

1107/20

European Fundamental Rights and Freedoms

edited by

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I. Freedom of Communication within the European Human Rights System

Since communication with fellow human beings is an essential element of an individual's personality, the protection of freedom of expression as well as freedom of assembly and association is of utmost importance in any human rights instrument. However, the protection of freedom of communication does not only serve the individual. Unhindered communication also is of societal and political importance since without such communication, democracy is inconceivable. In interpreting pertinent provisions of the Convention, the European Court of Human Rights has embraced this idea, arguing that freedom of expression "constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment".¹ While the Convention does not protect freedom of communication as such, its Articles 9,² 10 and 11 of the ECHR establish distinct interrelated freedoms extending across the different modes of communication in real life.

A closer look at the wording of Article 10 of the ECHR reveals that it specifies several communicative liberties: freedom of opinion, freedom of information, freedom of the press and freedom of broadcasting, television and film.³ The inclusion of the freedom to hold opinions and to receive and impart information as a separate part of the freedom of expression acknowledges that communication is not a unilateral activity but an interactive process, even though the reciprocity of dialogues is hard to grasp in legal terms.⁴ Article 10 of the ECHR is followed by Article 11 of the ECHR which guarantees freedom of assembly, freedom of association and trade union rights, in particular. According to the European Court of Human Rights, the rights guaranteed by Article 11 of the ECHR are closely associated with Articles 9 and 10. The Court, however, considers freedom of assembly and association as *leges speciales*⁵ and builds on jurisprudence of the US Supreme Court in this regard. The US Supreme Court derived the freedom of association from the freedom of opinion as guaranteed by the US Constitution's First Amendment.⁶ It follows that freedom of assembly and association must be considered in light of the rights guaranteed in Articles 9 and 10 of the ECHR.⁷

¹ ECtHR *Handyside* (1979–80) 1 EHRR 737, para 49; *Lingens* (1986) 8 EHRR 407, para 41; *Oberschlick* (1998) 25 EHRR 357, para 58; *Observer* (1992) 14 EHRR 153, para 59; *Feldek* App No 29032/95, para 83.

² This chapter does not address Art 9 ECHR. For a discussion of religious liberty in Europe and of pertinent Strasbourg jurisprudence see Evans *Religious liberty and international law in Europe* (Cambridge 1997), and, recently, Langlaude (2006) 55 ICLQ 929–944.

³ Grabenwarter *Europäische Menschenrechtskonvention* (Munich/Vienna 2003) Art 23, para 2.

⁴ This was already pointed out by Müller *Grundrechte in der Schweiz* (3rd ed, Bern 1999) p 184.

⁵ ECtHR *Ezeli* (1992) 14 EHRR 362, para 35: "In the circumstances of the case, this provision (*ie* Article 10) is to be regarded as a *lex generalis* in relation to Article 11 (...), a *lex specialis*, so that it is unnecessary to take it into consideration separately".

⁶ United States Supreme Court *NAACP v Alabama ex rel Patterson* (1958) 357 US 449.

⁷ ECtHR *United Communist Party of Turkey* (1998) 26 EHRR 121, para 42: "The Court reiterates

3 It is true that there is no formal hierarchy among the rights and freedoms guaranteed by the ECHR, except for non-derogable rights. However, freedom of expression and freedom of assembly and association can be considered to be elementary for the enjoyment of all other freedoms included in the ECHR. The main argument is that without free communication, there is no effective defence of fundamental freedoms.⁸ In order to further pluralism and tolerance, Strasbourg jurisprudence has paid tribute thereto by broadly interpreting the scope of Articles 10 and 11 of the ECHR and by considering limitations permissible only under narrow circumstances. A sharp distinction between the various freedoms included in Articles 10 and 11 of the ECHR is neither possible nor necessary since the provisions are designed to comprehensively protect human discourse.⁹ However, differences are taken into account when evaluating the proportionality of limitations.¹⁰

II. Freedom of Opinion and Freedom of Information

Leading cases: ECtHR *Handyside* (1979–80) 1 EHRR 737; *Lingens* (1986) 8 EHRR 407; *Müller* (1991) 13 EHRR 212; *Groppera Radio AG* (1990) 12 EHRR 321; *Oberschlick* (1998) 25 EHRR 357; *Open Door* (1993) 15 EHRR 244; *Informationsverein Lentia* (1993) 17 EHRR 93; *Otto-Preminger-Institut* (1995) 19 EHRR 34; *Vogt* (1996) 21 EHRR 295; *Observer* (1991) 14 EHRR 153; *Markt intern* (1990) 12 EHRR 161; *Janowski* (2000) 29 EHRR 705; *Bladet Tromsø* (1999) 29 EHRR 125; *Özgür Gündem* (2001) 31 EHRR 1082; *Feldek* App No 29032/95; *von Hannover* (2005) 40 EHRR 1.

Further reading: Calliess *Werbung, Moral und Europäische Menschenrechtskonvention* [2000] AfP 248; Cram *Automatic Reporting Restrictions in Criminal Proceedings and Article 10 of the ECHR* [1998] EHRLR 742; Engel *Einwirkungen des europäischen Menschenrechtsschutzes auf Meinungsäußerungsfreiheit und Pressefreiheit – insbesondere auf die Einführung von innerer Pressefreiheit* [1994] AfP 1; Frowein/Peukert (eds) *Europäische Menschenrechtskonvention. Kommentar* (2nd ed, Kehl/Strasbourg/Arlington 1996); Gornig *Außerungsfreiheit und Informationsfreiheit als Menschenrechte* (Berlin 1988); Grabenwarter *Europäische Menschenrechtskonvention* (Munich/Vienna 2003) pp 267 ff; Hoffmeister *Art. 10 EMRK in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte 1994–1999* (2000) 27 EuGRZ 358; Kirby *Opinion: Freedom of information* [1998] EHRLR 245; Malinverni *Freedom of Information in the European Convention on Human Rights and the International Covenant on Civil and Political Rights* [1983] HRLJ 443; Peters *Einführung in die Europäische Menschenrechtskonvention* (Munich 2003) §§ 9–14; Thorgerisdóttir *Journalism Worthy of the Name* (2004) 22 NQHR 601.

1. Scope of Protection

a) Freedom to Hold Opinions

4 The freedom to hold opinions as guaranteed by Article 10(1)(ii) of the ECHR is the basis for and the generic notion of the right to freedom of expression as incorporated in Article 10(1)(i) of the ECHR.¹¹ Similar to the freedom of thought as guaranteed by Article 9 of

that notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10”.

8 Cf Peukert *Die Kommunikationsrechte im Lichte der Rechtsprechung der Organe der Europäischen Menschenrechtskonvention (EMRK)* in: Däubler-Gmelin (ed) *Gegenrede – Aufklärung, Kritik, Öffentlichkeit. Festschrift für Ernst Gottfried Mahrenholz* (Baden-Baden 1994) pp 277–301.

9 ECtHR *Barthold* (1985) 7 EHRR 383, para 42: “All these various components overlap to make up a whole, the gist of which is the expression of “opinions” and the imparting of “information” on a topic of general interest. It is not possible to dissociate from this whole those elements which go more to manner of presentation than to substance ...”.

10 Villiger *Handbuch der Europäischen Menschenrechtskonvention (EMRK)* (2nd ed, Zurich 1999) p 390.

11 Guradze *Die Europäische Menschenrechtskonvention* (Berlin 1968) p 142.

the ECHR, the freedom to hold opinions protects the internal formation of an opinion, the *forum internum*. In order to safeguard this internal sphere, the government is, inter alia, barred from wilful indoctrination of its citizens.¹² Likewise, a continuous and systematic one-sided information policy or one-sided reporting in government-controlled mass media can be considered to be contrary to the Convention.¹³

5 While the German Federal Constitutional Court, in an effort to separate a factual statement from the voicing of an opinion, has interpreted the core concept of “opinion” (as included in Article 5 of the *Grundgesetz* (GG – German Basic Law)) by vaguely paraphrasing it,¹⁴ the ECHR has avoided any abstract definition of “opinion” so far. Such definitional reluctance may be criticized. However, synonyms and transcriptions lacking the necessary precision are not only deficient from a methodological point of view, but also run the risk of blending the problems related to the scope of protection on the one hand and the legitimacy of an interference on the other. Besides, the ECHR can avoid distinguishing between imparting facts and communicating opinions by simply referring to the wording of Article 10 of the ECHR which speaks of “freedom of expression”. This notion is broad enough to cover both factual statements and opinions.¹⁵

b) Freedom of Expression

6 Freedom of expression includes both the freedom of an individual to express an opinion and to impart information and ideas (sometimes characterised as active freedom of information¹⁶). Considering the authentic English (“freedom of expressions”) and French (“liberté d’expression”) text, freedom of expression is not limited to communicating “opinions” but also covers statements of fact.

