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On European Press Freedom: An Introduction

ANDRÁS KOLTAY

This introductory chapter will outline some of the elements of the Pan-European concept of the freedom of the press, while respecting the individual characteristics of each European state as regards the details of press freedom. I will work on the assumption that freedom of the press has elements in common in democratic European states that make it possible to identify a 'European' doctrine. It is important in this context to understand freedom of the press as a right that generally guarantees the freedom of all media. I will not cover issues of 'media regulation', although television, radio and on-demand media services are subject to a separate regulatory regime and slightly distinct constitutional doctrines. Similarly, the freedom of online platforms that have characteristics other than those of legacy media but which play a similar role in the public sphere is treated as a separate issue. Freedom of the press is therefore the freedom of all channels of communication that can be covered by the notion of 'press' or generally the 'media', but it does not include media or Internet (platform) regulation.

1. Freedom of the Press and Freedom of Expression

According to Jacob Rowbottom, the concept of the press can be defined in several ways, and definitions can be either 'institutional' or 'functional' in nature.[1] To this we can add an approach to the press as a 'technology', as Eugene Volokh argues that freedom of the press is nothing more than the right to freely use various technologies that facilitate mass communication, and thus the press is not privileged or burdened with additional obligations, and its boundaries coincide with those of freedom of expression.[2]

[1] J Rowbottom, *Media Law* (Oxford, Hart Publishing, 2018) 27–31.

[2] E Volokh, 'Freedom for the Press as an Industry, or for the Press as a Technology?' (2012) 160 *University of Pennsylvania Law Review* 459. For a summary of similar views of other authors, see

If the press is considered an important institution of a democratic social order, then the question arises as to whether it is necessary for the legal system to provide the press with additional rights, or possibly impose additional obligations in return. If the press is an 'institution', this seems inevitable, but as Tom Gibbons notes, 'their association with truth and participation in a democracy is only incidental'.[3] Gibbons' tactful words highlight the fact that the press cannot be obliged at all to act in accordance with the justifications underlying the protection of freedom of expression, just as individuals cannot always be obliged to exercise their freedom of expression in the interests of democracy or truth, or possibly with a view to self-fulfilment, in accordance with one philosophical justification for freedom of expression.

It would be tempting to define the press or media in terms of its technological characteristics, and just a few decades ago this would not have raised any particular difficulties; at most there may have been some controversy over the legal status of freelance or citizen journalists.[4] However, with the development of technology, previous frameworks have loosened, and public information is now provided not only by legacy media journalists but also by bloggers, vloggers, influencers, youtubers and, of course, any individual who has access to a public forum, typically online. It is not necessary for the speaker who provides information to be a professional journalist, nor is it necessary for him to carry out his activity on a for profit basis at all. The press can no longer be defined on the basis of purely formal criteria. It is worth determining whether it is reasonable to approach the press on the basis of its functions. Three functions can be identified that may bring us closer to establishing a useable definition of the press, and these are:

- informing the public about important and newsworthy events;
- monitoring the government as a public watchdog;
- promoting democratic dialogue, providing a platform for individual opinions.

Providing information to the interested public is essential in a democracy, and is a key element of the press's self-image and self-reinforced image. The press is a symbolic agora of today's society;[5] it is the space where individual opinions may appear and clash, and which also helps those interested in making informed opinions and making decisions. Individuals need the help of the press without which they would not have access to the necessary information. It would be a mistake to idealise the relationship between the press and its audience, as the former does not necessarily provide information properly and the latter does not necessarily take an interest in public affairs information.[6] The former problem can be dealt

P Coe, 'Redefining "Media" Using a "Media-as-a-constitutional-component" Concept': An Evaluation of the Need for the European Court of Human Rights to Alter its Understanding of "Media" Within a New Media Landscape' (2017) 37 *Legal Studies* 25, 37–39.

[3] T Gibbons, *Regulating the Media* (London, Sweet & Maxwell, 1998) 28.

[4] See P Coe, *Media Freedom in the Age of Citizen Journalism* (Cheltenham, Elgar, 2021).

[5] TG Tucker, *Life In Ancient Athens: The Social and Public Life of a Classical Athenian from Day to Day* (London, Macmillan, 1906).

[6] Rowbottom (n 1) 18–19.

with in part through legal regulation, while the latter has nothing to do with press regulation.

The idea of the press keeping watch over the government can be linked to the 'Fourth Estate' metaphor Thomas Carlyle attributes to Edmund Burke:

> Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all … Literature is our Parliament too. Printing, which comes necessarily out of Writing, I say often, is equivalent to Democracy: invent Writing, Democracy is inevitable … Whoever can speak, speaking now to the whole nation, becomes a power, a branch of government, with inalienable weight in law-making, in all acts of authority.[7]

The metaphor that the press is the Fourth Estate next to the clergy, the aristocracy and the commoners is undoubtedly captivating. However, Carlyle may have been wrong in attributing the term to Burke, whose published works do not include it. Presumably it was Thomas Macaulay who first published it in print in 1828:[8]

> The gallery in which the reporters sit has become a fourth estate of the realm. The publication of the debates, a practice which seemed to the most liberal statesmen of the old school full of danger to the great safeguards of public liberty, is now regarded by many persons as a safeguard tantamount, and more than tantamount, to all the rest together.[9]

According to this, the press exercises control over the current power, revealing the functioning of state bodies and government, exposing its anomalies and providing the members of society with sufficient information in order to be able to make informed decisions in democratic procedures. It should be noted, however, that Jeremy Bentham had recognised this before Carlyle[10] and James Mill[11] also highlighted the supervisory role of the press. This is an idea that has its roots in Europe, where government control of the press is identified as an important function of the press,[12] and the European Court of Human Rights (ECtHR) often refers to the press as the public watchdog of the public if it wants to justify extending its freedom.[13]

[7] T Carlyle, *On Heroes, Hero-Worship, and the Heroic in History: Six Lectures* (New York, Wiley and Putnam, [1841] 1846) 147.

[8] L Blom-Cooper, 'Press Freedom: Constitutional Right or Cultural Assumption?' [2008] *Public Law* 260, 261–62.

[9] TB Macaulay, 'Hallam's Constitutional History' (1828) 4 *Edinburgh Review* 96, 165. For the sake of completeness, we recall that Henry Fielding in a 1752 newspaper article meant the masses, the mob under 'Fourth Estate'. See H Fielding, 'O Ye Wicked Rascallions' *Covent Garden Journal* (13 June 1752).

[10] J Bentham, 'Letter to the Spanish People I on the Liberty of the Press, the Approaching Eight Months' Sleep of the Cortes, and the Exclusion of Experience from the Succeeding Cortes' in J Bentham, *On the Liberty of the Press and Public Discussion* (London, William Hone, 1821) 12.

[11] J Mill, 'Liberty of the Press' in *Encyclopaedia Britannica* vol VIII, 7th edn (Edinburgh, Adam and Charles Black, 1842) 278.

[12] Rowbottom (n 1) 19–20.

[13] *Lingens v Austria* [1986] App no 9815/82, [44]; *Jersild v Denmark* [1994] App no 15890/89, [31] and [35]; *Bladet Tromsø and Stensaas v Norway* [1999] App no 21980/93, [59] and [68]; *Observer and Guardian v the United Kingdom* [1991] App no 13585/88, [59(b)]; *The Sunday Times v the United Kingdom (No 2)* [1991] App no 13166/87, [50(b)]; *Dalban v Romania* [1999] App no 28114/95, [49]; *Bergens Tidende and Others v Norway* [2000] App no 26132/95, [49] and [57]; *Thoma v Luxembourg* [2001] App no 38432/97, [45]; *Goodwin v the United Kingdom* [1996] App no 28957/95, [39].

