media as compared to the printed media. Yet, the Court concluded that the criminal conviction of a journalist was disproportionate, given the fact that the interview for the documentary film was made with the aim of contributing to public debate on matters of general interest and not with intent to propagate racism. In addition to intent, the Court took into account that broadcasting occurred in the context of the news program and was intended for a well-informed public, as well as the fact that the journalist had denied any liability for the interviewees' statements and opinions³¹. After carefully establishing a balance between the possible limitations and the public interest, the Court concluded that the public interest in the dissemination of information on the important topic shall prevail. In performing their primary duty and ensuring the exercise of the citizens' right to information on matters of public importance, the media acted as "public guardians" of the social order by raising and discussing issues pertaining to all social topics (including the unpleasant ones). Yet, in the given example, the Court did not rule that journalists shall be given absolute freedom or be exempt from liability because the media must always be cautious not to become an instrument of transmission and dissemination of hate speech.³²

4. CRITICISM OF PUBLIC AUTHORITY HOLDERS AND DEBATE ON ISSUES OF PUBLIC IMPORTANCE

In 1970, the Resolution no. 428 of the Parliamentary Assembly of the Council of Europe provided the obligation of the media to disseminate general and complete information on matters of public concern. The right to freedom of expression is often a prerequisite for the exercise of other rights and freedoms guaranteed by the Convention; thus, it "... *is one of the foundations of such a society, one of the basic conditions for its progress and for the development of every man..... It refers not only to "information" or "ideas" that are acceptable*

²⁹ *Gündüz v. Turkey*, judgment of 4 December 2003, para. 40-41.

³⁰ In the case of *Jersild v. Denmark*, the reporter interviewed three members of racist groups in Copenhagen, who gave extremely negative comments about immigrants, the black population and other ethnic minorities in Denmark.

³¹ Content of an interview with a sociologist was also the subject of analysis in *Erdoğan and Ince v. Turkey*, judgment of 8 July 1999.

³² It was confirmed in *Sürek v. Turkey*, judgment of 8 July 1999, para. 63, when the owner of the newspaper was fined for publishing leaflets which, inter alia, suggested that the state took part in the massacres of the Kurds in the course of the strategic campaign for their extermination. The Court found that the said leaflet is not protected by Art. 10 because of the essence of the message that is propagated, i.e. that violence is a necessary and justified measure of self-defense against the aggressor.

or regarded as inoffensive or inconsequential, but also those that offend, shock or disturb the State or any sector of the population. These are all demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".³³

Accordingly, the media play one of the most significant roles in countries governed in compliance with a system of rule of law³⁴ because they act as "public guardians"³⁵. Due to the importance of the public functions they perform as elected representatives of the people, political representatives have a great freedom of expression but they are also subject to criticism. The media are allowed a wider freedom in criticizing these persons since the freedom of political debate is an essential concept of a democratic society. It is through media that the public becomes familiar with the ideas, views, politicians' activities and political debates, which enable people to form opinions on different issues.³⁶ "*Freedom of the press... affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. Overall, 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 than as regards private individuals. Unlike private individuals, politicians inevitably and knowingly exposing scrutiny of his every word and every work by journalists and the public in general... Art. 10 (2) enables that the reputation of others ... is protected, and this protection extends to politicians ... but in such cases, such protection must be weighed against the interests of open discussion of political issues.*"³⁷ By entering the "public arena", politicians inevitably and knowingly expose their views and actions to public scrutiny, for which reason the limits of permissible criticism are much wider. In contrast, an "ordinary" citizen does not enter the public arena, for which reason he/she enjoys a much greater right to privacy.

In addition, the Court has established that newspaper articles may include a certain amount of exaggeration and provocation³⁸, if they are aimed at contributing to the public debate on important political issues. Therefore, the Court pointed out that the government measures against journalists who criticize public figures "*is a kind of censorship, which might discourage them from criticism in the future ... In the context of political debate, the imposition of such sanctions would probably deter journalists from contributing to public discussion on matters affecting the life of the community. In the same way, such a penalty is likely to hamper the press in performing its task of transferring information and being the public guardian.*"³⁹

Freedom of expression entails the right to criticise all political and public figures, both domestic and foreign⁴⁰. However, in these sensitive cases, it is difficult to establish the

³³ *Handyside v. UK*, judgment of 7 December 1976, para. 48-49.