7 While assessing each individual case separately, the ECHR has generally interpreted freedom of expression as covering all forms of expression, any medium and any content (facts, opinions, entertainment,¹⁷ etc). The right to freedom of expression even includes content which may offend, shock or disturb the State or any sector of the population.¹⁸ Article 10 of the ECHR is not limited to information and ideas that are favourably received

12 ECtHR *Kjeldsen* (1979–80) 1 EHRR 711, para 53: “The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions”.

13 Similarly, Frowein in: Frowein/Peukert (eds) *Europäische Menschenrechtskonvention* (2nd ed, Kehl 1996) Art 10, para 4.

14 Cf BVerfG (1983) 61 BVerfGE 1, 8–9.

15 For a critique of the jurisprudence of the German Federal Constitutional Court see Erichsen [1996] JURA 84. – The European Court on Human Rights, nevertheless, distinguishes between opinion and statements of fact in the context of whether or not a limitation can be justified under the Convention; cf Peters *Einführung in die Europäische Menschenrechtskonvention* (Munich 2003) p 59.

16 See above (note 15) Peters pp 70 ff.

17 ECtHR *Groppera Radio AG* (1990) 12 EHRR 321, para 55: “... the Court considers that both broadcasting of programmes over the air and cable retransmission of such programmes are covered by the right enshrined in the first two sentences of Article 10 sec 1 (Art 10-1), without there being any need to make distinctions according to the content of the programmes”.

18 ECtHR *Handyside* (1979–80) 1 EHRR 737, para 49: “... it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population”.

ed or regarded as inoffensive. According to the jurisprudence of the ECHR, open intellectual discourse is at the heart of the freedom of expression. This necessitates the maintenance of pluralism in the information sector.

8 Apart from political expression, the ECHR considers commercial statements to be covered by Article 10(1) of the ECHR,¹⁹ including criticism of business practices²⁰ and commercial publicity²¹. Such a broad interpretation can at best be criticized by arguing that successful advertising does not require a conscious consumer. Placing incentives on the market in order to convince the consumer does not presuppose open discourse, which is deemed to be at the heart of Article 10(1) of the ECHR.²² However, neither the wording nor the context of Article 10(1) of the ECHR suggest a restrictive reading of the scope of protection, which would only be based on the view that commercial expression does not need to be privileged vis-à-vis other commercial activities.

9 Article 10(1) of the ECHR does not only protect the content and substance of expression, but also its form and illustration.²³ Even acts which simply express disapproval of the activities of others are protected by Article 10(1) of the ECHR.²⁴ Neither form nor illustration of expression require advance authorisation. Article 10(1)(iii) of the ECHR, however, serves as a limit by stating that certain broadcasting, television or cinema enterprises are subject to prior approval.

c) Freedom of Information

10 Article 5(1)(i) of the Basic Law protects the freedom of every person to inform herself or himself from generally accessible sources. By contrast, Article 10(1)(i) of the ECHR does not qualify sources of information, but simply guarantees “freedom ... to receive ... information and ideas”. The German Federal Constitutional Court has considered such sources to be “generally accessible” which are technologically appropriate and designed to inform the general public. According to the jurisprudence of the German Federal Constitutional Court, sources remain “generally accessible” notwithstanding measures taken to prevent their dissemination.²⁵ Thus, the Court has taken a broad view of what is “generally accessible”. However, there has long been a certain reluctance vis-à-vis the freedom of

19 For a detailed analysis see Nolte [1999] *RabelsZ* 507; see also Lester of Herne Hill/Pannick *Advertising and Freedom of Expression in Europe. Joint Opinion on the Scope and Effect of the European Convention on Human Rights, Marketing Commission of the ICC* (1984).

20 ECtHR *markt intern* (1990) 12 EHRR 161, para 35.

21 ECtHR *Barthold* (1985) 7 EHRR 383, para 58. See also ECtHR *Casado Coca* (1994) 18 EHRR 1, para 35 where the Court saw no violation of Art 10 ECHR because the prohibition against advertising by lawyers was not absolute; however, the Court clearly stated that “Article 10 does not apply solely to certain types of information or ideas or forms of expression ..., in particular those of a political nature; it also encompasses artistic expression ..., information of a commercial nature ... and even light music and commercials transmitted by cable ...”.

22 Thus arguing in favour of a more restrictive definition, Ipsen *Staatsrecht II, Grundrechte* (7th ed, Neuwied 2004) para 394.

23 Frowein (note 13) Art 10, para 5.

24 ECtHR *Steel* (1999) 28 EHRR 603, paras 7 and 92; *Hashman and Harrup* (2000) 30 EHRR 241, para 28: “It is true that the protest took the form of impeding the activities of which they disapproved, but the Court considers nonetheless that it constituted an expression of opinion within the meaning of Article 10 ...”.

25 BVerfG (1970) 27 BVerfGE 83; (1973) 33 BVerfGE 52, 65; (1994) 90 BVerfGE 27, 32.

information in the German constitutional and legislative tradition insofar as claims to information against the State are concerned. Only recently – as part of the development towards an information society – has it become accepted that the freedom of information is a precondition for rational formation of opinion and decision-making within a democratic polity.²⁶ Freedom of information, however, is not only conducive to the establishment of a democratic society; an open information society supports self-development of the individual and has the potential to increase the efficiency of a polity by raising its problem-solving capacity and innovative ability.²⁷

11 Unfortunately, the Convention organs so far have taken a rather narrow view on the freedom to receive information – even though the text is open to a broader approach. In particular, they have rejected the idea that public authorities are under an obligation to actively inform the citizen.²⁸ While the Court has sought to protect the role of the media as intermediary and has made it clear that the general public is entitled to receive any pertinent information,²⁹ it, nevertheless, reads Article 10(1)(i) of the ECHR as only guaranteeing the right to receive information from generally accessible sources.³⁰ Within these limits, the individual is entitled to receive information, news and ideas without governmental interference – which is of particular importance for broadcasting. In contrast to Article 5(1)(i) of the Basic Law, Article 10(1)(i) of the ECHR expressly guarantees this right “regardless of frontiers”. This includes the use of pertinent receivers, subject to the provisions of Article 10(1)(iii) and (2) of the ECHR.³¹

12 Until today, there is still no interpretative consensus on whether Article 10(1) of the ECHR goes beyond the (passive) freedom to receive and includes the (active) freedom to acquire information. It is noteworthy that Article 10(1) of the ECHR insofar differs from Article 19(2) of the ICCPR and from Article 13(1) of the ACHR. Nevertheless, this difference in wording may be considered an editorial lapse rather than a deliberate choice in light of an ECHR draft that expressly included a right to actively acquire information.³² It seems, however, plausible to include the freedom to acquire information in Article 10(1) of the ECHR by reference to the object and purpose of this provision, since without such freedom there can be no effective reception or impartation of opinions.³³ Finally, the Convention does not intend to devalue the freedom of expression by leaving the freedom to search for information unprotected.

26 Only in 2005, the German legislature adopted an Act to Regulate Access to German Federal Government Information (BGBl I 2005, 2722); for an analysis cf Kugelmann [2005] NJW 3609.

27 See above Müller (note 4) pp 278–279.

28 ECtHR *Guerra* (1998) 26 EHRR 357, para 53: “That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion”. Even in a case where the information requested had been specified by the applicant, the Court was not willing to derive a positive obligation from Art 10(1) ECHR: “Also in the circumstances of the present case, Article 10 does not embody an obligation on the State concerned to impart the information in question to the individual” (ECtHR *Gaskin* (1990) 12 EHRR 36, para 52).

29 ECtHR *Sunday Times* (1979–80) 2 EHRR 245, para 65.

30 ECtHR *Lingens* (1986) 8 EHRR 407, para 41; *Leander* (1987) 9 EHRR 433, para 74.

31 See above Villiger (note 10) p 413.

32 For a discussion of the draft see Gornig *Außerungsfreiheit und Informationsfreiheit als Menschenrechte* (Berlin 1989) p 291.

33 This argument was developed, among others, by Probst *Art 10 EMRK – Bedeutung für den Rundfunk in Europa* (Baden-Baden 1996) pp 24–25.