The third essential function of the press is to promote democratic dialogue by providing a channel for different opinions. This idea was formulated long before the emergence of democracies in today's sense.[14] It can also mean that journalists report on individual positions themselves and that they allow room for other speakers. It is important that the press does not transmit individual opinions to the audience 'raw' without sorting and processing them, but arranges them, puts them in context and confronts them with other opinions. The press is the principal organiser of public dialogue.[15] However, it should also be noted that tensions may arise between the individual wishing to express his views and the press, due to the latter's decision-making role as an organiser.[16]

After reviewing the most important functions of the press, it is clear that simply listing them is not sufficient to distinguish the press from other public speakers who are also able to perform one or all of these functions. These may be individual speakers, bloggers or social media users, but they can also be the service providers themselves, such as a blogger, video sharing, or social media platform. It is welcome if, for example, a court grants an individual speaker who is engaged in information activities strong protection similar to that of the professional press,[17] but it raises the question of whether it is necessary to grant him privileges as well, and whether such a speaker has any responsibility to the public.

In order to clarify the concept of the press, it is not enough to define its functions; it is also necessary to identify other distinguishing features. Some of these can be found – all of which will be features that an individual speaker or, for example, an online platform may have, but which are entirely specific to the press, and presumably only to a part of it. One of the most obvious such features is mass communication, which is undoubtedly one of the peculiarities of the press: its purpose and life force is to address many people.[18] The professional nature of the operation, and the knowledge of and adherence to standards of conduct specific to the activity, is another distinguishing feature.[19]

It is important to keep in mind that defining a concept of the press, one which is acceptable in principle and can be used in practice, is important only in so far as the legislation distinguishes between the press and other public speakers; if the press enjoys special privileges, access to those rights must be restricted so that the rights can be used in practice for the purposes established in principle. Therefore, in the age of mass public speech it may be necessary to identify which speakers qualify as the 'press', based on the nature of the information they publish.

[14] D Defoe, *An Essay on the Regulation of the Press* (London, 1704); Mill (n 11).

[15] D Anderson, 'The Press and Democratic Dialogue' (2013–14) 127 *Harvard Law Review Forum* 331, 333. See also D Anderson, 'The Press and Political Community' in A Koltay (ed), *Comparative Perspectives on the Fundamental Freedom of Expression* (Budapest, Wolters Kluwer, 2015).

[16] Rowbottom (n 1) 22.

[17] Jan Oster gives examples of this from the practice of the ECtHR, see J Oster, *European and International Media Law* (Cambridge, Cambridge University Press, 2017) 11–12.

[18] J Oster, *Media Freedom as a Fundamental Right* (Cambridge, Cambridge University Press, 2015) 60–61; Coe (n 2) 39–40.

[19] Coe (n 2) 40–41.

2. Regulation of the Press

The regulation of the press, although not completely uniform, is largely similar in most European countries (with notable exceptions). Freedom of the press is enshrined in the codified constitutions as an independent right, and either a separate press law or a uniform media law covering media services and also press products settles specific issues relating to the press. In addition, laws of general application and certain special laws may affect the conduct of the press. However, it is common for the content of freedom of the press to emerge not only from codified legislation but also from the case law of courts and constitutional courts. When reviewing the sources of regulation, other forms of regulation beyond state regulation, such as co-regulation and self-regulation, must also be taken into account. The latter is also common in Europe and rests on similar foundations in several countries.

In European states, constitutions identify and protect freedom of the press in addition to freedom of expression. These provisions are concise in their wording, in keeping with the 'genre' of constitutions, and do not seek to delimit or define the content of freedom of expression and the press. The clarification of these issues is left to lower-level legislation as well as for constitutional or higher courts and case law. However, it is difficult to argue that it would follow mandatorily from European constitutions protecting freedom of the press that the press must necessarily be afforded privileges. Even if a constitutional court or tribunal reaches this conclusion, it does not imply that it stems from the text of the constitution, but from the values and approach of the relevant decision-maker.

Even without a uniform European press regulation, the European Convention on Human Rights (ECHR), aiming to protect human rights and political freedoms in Europe, is very influential, and has a unifying effect between party states. Drafted in 1950 by the Council of Europe, the Convention entered into force in 1953. It established the ECtHR, thereby broadening the possibilities for the protection of human rights around Europe (states behind the Iron Curtain joined after the fall of Communism). Any person who feels their rights have been violated under the Convention by a State party can take a case to the ECtHR.

Article 10 of the ECHR provides the right to freedom of expression and information, subject to certain restrictions that are 'in accordance with law' and 'necessary in a democratic society'. This right includes the 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.

The Helsinki Final Act, another influential human rights document, was signed at the Conference on Security and Co-operation in Europe (CSCE) held in Helsinki in 1975. The document provides for the respect of human rights and fundamental freedoms, freedom of expression and the press among them. In 1994, the Organisation for Security and Cooperation in Europe (OSCE) was established as a successor to the CSCE. Within this framework, a number of commitments

of the participating States were published in the fields of freedom of the media, freedom of expression and the free flow of information.[20]

The European Union (EU) does not regulate the press in general, as it does for audiovisual media services and video-sharing platform services.[21] However, many of the rules created by the EU can be applied specifically to press activities, even directly, such as the General Data Protection Regulation (GDPR),[22] or through their obligatory implementation in the Member States, as is the case with directives on copyright law[23] and on the fight against terrorism,[24] as well as other directives in similar specific fields. Some EU standards provide for certain restrictions on freedom of expression, such as the Framework Decision prohibiting the denial of genocide.[25] The most important of these rules, however, are the EU's general rules on the free movement of goods and services,[26] which also affect certain press markets, thus creating greater business opportunities and increased competition between players in the European press market. State aid rules[27] and general competition law, as established by the EU, are also relevant to media markets.

Article 11(1) of the Charter of Fundamental Rights protects 'the freedom of information and expression' and states in the second paragraph that '[t]he freedom and pluralism of the media shall be respected'. The fundamental rights enshrined in the Charter apply only within the scope of EU law, and as such the rights enshrined in the Charter cannot be invoked against the decisions of individual Member States in the absence of any other EU legal basis, that is connection to EU law. According to Article 51(1) of the Charter, its provisions 'are addressed to the institutions and bodies of the Union with due regard for the principle of

[20] *Commitments: Freedom of the Media, Freedom of Expression, Free Flow of Information, 1975–2017*, 4th edn (Vienna, OSCE Representative on Freedom of the Media, 2017), available at: www.osce.org/representative-on-freedom-of-media/99565.

[21] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L95/1 (AVMS Directive).

[22] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1 (General Data Protection Regulation, GDPR).

[23] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92.

[24] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L88/6, Art 5.

[25] Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expression of Racism and Xenophobia by Means of Criminal Law [2008] OJ L328/55.

[26] The Treaty on the European Union and the consolidated version of the Treaty on the Functioning of the European Union 2012/C 326/01.

[27] See Communication from the Commission on the application of State aid rules to public service broadcasting [2009] OJ C 257/1.

subsidiarity and to the Member States only when they are implementing Union law'.[28] The provisions of the Charter do not standardise the level of protection of fundamental rights in the Member States and thus, as freedom of the press is only tangentially covered by EU standards, Article 11 of the Charter is also only marginally applicable to press matters. It is therefore up to the Member States to define the content of freedom of the press, to distinguish it from freedom of expression and to remove restrictions from it.

In September 2022, the European Parliament and the Council tabled a proposal for a European Media Freedom Act which would cover a number of aspects of media regulation and bring them under common EU rules, as opposed to the current approach of not including press products in EU media regulation.[29] The fate of the proposal is still uncertain, but it is in any case indicative of what the EU Commission considers to be among the fundamental issues of media freedom: protection of editorial freedom; protection of journalistic sources; protection against surveillance; independent and balanced public service media; protection of media service providers against arbitrary decisions by online platforms; action against media market concentration; fair and transparent spending of state advertising budget, etc.