³⁴ *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, para. 34.

³⁵ D. Voorhoof - H. Cannie, op.cit, pp. 414-415; Confirmed in *the Sunday Times v. UK*, para. 65; *Lingens v. Austria*, judgment of 8 July 1986, para. 41; *Jersild*, para. 31

³⁶ The right to criticize the government, send and receive political information is the basic right of the media, as confirmed in *Lingens*; *Sener v. Turkey*, judgment of 18 July 2000; *Dichand et. al. v. Austria*, judgment of 26 February 2002

³⁷ *Lingens*, para. 42.

³⁸ *Prager and Oberschlick*, para. 38, *Dichand et. al. v. Austria* para. 41 and *Dalban v. Romania*, judgment of 28 September 1999, para. 49.

³⁹ *v. Switzerland*, judgment of 21 September 2006, para. 70 and *Lingens*, para. 44.

⁴⁰ In the case of *Colombano et.al. v. France*, judgment of 25 July 2002, the King Hasan II of Morocco was harshly attacked as the head of state which is the main supplier of drugs in continental Europe, even though in his public addresses he repeatedly emphasized his firm commitment to combating against drug trafficking.

boundaries of freedom of expression and how far one can go before it turns into a criminal offence, such as: offensive speech or insult aimed at a foreign head of state or against the sovereignty and territorial integrity of a country. Notwithstanding the "case-by-case" approach in its jurisprudence, the Court can be said to be favouring freedom of expression if it does not contain elements of hate speech or violence⁴¹. Even in the anti-terrorism cases, the Court does not consider that the state has unlimited resources at its disposal. It is not always necessary nor proportional to restrict freedom of expression, particularly when it entails criminal liability of the media⁴² or a ban on the distribution of information available in other High Contracting States⁴³.

Concerning the limits of permissible criticism, the Court also pointed out "that freedom of expression carries with it special duties and responsibilities". In fact, freedom of expression cannot be protected if it leads to violation or substantial limitation of other human rights and freedoms, especially the right to privacy or the right to freedom of religion. Furthermore, the Court drew a clear line between permissible exaggeration and impermissible offensive or defamatory language.

In cases where criminal charges for libel and defamation were a result of expressed criticism, the Court jurisprudence clearly underscored the necessity of distinguishing facts from value judgments. A fact may be subjected to the process of establishing its validity or veracity; on the other hand, one's value judgment is an expression of individual perception which is beyond any attempts to establish the truth.

In the case *Lingens*,⁴⁴ the Court for the first time highlighted the role of the media as the main controller of socio-political processes, stating that: "... a clear distinction must be made between facts and value judgments. The presence of facts can be proven but the veracity of a value judgement may not be subjected to the process of truth-finding.... In such cases, journalists cannot escape punishment ... unless they can prove the veracity of their statements ... As regards value judgments, this requirement is impossible to meet and this is a violation of the freedom of thought, which is a fundamental part of the rights provided in Art. 10 of the Convention."⁴⁵ For these reasons, the Court concluded that it would be unacceptable in a democratic society to prevent a journalist from articulating his/her critical attitude⁴⁶. The essence of the media is to inform and impart information and ideas, which implies not only facts but also value judgments⁴⁷, which in turn must be based on

⁴¹ Donna Gomien, op.cit, p. 116; Confirmed in *Incal v. Turkey*, judgment of 9 June 1998; *Başkaya and Okçuoglu v. Turkey*, judgment of 8 July 1999; *Karatas v. Turkey*, judgment of 8 July 1999.

⁴² *Erdogdu and Ince v. Turkey*, supra 31.

⁴³ *Association Ekin v. France*, judgment of 17 July 2001

⁴⁴ In this case, the journalist criticized the then Chancellor's leniency towards the politician with the Nazi past. More: Flauss J. F., op.cit, pp. 816-821

⁴⁵ *Lingens*, para. 46, also confirmed in *Feldek v. Slovakia*, judgment of 12 July 2001, para. 76 and 85; *Pedersen and Baadsgaard*, para. 71; *Jerusalem v. Austria*, judgment of 27 February 2001, para. 43.