13 Article 10 of the ECHR does not expressly prohibit censorship. An interference with free expression, however, is only permissible subject to Article 10(2) of the ECHR.³⁴ Thus, even though Article 10(1)(iii) of the ECHR permits licensing requirements for broadcasting, television or cinema (*sic!*), this does not allow pre-censorship for programmes.³⁵

d) Freedom of the Arts

Case 1 – Problem: (ECtHR *Müller* (1991) 13 EHRR 212)

14 M, an artist, produced three huge paintings on the spot as part of an exhibition. The three paintings depicted homosexual acts and sodomy. On the day of the opening of the exhibition, a father complained after his minor daughter had reacted intensely to the paintings. The paintings were subsequently seized by the authorities on the ground that they were obscene. Moreover, M was prosecuted. Swiss authorities even ordered the destruction of the paintings.

15 Freedom of the arts is not expressly included in Article 10 of the ECHR. Nevertheless, the arts generally, and paintings in particular, are a form of expression covered by Article 10(1) of the ECHR. The artist's creative activities communicate his or her worldview as well as his or her thoughts about society.³⁶ Thus, there is general interpretative agreement that Article 10 of the ECHR also covers freedom of the arts. This includes the making of the object of art as well as its reception by the general public and thus also protects the interpretation, the dissemination and the exhibition of works of art.³⁷

Case 1 – Answer:

16 The activities of M, the making of as well as the exhibition of the paintings are all covered by the scope of Article 10(1) of the ECHR. The imposition of fines, the seizure, the confiscation and the eventual destruction of the paintings are interferences with the freedom of expression enjoyed by the artist. In order to be lawful, such interferences must be prescribed by law and must pursue one of the objectives listed in Article 10(2) of the ECHR. In this particular case, one could refer to the protection of public morals. When assessing whether or not such interference can be justified, States enjoy a wide margin of appreciation. Whereas the imposition of fines may meet the requirements of the proportionality principle, this can not be argued with regard to the eventual destruction of the paintings. Such a destruction would deprive M of the chance to exhibit the paintings at another place where they might be welcome. This appears to result in a disproportionate interference. Even a return of the paintings will not change the fact that the threat of their destruction was disproportionate (the Strasbourg Court, however, regarded this threat to be proportionate).

34 Cf ECtHR *Cyprus v Turkey* (2002) 35 EHRR 731, indicating that censorship with regard to school textbooks amounts to a violation of Art 10 ECHR.

35 Along the same lines see above Gornig (note 32) p 294.

36 ECtHR *Müller* (1991) 13 EHRR 212, para 70. See also ECtHR *Wingrove* (1997) 24 EHRR 1; *Otto-Preminger-Institut* (1995) 19 EHRR 34.

37 ECtHR *Otto-Preminger-Institut* (1995) 19 EHRR 34, para 56.

e) Freedom of the Press and of the Media

Freedom of the press is not expressly listed in Article 10(1) of the ECHR. However, it is an integral part of the freedom of expression and of the freedom to receive and impart information.³⁸ The Convention thus follows the traditional approach of international human rights instruments which implicitly protect the freedom of the press even though they do not expressly mention it. The ECHR has continuously emphasized the democratic function of the press when informing the general public about issues of general interest.³⁹ The role of the press as a public watchdog meant to inform the public of deficiencies, mistakes and illegal activities in politics and society has been taken up for the establishment of a comprehensive protection of freedom of the press.⁴⁰ Freedom of the press includes critical debate of commercial activities of individual undertakings.⁴¹ In general, there are three categories to be distinguished: traditional press coverage including expression of opinions, dissemination of opinions voiced by others and dissemination of facts and materials. These distinctions have an impact on the assessment of due diligence in the context of press and media law.⁴²

Undoubtedly, freedom of the press includes all editorial work irrespective of the method of reproduction.⁴³ So far, however, it is not totally clear whether and in how far the related infrastructure of the press (including sales and distribution)⁴⁴ is also covered by Article 10(1) of the ECHR. Given that the ECHR has considered means of transmission and receivers as being protected by Article 10(1) of the ECHR⁴⁵ and bearing in mind

38 The only explicit reference to the press in the Convention is in Art 6(1)(ii) ECHR: "Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

39 ECtHR *Sunday Times* (1979–80) 2 EHRR 245, para 65: "... freedom of expression constitutes one of the essential foundations of a democratic society; subject to section 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population ... These principles are of particular importance as far as the press is concerned".

40 ECtHR *Sunday Times (No 2)* (1992) 14 EHRR 229, para 50; *Thorgeirson* (1992) 14 EHRR 843, para 63; *Observer* (1992) 14 EHRR 153, para 59.

41 ECtHR, *Markt intern* (1990) 12 EHRR 161, para 35; see also ECtHR *Weber* (1990) 12 EHRR 508; *VGT Verein gegen Tierfabriken* (2002) 34 EHRR 159.

42 On these distinctions see Hoffmeister (2000) 27 EuGRZ 358; on due diligence see also ECtHR *Özgür Gündem* (2001) 31 EHRR 1082, para 58: "While the press must not overstep the bounds set, inter alia, for the protection of the vital interests of the State, such as the protection of national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to convey information and ideas on political issues, even divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. 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".

43 See above Villiger (note 10) p 405.

44 The German Federal Constitutional Court includes sales and distribution as part of freedom of the press according to Art 5(1)(ii) Basic Law BVerfG (1988) 77 BVerfGE 346, 353–354.

45 ECtHR *Autronic AG* (1990) 12 EHRR 485, para 47.

that freedom of the press does not only protect the individual medium but also the press as a whole, it is important to point out that an interference with sales and marketing can have a major impact on the press as such. Interpreting Article 10(1) of the ECHR in light of its object and purpose necessitates the inclusion of media infrastructure as part of freedom of the press.⁴⁶

19 It has been discussed whether Article 10(1) of the ECHR includes an obligation imposed upon the national legislature to introduce a right of counterstatement. Counterstatements were already well known at the time the ECHR was drafted. Nevertheless, nothing was included in the ECHR to this end. Thus, it seems to be rather difficult to argue in favour of a right of counterstatement on the basis of Article 10 of the ECHR. However, what seems reasonable is an interpretation relying on Articles 8 and 10 of the ECHR which grants a right to counterstatement in the case of serious violations of personal rights by the media.⁴⁷ It seems even more convincing to establish such a right solely on the basis of Article 8(1) of the ECHR⁴⁸ and to consider it as a particular instrument to protect the reputation of others according to Article 10(2) of the ECHR.⁴⁹

20 Article 10(1)(iii) of the ECHR implicitly confirms that the scope of protection of Article 10(1) ECHR as a whole extends to the freedom of broadcasting, television and film. This includes the production, transmission and reception of programmes. The provision does not differentiate according to the medium of transmission but covers all modalities thereof (airwaves, cable, satellite, etc). With regard to broadcasting, television and film it is noteworthy that Article 10(1) of the ECHR is not limited to national broadcasting but explicitly protects the international flow of information since the freedom is granted "regardless of frontiers".

21 As far as broadcasting is independent of its organizational and institutional setting, the only problem of scope relates to public broadcasting. Commercial broadcasting undoubtedly enjoys the protection of Article 10(1) of the ECHR.⁵⁰ It is, however, accepted that public broadcasting must enjoy a sufficient degree of freedom from governmental interference.⁵¹ Otherwise freedom of broadcasting would prove ineffective in situations of public broadcasting monopolies which were widespread in Europe until the 1970s.

22 As to scope, finally, the applicability of Article 10(1) of the ECHR to new media has to be addressed. In order to reach a proper assessment in this regard, it is helpful to bear in mind that the Convention distinguishes between individual (Article 8 ECHR) and mass communication (Article 10 ECHR). In light of this distinction, it seems plausible to differentiate along the same lines with regard to new media.⁵² Thus, Email communication should evidently be covered by Article 8 of the ECHR, whereas the presentation of information on a website should rather be protected by Article 10 of the ECHR. Difficulties occur with regard to forms of communication which are not unequivocally individual or mass communication. Thus, a discussion forum can be assessed depending on whether or

not it is moderated or open. However, with regard to interactive media pertinent distinctions become increasingly blurred. This is a particular problem under the ECHR because the Convention lacks a catch-all clause. It thus seems to be difficult to construe an abstract freedom of internet use to fill in the (perceived or real) gap.⁵³ On the other hand, the Convention does not intend to leave certain freedoms of communication unprotected. Thus, it may be argued that decisions are best taken on a case-by-case basis, holding either Article 8 or Article 10 of the ECHR applicable.⁵⁴ Such an approach can also pay tribute to the different limitation clauses attached to those freedoms.