In many European countries, the press is regulated by statutory law. Europe's press laws present a varied and colourful picture, and a review of them suggests that, in general, the existence or non-existence of a stand-alone press law is not necessarily directly related to the degree of freedom of the press in a given country. So far no comprehensive analytical work comparing European press regulations has been published, but the text of the laws and the collections summarising the essential elements of each regulation are sporadically available.[30] Press laws do not necessarily contain rules restricting content directly; where one exists, it typically establishes a criminal act or private law tort, such as a ban on hate speech or defamation, and does not establish a separate liability system for the press, instead ordering the application of general rules of criminal or civil procedure.[31] That is, these rules do not put the press in a more difficult position than if they were contained in criminal or civil codes. While press laws may include privileges granted to the press, these are not necessarily enshrined in such laws.[32]

[28] See also C-617/10 *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105.

[29] Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU (Text with EEA relevance) (SEC(2022) 322 final) – (SWD(2022) 286 final) – (SWD(2022) 287 final).

[30] See 'Press Law and Practice: A Comparative Study of Press Freedom in European and Other Democracies' (London, Article 19 – International Centre Against Censorship, 1993); (2019) *Media and Entertainment Law Review*.

[31] See, eg, loi du 29 juillet 1881 sur la liberté de la presse (French Press Act); Disposizioni sulla stampa, legge 8 febbraio 1948, no 47 (Italian Press Act); Laki sananvapauden käyttämisestä joukkoviestinnässä, 460/2003 (Finnish Media Act).

[32] eg, the right to source protection may also be included in the press law and in the laws on criminal and civil litigation, compare section 5.1 below.

However, with very few exceptions, it can be stated that the press laws do not stipulate an obligation of the press to inform the public, or the possible responsibility of the government for supervising such provision of information or any task in the public interest. The common content of press laws is to lay down certain detailed rules relating to press activities, such as rules for the mandatory registration of press products, the appointment of the editor-in-chief, the provision of legal deposit copies and other formal requirements for the smooth application of the law (such as imprint content).[33] As compliance with legal requirements can be investigated by civil and criminal courts, media authorities that would otherwise have extensive oversight of television and radio media services usually have no jurisdiction over press outlets.

The media laws for these broadcast services are in most cases separate from the press laws, forming an independent set of rules, although uniform, comprehensive regulation exists in some legal systems.[34] The possibility of authority supervision is created exclusively by the Hungarian regulation which also attempts to ensure that decisions are taken in a special co-regulatory system, in which the decision-maker is a body appointed by the professional organisation operated by the publishers of press products, which is independent of the authority.[35] In addition to stand-alone press laws, there are a number of other statutory requirements for the press. They include the general private and criminal codes already mentioned which may also impose mandatory bans on the press, as well as sectoral rules such as data protection, copyright or advertising law.

Self-regulation can also help to achieve the goals of press regulation, as evidenced by the widespread use of press self-regulation across Europe. There is no clear definition of self-regulation – instead, it serves as an umbrella term for alternative (extra-legal) regulatory approaches. By self-regulation, here I mean a system of rules created and/or supervised by bodies set up by market and industry actors, but which formally operate independently of them.

Self-regulation is a bottom-up model, the essence of which is that each sector develops its own rules of conduct and ethics, which each recognises as binding upon itself, and where those who violate the rules are threatened with sanctions. The main characteristic of self-regulation is its voluntary nature: the industry players concerned are free to decide whether they want to participate in self-regulation or submit themselves to the self-regulatory mechanism. They may have not only moral reasons for subjecting themselves to such a regime – in the free market these

[33] See French Press Act (n 31); Italian Press Act (n 31); Tiskový zákon, no 46/2000 Coll (Czech Press Act); Bekendtgørelse af medieansvarsloven, lov no 1719 of 27 December 2018 (Danish Law on the Liability of Media).

[34] Example of the latter, Bundesgesetz vom 12 Juni 1981 über die Presse und andere publizistische Medien (Mediengesetz, the Austrian Media Act); and Zakon o medijih – ZMed (Uradni list RS, št 35/01 z dne 11. 5. 2001) (Slovenian Media Act). In the case of post-Soviet states, see, eg, A Richter, 'Post-Soviet Perspective on Censorship and Freedom of the Media: An Overview' (2008) 70 *International Communication Gazette* 307.

[35] 2010. évi CLXXXV. törvény a médiaszolgáltatásokról és a tömegkommunikációról (Hungarian Media Act) arts 190–202.

reasons usually have little influence anyway – but also a well-conceived material interest in participating. By submitting to self-regulation, they may project the image of a socially responsible company to their audience or hope that effective self-regulation creating such a positive image can avoid stricter – and then binding and mandatory – state measures or legislation. The advantages of self-regulation over codified law are its flexibility and ability to adapt more rapidly to changing technology or market conditions. At the same time, it may suffer from a lack of credibility – since self-regulation is created according to the intentions of industry actors, and decisions are left to bodies that are not completely independent of these actors – and uncertain effectiveness. Due to the lack of actual binding force, participation and also submission to decisions made as a result of supervision is left to the discretion of stakeholders.

Self-regulation supported by codified legal regulation can also be considered to be a form of self-regulation, where legal rules prescribe the framework, but self-regulatory organisations are entrusted with both the creation of norms (codes) and their supervision, and the state cannot control their operation. However, as Paul Wragg notes, self-regulation and voluntary regulation are commonly used as interchangeable concepts. Similarly, the terms mandatory and statutory law are also used interchangeably. This is not the case for other highly regulated professions such as doctors, lawyers and accountants whose professional organisations themselves adopt mandatory regulations for their members, and for some of whom membership in such professional bodies is mandatory and is a condition for carrying out a particular activity, so the rules are also generally binding.[36]

Voluntary self-regulatory solutions essentially sacrifice a measure of efficiency.[37] In her study, Lara Fielden provides a thorough overview of each European system of self-regulation.[38] Based on this, the key issues in terms of efficiency are:

- defining the range of bodies setting standards;
- the composition of the decision-making bodies;
- sanctions applied by these bodies;
- funding of the scheme;
- the voluntary or compulsory nature of participation.

As long as the publishers themselves delegate or co-delegate members to the bodies and the funding comes from them, they cannot be subject to substantive sanctions, such as fines, and their participation in the scheme can be suspended or withdrawn at any time, and as such these schemes cannot be considered effectively independent or effective.[39] Their goal is primarily to maintain independence

[36] P Wragg, *A Free and Regulated Press* (Oxford, Hart Publishing, 2020) 53–54.

[37] ibid 65–66.

[38] L Fielden, *Regulating the Press: A Comparative Study of International Press Councils* (Oxford, Reuters Institute for the Study of Journalism, 2012), available at: reutersinstitute.politics.ox.ac.uk/sites/default/files/2017-11/Regulating%20the%20Press.pdf.

[39] Wragg (n 36) 61–71.

from public bodies, which they also fulfil, but which comes at a price. Wragg's clear conclusion is that only a regulatory body that is independent of publishers in terms of staffing and funding, whose decisions are binding on publishers and which is capable of imposing substantive sanctions, can be truly independent and effective, whether it be under purely statutory regulation or possibly in co-regulatory systems that exist under state supervision.[40]

3. Possibilities of Prior Restraint

Licensing, that is, a separate, official permit, issued by the state, cannot be required for the issue, distribution and sale of press products in democratic legal systems. Nevertheless, registration requirements, widely known in European legal systems, are somewhat similar to licensing. Registration can be a simple administrative act and usually involves providing important information about a press product (or media service). If the regulation makes it a condition for entering the market, then it can be compared to licensing, because the act creates the right to provide the service and in the absence of such registration commencing publication is not allowed.