⁴⁶ Among many ECHR cases involving libel and defamation, there are those where the defamatory speech was delivered through media: *Goodwin; Tolstoy Miloslavsky v. United Kingdom*, judgment of 13 July 1995; *Tonsbergs Blad As and Hauk v. Norway*, judgment of 1 March 2007; *Standard Verlagsgesellschaft MBH v. Austria*, no 2, judgment of 22 February 2007; *Lepojić v. Serbia*, judgment of 6 November 2007; *Filipović v. Serbia*, judgment of 20 November 2007; *Egeland and Hanseid v. Norway*, judgment of 16 April 2009; *Bodrožić and Vujin v. Serbia*, judgment of 23 June, 2009.

⁴⁷ *Lingens*, para. 46, *Oberschlick v. Austria*, no 1, judgment of 23 May 1991, para. 63 and *Schwabe v. Austria*, judgment of 28 August 1992, para. 34.

sufficient factual basis⁴⁸. On the other hand, the politician who has served a sentence for a criminal offense cannot file a defamation lawsuit against a journalist who referred to the politician's past conduct, which is a true and established fact⁴⁹.

The Court pointed out that the media is allowed to provide value assessment of the current state policy; it would be totally unacceptable to prevent journalists from expressing their critical attitudes as long as they can prove the veracity of their claims⁵⁰. It certainly does not entail any disrespect or failure to protect the reputation of politicians; it implies that need for protection must be balanced with the need for a free public debate on issues of general interest and concern.

Just as there is a higher degree of tolerance of criticism addressed to the government as compared to that addressed to individual politicians, there is also a higher degree of tolerance of criticism aimed against politicians in comparison to that aimed at an "ordinary" individual citizen.⁵¹ While politicians have the right to protect their reputation, usually by referring to the right to privacy provided in Art. 8, the limits of permissible criticism are wider when it comes to politicians than in terms of private individuals. In assessing whether a critical commentary was in the public interest, a significant decision-making factor will be consideration of the scope of "the public figure status"⁵², whereby it is irrelevant whether the person is known to the public; what is important is whether the person entered the "public arena"⁵³. Similarly, the Court found that any association that is actively involved in public discussions, as well as individuals who consciously enter the media space, must develop a high degree of tolerance for criticism.

Although in many national legislations a certain degree of criticism aimed at politicians and public figures has been incriminated as libel, in most cases the Court reached a conclusion that the freedom of expression in the media was unduly limited⁵⁴. In such circumstances, the Court concluded that it implied media criticism of those laws where the defendant (journalist) had the burden of proving the veracity of these statements.

More recently, the Court took a stand that journalistic freedom of expression may include a certain degree of exaggeration and even provocation⁵⁵. Moreover, the Court established the principle that a reaction of greater intensity, emerging in response to a formerly expressed provocation, enjoys a higher degree of protection⁵⁶. *Argumentum a simili ad simile*, the Court applied the same principles in cases where the domestic courts issued injunctions prohibiting the reiteration of the alleged harmful or offensive statements about public and political figures⁵⁷.

⁴⁸ Confirmed in *De Haes and Gijssels*, para. 47 and *Schorschach iNews Verlagsgesellschaft v. Austria*, judgment of 13 November 2003, para. 39.

⁴⁹ *Schwabe*, paras. 30-34.

⁵⁰ *Dalban* para. 49.

⁵¹ *Feldek*, para. 74-85. See supra 37.

⁵² *Tammer v. Estonia*, judgment of 6 February 2001, para. 67-68.

⁵³ *Krone Verlag GmbH*, para. 37; *Hrico v. Slovakia*, judgment of 20 July 2004.

⁵⁴ The issue of criticising politicians for their public statements on strategic issues of public importance was the subject matter of Court's analysis in cases: *Lingens*; *Oberschlick* no 1, 1991, and *Oberschlick v. Austria*, no 2, judgment of 1 July, 1997.

⁵⁵ Supra 38.

⁵⁶ For example, in case *Oberschlick v. Austria*, no 2 of 1997, the leader of a political party stated that the German battle during World War II was for peace and freedom, which was followed by a newspaper article where he was characterized as "an idiot". The Court agreed that the leader's statement was provocative but that the words used by the journalist were proportional response to the leader's statements.

⁵⁷ *Dichand*, paras. 44-47.