2. Interference

Case 2 – Problem: (ECtHR *Wille* (2000) 30 EHRR 558)

W, a national of L and, at the relevant time, a member of the government of L, had been involved in a controversy between the Head of State and the government of L on political competences in connection with a plebiscite. Later, W was appointed President of L's Administrative Court for a fixed term of office. When L, in the context of a series of lectures, expressed the view that the Constitutional Court was competent to decide on the interpretation of the Constitution in case of disagreement between government and parliament, the Head of State sent a letter to W, stating that W was disqualified from holding a public office. When L was proposed by parliament for a further term of office as President of the Administrative Court, the Head of State did not appoint him. The applicant complains that the letter sent by the Head of State, informing him that he would not appoint him to public office, should he be proposed by parliament, violated his right to freedom of expression as guaranteed by Article 10 of the Convention.

Article 10(2) of the ECHR lays down criteria for permissible governmental interference with the freedoms stipulated in Art. 10(1) of the ECHR. The provision explicitly names some types of interferences, namely formalities, conditions, restrictions and penalties. However, it is not possible to develop a clear-cut typology of permissible interferences on the basis of this list. Rather, a useful starting point is that not each and every limitation of the guarantees amounts to an interference which needs a justification based on the Convention. It is common ground that at least those governmental acts which directly and substantially affect the individual must be justified. This concept of „interference“ covers executive orders prohibiting publications. Consequently, the ECHR does not accept pre-censorship since this potentially reverses rule and exception.⁵⁵ Other “traditional” types of “interference” are disciplinary, administrative and penal sanctions imposed with regard to acts of communication.⁵⁶

46 For the position of a publisher under the Convention see ECtHR *NEWS Verlags GmbH & Co. KG* (2001) 31 EHRR 246, para 39.

47 Frowein (note 13) Art 10, para 16.

48 Malinverni [1983] HRLJ 443–460.

49 This is at least the approach adopted by the German Federal Constitutional Court with regard to the parallel provision of Art 5(2) Basic Law; see BVerfG (1983) 63 BVerfGE 131, 142–143.

50 Reference may be made to ECtHR *Autronic AG* (1990) 12 EHRR 485, para 47 → § 2 para 26.

51 See above Frowein (note 13) Art 10, para 19.

52 Cf Grote (1999) 27 KritV 29.

53 For a discussion of German law cf Mecklenburg [1997] ZUM 525.

54 On the multimedia debate cf Dörr *Festschrift Kriele* (Munich 1997) pp 1417 ff; see also Bröhmer *Die innerstaatliche und europarechtliche Bedeutung von Art. 10 EMRK für die Medienordnung in: Europäisches Medienrecht – Fernsehen und seine gemeinschaftsrechtliche Regelung* (Saarbrücken/Munich/Berlin 1998) pp 79 ff.

55 In its decision in the case of *Observer*, the ECHR did not outrule any preventive controls but applied strict scrutiny in this regard; see ECtHR *Observer* (1992) 14 EHRR 153, para 60. For an evaluation of this ruling see above Frowein (note 13) Art 10, para 24; see above also Probst (note 33) p 25.

56 See above Villiger (note 10) pp 391–392.

- 25 Narrow views of what constitutes an “interference” which were traditionally applied to Articles 8 to 11 of the ECHR⁵⁷ are increasingly questioned in the context of freedom of expression. Today, there is a tendency to even take into consideration indirect sanctions such as banning someone from a profession or claims for damages. Their chilling effect on future speech is considered to be as serious as direct forms of interference.⁵⁸ Restrictive readings of interferences are, however, more fundamentally questioned: commentators have taken up the idea of horizontal effect (“Drittwirkung”) of freedom of expression,⁵⁹ and the ECHR had to consider whether factual intimidation already amounts to an interference needs to be justified⁶⁰.
- 26 If biased reporting and indoctrination of public broadcasting already amounts to an interference with freedom of opinion,⁶¹ it is necessary to discuss whether the growing power of private media and the concentration of the media industry can affect freedom of opinion in a similar way. The Convention as such does not single out the idea of “Dritt-wirkung”. Consequently, the Strasbourg organs have so far taken a reserved position,⁶² which is not likely to be abandoned in the near future. On the other hand, the concept of “positive obligations”, which has been applied less in the context of Article 10 of the ECHR⁶³, but rather with regard to Article 8 of the ECHR (→ comp § 3 para 26 *et seq*), provides sufficient leeway to safeguard pluralism which is so essential for a democratic society as referred to in Article 10(2) of the ECHR.⁶⁴ In one of the cases under consideration, positive obligations gave rise to a careful balancing of individual and community interests within the framework of Article 10(1) of the ECHR rather than discussing the limitations clause of Article 10(2) of the ECHR.⁶⁵
- 27 If indirect sanctions are already considered to be more subtle forms of interfering with freedom of expression, this is even more so in the case of threatening sanctions which may be imposed irrespective of conventional freedoms. In finding an interference, the ECHR does not primarily consider whether the content of the threat is contrary to the Convention or whether the threat as such has any direct legal effect. What is decisive is whether the measure in question suppresses freedom of expression.⁶⁶ Opening up the notion of “interference” on the basis of earlier jurisprudence⁶⁷ the ECHR has meanwhile confirmed that attempts at factual intimidation amount to an interference.⁶⁸ Taking these

developments into account means to first apply the traditional notion of “interference” and then broaden it with regard to case-specific risks for individual freedoms.

Case 2 – Answer:

Prima facie, the case looks like access to public service. Such an individual right, however, is not included in the Convention. Nevertheless, civil servants can complain about dismissal if this act potentially violates a conventional freedom. In our case, the freedom of opinion is pertinent. Regarding the letter sent to W by the Head of State, it must be discussed whether the declaration of intent therein amounts to an interference. It has to be noted in this context that the letter was intended to criticize W and to discourage him from making further statements. While the decision of the Head of State not to appoint W as such does not violate the Convention, the threat uttered in the letter is intended to suppress W’s freedom of opinion.

If one accepts that the measure was provided by law and served a legitimate purpose it only remains to assess the proportionality of the incriminated measure. While W was under an obligation to exercise self-restraint when commenting on political decisions, it has to be noted that the statement was made in the context of an academic lecture and that it did not affect W’s conduct of office at all. Thus, the measure was not necessary in a democratic society. Hence, Article 10 of the ECHR was violated.

3. Justification

Interferences with any of the freedoms guaranteed by Article 10(1) of the ECHR are only permissible if they are prescribed by law, adopted in pursuance of one of the objectives listed in Article 10(2) of the ECHR and “necessary in a democratic society”. All of these conditions must be met. It is noteworthy that the list of objectives that may be legitimately pursued is the most extensive one compared to other rights and freedoms guaranteed by the Convention.⁶⁹ Furthermore, it is unusual that Article 10(2) of the ECHR starts off by giving reasons for such limitations: the exercise of freedom of expression “carries with it duties and responsibilities”. Whereas the ECHR in an early case argued that it could not overlook the “duties” and “responsibilities” of a person making use of the freedoms guaranteed by Article 10(1) of the ECHR⁷⁰, it later made it clear that the introductory phrase does not constitute an independent limitation of Article 10(1) of the ECHR.⁷¹ It may be argued that, originally, the introductory formula only provided some legitimacy to address the specific risks of mass media.⁷²

a) Situations in which a Restriction May Be Justifiable

One of the most important situations in which a restriction may be justifiable according to Article 10(2) of the ECHR is the **protection of the reputation of others**. Since defamation laws can have a serious impact on the freedom of expression, this clause must be interpreted restrictively and can only be applied after a careful analysis of the facts. Any other approach would place freedom of speech as one of the essential backbones of

57 See above Villiger (note 10) p 344; see also Grabenwarter (note 3) Art 18, paras 5–6; for further details.

58 For further details cf Frowein (note 13) Art 10, para 36.

59 See above Probst (note 33) pp 27–28; Peukert *Festschrift Mahrenholz* (Baden-Baden 1994) pp 285–286; → § 2, para 34.

60 See ECtHR *Hashman and Harrup* (2000) 30 EHRR 241; *Steel* (1999) 28 EHRR 603.

61 See above Frowein (note 13) Art 10, para 4.

62 For further details see above Probst (note 33) p 27; see also EurCommHR *Rommelfanger v Germany* (1989) 62 RJD 151.

63 But see EurCommHR *T v United Kingdom* (1983) 49 RJD 49, 5.

64 On pluralism as one of the foundations of freedom of opinion and freedom of the press in a democratic society see ECtHR *Informationsverein Lentia* (1994) 17 EHRR 93, para 38.