Reviewing the regulations of some European states, it can be concluded that where there is an obligation to register, this requirement for press products is a condition for starting the activity (commencing publication).[41] Registration is an administrative act, but in principle, in the case of arbitrary application of the law, it can have censorious effects. The reasons for its maintenance include the interest of different services, as this is the easiest way to prevent market problems arising from identity or similarity of names. It is also necessary for the official or judicial supervision of services to have an up-to-date, authentic register. Several European states reject this approach, while others have long used it, but, provided there are adequate legal guarantees, the obligation to register and censorship are well separated.

During the historical development of the notion of the freedom of the press, a consensus has grown up that prior and arbitrary intervention in the process of publication of opinions is impermissible, whereas *a posteriori* accountability or prosecution for the publication of unlawful content is acceptable, subject to appropriate legal safeguards. Formally, making the publication of newspapers conditional on a licence and thus the practice of official censorship ceased to exist in England in 1694, and after William Blackstone it has become a generally accepted view that the liberty of the press means the absence of prior restraints: 'The liberty of the

[40] ibid 255–77.

[41] Just a few examples, Italian Press Act (n 31), Legge in tema di editoria elettronica, no 62 del 7 marzo 2001, Art 1; Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe (Polish Press Act) Arts 20–24; Tryckfrihetsförordning (1949:105) (Swedish Press Freedom Act) Art 5(5).

press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.'[42] The prohibition of prior and arbitrary interference has become so fundamental to freedom of the press across Europe that it is seldom enshrined separately in individual state constitutions and laws.[43]

At the same time, prior restraint – along with legal guarantees that protect press freedom – is not in itself impermissible. The case law of the ECtHR does not preclude prior restraints from being a permissible restriction on freedom of expression either: in *The Sunday Times v the United Kingdom (No 2)*[44] and in *The Observer and The Guardian v the United Kingdom*[45] it expressly acknowledged this possibility, with the proviso that state courts should conduct the most thorough investigation possible in the cases that arise.

4. 'Duties and Responsibilities' of the Press

It is questionable whether the press has 'duties and responsibilities' when exercising its freedom. This wording is included in two documents that play an important role at the international level in the interpretation of freedom of expression and of the press: the European Convention on Human Rights (Article 10(2)) and the International Covenant on Civil and Political Rights (Article 19(3)). It is noteworthy that the texts do not mention these explicitly in relation to freedom of the press, but generally consider the freedom of expression. Nevertheless, the ECtHR, which monitors compliance with the Convention, clearly interprets these duties in relation to the press (media),[46] while it does not emphasise them for individual speakers.[47]

Peter Coe sums up the theory of the social responsibility of the press in his paper: according to this view, the press must act in the public interest, aiming to inform the public, as part of which it must follow standards of conduct that take into account the rights of others. In return it is entitled to additional protection compared with other persons exercising the freedom of expression or other press products not providing public interest information.[48] Damian Tambini argues that certain privileges are granted to the press 'based on a theory of the function and

[42] W Blackstone, *Commentaries on the Laws of England* Vol 4 (Chicago, IL, University of Chicago Press, [1765–69] 1979) 151.

[43] Examples of the constitutional prohibition of censorship, Grundgesetz (German Constitution) Art 5; Greek Constitution, Art 14; Dutch Constitution, Art 7; Luxembourg Constitution, Art 24.

[44] *Sunday Times (No 2)* (n 13).

[45] *Observer and Guardian* (n 13).

[46] *The Sunday Times v the United Kingdom (No 2)* [1979] App no 6538/74; *Observer and Guardian* (n 13); *Jersild v Denmark* (n 13) among other decisions.

[47] Oster (n 18) 36.

[48] P Coe, '(Re)Embracing Social Responsibility Theory as a Basis for Free Speech: Shifting the Normative Paradigm for a Modern Media' (2018) 69 *Northern Ireland Legal Quarterly* 403, 418–24.

role of the press in a democracy'.[49] The additional rights granted to the press and the additional duties associated with their exercise are thus in balance. According to Gibbons, private media companies can also have a public function in addition to their private interest activities.[50] Privately owned media enterprises need to both take into account the interests of their audiences and to impart diverse opinions.[51] Gibbons believes that the state cannot evade its responsibility to protect freedom of expression, especially with regard to fair participation in public discourse and access to opinions, and may use regulatory means to ensure this protection.[52] Eric Barendt notes that, by its nature, the media foster the exercise of freedom of expression,[53] and the regulation of the press must be judged in terms of its support for or inhibition of freedom of expression.[54] He refers to the right of reply as an example: if it expands the possibilities of public discourse, the regulation is acceptable despite the fact that it narrows the room for manoeuvre of the press.[55] In his later monograph, Barendt argues that the freedom of speech can be subject to regulation 'to make its exercise more effective'.[56] The social role of the press and the protection of freedom of expression can therefore confront each other, and the resolution of the conflict may only take place with a view to protecting public discourse.

The press not only reports on public debates but is also a catalyst for and participant in public discourse.[57] The press is a public forum; it is a place to publish thoughts and information that concern the public, but not in the sense of streets, squares and other public spaces – it is not open to anyone. An individual may not claim a right of access to the press for the purpose of publishing his opinion.[58] The public has a right of access to information on public affairs which involves much more than the right to freedom of information against the state. It is a strange kind of 'right': just as a right to access does not exist for the individual against the press, so this 'right to know' cannot be enforced; there is no duty to do so.

The press is free to report on what it wants, so it is possible to set up a newspaper to cover perfectly policy-free tabloid news or information on any topic, be it the culinary arts, DIY or imaginary superheroes. Nor does the theory of social

[49] D Tambini, *Media Freedom* (Cambridge, Polity Press, 2021) 67.

[50] T Gibbons, 'Free Speech, Communication and the State' in M Amos, J Harrison and L Woods (eds), *Freedom of Expression and the Media* (Leiden, Martinus Nijhoff, 2012) 33.

[51] ibid 39.

[52] ibid 42.

[53] E Barendt, 'Inaugural Lecture: Press and Broadcasting Freedom: Does Anyone Have any Rights to Free Speech?' (1991) 44 *Current Legal Problems* 63, 66.

[54] ibid 71.

[55] ibid 70–71.

[56] E Barendt, *Freedom of Speech* (Oxford, Oxford University Press, 2005) 69.

[57] E Carolan, 'Promoting Civic Discourse: A Form of Positive Free Speech under the Constitution of Ireland?' in AT Kenyon and A Scott (eds), *Positive Free Speech: Rationales, Methods and Implications* (Oxford, Hart Publishing, 2020) 76–79.

[58] G Marshall, 'Press Freedom and Free Speech Theory' [1992] *Public Law* 40, 50.

responsibility state that all press products must serve the public interest. Public interest content is indeed given greater protection by the courts, but this stems from the nature of the content and not from the identity of the speaker – the press has no additional rights over other speakers, just as it has no additional duties either.

Wragg argues that no duty can be imposed on the press, since there is no right to be set against it; the public cannot oblige the press to provide it with adequate information.[59] This is the weakness of the theory of social responsibility; the responsibility of the press is at best a moral expectation that cannot be enforced. Following Article 10(2) of the Convention, the ECtHR often refers in its decisions to 'duties and responsibilities', but this does not mean anything more than that the legal standards applicable to public speech must be complied with, both by the press or any another speaker.[60] At the same time, in the absence of an actual legal obligation, there are strong (and, in many cases, statutory) incentives for the media to report on public issues, which I will discuss later. Nevertheless, Jan Oster argues that the ECtHR actually takes the standards of 'ethical journalism' and 'responsible journalism' into account in its jurisprudence.[61]

After reviewing the case law of the Court, however, we cannot be sure that when it considers all the circumstances of the communication and applies ethical criteria in its decisions, it would indeed consider these criteria to be applicable only to the media and not to any speaker who exercises their general freedom of expression. The question arises whether the ethical standards for the street corner speaker is different from that of the media. The functioning and specific activities of the media (information gathering and its means, the use of effective language, editing, image selection, the tendency to use bombastic headlines, etc) naturally give rise to the need to comply with certain ethical standards, whereas these may not apply to the street corner speaker. The consideration of ethical aspects by the media is certainly not an 'obligation' in the legal sense because there is no legal right to be opposed to it. No one can demand that the media act ethically, and compliance with or failure to comply with ethical standards can only be a subsidiary consideration in determining the scope of media freedom.