In addition to political issues, media enjoy a special status when it comes to all other issues of importance to society. The Court concluded that media do not have only a functional task but also a moral obligation to impart information and ideas that are presented in other areas of public interest, which corresponds to the right of the public to receive such information⁵⁸. Thus, when a newspaper published an article reporting on the witness statements involving their allegation on police brutality,⁵⁹ the journalists were convicted, but the Court pointed out that such a punishment deters open social debate on issues of general importance.⁶⁰

5. JOURNALISTIC SOURCES OF INFORMATION

Considering the journalistic sources of information, the Court has encountered three types of issues in its practice: the permissibility of using publicly available information, the reliability of information, and the protection of confidential sources of information.

5.1. Publicly available information

If a journalist is prevented from using the information that is easily accessible to the public or punished for using such information, such a case (as a rule) constitutes a violation of Article 10.

In one of the most famous cases⁶¹, the Court found that the temporary ban on publication of the newspaper until the completion of the national court proceedings was in accordance with Art. 10, given the fact that Article 10 paragraph 2 envisages that a state has the discretionary authority to assess the situation and restrict the freedom of expression if it determines that there is a threat to national security. However, in case privacy was greatly affected due to the wide distribution of impugned information⁶², the Court thought that it was inconsequential to keep the publication ban, which constitutes a violation of Art. 10. Similarly, when employees of a newspaper company printed and distributed new copies of the disputed magazine during the night, the editor was arrested and the magazine copies were seized. The Court found that there was a violation of Article 10 because the disputed information had already been made accessible to the public,⁶³ which was thus deprived of information.

Similarly, when a newspaper organization was forbidden to publish pictures of a person suspected of committing a crime, designated in the text as a perpetrator, the Court found that the prohibition of publishing images was prescribed by law and had a legitimate aim: "to protect the rights and reputations of others" and "to maintain the authority and independence of the judiciary ". The final step in a three-stage test limit was the question of necessity of the measure in a democratic society. Considering all the circumstances of the case, particularly the fact that the suspect was a public figure well-known to the public and that he was suspected of

⁵⁸ Ibid, para. 40.

⁵⁹ *Thorgeirson v. Iceland*, judgment of 25 June 1992; the witnesses called the police officers "animals in uniform" and "individuals whose mental capacities equal those of newborns", para. 9

⁶⁰ Ibid, para. 68, see supra 39.

⁶¹ In the joined cases *Observer and Guardian and the Sunday Times v. UK*, no 2, 1991, the two daily newspapers had published information and excerpts from the published books of retired members of the British security service who claimed that the service carried out some illegal activities.

⁶² A wide distribution implies book publishing and sale in several countries, and even its unrestricted import into the United Kingdom.

⁶³ *Vereniging Weekblad Bluf!*, paras. 43-45.

committing political offenses that affect the very foundations of a democratic society, the Court upheld the prevailing public interest in the reporting. Thus, the Court came to the conclusion that the measure prohibiting the publication of photos limited the freedom of reporting. The Court concluded that the measure taken was disproportionate to the legitimate aim for which it was taken, *a fortiori* given that the photos were freely published in other newspapers. As the person was a public figure, the Court held that such a ban was a violation of Art. 10.⁶⁴

Notably, the very first case referred to the newly formed permanent Court concerned freedom of expression⁶⁵, where the Court established that the disclosure of one's financial and tax information which is publically accessible through public tax registries cannot be prohibited. Also, when journalists report on facts and information publically presented at a press conference and/or had already been accessible to the general public before the conference, the state cannot implement measures to punish journalists for endangering the confidentiality of a judicial investigation.⁶⁶

5.2. Reliability of information sources

Although one of the basic rules of journalism is "check, double-check and re-check", the Court has taken the stance that it is quite reasonable for journalists to rely on authoritative and official reports, without checking the accuracy of the statements made in them⁶⁷. On that occasion, the Court considers that it would be unreasonable to impose a requirement to verify and confirm the veracity of the reported information, as this would mean that media were allowed to publish only fully proven facts. In line with this *ratio*, which permits disclosure of information that cannot be verified, including even rumours circulating in public⁶⁸, the Court seeks to contribute to the open debate on all issues of public concern while respecting the citizens' right to receive information⁶⁹. "The media should leave some room for error, and their defence must be based on acting in good faith (*bona fides*), and not on the veracity of the claims."⁷⁰ If a journalist is guided by these legal standards of conduct, and the statements/information subsequently prove to be false, the journalist will not be held responsible. If unverified statements obtained from authoritative sources and official reports are insulting or defamatory, it would be disproportionate to condemn chief editors and journalists⁷¹. The issue of journalists' responsibility is also raised in case a journalist is involved in the dissemination of information provided by others, where intention is of key importance⁷². If a journalist disseminates information in order to promote ideas provided therein, he will be considered accountable; in case a journalist intended to raise awareness and inform the public about an issue of public concern, the reporter will not be considered responsible⁷³. The

⁶⁴ *News Verlags GmbH and Co. KG v. Austria*, judgment of 11 January 2000.