65 This was the approach taken by the Court in ECtHR *Gaskin* (1990) 12 EHRR 36, para 42 and in *Powell and Rayner* (1990) 12 EHRR 355, para 41.

66 Hoffmeister [2000] EuGRZ 358, 359.

67 See, among others, ECtHR *Lingens* (1986) 8 EHRR 407, para 44; *Barfod* (1991) 13 EHRR 493, para 29.

68 ECtHR *Wille* (2000) 30 EHRR 558, paras 44 ff.

69 Along the same lines see above Frowein (note 13) Art 10, para 23.

70 ECtHR *Handyside* (1979–80) 1 EHRR 737, para 49.

71 ECtHR *Thorgeirson* (1992) 14 EHRR 843, para 46.

72 See above Probst (note 33) p 28.

democracy at risk.⁷³ Only a restrictive interpretation of defamation laws will contain the dangers described as having a “chilling effect” on so many occasions by the U.S. Supreme Court.⁷⁴ Future speech should not be put at risk by an extensive application of defamation laws. On the other hand the ECHR that defamation laws contribute to law and order (“*Rechtsfrieden*”).⁷⁵ The Court, adopting a functional approach, has established broader limits for political speech than in the case of criticism of private individuals.⁷⁶ This is a matter of proportionality. Special problems arise in the case of public bodies and institutions. While it at first recognized the need to protect their reputation⁷⁷, the ECHR meanwhile seems to have distanced itself from this line of argument. Thus, the Court considered the imposition of criminal proceedings against a conscript in the perceived interest of national security and public safety because of collective defamation of the Greek armed forces to be disproportionate.⁷⁸ By declaring that the functions to be performed by the armed forces merit judicial protection, the Court implicitly seems to reject the idea of protecting the reputation of state organs and other public bodies.⁷⁹

31 Closely related to defamation laws is the **protection of rights of others**. This partly overlaps with the protection of the reputation of others. However, it is much broader. Thus, the ECHR has accepted that interferences may be justified in pursuit of protecting the religious beliefs of others⁸⁰ as well as their privacy⁸¹. Furthermore, the protection of rights of others may be relevant with regard to commercial speech. Measures adopted against unfair competition may easily be attributed to the protection of rights of others.⁸² Recently, the ECHR has even considered the right to effective democracy as a right of others.⁸³ Thus, the protection of the rights of others develops into a kind of blanket clause.

73 For a differentiated approach see above Peukert (note 59) pp 294 ff; likewise see above Frowein (note 13) Art 10, para 32.

74 On the “chilling effect” see United States Supreme Court *NAACP v Alabama ex rel Patterson* (1958) 357 US 449; for German doctrine and jurisprudence cf Grimm [1995] NJW 1703; on the ECHR cf ECtHR *Thorgeirson* (1992) 14 EHRR 843, para 68 and Prepeluh [2001] ZaöRV 771, 819–820.

75 ECtHR *Lingens* (1986) 8 EHRR 407, para 36.

76 ECtHR *Lingens* (1986) 8 EHRR 407, para 42; *Oberschlick* (1998) 25 EHRR 357, para 59; see above also Peukert (note 59) pp 294 ff.

77 ECtHR *Thorgeirson* (1992) 14 EHRR 843, para 59; *Castells* (1992) 14 EHRR 445, para 46.

78 ECtHR *Grigoriades* (1999) 27 EHRR 464, para 47; on the applicability of Art 10 ECHR to members of the armed forces see ECtHR *Vereinigung demokratischer Soldaten Österreichs* (1995) 20 EHRR 56, para 36.

79 Thus, the explicit argument of Judge Jambrek in his separate opinion in the case of ECtHR *Grigoriades* (1999) 27 EHRR 464, paras 3–4. For details on the reputation of the armed forces, Nolte [1996] AfP 313.

80 ECtHR *Otto-Preminger-Institut* (1995) 19 EHRR 34, paras 47–48; *Wingrove* (1997) 24 EHRR 1, paras 52 ff.

81 See ECtHR *Tammer* (2003) 37 EHRR 857, paras 68–69; *von Hannover* (2005) 40 EHRR 1, paras 63–66 (clearly taking a different approach than the German Federal Constitutional Court, BVerfG (2000) 101 BVerfGE 361, 390–391). Earlier already Frowein (note 13) Art 10, para 33, referring to Art 8 ECHR.

82 ECtHR *Barthold* (1985) 7 EHRR 383; *markt intern* (1990) 12 EHRR 161; *Casado Coca* (1994) 18 EHRR 1.

83 ECtHR *Ahmed* (1997) 24 EHRR 278, para 54; early indications in *Bowman* (1998) 26 EHRR 1, para 38; for some discussions see Hoffmeister [2000] EuGRZ 358, 360.

The admissibility and exigency of political speech is particularly sensitive with respect to the interests of **national security, territorial integrity and public safety**. The distribution of pamphlets including a call for desertion and specific advice to this end may be easily considered as endangering national security.⁸⁴ The same applies to the distribution of propaganda material of unconstitutional organizations⁸⁵, although pertinent governmental reactions may also be adopted by reference to the protection of the rights of others. On the other hand, it is doubtful to consider the publication of the memoirs of a former secret service agent as endangering national security, in particular, if it is rather the reputation of the secret service and not national security that seems to be at stake.⁸⁶ In its recent case-law concerning Turkey, the ECHR addressed the protection of territorial integrity. The Court recognized that measures against separatist pro-Kurdish propaganda may be justified for reasons of protecting both territorial integrity as well as national security.⁸⁷

The **prevention of disorder or crime** goes beyond the protection of public order. It includes the protection of societal groups and non-state institutions, their internal functioning and their structure.⁸⁸ On the one hand, reference may be made to the protection of the armed forces⁸⁹ and prisons,⁹⁰ on the other hand, non-state actors have been protected by reference to rules of professional conduct⁹¹ (in the context of commercial speech). In as far as hate speech, in particular the spread of racist propaganda⁹² or the Auschwitz lie,⁹³ cannot be attributed to any of the other objectives listed in Article 10(2) of the ECHR, a related interference may be justified by reference to the prevention of disorder. These cases have to be distinguished from what has been argued in the context of the organization of a country's broadcasting system. This may be legitimately developed on the basis of Article 10(1)(iii) of the ECHR. License requirements for undertakings pursuing pertinent commercial activities may be based on this provision. Nevertheless, the requirements of Article 10(2) of the ECHR must also be met in such a case, and reference to the prevention of disorder is advisable.⁹⁴ It is noteworthy that among the limitation clauses of Articles 8 to 11 of the ECHR only Article 8(2) of the ECHR explicitly refers to “the economic well-being of the country”.

84 EurCommHR *Arrowsmith* (1981) 3 EHRR 218, paras 38–39.

85 EurCommHR *Kühnen* (1988) 56 RJD 205, 209.

86 Thus the criticism of Frowein (note 13) Art 10, para 2, positioning himself against ECtHR *Observer* (1992) 14 EHRR 153, paras 56 and 69; see also the dissenting opinions of Judges *Petitti* und *Morenilla* in this case.

87 See ECtHR *Arslan* (2001) 31 EHRR 264, paras 40, 48–49.

88 See above Frowein (note 13) Art 10, para 30.

89 ECtHR *Engel* (1979–80) 1 EHRR 647, para 98.

90 ECtHR *Golder* (1979–80) 1 EHRR 524, para 45 (on Art 8(2) ECHR). See also Laeuchli/Bosshard *Die Meinungsfreiheit gem Art 10 EMRK unter Berücksichtigung der neueren Entscheidungen und der neuen Medien* (Bern 1990) pp 165 ff.

91 Also ECtHR *Casado Coca* (1994) 18 EHRR 1.

92 ECtHR *Jersild* (1995) 19 EHRR 1, paras 33–35.

93 EurCommHR *X v Germany* (1982) 29 RJD 194; *Remer* (1995) 82 RJD 117. In an obiter dictum, the Court has meanwhile argued that the so-called Auschwitz lie is not protected by Article 10 ECHR because of Article 17 ECHR, see ECtHR *Lehideux and Isorni* (2000) 30 EHRR 665, para 47.