The presentation of public issues and fostering of public discourse are not required by codified law or by any court, just as the right of individual access to the press is not guaranteed to anyone (which does not mean that access to the information published by the press shall not be guaranteed). The only exception to the latter, which is present in almost all European legal systems, is the right of reply. This right not only protects individual reputation – breached by the press – but

[59] Wragg (n 36) 83–109.
[60] ibid 91–92.
[61] See Oster, 'The Press Freedom Jurisprudence of the European Court of Human Rights', ch 11, section 4.2 in this volume.

also ensures that the public is informed of the false factual statements previously made by the press, and also of the truthful information relating to the given story. Such regulations are known Europe-wide, and they typically impose obligations on radio, printed and online press alike.[62] The legal systems of all EU Member States provide for a right of reply against the press[63] and Greece, Portugal and Slovenia even enshrine it in their constitutions.[64] The laws of most states are sufficient to ensure the right of reply in relation to false statements of fact, but in some states the applicant also has the right of reply to injurious statements (value judgements).[65] The compatibility of the right of reply and Article 10 has been confirmed by the ECtHR in several decisions.[66]

Mention should also be made of anti-concentration rules aimed at the diversity of press ownership, which restrict acquisition of ownership in the media market, including the press market.[67] Such restrictions are widespread across Europe, although they do not impose a duty directly on publishers of existing press products and can only prevent future acquisitions. The purpose of the restriction is to allow as many voices as possible to be present in the public arena, and as such it does not relate to the content but to the diversity of the proprietors. This may also imply a diversity of speakers and their opinions, but not necessarily.

The codes applied by the bodies implementing the self-regulation of the press may go beyond the legal regulation in prescribing the public interest tasks of the press. Accuracy and correctness and protection of privacy are typically included in European press self-regulatory codes,[68] albeit without actual binding force. However, the breach of ethical standards set in journalistic codes can indirectly influence the decisions of the courts. That was the case in *Stoll v Switzerland*,[69] where the manner in which the applicant obtained confidential

[62] K Ho Youm, 'The Right of Reply and Freedom of the Press: An International and Comparative Perspective' (2008) 76 *George Washington Law Review* 1017; A Richter, 'Right of Reply: International Standards and Slovak Press Law' (2019) 1–2 *Otázky žurnalistiky* 4.

[63] See, eg, French Press Act (n 31) Arts 12–13; Italian Press Act (n 31) s 8; Nederlands Burgerlijk Wetboek (Civil Code of the Netherlands) Book 6, Art 167.

[64] See Greek Constitution, Art 14(5); Portuguese Constitution, Art 37(4); Slovenian Constitution, Art 40.

[65] Finnish Media Act (n 31) c 3, Art 8; loi du 8 juin 2004 sur la liberté d'expression dans les médias (Luxembourg Media Act) Art 36; French Media Act (n 31) Art 13; Loi no 82-652 du 29 juillet 1982 sur la communication audiovisuelle (French Audio-visual Act) Art 6; Constitution of Portugal, Art 34(4); Lei no 2/99 de 13 de Janeiro, Art 24; Constitution of Greece, s 14; Ministerial Decree no 100/2000 on Private Purpose Audio and Audio-visual Media, Art 9; Act 1730/1987 on Public Service Radio and Television, Arts 3(12)–3(14); Act 1092/1938 on Printed Media, Arts 37–38; Att dwar l-istampa, XL (1974) (Maltese Press Act) Art 21.

[66] *Ediciones Tiempo SA v Spain* [1989] App no 13010/87; *Melnychuk v Ukraine* [2005] App no 28743/03; *Kaperzyński v Poland* [2012] App no 43206/07; *Eker v Turkey* [2017] App no 24016/05.

[67] Barendt (n 56) 429–33.

[68] Fielden (n 38) 65–70.

[69] *Stoll v Switzerland* [2007] App no 69698/01.

information and the form, tone and aim of the article were factors taken into account by the ECtHR in its decision that established no violation of Article 10 of the Convention.[70]

5. Privileges Granted to the Press

The public interest duties imposed on the press actually exist only to a limited extent in the legislation, yet the additional rights of the press are recognised by all legal systems. To whom should legal systems grant additional rights? Certain rules in some jurisdictions – such as the UK's law on the protection of journalistic sources[71] – are worded in general terms, protecting not only the press but also anyone who reaches out to the public and makes their views or some information known. This is not an unjustified approach, as not only the press but also an individual speaker can provide information to the public. However, most rules granting such privileges refer to the press or to journalists specifically. In this case, it is up to the courts to decide who is considered to be covered by the rule; only professional media actors or journalists, or instead even amateurs, lone bloggers or social media users, if they otherwise carry out regular information activities by the means available to them.

The case law of the ECtHR has also addressed the issue of the limits of these rights in a number of cases, and the Council of Europe's recommendation also mentions the granting of additional rights to the press by Member States as a matter of course.[72] An overview of European legal systems reveals a wide range of additional rights.

5.1. Protection of Journalistic Sources

The privileges of the press and journalists include their right not to be required to disclose their sources of information. A wealth of information comes to the press from confidential sources who only contribute to informing the public on condition that they remain anonymous. The maintenance of the confidentiality of sources is integral to the freedom of the press as, lacking such a guarantee, the media would be barred from a wide range of confidential information of public interest which, in turn, would impede the right of the public to information.

[70] ibid paras [140]–[152].
[71] Contempt of Court Act 1981, s 10.
[72] Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media, paras 42, 70–73.

The protection of the sources of information, however, may not be unlimited; in certain cases, the protection of the public interest may call for the revelation of the journalist's sources.[73]

Most European legal systems guarantee the freedom of journalistic sources. The case law of the ECtHR sets out the requirements that state regulations must meet:

- the opportunity to resort to preliminary court revision against the first decision;
- the statutory limitation shall be in accordance with the provisions of Article 10(2) of the Convention, that is, limitation shall be properly substantiated;
- the limitation is possible only when the authorities do not have alternative ways of obtaining the relevant information;
- the limitation should be proportionate, that is, revealing the identity of information sources should take place in exceptional cases only, when so justified by threat to human life or health or particularly significant public interest;
- in the context of protecting information sources, the opportunity to reject delivery of documents, deeds and data media shall also be provided for;
- no burden of proof may be required for the exercise of the right of information source protection.[74]

5.2. Protection against Search and Seizure

A right that is related to the protection of sources, which can also be interpreted separately from it, is that of protection against house searches and the seizure of tools and data carriers used by journalists. Such rules are also widespread, without which the right to protection of sources would be meaningless. Examples include the United Kingdom (UK), German or French rules,[75] each of which lay down the relevant rules as the rights of journalists and the press, subject to the necessary restrictions. The case law of the ECtHR on this right is also rich.[76]

[73] For national regulations see, eg, the UK's Contempt of Court Act 1981, s 10; and Germany's Strafprozeßordnung – StPO 7 April 1987 (law on criminal procedure) Art 53(1)5 and Zivilprozessordnung (law on civil procedure) Art 383(5)1.