⁶⁵ *Fressoz and Roire v. France*, judgment of 21 January 1999.

⁶⁶ *Weber v. Switzerland*, judgment of 22 May 1990

⁶⁷ Confirmed in *Colombani*, para. 65.

⁶⁸ *Lingens*, para. 41; *Thorgeirson*, para. 65.

⁶⁹ *Salov. v Ukraine*, judgment of 6 September 2005.

⁷⁰ M. Paunović, B. Krivokapic, I. Krstić, *International Human Rights*, Belgrade, 2010, p. 231, ECHR cases: *Goodwin*, para. 39, *Colombani*, para. 65, *Fressoz and Roire*, para. 54

⁷¹ *Colombani*, para. 66.

⁷² ECHR case: *Thoma v. Luxembourg*, judgment of 29 March 2001. M. Macovei, *Freedom of Expression - A guide to the implementation of Article 10 of the European Convention on Human Rights*, Council of Europe, 2004, p. 52.

⁷³ *Jersild*, para. 29.

publication of news or broadcasting programs based on interviews is one of the many ways in which the media play their role of "public guardians"⁷⁴.

5.3. The disclosure of confidential sources of information

Protection of confidential sources of information is the basis of investigative journalism⁷⁵. Thus, when national courts issued an order for disclosure of sources of information, which was the legal ground for the prohibited journalistic text, the Court concluded that the means chosen to achieve a legitimate aim were disproportionate.⁷⁶ The Court reached the same conclusion when the state authorities conducted unreasonable searches of journalists' homes and editorial offices, for the sole purpose of discovering the identity of journalistic sources, as the journalists had not been suspected of committing the criminal activities⁷⁷. The Court pointed out that searches of this kind undermine the protection of journalistic sources and constitute a violation of the principle of proportionality to a much greater extent than in the previously given example. Thus, the Court stated that the investigation, conducted with the aim of discovering journalists' sources, was even less proportional than the adoption of measures ordering the disclosure of the identity of the source⁷⁸. Such further measures would have to be justified by the primary requirement of public interest. Thus, Article 10 protects not only the content but also the sources of information.

In addition, in its recent jurisprudence, the Court has made another small but symbolic step forward in the protection of journalistic sources. The Court explained the protection grounds, by pointing out that "the right of journalists not to disclose their source should not be viewed as a privilege given to them depending on whether it is a lawful or unlawful source of information, but as an attribute of the right to information."⁷⁹

6. CONCLUSION

During the development of the ECtHR jurisprudence regarding Article 10 of the Convention, which regulates the freedom of expression, the Court has established certain "Governing Principles" which confirm that the media have "a special status" because they represent the "public guardians" of a democratic society whose functional and moral obligation is to disseminate information of public importance.

The freedom of expression is not an absolute right and it is subject to restriction, which may be two-fold. The first limitation is provided in Art. 10 (2), where the State provides the list of permitted derogation grounds; the second limitation to the freedom of expression is hate speech. As for the latter, media must demonstrate special caution when information is disseminated via audio-visual media, which have a more powerful and immediate impact than the printed media. The media should also pay attention not to become an instrument for transmission and dissemination of hate speech, in which case the Court considers the intention.

⁷⁴ Supra 35.

⁷⁵ Donna Gomien, op.cit, p. 120, *Goodwin*, para. 39.

⁷⁶ Ibid, para. 46.

⁷⁷ ECHR cases: *Roemen and Schmitt v. Luxemburg*, judgment of 25 February 2003; *Ernst and others v. Belgium*, judgment of 15 July 2003.

⁷⁸ Ibid.

⁷⁹ ECHR case: *Tillack v. Belgium*, judgment of 27 November 2007. More: J. F. Flauss, op.cit, p. 828

In performing the functions of "public guardians" of the social order, the media can raise all topics of the society, including the unpleasant ones, in order to exercise the rights of the public to receive relevant information. Considering the need for diversity and tolerance in a democratic society, the Court may allow some forms of expression that are "offensive, disturbing and even shocking," and some "exaggeration and provocation," provided that they are aimed at imparting information of public interest.