94 On the interrelationship between Art 10(1)(iii) ECHR and Art 10(2) ECHR, see below (para 54).

34 One of the more difficult objectives listed in Article 10(2) of the ECHR is the **protection of morals**. Since it is open to broad interpretation, its scope must be limited by reference to the principle of proportionality. State practice demonstrates that public authorities, probably due to its flexibility and its lack of precision, seem to prefer reference to the protection of morals even in cases when reference to the **protection of health** is plausible. The protection of morals has thus been relied upon when dealing with pornographic literature and videos. Sometimes reference to morals was combined with an argument to protect the rights of others, meaning religious beliefs. The main issue is that the protection of morals is a controversial issue and that ideas about its content differ widely. There is no European conception of morals. Due to the multitude of differing conceptions, the ECHR is less qualified to assess a pertinent situation than national and local authorities.⁹⁵ In this context, the national authorities' „margin of appreciation“ („marge d'appréciation“) ⁹⁶ is of importance and will be analysed more closely when discussing the principle of proportionality below.

35 The objective of **preventing the disclosure of information received in confidence** has so far not received much attention by the Convention organs. In the context of governmental activities there is a close connection to issues of national security.⁹⁷ Whether and in how far the objective of preventing the disclosure of information can also be relied upon in order to protect confidential business information needs to be re-considered in light of new technological developments. It is noteworthy that municipal regulation of telecommunications includes rules on protecting the confidentiality of individual communication. Since Article 8 ECHR only provides limited protection of private communication against interference by non-state actors (even if drawing on positive obligations), there seems to be little room for conflicting principles emerging from Articles 8 and 10 of the ECHR.⁹⁸ Only if and in so far as private communication is protected by national legislation, those protective measures may amount to an interference with the freedoms included in Article 10(1) of the ECHR which then has to be assessed against Article 10(2) of the ECHR.

36 From a German perspective, the objective of **maintaining the authority and impartiality of the judiciary** has never been of primary importance. The objective was included in order to safeguard the common law instrument of “contempt of court”.⁹⁹ Recently, however, the objective has sometimes been taken up in the context of media reporting on court proceedings (read together with the prevention of disorder).¹⁰⁰

b) The Requirement of a Legal Basis for the Interference

Case 3 – Problem: (ECtHR *Steel* (1999) 28 EHRR 603)

37 A, an animal-rights activist, took part in a protest against a grouse shoot. She walked in front of a member of the shoot as he lifted his shotgun to take aim and thus prevented him

95 ECtHR *Handyside* (1979–80) 1 EHRR 737, para 48; *Müller* (1991) 13 EHRR 212, para 34.
 96 For a general discussion of the doctrine of margin of appreciation see Brems [1996] ZaöRV 240; on the margin of appreciation as applied to freedom of the press cf Prepeluh [2001] ZaöRV 771.
 97 See above Laeuchli/Bosshard (note 90) p 180. See also EurCommHR *X v Germany* App No 4247/69 = (1970) 13 YECHR 888.
 98 On Art 8 ECHR and its relevance for cryptography, cf Dregger [1998] DuD 28.
 99 ECtHR *Sunday Times* (1979-80) 2 EHRR 245, paras 56–57.
 100 ECtHR *Worm* (1998) 25 EHRR 454, para 49. For a comparative perspective see Gehring [2000] ZRP 197.

from firing. A was arrested for “breach of the peace”. She was found guilty, a fine was imposed and the Court ordered her to agree to be bound over for 12 months. She refused and was committed to prison for 28 days. A argues that her freedom of opinion as guaranteed by Article 10 of the ECHR was thus violated.

What is normally required in order to justify an interference is a general and abstract rule authorizing public authorities to adopt pertinent measures. This rule, whether written or unwritten, must have the force of law. It must further be accessible and predictable (→ § 2 para 46). Problems normally only occur when a broad notion of “interference” is applied. Thus, if factual attempts at intimidation qualify as interferences,¹⁰¹ it will be difficult to identify a legal basis for such interferences within the meaning of Article 10(2) of the ECHR. As can be gathered from the jurisprudence of the ECHR, this does not necessarily imply the illegality of the measure taken, since Article 10(2) of the ECHR seems to have been drafted with formal and not factual measures in mind. Thus, with regard to factual interferences it may be permissible to abandon the requirement of a legal basis for the interference if at least the principle of proportionality is met.¹⁰²

Case 3 – Answer:

39 First, it has to be discussed whether the freedom of opinion is at all applicable. A did not say anything to the participant in the shoot. She just performed an act of protest. It can, however, not be disputed that opinions can be communicated by both words and deeds. The arrest and the court ruling therefore constitute interferences with the freedom of opinion. The second problem in our case is the justification of the interferences. Even though “breach of the peace” is very general, it has been specified over years by jurisprudence and police practice. This meets the requirements of Article 10(2) of the ECHR. The objectives pursued by the court ruling were the prevention of disorder and the protection of the rights of others. In addition, the imprisonment also served to maintain the authority of the judiciary. Since the municipal court – given that A refused to be bound over – could legitimately expect her to continue her protest activities, 28 days of imprisonment can still be considered to be proportionate in the case.

c) The Principle of Proportionality

40 Similar to the other limitation clauses of Articles 8, 9 and 11 of the ECHR, governmental interference with the freedom guaranteed, *ie* freedom of expression, is not justified by mere reference to a legitimate aim. Rather, the act must be “necessary in a democratic society” in order to be compatible with the Convention. Whether or not the principle of proportionality has been met is for the Convention organs to decide. In light of the importance of freedom of expression for a democratic society, the assessment of whether or not the interference is proportionate is of utmost importance (generally on the prin-

101 See above (paras 23 ff).
 102 Similarly, Hoffmeister [2000] EuGRZ 358–359. Alternatively, the requirements as to clarity and preciseness of the statutory basis maybe reduced; for such an approach see above Grabenwarter (note 3) Art 23, para 20. This basically seems to be compatible with the rule of law, see Degenhart *Staatsrecht I* (20th ed, Heidelberg 2004) para 281.

principle of proportionality → § 2 para 48).¹⁰³ First of all, this necessitates that the objectives which are considered as legitimate aims of governmental interference have to be interpreted narrowly. Furthermore, any interference must be well reasoned. This means that, in principle, Article 10 of the ECHR must be read as an assumption in favour of the permissibility of the expression under scrutiny.¹⁰⁴ While this is convincing *prima facie*, it leads to a differentiation resulting from the interrelationship between a democratic society and freedom of expression: the ECHR seems to privilege political speech when applying the principle of proportionality¹⁰⁵ and thus adopts a functional interpretation of Article 10 of the ECHR.¹⁰⁶ But even if one doesn't share the resulting discrimination of commercial and other forms of non-political speech, it must be admitted that the ECHR does not make this distinction when defining the scope of protection, but rather in the context of the proportionality, i.e. in the context of a possible justification of interferences. Only such an approach seems to be methodologically viable. There is no resulting differentiation with regard to the scope of Article 10(1) of the ECHR.

41 Even though Strasbourg jurisprudence – in contrast to German constitutional doctrine – does not normally distinguish between appropriateness, necessity and reasonableness as sub-categories of proportionality, there are indications that the underlying elements of such differentiation are taken into account when applying Article 10(2) of the ECHR. It is plausible to first assess the appropriateness and necessity of interferences.

42 An executive order preventing publication is inappropriate (even ineffective) if – as in the case of a former secret service agent – the material has already been published abroad (in the case under consideration, in the United States).¹⁰⁷ The same seems to apply to a prohibition to disseminate information in Ireland about British abortion clinics if interested women can obtain the information without any major difficulties otherwise (e.g. by consulting British phone books or journals).¹⁰⁸

43 The necessity of interferences can be doubtful in cases of indirect sanctions. For purposes of illustration, reference is made to the Strasbourg organs' case-law on banning someone from a profession. Early jurisprudence of the ECHR was not really convincing when arguing that there was no violation of Article 10 of the ECHR because the Convention does not include rights of access to public service. This reasoning overlooked that it was not access to public service which was at issue (one of the cases concerned the withdrawal of a probationary appointment of a teacher because of fraudulent misrepresentation,¹⁰⁹ in another case a civil servant was removed from office because of fascist statements¹¹⁰), but the extent of obligations of loyalty which may be imposed on civil servants.

103 ECtHR *Thorgeirson* (1992) 14 EHRR 843, para 63; *Castells* (1992) 14 EHRR 445, para 42.

104 See above Frowein (note 13) Art 10, para 26.

105 For a parallel assessment see above Villiger (note 10) p 400 and Brems [1996] ZaöRV 240, 274–275. Occasionally, the margin of appreciation was strictly limited even in the context of business life; see Prepeluh [2001] ZaöRV 771, 805.