[74] See, among other decisions, *Goodwin v the United Kingdom* no 17488/90; *Financial Times Ltd and Others v the United Kingdom* no 821/03; *Sanoma Uitgevers BV v the Netherlands* no 38224/03; *Voskuil v the Netherlands* no 64752/01; *Telegraaf Media Nederland Landelijke Media BV and Others v the Netherlands* no 39315/06; *Becker v Norway* no 21272/12.

[75] Police and Criminal Evidence Act 1984 (UK) s 13; Strafprozeßordnung 7 April 1987, Art 97(5)(1) (Germany); Code de procédure pénale (French Criminal Code) Art 56(2).

[76] *Nordisk Film & TV A/S v Denmark* [2005] App no 40485/02; *Roemen and Schmit v Luxembourg* [2003] App no 51772/99; *Ernst and Others v Belgium* [2003] App no 33400/96; *Tillack v Belgium* [2007] App no 20477/05; *Martin and Others v France* [2012] App no 30002/08; *Ressiot and Others v France*

5.3. Exemption from the Duty to Testify in Court Proceedings

In addition to the protection of sources, some jurisdictions provide, within certain limits, an exemption for journalists from the obligation to testify in court proceedings if the reason for the summons is related to their journalistic activities. This privilege is strongly linked to the right to source protection.[77]

5.4. Access Rights

The collection of news and information is supported by certain 'access rights' which grant journalists access to places that are otherwise closed to the public or to which they have limited access. These may include prisons, government buildings, press conferences, the otherwise restricted areas in courtrooms or parliament buildings, or any place or institution which, for some reason, even on a case-by-case basis, the press may need access to.[78] They may even have special access rights to public protests, disaster areas and crime scenes. Nor is this right of the press unrestricted, in fact, if necessary, it may be proportionately restricted: in *Pentikäinen v Finland*,[79] the request of a journalist who did not leave the scene of a violent demonstration despite a call from the police was rejected by the ECtHR.[80] The right of access is not always limited to the press: the Parliament's gallery and the courtroom are, as a general rule, open to all, but the press also has additional rights in these places (for example, the possibility of recording and interviewing). In other cases, such as in a prison or at a press conference, only members of the press may be present. A specific case of the right of access is the right to distribute a press product in places closed to the public: in one case, the ECtHR found that a ban on distribution at a military base that affected a magazine for no good reason violated the Convention.[81]

5.5. Protection of Investigative Journalism

Certain legal systems specifically protect investigative journalism and may even provide immunity from liability for wrongdoing. The ECtHR is reluctant to

[2012] App no 15054/07; *Saint-Paul Luxembourg SA v Luxembourg* [2013] App no 26419/10; *Nagla v Latvia* [2013] App no 73469/10; *Stichting Ostade Blade v the Netherlands* [2014] App no 8406/06; *Ivaschenko v Russia* [2018] App no 61064/10.

[77] See, eg, the German Criminal and Civil Procedural Law Rules: Strafprozessordnung, Art 53(1)(5), Zivilprozessordnung, Art 383(1)(5).

[78] eg, a refugee camp, as in *Szurovecz v Hungary* [2020] App no 15428/16.

[79] *Pentikäinen v Finland* [2015] App no 11882/10.

[80] See also *Butkevich v Russia* [2018] App no 5865/07.

[81] *Demokratischer Soldaten Österreichs and Gubi v Austria* [1994] App no 15153/89.

establish the breach of Article 10 in cases where the previous convictions were related to illegal preparatory acts of newsgathering.[82] At the same time an investigative journalist may choose the method of obtaining information which he uses, and in the meantime he has the right to keep the fact of his being a journalist secret.[83] A related issue is the possibility of publishing illegally obtained information and recordings. The law does not give a general permission to the press to do such things, but the courts may consider conflicting interests and may even decide that although a member of the press has obtained information illegally, its disclosure was not infringing.[84]

5.6. Anonymous Expression

The right of speakers (as opposed to 'sources') to remain anonymous in Europe does not necessarily follow from the constitutional protection of freedom of the press,[85] although this does not preclude it from being provided for by certain legislation or contractual arrangements. There are many examples of the latter in online communication – recognition of the right of journalists to remain anonymous is less frequent. Finnish law provides this right for publishers and media service providers, who may thus refuse to identify any of their authors.[86] On the contrary, other states may even oblige the press to reveal the identity of their authors.

5.7. Editorial Independence and 'Internal Freedom of the Press'

The essence of internal freedom of the press is that a journalist should not be obliged to do or refrain from doing something that would be contrary to the professional requirements of his profession or press ethical norms, or, if he resists such instructions, he should not be disadvantaged under labour law.[87] In certain cases, journalists and editors may be entitled – at least theoretically – to freedom of the press vis-á-vis the owner of the press product or media service. Only a few countries have introduced rules about this, and the rights they guarantee – the scope of the so-called 'internal freedom of the press', that is, within the organisation of the press, is not very wide. Editorial independence in this case is at most external – for instance, it may be exempt from government interference.

[82] *Erdtmann v Germany* App no 56328/10; *Brambilla and Others v Italy* [2016] App no 22567/09; *Salihu and Others v Sweden* App no 33628/15.
[83] *Nordisk Film & TV A/S* (n 76).
[84] *Radio Twist AS v Slovakia* no 62202/00; *Nagla* (n 76).
[85] E Barendt, *Anonymous Speech: Literature, Law and Politics* (London, Bloomsbury, 2016) 78–80.
[86] Finnish Act on Freedom of Expression in the Mass Media, s 16.
[87] CE Baker, *Human Liberty and Freedom of Speech* (Oxford, Oxford University Press, 1989) 262–66.

It can be argued that these rules may be contrary to the protection of freedom of the press, as they undoubtedly restrict the freedom of owners. In contrast, Gibbons argues that

> if freedom of the press has any significance, other than the owner's economic right to start a newspaper or his liberty to speak, it is in its identity with editorial autonomy conceived in this sense of serving a public interest in communication.[88]

According to Article 6(2) of the proposal of the European Media Freedom Act,

> media service providers providing news and current affairs content shall take measures that they deem appropriate with a view to guaranteeing the independence of individual editorial decisions. In particular, such measures shall aim to:
>
> (a) guarantee that editors are free to take individual editorial decisions in the exercise of their professional activity; and
> (b) ensure disclosure of any actual or potential conflict of interest by any party having a stake in media service providers that may affect the provision of news and current affairs content.[89]

The recital to the proposal states:

> Media integrity also requires a proactive approach to promote editorial independence by news media companies, in particular through internal safeguards. Media service providers should adopt proportionate measures to guarantee, once the overall editorial line has been agreed between their owners and editors, the freedom of the editors to take individual decisions in the course of their professional activity. The objective to shield editors from undue interference in their decisions taken on specific pieces of content as part of their everyday work contributes to ensuring a level playing field in the internal market for media services and the quality of such services.[90]

The Recommendation accompanying the proposal, which has already been published,[91] contains a catalogue of internal safeguards within media companies that could be used to implement the proposal. Among others, the Recommendation identifies the following: editorial mission statements; policies to promote a diverse and inclusive composition of editorial teams; rules to ensure the separation of commercial and editorial activities; procedures for reporting possible pressures (which may provide for the possibility to report pressures anonymously or confidentially); the right to object (which allows members of editorial teams to refuse to sign articles or other editorial content that has been changed without their knowledge or against their will); the possibility of invoking conscientious objection (which provides protection against disciplinary sanctions or arbitrary dismissal of

[88] T Gibbons, 'Freedom of the Press: Ownership and Editorial Values' [1992] *Public Law* 279, 289.

[89] Proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU COM/2022/457 final.

[90] Recital (20) of the proposal.

[91] Commission Recommendation on internal safeguards for editorial independence and ownership transparency in the media sector C(2022) 6536 final.

members of the editorial board who refuse to carry out tasks which they consider to be contrary to professional standards); ethics or supervisory committees to monitor the implementation of internal rules; bodies responsible for the appointment, autonomy and independence of the editor-in-chief, etc.