Upon reviewing the Court practice on the freedom of expression pertaining to the media, we note that the Court has considered certain issues pertaining to the limits of allowed criticism, responsibility of the media and journalists' sources of information. In cases concerning the allowed media criticism, the Court takes into account that there is a higher degree of tolerance in criticism addressed to the government as compared to the criticism aimed at individual politicians; by analogy, there is a higher degree of tolerance in criticism directed against politicians in comparison to criticism aimed at an "ordinary" individual citizen. However, the Court has taken a more restrictive stand when it comes to criticism of the judiciary.

When determining the responsibility of the media and journalists for libel and insult, it is necessary to distinguish facts and value judgments. Namely, a fact may be proven in the process of fact-finding and establishing the truth, which may give rise to journalists' liability in case of imparting untrue/half-true information; this process cannot apply to value judgments which entail personal perception. Given the essential function of the media to impart information including not only facts but also value judgments, it is unacceptable in a democratic society to prohibit journalists to express critical attitudes, which certainly have to be based on sufficient factual grounds.

On the issue of journalistic sources of information, the Court considers that a journalist cannot be prevented from or punished for using the information accessible or already available to the public. The Court has also pointed out that it is reasonable to rely on authoritative sources and official reports without checking the accuracy of provided information; moreover, journalists are allowed to publish some information that cannot be verified or may be regarded as a rumour. In case of prohibiting the publication of such information, the media would be in an awkward situation because they would be obliged to publish only fully proven facts, which would further abolish or reduce the possibility of public discussion on issues of common interest. In case of some mistake or misrepresentation, instead of proving the veracity of the sources' claims, media may base their defence on good faith, which necessarily implies that media have taken reasonable measures to verify the authenticity of these claims. If the media comply with this legal standard but the sources' statements subsequently prove to be false, the issue of journalists' responsibility will not be raised. In cases where a journalist is involved in the dissemination of information provided by others, the intention is of crucial importance. If a journalist disseminates information in order to promote the given idea, he/she will be held accountable; however, the journalist will not be considered responsible if the disseminated information is aimed at raising general public awareness about the issue of public concern. In addition, Article 10 protects not only the content but also the sources of information; thus, the decision to impose measures for disclosure of journalists' sources of information must be justified by the prevailing public interest.

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SLOBODA IZRAŽAVANJA MEDIJA U PRAKSI EVROPSKOG SUDA ZA LJUDSKA PRAVA

Važna komponenta slobode izražavanja, kao složenog ljudskog prava, predstavlja pravo na slobodno i neometano prenošenje informacija. Ovo pravo regulisano je članom 10 Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda koje po svojoj pravnoj prirodi predstavlja specifično pravo jer je spona između građanskih i političkih prava. Mediji su sredstva za masovno komuniciranje sa osnovnom obavezom širenja opštih i potpunih informacija o pitanjima od javnog značaja. Kao primarni prenosioци informacija u savremenim demokratskim društvima, mogu se javiti u dvostrukom svojstvu: kao prekršioци ili kao subjekti kojima se krši sloboda izražavanja. Kroz praksu Evropskog suda za ljudska prava koja se tiče odnosa između čl. 10 Evropske konvencije i uloge medija u društvu, utvrđeni su evropski standardi poštovanja slobode izražavanja. Najznačajnija pitanja iz prakse pomenutog suda ticala su se govora mržnje, zaštite izvora podataka medija, kritike političkih procesa i sudstva, kao i derogacije ovog prava putem tzv. testa proporcionalnosti. Takođe, tokom razvoja jurisprudencije Suda došlo je do značajnog pomeranja granice između slobode izražavanja i prava na privatnost, kao i granice između slobode izražavanja i klevete i uvrede, u korist slobode izražavanja. Utvrđeni standardi i ograničenja su, pre svega, upućeni državama i medijima kao dominantnim subjektima u procesu razmene informacija, koji raspoložu sistemom dozvola, odnosno poseduju kapital.

Ključne reči: *Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda, Evropski sud za ljudska prava, sloboda izražavanja, ograničenje slobode izražavanja mediji, princip proporcionalnosti.*