106 On the interrelationship between the theory of human rights and the interpretation of pertinent norms still appropriate: Böckenförde [1974] NJW 1529.

107 Not really convincing ECtHR *Observer* (1992) 14 EHRR 153, paras 66 ff. For a critique thereof see above Frowein (note 13) Art 10, para 27.

108 ECtHR *Open Door* (1993) 15 EHRR 244, para 55; for detailed analyses of this ruling and a parallel ruling of the ECJ see Zimmermann [1993] NJW 2966 and Langenfeld/Zimmermann [1992] ZaöRV 259.

109 ECtHR *Glaserapp* (1987) 9 EHRR 25.

110 ECtHR *Kosiek* (1987) 9 EHRR 328.

Looking back at those early court rulings, it seems likely that the ECHR did not want to address the hard issues during the Cold War. Only after the end of the (ideological) conflict between East and West, the ECHR adopted a critical approach to the extent of loyalty requirements and ruled that obligations of loyalty may in principle be imposed, but their application must take into account the functions performed by the civil servant. Mere membership of a political party doesn't seem to be sufficient for removal from office, which would thus be disproportionate.¹¹¹ Other disciplinary measures might have met the principle of proportionality, in particular, the element of necessity. Taking another example, the award of extremely high amounts of damages in defamation cases can not be considered to be necessary and thus is also disproportionate.¹¹²

Apart from appropriateness and necessity, several differentiations have been developed when applying the principle of proportionality in the context of Article 10(2) of the ECHR. These differentiations concern political speech, defamation laws, the margin of appreciation when protecting morals, and the criteria applied to interferences with broadcasting.

d) Political Speech

Strasbourg jurisprudence provides a relatively high level of protection for political speech: An “interference” which more or less prevents political criticism is generally regarded as disproportionate and thus contrary to the Convention. On several occasions, the Court has considered a municipal rule on the need to demonstrate that value judgements are “true” as disproportionate in political discourse. Sometimes the ECHR qualified expressions as value judgements even though they had been considered to be statements of fact by municipal courts.¹¹³ In particular, the ECHR considered the requirement to prove correctness when reporting about rumours and narratives on police abusiveness to be disproportionate.¹¹⁴ Furthermore, the sentencing of a Danish journalist who had included racist statements of interviewees in a broadcast reportage, even though he had – according to the views taken by the ECHR – distanced himself from them, was likewise held to be disproportionate.¹¹⁵ More generally, the ECHR has made it clear that statements of fact may not be made without any substantiation nor maliciously.¹¹⁶

Interference with expressions of a commercial character is subject to less scrutiny;¹¹⁷ there is more leeway for reliance on the doctrine of margin of appreciation. Thus, statements of fact¹¹⁸ or the remittance of newspaper articles¹¹⁹ can be restricted by rules

111 ECtHR *Vogt* (1996) 21 EHRR 205.

112 ECtHR *Tolstoy Miloslavsky* (1995) 20 EHRR 442.

113 It can be argued today that if proof of validity (truth) is required by municipal law, this normally will amount to a violation of Article 10 ECHR; cf ECtHR *Lingens* (1986) 8 EHRR 407, para 46; *Oberschlick* (1998) 25 EHRR 357, para 63; *Schwabe* App No 13704/88, para 34; *Unabhängige Initiative Informationsvielfalt* (2003) 37 EHRR 710, paras 45–46. These rulings have to be distinguished from the case of *Castells* (1992) 14 EHRR 445, para 48 which concerned facts the validity of which can in principle be assessed and which were not made part of the proceedings in the case at hand.

114 ECtHR *Thorgeirson* (1992) 14 EHRR 843, para 65.

115 ECtHR *Jersild* (1995) 19 EHRR 1, paras 33–36.

116 ECtHR *Thorgeirson* (1992) 14 EHRR 843, paras 63, 67.

117 See also Calliess [2000] AfP 248 and Grabenwarter [2002] ÖZW 1.

118 ECtHR *markt intern* (1990) 12 EHRR 161, paras 35–36.

119 ECtHR *Jacobowski* (1995) 19 EHRR 64, paras 26–30; there was a strong dissenting opinion in

against unfair competition without qualifying such interference as disproportionate. To a limited extent, this also applies to rules of professional conduct and the prohibition of adverts based thereupon. The ECHR takes a sceptical position on a broad interpretation of rules of professional conduct in this regard. Rather, it underlines the participation of competent individuals in public discourse and assesses the admissibility of interferences according to whether the advertising effect was primary or secondary (for a law firm or a doctor's practice).¹²⁰

e) Defamation Laws and Due Diligence of the Press

Case 4 – Problem: (ECtHR *Bladet Tromsø* (2000) 29 EHRR 125)

47 A journal had published a report written by a government inspector on his observations made on a ship during the seal hunting season. The ship was named in the report. In the report, the inspector had stated that individual members of the crew whose names were also mentioned had taken off the fur of seals still alive and had violated other provisions related to seal hunting. The publication of the article was part of a series of articles which gave a voice to all interested parties. However, at the time of publication, the journal was aware that the government had blocked public access to the report in order to carefully examine all criminal charges raised against members of the crew. Eventually, both the inspector and the journal were fined because they were not able to prove that the statements made in the report were indeed true. The inspector and the journal subsequently complained that their rights under Article 10 of the ECHR had been violated.

48 Generally speaking, politicians cannot complain about being harshly criticized. However, given that Strasbourg jurisprudence strictly applies the principle of proportionality in the context of defamation laws,¹²¹ it is *prima facie* surprising that the Convention organs assess the proportionality of political speech rather than of the act of interference. Pertinent jurisprudence tends to reverse the relationship between rule and exception, and must thus be assessed in critical terms.

49 Typically, the ECHR raises the question whether criticism could have been voiced differently while having the same effect. With regard to the form of expression, the Court requires an assessment of whether or not personal attacks were indispensable.¹²² Consequently, the Court does not protect false statements of fact, libellous propositions, unnecessary incisiveness, and value judgements lacking a factual basis since governmental interference with any of these usually is proportionate.¹²³ While the case-law as such can

the Court in this particular case. See also ECtHR *Markt intern* (1990) 12 EHRR 161, paras 35–36 and *Calliess* [1996] EuGRZ 293, 295.

120 Thus the argument presented by Villiger (note 10) p 404, referring to ECtHR *Barthold* (1985) 7 EHRR 383, para 58; but see also ECtHR *Casado Coca* (1994) 18 EHRR 1, paras 55–56, where the ECHR was not prepared to further attack rules of professional conduct on the basis of Art 10(2) ECHR in light of a lack of consensus across Europe. In its ruling in the case of Eur-CommHR *Schöpfer* (1996) 22 EHRR 184, paras 30–34, the Court considered a fine imposed on a lawyer as proportionate because he had attacked the courts in a press conference rather than bringing the case before the courts in the first place.

121 Settled jurisprudence since ECtHR *Lingens* (1986) 8 EHRR 407, para 46.

122 ECtHR *Barfod* (1991) 13 EHRR 493, paras 33–35; for a critique see above Frowein (note 13) Art 10, para 25.

123 ECtHR *De Haes* (1998) 25 EHRR 1, para 47; *Unabhängige Initiative Informationsvielfalt* (2003) 37 EHRR 710, para 47.

be considered convincing, the methodological approach of the ECHR nevertheless deserves criticism.

With regard to reproducing statements of fact or materials received from others, the ECHR imposes an obligation of due diligence on the press. This has direct repercussions on the proportionality of governmental interference. On the one hand, the Court has accepted that there is no need for protecting confidential information if the information is already available elsewhere.¹²⁴ In the case of anonymous informants, the interest in protecting them and their identity prevails if the person concerned will only be marginally affected.¹²⁵ In so far, the press is hardly subject to any due diligence obligations. This may, however, be different if the press anonymously receives material. In principle, the Court then requires that the journalist at least assesses the authenticity of the material before publication,¹²⁶ unless there are special reasons to relieve the press of such a due diligence obligation, e.g. the general reliability of the information received.¹²⁷ The publication of libellous statements of fact may be permissible even if their validity cannot be assessed ex post.¹²⁸

Case 4 – Answer:

It is fairly obvious that Article 10 of the ECHR is applicable, that there were interferences, and that the aim pursued by the government was to protect the reputation of others. What needs closer scrutiny is whether the imposition of a fine met a pressing social need, whether it was proportionate to the aim pursued, and whether the reasons given by the authorities were sufficient. Thereby it has to be borne in mind that the publication of the report was part of a series of articles and that, hence, there was no intention on the side of the inspector and the journal.