The proposal has been the subject of a number of fundamental criticisms,[92] including the provisions of Article 6 cited above. If the proposal becomes law, the previously unsegmented right to freedom of the press would be differentiated according to the person exercising the right, and the freedom of media owners – who were previously the 'primary' holders of press freedom – would be subject to significant restrictions.

5.8. Tax and Other Benefits

Various tax benefits for the press can also be regarded as additional entitlements that indirectly and financially support the operation of the press. These include a sales tax rebate or reduced rate for printed products in some countries. Another such benefit is the setting of discounted postage rates for sending printed products which support the printed press.[93]

6. The Press as Primary Beneficiary of the Rules of General Application

The press is not only able to exercise the additional rights specifically granted to it; otherwise universal rights and exemptions from liability are in many cases primarily an actual advantage for the press. The obvious reason for this is that these rules are intended to protect public speech, and it is the press that exercises this right professionally on a day-to-day basis. In addition, the press can cause significant damage by violating the rights of others, and it naturally follows from these two characteristics that, even in the application of general legislation, the press is the one that exercises these rights most often or becomes a party to litigation.

6.1. Freedom of Information and Access to Government Information

Freedom of information laws are widespread in Europe and allow anyone to access data of public interest.[94] Information in the public interest is information held by

[92] 'We're fine as we are, Press tells EU as Brussels plans media freedom law' (*Politico.eu*, 16 September 2022), available at: www.politico.eu/article/eu-law-to-protect-media-freedom-scares-off-press-publishers.

[93] Barendt (n 56) 427–29.

[94] Freedom of Information Act 2000 (UK); Informationsfreiheitsgesetz, 5 September 2005 (Germany); Legge 6 novembre 2012, no 190, Decreto legislativo 14 marzo 2013, no 33 (Italy).

state bodies, local government or other bodies performing public tasks and relating to their activities or generated in the performance of their public task, the disclosure of which is not restricted (for instance, for the purposes of national security or for the protection of personal data). These laws do not explicitly grant additional rights to the press, but it is clear that it is the press which is able to exercise these rights in a truly effective way. It is the business of the press to concern itself with the procedure of obtaining the data, to interpret the information thus obtained and to use it in the course of its journalistic activities. Typically, the ECtHR invoked freedom of the press even when the applicant was not a journalist or publisher of a press product but a non-governmental organisation: refusing to provide information of public interest could infringe both freedom of expression and freedom of the press.[95] However, freedom of information laws do not generally require access to information held by governments; there is no such general right.[96]

6.2. Protection of Personality Rights and the Protection from their Excessive Application

Of the personality rights, the right to privacy and the right to reputation are those most often violated by public communication. This entails that an important element of freedom of the press is protection against the unjustified, excessive application of rules protecting these rights.[97] The court proceedings that have fundamentally shaped the case law in this area have typically been initiated following press communications. It makes sense that in proceedings to protect these rights, it is the press, and not individual speakers, which is most often on one side.

6.3. Data Protection

The protection of personal data can also be a barrier to public communication. Within the EU, the relevant issues are primarily governed by the GDPR which is directly applicable in all Member States,[98] but beyond that, there are additional statutory rules that are binding only in that particular State. The GDPR explicitly mentions, among other exceptions, the 'journalistic purposes', which may allow exceptions to be made to the strict data protection rules. Article 85(1) mentions journalism as a form of expression; in other words, it is clear that exceptions that can be defined by a Member State may also apply to speakers beyond the press.[99] The situation is similar for the right of erasure (also known as the right

[95] *Társaság a Szabadságjogokért v Hungary (TASZ)* [2009] App no 37374/05.
[96] Oster (n 18) 95–101.
[97] Recommendation CM/Rec(2011)7 (n 72) para 97.
[98] Regulation (EU) 2016/679 (n 22).
[99] For the overview of European regulations, see *Journalism and Media Privilege* (Strasbourg, European Audiovisual Observatory, 2017); B Wong, 'The Journalism Exception in UK Data Protection Law' (2020) 12 *Journal of Media Law* 216.

to be forgotten), where Article 17(3)(a) of the GDPR mentions, as an exception to the obligation to ensure the right to delete personal data, situations where the processing is necessary 'for the exercise of the right to freedom of expression and information'. It is clear, however, that these exceptions can most often be used by the press, due to the nature of its activities.[100]

6.4. Copyright

Copyright regulation is also a widely harmonised area within the EU. A member of the press may be exempted from the requirement to strictly protect copyrighted works and the obligation to acquire the consent of the copyright holder for the use of his work, in view of his information duties. The EU Directive also specifies the press and sets out the purpose of providing information and coverage of daily events, which form the basis for the free and complimentary use of copyright works.[101] This Directive gives Member States the option of granting exemptions, of which they do make use.[102] (Apart from EU regulation, several international treaties also exist in the field of copyright.)[103]

6.5. Protection for Whistle-Blowers

Whistle-blowers should not be retaliated against because they have exposed abuses, the exposure of which serves the public interest. Such notifiers, if they are determined to act, may contact either the public authority competent in the matter or the press. The French legal system provides protection for them in a separately identified way.[104] The protection of whistle-blowers is not a right of the press, as the press can in any case ensure their anonymity through the right to protection of sources, but the press is also the beneficiary of the rules protecting them, as it has a better chance of accessing important and worthwhile content. A particularly unique problem is when journalists themselves become whistle-blowers of abuses. The ECtHR has ruled in cases where journalists have drawn public attention to abuses by their own employers and ECtHR decisions have protected journalists from sanctions by their employer.[105]

[100] See also D Erdos, *European Data Protection Regulation, Journalism, and Traditional Publishers: Balancing on a Tightrope?* (Oxford, Oxford University Press, 2019).

[101] Directive 2001/29/EC (n 23) Art 5(3)(c).

[102] See the UK's Copyright, Designs and Patents Act 1988, Art 30(2); for the relevant regulation of further nine European countries, see *Journalism and Media Privilege* (n 99).

[103] Most importantly, the Berne Convention for the Protection of Literary and Artistic Works, from 1886.

[104] Loi no 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique és Code pénal, Art L.122-9.

[105] *Matúz v Hungary* [2014] App no 73571/10; *Wojtas-Kaleta v Poland* [2009] App no 20436/02.

7. Regulating the Content of the Press Beyond the Limits of Free Speech

The general restrictions on freedom of expression should apply, *mutatis mutandis*, to press speech. The protection of reputation, safeguards on privacy, limitations on hate speech, etc are determined in each legal system by taking into account the extent to which a given speech act can be considered to be participation in the discussion of public affairs. The purpose and content of the speech, not the person of the speaker, determine the degree of freedom. Accordingly, the press as a speaker has no additional duties compared with other speakers, and the general restrictions on freedom of speech also apply to it. However, as Coe warns, ethical and bona fide conduct by the press and adherence to standards of conduct for its activities can be an important consideration in deciding whether a particular piece of content is permissible.[106] In order to assess whether the press can enjoy broad protection of freedom of expression at all, it may be necessary to take into account certain behavioural expectations. All this does not lead to any additional protection for the press or to additional duties or expectations being imposed on it, since acting in good faith, exercising diligence, taking steps with a view to exploring reality, etc may be relevant considerations for all speakers. However, objective duties may arise from the objective differences between speakers; it is clear that the press must act differently, for example in ascertaining the truthfulness of the information it conveys, to the individual speaker who, in his spare time, forms an opinion on certain public matters.

The press, like any other speaker, must adhere to the norms that restrict public speaking. However, operating in accordance with the legal regulations alone does not make the press, or the public sphere in general, suitable as a venue for thorough, multifaceted discussions and discussions on important public affairs that help the public to make the right decisions. This is due to the widespread protection of freedom of expression, which also allows – to a certain, and not insignificant extent – insults, expressions of hatred or the spread of untruths.