The right of journalists to disseminate information is, however, only protected by Article 10 of the ECHR in as far they act in good faith, rely upon established facts, and respect professional ethics (this is already an application of the principle of proportionality). In this case it is critical whether the journal had good reasons not to cross-check the validity of the statements included in the report. This depends on the form and on the intensity of the statements. While some of the charges were grave, their negative impact was mitigated because they were not addressed against the crew as a whole. Furthermore, since it was a government sponsored report, the journal could to a certain extent rely upon its correctness. Were the press – under those circumstances – obliged to perform its own research into the matter, this would question its capacity as a public watchdog.

Thus, there can hardly be any doubt that the journal acted in good faith. Hence, the imposition of the fine was disproportionate.

f) The Margin of Appreciation when Protecting Morals and Religious Beliefs

The ECHR has always pointed out that there is no European conception of morals. Thus, municipal authorities are – in principle – in a better position to assess the reasonableness of pertinent interferences with any of the freedoms included in Article 10(1) of the

124 ECtHR *Vereniging Weekblad Bluf!* (1995) 20 EHRR 189, paras 44 ff.

125 ECtHR *Goodwin* (1996) 22 EHRR 123, paras 42–45.

126 ECtHR *Fressoz and Roire* (2001) 31 EHRR 28, paras 53–55.

127 ECtHR *Bladet Tromsø* (2000) 29 EHRR 125, para 66.

128 Prepeluh [2001] ZaöRV 771, 801; Hoffmeister [2000] EuGRZ 358, 366.

ECHR. Hence, the Court accepted the assessment made by English courts on the morally damaging effect of a disputed publication on children and youngsters.¹²⁹ Similarly, the Court relied on the margin of appreciation with regard to religious beliefs. The Court explicitly stated that it is impossible to agree on religious beliefs in a given society within Europe.¹³⁰ Even though there is little room for governmental interference with freedom of expression in political (and other public) discourse, the Court accepts that it is primarily for the municipal authorities to assess whether or not the protection of religious beliefs necessitates interferences with freedom of expression. The Court argues that municipal authorities are directly and continuously in touch with local groups and other parts of civil society.¹³¹ The reluctance of Strasbourg organs in this regard can be illustrated by reference to the case of a Belgian national who was prosecuted for distributing a journal that was freely available in the Netherlands. The Commission itself considered this interference to be proportionate.¹³²

53 The Court's ruling in the – already mentioned – case of an artist who had created and exhibited pornographic paintings is less convincing. The painter was not only to be prosecuted, but his paintings should be destroyed. Whereas the Commission only considered the prosecution to be proportionate, the ECHR regarded both the prosecution and the order of destruction as proportionate.¹³³ Even though the paintings were not destroyed and were returned to the plaintiff several months before (*sic!*) the Court's ruling, the ECHR failed to comprehensively assess the reasonableness of such interferences. The only acceptable reasoning may be that it would be to ask too much of the Court to develop uniform approaches to morals among all High Contracting Parties. Thus, whenever confronted with morals or religious beliefs, the Court refers to the doctrine of margin of appreciation and avoids a careful assessment of proportionality.

g) Yardsticks with Regard to Interferences in Broadcasting

54 With regard to broadcasting, the substance of Article 10(1)(iii) of the ECHR is relevant. Clearly, there is sufficient leeway for the High Contracting Parties to regulate the technical aspects of broadcasting. In this regard, Article 10(1)(iii) of the ECHR can even be the basis for implementing international telecommunications law.¹³⁴ When doing so, the principle of proportionality has to be respected. Thus, the ECHR ruled that the refusal of Swiss authorities to license the reception of USSR radio transmissions was disproportionate since the Court could not identify reasons to prohibit the reception of transmissions addressed to the general public in the USSR.¹³⁵ Similarly, limitations on the establishment of individual receivers based on building and conservation laws will at least be subject to strict scrutiny (based on the principle of proportionality) if a collective receiver does not

129 ECtHR *Handyside* (1979–80) 1 EHRR 737, para 52.

130 ECtHR *Otto-Preminger-Institut* (1995) 19 EHRR 34, para 50; See also Grabenwarter [1995] ZaöRV 128.

131 ECtHR *Wingrove* (1997) 24 EHRR 1, para 58; see on this case Kolonovits in: Grabenwarter/Thienel (eds) *Kontinuität und Wandel der EMRK* (Kehl 1998) pp 169 ff.

132 EurCommHR *X, Y and Z v United Kingdom* App No 21830/93.

133 ECtHR *Müller* (1991) 13 EHRR 212, paras 35–36 and 43.

134 ECtHR *Groppera Radio AG* (1990) 12 EHRR 321, paras 60–61.

135 ECtHR *Autronic AG* (1990) 12 EHRR 485, para 63.

provide equivalent possibilities.¹³⁶ Whenever the essence of the freedom of information is affected, interferences are likely to be disproportionate.¹³⁷

In as far as regulations go beyond addressing the technical aspects of broadcasting, the ECHR has subjected licensing requirements to the provisions of Article 10(2) of the ECHR. This may be difficult to accept from a methodological perspective. However, it pays tribute to technological progress and socio-economic change when interpreting Article 10(1)(iii) of the ECHR restrictively and thus including freedom of private broadcasting into freedom of expression¹³⁸. This is not only appropriate, but – on the contrary – a state monopoly on broadcasting would seem to be disproportionate.¹³⁹ Whenever a High Contracting Party has eased its traditional state monopoly on broadcasting and introduced a licensing system for private broadcasting, the licensing as such has to be assessed against the provisions of Article 10(2) of the ECHR. This does not prevent governments from including aspects other than those of a technological nature when deciding on the license, such as the objectives pursued by the undertaking, cultural pluralism, the specifics of the political organization of the state (*eg* a federal state) as well as non-technical obligations arising from international treaties.¹⁴⁰ In as far as the government pursues objectives not listed in Article 10(2) of the ECHR, the Court considers this to be permissible and covered by Article 10(1)(iii) of the ECHR,¹⁴¹ but requires compliance with the other criteria incorporated in Article 10(2) of the ECHR, in particular the requirement of a legal basis for the interference and the principle of proportionality.¹⁴²

While Article 10 of the ECHR does not explicitly include other requirements with regard to the organization of broadcasting, some may be taken from the jurisprudence of the Convention organs. In particular, the ECHR has accepted the principle of media pluralism and has incorporated this into the protection of the rights of others within Article 10(2) of the ECHR.¹⁴³ However, the Convention organs – in contrast to the German Federal Constitutional Court¹⁴⁴ – have always been reluctant to impose broadcasting standards on the High Contracting Parties. In particular, the Court has refrained from imposing a positive obligation on governments in so far. Thus, there is no risk that Strasbourg will transform freedom of broadcasting (and media) into an obligation.¹⁴⁵

136 ECtHR *Autronic AG* (1990) 12 EHRR 485, para 47; see also the decisions of the European Commission of Human Rights EurCommHR *Radio X. S. and W. v Switzerland* (1984) 37 RJD 236; *A v Switzerland* (1984) 38 RJD 219, para 49; *Ebner* App No 13253/87, para 3.

137 See above Laeuchli-Bosshard (note 90) pp 31 ff; Villiger (note 10) p 413.

138 In general Engel *Privater Rundfunk vor der Europäischen Menschenrechtskonvention* (Baden-Baden 1993).

139 ECtHR *Informationsverein Lentia* (1994) 17 EHRR 93, paras 39, 41–43; see also the settlement in EurCommHR *Telesystem Tirol Kabeltelevision* (1997) 24 EHRR 11, as well as the ruling in the case of ECtHR *Radio ABC* (1998) 25 EHRR 185, paras 31–33. In another case ECtHR *Tele 1 Privatfernsehgesellschaft MBH* (2002) 34 EHRR 181.

140 See above Frowein (note 13) Art 10, para 19.

141 ECtHR *Informationsverein Lentia* (1994) 17 EHRR 93, para 32.

142 ECtHR *Groppera Radio AG* (1990) 12 EHRR 321; *Informationsverein Lentia* (1994) 17 EHRR 93, para 32.

143 ECtHR *Groppera Radio AG* (1990) 12 EHRR 321, paras 69–70; affirmative see above Probst (note 33) p 26.

144 Cf Stock [1997] JZ 583.

145 For a critique of the jurisprudence of the Federal Constitutional Court see Engel [1994] AFP 185.