For the press, not only general legislation but also legal norms that are specifically binding on the press may impose a duty that directly affects the content they publish. 'Content regulation' is not the most reassuring term when it comes to freedom of the press, but it does not really mean anything more than the restrictions on freedom of the press that are specifically defined by the legislature to regulate the activities of the press. Standards aimed at regulating the specific content of the press are most often enshrined in the press laws of individual states, and violations of these laws may give rise to either criminal or civil liability. The use of press laws to define these rules can in fact only be seen as a simple legal means, and duties in criminal and civil proceedings could be enshrined in a country's criminal or civil law, so content regulation in press law alone does not impose

[106] Coe (n 48) 423.

a real additional burden on the press. Of course, it is very important what these rules are and how judicial practice can relax their potentially strict application to protect public discourses. Typical areas regulated by press laws include the protection of reputation[107] and privacy,[108] the restriction of 'hate speech'[109] or rules for the protection of minors.[110]

At the same time, the public interest duties and social responsibility of the press are usually not prescribed by special content regulations concerning the press. The exceptions to this are the Danish, Polish and Luxembourg regulations. These national legal systems impose certain obligations – with ethical content – at least in cases where the media outlet in question wishes to provide information in the public interest. Danish law requires compliance with general rules of press ethics without setting the ethical standards themselves, and only requires the publication of a condemnation decision of the Press Council as a sanction.[111] Polish press law requires the press to present the events it covers 'truthfully'.[112] It is the duty of the journalist to serve society and the state, and in doing so, he must exercise due diligence in his work, strive for accuracy, protect his informants, and use language correctly, avoiding profanity.[113] However, the Press Act does not provide for the liability of journalists in the event of non-compliance with the above provisions. Luxembourg media law also requires the press to verify the accuracy of the information obtained.[114] Failure to comply with this duty may result in a defamation procedure, that is, inaccuracy or error alone does not give rise to legal liability under the regulation.

In addition to press laws, other laws may apply specifically to the press. The range of these can be wide, so I will only mention two regulatory topics here. Special rules apply to reporting on ongoing court proceedings in order to protect the order of the judiciary. The UK's Contempt of Court Act 1981, for example, sets out detailed rules for what and how the press can report, and these duties may even prevent them from being present at trials.[115] The openness of the courtroom or the closure of the trial and recordings in the courtroom is a similar issue regulated by the legal systems.[116] Another area of regulation that is particularly important to the press is the regulation of advertising or, more broadly, commercial

[107] French Press Act (n 31) Art 29; Italian Press Act (n 31) Arts 12–13; Luxembourg Media Act (n 65) Arts 16–17; Maltese Press Act (n 65) Arts 11–12.
[108] Luxembourg Media Act (n 65) Arts 14–15.
[109] French Press Act (n 31) Arts 23–24.
[110] Italian Press Act (n 31) Art 14; Luxembourg Media Act (n 65) Art 18.
[111] Danish Law on the Liability of Media (n 33) ss 34 and 43.
[112] Polish Press Act (n 41) Art 6.
[113] ibid Arts 10 and 12.
[114] Luxembourg Media Act (n 65) Arts 10–11.
[115] Barendt (n 56) 145–48.
[116] See I Cram, *A Virtue Less Cloistered. Courts, Speech and Constitutions* (Oxford, Hart Publishing, 2002); on the British law, see also J Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford, Oxford University Press, 2002); J Bosland and J Townend, 'Open Justice, Transparency and the Media: Representing the Public Interest in the Physical and Virtual Courtroom' (2018) 23 *Communications Law* 183; P Wragg, 'Open Justice and Privacy' (2017) 22 *Communications Law* 90.

communication, which can contain specific norms relevant to the press. All this is reflected in EU law,[117] or may appear in national regulations in addition to harmonised issues.

In order to avoid the damage and dangers that can be caused by the exercise of freedom of the press, steps can be taken not only through mandatory legal regulation but also through self-regulation of the press. The codes of conduct applied by self-regulatory organisations seek to influence the activities of the press in a variety of ways, which are more varied than legal norms. These codes may contain content requirements, in areas such as respect for privacy, protection of minors and publication of information on criminal offences, as well as elements that are missing from the legal framework, chiefly because enforcing them as a legal norm would presumably be incompatible with the constitutional protection of freedom of the press. These rules may apply to the process of producing content, the information gathering activity of the press, and not necessarily the published content itself.

Under certain circumstances, the freedom of the press can be broader than the freedom of individual speakers, namely when the press reports on the speeches of others. If the press informs credibly and accurately that someone has said or communicated something relating to the discussion of a public matter, the press may be released from liability, even if the information it provides is otherwise infringing. For example, if a statement made by the press violates someone's right to protection of reputation, the original speaker can, of course, be sued, but the press, if it has remained within the terms of its coverage, cannot. This principle applies in many European countries,[118] and in the practice of the ECtHR.[119] It is not only the press that can rely on the defence of reporting, that is, the transmission of information from others, but in practice it typically protects the press, and courts and constitutional courts also loosen the framework of typically more rigid legal regulations where the press is concerned.[120]

8. On the Aims and Further Chapters of this Book

In this volume, we look at the legal systems of nine European countries to see how these democracies approach the fundamental right of freedom of the press and

[117] See, eg, Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22 (the Unfair Commercial Practices Directive) s 11 of Annex I; Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ L152/16, Art 3.

[118] See the English Defamation Act 1996, ss 14–15 and sch 1 (Qualified privilege).

[119] *Thorgeirson v Iceland* no 13778/88; *Bladet Tromsø* (n 13); *Thoma* (n 13); *Selistö v Finland* [2004] App no 56767/00.

[120] See, eg, the Hungarian Constitutional Court Decision no 34/2017 (XII. 11.) AB. See also *Magyar Jeti Zrt v Hungary* [2018] App no 11257/16.

how they regulate it, and in another chapter we analyse the relevant case law of the ECtHR. The list of countries is by definition not exhaustive, but we have tried to select states from all geographical regions, whose overview gives an overall outline of the common European category of press freedom. Each chapter also provides a theoretical underpinning of press freedom and a historical overview. It is believed that the current concept of press freedom can only be understood in the light of different national histories, which vary considerably from country to country, but that the process of European unification that began at the end of the twentieth century has led to a convergence of national regulations which makes it meaningful to speak of 'European' press freedom. We are also aware that an adequate legal environment, including sufficient constitutional protection, legislation and consistent judicial decisions to ensure a sensitive balance between protection and restriction, is only one of the necessary but not sufficient conditions for the effective existence of press freedom, both to protect the press and to provide safeguards against excesses of the press. At the same time, we believe that jurisprudence fulfils its role by examining these issues and leaving the rest to other social sciences, democratic decision-making and the public itself, civil society more broadly, which can assert its expectations of the press and of the government of the day.

The authors of this volume present the legal system of their own countries (with the obvious exception of the case law of the ECtHR), and are therefore familiar with the rules they present from the inside. They are also internationally recognised scholars who present their subject of study in an unbiased manner, highlighting the achievements but not obscuring the difficulties. The volume does not seek to compare national legal systems but to present them side by side, and in this sense is comparative.

Along with Paul Wragg, the co-editor of this volume, we are convinced that the history of press freedom in Europe, however advanced and rich its regulation and practice, is not a closed story, and that not only the issues raised by new technologies but also the regulatory issues of traditional media are worthy of further reflection. It is a long time since international readers have had access to a volume that addresses the issues examined here in a comprehensive way, taking into account national specificities. The present volume – and its forthcoming companion which will cover the perception and regulation of press freedom in non-European countries – seeks to fill this gap, hopefully successfully. But that is for the reader to judge.